CAPITAL CASES BENCHBOOK

Produced by
The National Judicial College
and the
National Conference of State Trial Judges,
Judicial Administration Division,
American Bar Association

Supported by a grant
from the
Bureau of Justice Assistance

AMERICAN BAR ASSOCIATION

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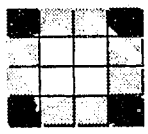

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This document was prepared by The National Judicial College and the Conference of State Trial Judges, Judicial Administration Division, American Bar Association, supported by grant number 92-DS-CX-0001, awarded by the Bureau of Justice Assistance, U.S. Department of Justice. The opinions, findings, and conclusions or recommendations expressed in this document are those of the author(s) and do not necessarily represent the official position or policies of the U.S. Department of Justice.

The Bureau of Justice Assistance is a component of the Office of Justice Programs which also includes the Bureau of Justice Statistics, the National Institute of Justice, the Office of Juvenile Justice and Delinquency Prevention, and the Office for Victims of Crime.

The National Judicial College is most grateful for this expression of support for judicial education and the improvement of justice in our country.

Table of Contents

II. Chapter 2

Counsel In Capital Cases
by Honorable F. Harold Entz, Jr.

III. Chapter 3

Free Press vs. Fair Trial
by Honorable Harl H. Haas

IV. Chapter 4

Judicial Management and the Capital Case
by Honorable William F. Dressel and Honorable Ricardo Jackson

V. Chapter 5

Jury Selection
by Honorable Connie Petterson

Foreword

This is the first edition of the *Judges' Benchbook for Capital Cases*. At the outset, it should be observed that this book does not purport to deal with the substantive law of each state, although some chapters contain extensive recitations of authority from most, if not all, jurisdictions. Instead, the book is intended to generally acquaint judges who are handling capital cases with an overview of the special logistical and legal problems and issues with which they will be faced as a case progresses and to furnish them with some advice and a starting point for their preparation for trying a capital case. The book is not intended to be a substitute for a judge's individual research. However, it will be helpful in guiding a judge as she or he starts to examine the special issues involved in a capital case.

A concerted effort has been made to provide the reader with the most recent case law. The citations for cases decided by the United States Supreme Court are to the United States Reports only; if the case is too recent to be cited in the United States Reports, the Supreme Court Report is cited. For state cases, only the regional reporters are cited. The decision to utilize single citations was made by the authors and editors in an effort to make the final product more readable. At the back of the Benchbook is an appendix listing all death penalty-related cases decided by the United States Supreme Court since 1972. In this appendix the reader will also find some sample forms and checklists.

The benchbook format follows the usual sequence of events of a capital case from pretrial motions and hearings through the trial, post-conviction and sentencing phases. While procedures vary from state to state this format should be equally applicable and useful in almost every court. Each chapter has been numbered individually to facilitate updating one or more chapters at a time.

The National Judicial College and the Conference of State Trial Judges of the Judicial Administration Division of the American Bar Association would like to thank the following persons for their efforts on behalf of this project:

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We single out Judge William Schafer and Judge Susan S. Schaeffer who have devoted an extraordinary amount of effort to this project. They have generously shared their precious time, their extensive knowledge, and their professional experience to make this book possible.

Having made the forgoing observations, this work is respectfully submitted for use to the trial bench and Bar by The National Judicial College and the Conference of State Trial Judges.

V. Robert Payant
Dean, The National Judicial College

Hon. Phillip J. Roth
Chair, Capital Case Benchbook Committee
Conference of State Trial Judges
Judicial Administration Division
American Bar Association

...The trial judge has the responsibility for safeguarding both the rights of the accused and the interests of the public in the administration of criminal justice. The adversary nature of the proceedings does not relieve the trial judge of the obligation of raising on his or her initiative, at all appropriate times and in an appropriate manner, matters which may significantly promote a just determination of the trial. The only purpose of a criminal trial is to determine whether the prosecution has established the guilt of the accused as required by law, and the trial judge should not allow the proceedings to be used for any other purpose.

...The trial judge should require that every proceeding before him or her be conducted with unhurried and quiet dignity and should aim to establish such physical surroundings as are appropriate to the administration of justice. The trial judge should give each case individual treatment; and the judge's decisions should be based on the particular facts of that case. The trial judge should conduct the proceedings in clear and easily understandable language, using interpreters when necessary.

...The trial judge should be sensitive to the important roles of the prosecutor and defense counsel; and the judge's conduct toward them should manifest professional respect, courtesy, and fairness.

ABA Standards for Criminal Justice
Second Edition
Special Functions of the Trial Judge

Introduction

If a man destroy the eye of another man, one shall destroy his eye.
If one break a man's bone, one shall break his bone.
If a man knock out the teeth of a man who is his rank, one shall knock out his teeth.

The Code of Hammurabi §§196, 197, 200

Lex talionis, the law of equivalent retaliation, has been a part of civilization since mankind began writing down its rules, and undoubtedly a long time before that. These rules reflect a need for retribution that is rooted deep in human nature, and 37 of our states have attempted to placate this longstanding human need through statutes that allow imposition of the death penalty for aggravated murder.

Unlike the laws in those states, the *Code of Hammurabi* contained no penalty for murder. Its provisions, however, did reflect a principle that, like "eye for an eye" justice, is present in modern American law, namely the belief that guilt of an accused person must be clearly established. Under Hammurabi's reign an accuser who failed to adequately substantiate an accusation was guilty of a crime as serious as that with which the original accused was charged. In addition, the crime of perjury was punishable by death.

While American courts do not execute those convicted of perjury, this does not mean that our society is less diligent in its pursuit of justice than was King Hammurabi. His rather draconian methods of ensuring justice have been replaced by means that are less violent and undoubtedly more time consuming. This is no more apparent than in the individual voir dires, bifurcated trials, and automatic appeals involved in current death penalty litigation. Indeed, today's capital cases present the best examples of how modern "eye for an eye" justice in this country is tempered by society's demand that due process be strictly observed regardless of how despicable the accused or how horrendous the circumstances surrounding the crime. Caught in the middle of these two perspectives of justice are trial court judges.

Of course, the trial judge in a capital case does not spend his or her time pondering the philosophical and emotional underpinnings of the death penalty. Instead, the court has to deal with the practicalities of capital litigation, such as how to evaluate requests for extraordinary costs, or whether to exclude aggravating or mitigating evidence offered during the penalty phase. The trial judge in this type of case walks a tightrope between a prosecutor vigorously pushing for death and a defense attorney desperately seeking to avoid his client's execution.

The purpose of the Capital Cases Benchbook is to help trial judges walk this tightrope. The goal of this publication is not to restate the law, but to provide guidance from a composite group of experienced jurists on how to cope with the myriad of challenges and issues common to this type of criminal litigation. From pre-trial motions to post conviction remedies, this handbook seeks to cover its subject completely. This approach must necessarily go beyond the courtroom and examine behind-the-scene issues such as handling intense media interest, fully utilizing court resources, and generally managing a capital case. These issues are fully discussed in the following chapters.

Those who contributed to this benchbook have done so as educators and not as advocates for either side of this volatile issue. The citizens in this country whose taxes pay judges' salaries deserve a well-informed judiciary. Simply because capital punishment is controversial does not automatically mean that our judges should be left in the dark when presiding over cases involving this issue. Human lives are at stake, and the continuing erosion of federal habeas corpus may soon cause the full weight of dealing with a death penalty issues to fall squarely on the backs of our state judges. The need for this type of source book has never been greater.

The editors wish to acknowledge all the time and effort the authors put into their contributions. We also wish to thank the Bureau of Justice Assistance for its generous funding of this project. Finally, we wish to express our gratitude to The National Judicial College, not only for its invaluable help on this project, but for its efforts over the years to ensure that the judges of this country keep pace with the growing complexities of the law.

Phillip J. Roth

Chapter 1

Managing Costs in Capital Cases

Chapter 1. Managing Costs in Capital Cases

by The Honorable J. David Francis, Circuit Court, Bowling Green, Kentucky

A. Preliminary Statement

Capital cases are expensive. Because there may be no one else who is in a position to monitor and control costs, particularly defense costs, the trial judge must often act as a comptroller. At the same time, the judge is responsible for ensuring that the defendant receives competent representation, both at the guilt phase and at sentencing. The financial burden of defending a capital case is most often borne not by the defendant, who is probably indigent, nor by the state, but rather by the community in which the crime occurred. One or two capital trials within the same year can break the budget in a small community. It is therefore recommended that judges view cost management as a necessary feature of the judicial administration of capital cases.

A prosecutor may bring a capital indictment to further his or her own political agenda. While this is ethically questionable (*see* ABA Std. for the Prosecution Function 3-3.9(c)), it is a reality. A case may be so charged for tactical reasons, *e.g.* to (1) use the aggravating factors (called "special circumstances" in some states) as bargaining chips, or (2) to "death qualify" a jury with the expectation that such a jury will be more inclined to return a conviction. Judges should be on the alert early in the process, before large costs are incurred, to identify those cases that are not "true" death penalty cases. The judge should not hesitate to strike any aggravating factor not supported by the evidence. This should be done at an early stage to allow the prosecutor to appeal.

B. Arraignment

After formal charges are filed, the defendant must be arraigned. The primary concern at this point is to provide counsel for the defendant. Most capital defendants are unable to retain counsel. It is he responsibility of the judge to assign counsel or otherwise activate the public defender system so that the defendant will have a lawyer at arraignment. It is possible, of course, that counsel will have been assigned at an earlier stage or that private counsel will appear for the defendant. At the arraignment, the judge should set an early date for a preliminary conference.

C. Preliminary Conference

At this conference, which the prosecutor and defense counsel must attend, the judge should do the following:

1. Ascertain defense responsibility: Who will be responsible for defending the case? Who will pay for the defense? Will the attorney make a request for funds? Is the defendant able to contribute to the cost of the defense? If counsel indicates that the judge may be asked to approve funds, the judge should schedule a cost conference. The defense counsel may ask for an ex parte conference.
2. Review the defendant's release status.
3. Set a tentative trial date.
4. Ascertain the status of plea negotiations.
5. Consider whether the evidence supporting the aggravating factors (or special circumstances) appears deficient, and schedule a hearing, if needed, to take evidence and hear argument concerning the aggravating factors.
6. Consider orders restricting pretrial publicity.
7. Set a date for a discovery conference (see below).

D. Costs Conference with Defense Counsel

If defense counsel anticipates seeking court approval of funds, counsel should prepare a preliminary request identifying areas of need, estimating the costs, and identifying any available alternatives to the expenditure of public monies. For example, if the defendant is represented by a public defender, and that agency has investigators on staff, it will not be necessary to appoint a private investigator. When preparing the request, counsel should assume that the case will be tried through the sentencing phase. At this conference, counsel should also submit the defendant's sworn statement listing (a) income, (b) expenses, (c) dependents, (d) assets, and (e) liabilities. The judge should use this statement to determine how much money, if any, the defendant should be required to contribute to the costs of the defense. The judge may require the defendant to submit copies of tax returns and execute consent forms for the release of financial information, at least to the extent that such information will not implicate the defendant in criminal activity. Court personnel should attempt to verify all information provided to the fullest extent possible.

E. Discovery Conference

Before approving any requests for funds, the judge should hold a discovery conference with defense counsel, the prosecutor, and the principal investigating officer. The prosecutor and officer should be required to bring all discovery materials to the conference. The objectives of this conference are to:

1. Provide the defendant with required discovery;
2. Encourage the prosecutor to allow "open file" discovery;
3. Provide the prosecution with required discovery;
4. Narrow the issues (and reduce costs) by stipulations concerning foundational testimony and the like;

5. Provide the defendant with access to government laboratories and technicians; and

6. Identify areas where funds will be required for defense services.

After the discovery conference, the judge should enter an order reflecting the discovery provided by both parties, stipulations, and any agreements by counsel regarding future discovery. The order should impose continuing discovery obligations on counsel; of course, the order will be subject to modification on the basis of changed circumstances. The judge should require, and so indicate in the order, that state facilities be used for forensic examinations and that the personnel employed by such facilities comply with reasonable defense requests.

F. Defense Requests for Funds

After the discovery conference, the judge should consider defense requests for funds. The judge may wish to hold one or more ex parte conferences with defense counsel concerning these requests. Each request should be as specific as possible, setting forth the purpose, the amount, and the entity to be paid in connection with each proposed expenditure. Travel expenses should be estimated. On the basis of the discovery provided by the state, defense counsel should be in a position, at this stage, to make requests for expert witnesses.

The judge should examine the defense requests in light of the constitutional test set forth in *Ake v. Oklahoma*, 470 U.S. 68 (1985), which can be paraphrased in the following manner: Has defense counsel made a prima facie showing that the funds requested are needed to pay for services necessary to a competent defense? While the answer will depend on the facts of the particular case, some general guidelines for defense requests in capital cases are as follows:

G. Investigation Costs

It is the ethical responsibility of defense counsel to fully investigate "the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction.... The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty." ABA Standard for the Defense Function 4-4.1. Failure to make adequate investigation is one of the leading reasons for granting habeas corpus relief. *Henderson v. Sargent*, 926 F.2d 706 (8th Cir. 1991), *cert. denied,* 112 S.Ct. 915 (1992); *Blackburn v. Foltz,* 828 F.2d 1177 (6th Cir. 1987), *cert. denied*, 485 U.S. 970 (1988); *Nealy v. Cabana*, 764 F.2d 1173 (5th Cir. 1985).

Because mitigating circumstances may be introduced at the penalty phase, the duty to investigate in capital cases extends to the defendant's background, including any substance addiction or mental illness. *Harris v. Dugger*, 874 F.2d 756 (11th Cir.), *cert. denied*, 499 U.S. 1011 (1989) (failure to investigate background); *Becton v. Barnett*, 920 F.2d 1190 (4th Cir. 1990) (failure to investigate hospitalizations for mental illness). From this duty it follows that a high defense priority should be a request for funds to conduct an adequate factual investigation. In fact, it might be wise for the judge to inquire about the progress of the investigation if no such request is submitted. Defense requests for investigative funds should be approved if it appears that the avenue of investigation is one that a reasonable attorney, with funds but not unlimited funds, would undertake. *See Brooks v. State*, 385 S.E.2d 81 (1989); *Johnson v. State*, 416 So.2d 1195 (Miss. 1985). Defense counsel should be required, however, to conserve resources by methods such as conducting interviews by telephone and using local investigators.

H. Attorney's Fees

It is incumbent upon the judge to ensure that the defendant is represented fully and competently. Ideally this means the appointment of two attorneys with capital trial experience, both competent and able to devote the time necessary for the investigation, preparation for trial, and trial of the case. However, because of statutory limitations, the lack of qualified attorneys, and other factors, the judge may not be able to achieve the ideal representation for the defendant.

I. Jury Specialists

The defendant is not entitled to funds for jury specialists (*e.g.*, psychologists or sociologists) to assist in jury selection and the presentation of evidence. *Duren v. State*, 507 So.2d 111 (Ala. Cr. App. 1986); *Spranger v. State*, 498 N.E.2d 931 (Ind. 1986). A stronger case may be made, in some instances, for the appointment of a pollster to determine community attitudes in connection with a motion for change of venue. In small communities, it may be useful to know the extent to which potential jurors have prejudged the case. A qualified pollster can provide that information. *But see State v. Tison*, 633 P.2d 335 (1981), in which the court, although it conceded that there is constitutional and statutory authority that supports the appointment of investigators and experts to assist a capital defendant, deemed that it was not error to deny the defendant's request for an expert to conduct a public opinion survey in support of the defendant's request for change of venue.

J. Mental Health Experts

Counsel should seriously consider having the defendant examined to develop mitigating evidence for the sentencing phase. In addition, where either competency or criminal responsibility (insanity) is a potential issue, the defendant has a constitutional right to at least one psychiatric

examination. *Ake v. Oklahoma, supra; Blake v. Zant*, 513 F.Supp. 112 (S.D.Ga. 1981), *aff'd*, 758 F.2d 523 (11th Cir.), *cert. denied,* 474 U.S. 998 (1985). Because the defendant does not have a constitutional right to choose the psychiatrist, he or she can be sent to a state facility for examination. Nevertheless, the court should, if possible, approve funds for an independent examination. In this respect, the judge may require defense counsel to submit the names of several psychiatrists. In addition, funds should ordinarily be approved for one mental health expert to examine the defendant in connection with the sentencing phase. The defendant is constitutionally entitled to a mental health expert on the issue of future dangerousness if the prosecutor introduces expert testimony on this issue. *Buttrum v. Black*, 721 F.Supp. 1268 (N.D.Ga. 1989), *aff'd*, 908 F.2d 695 (11th Cir. 1990); *Walaker v. State*, 254 Ga. 149, 327 S.E.2d 415 (1985); *State v. Powell,* 49 Ohio.St.3d 255, 552 N.E.2d 191 (1990); *Tuggle v. Commonwealth*, 230 Va. 99, 334 S.E.2d 838 (1985). Even if the prosecutor does not intend to introduce testimony on the future danger posed by the defendant, the judge should, if possible, approve funds for a mental health expert to assist defense counsel at sentencing.

K. Scientific Experts

Requests should be approved for scientific tests if counsel makes a prima facie showing of necessity; in effect, this means that counsel must show that there is at least a reasonable possibility that the test will reveal exculpatory evidence. *See State v. Tison, supra.* The showing must be based on more than speculation. If the state has already performed the requested test, funds should not be approved to replicate the test unless the defendant can show "that the state's experts might be erroneous in their opinions or that another expert might necessarily be expected to disagree with their conclusions." *State v. Carmouche,* 526 So.2d 866, 867 (La.App.3 Cir. 1988) The more controversial the procedure, the easier it will be for

defense counsel to demonstrate the need for a "second opinion." The defendant may be entitled to the services of an independent expert to evaluate the results of any test performed by the state where a showing is made that the results are subject to different interpretation. *Sommers v. Commonwealth*, 843 S.W.2d 879 (Ky. 1992) In considering defense requests for funds, judges may find the following annotations helpful: 85 A.L.R. 4th 19 (mental health experts); 81 A.L.R. 4th 259 (investigators); 14 A.L.R. 4th 330 (behavioralists); 74 A.L.R. 4th 388 (chemists); 12 A.L.R. 4th 874 (fingerprint experts); 71 A.L.R. 4th 638 (ballistics experts).

L. Approval of Defense Requests and Submission to Funding Agency

To the extent possible, all defense requests for funds should be considered at the same time. The judge should then issue an ex parte order setting forth the court's rulings on the various requests. This order should be sent to defense counsel, but otherwise sealed. The judge should prepare another order to be served on the funding agency, requiring the agency to appropriate the funds deemed to be necessary for defense costs. The funding agency should either pay this amount to the court or set it aside in a separate fund to be drawn on as needed. Unless the defendant requests a speedy trial, the case should not be set for trial until the funds are appropriated.

M. Administration of Funds

All providers (expert witnesses, investigators, attorneys) should be paid either directly by the court or, if the funding agency has set aside the funds, by the agency. The providers should be required to submit itemized statements in connection with all requests for payment. In some cases, the court or funding agency may advance money to defense counsel for expenses not related to overhead. Insofar as practicable, however, the court or funding agency should pay providers directly from the fund on the basis of statements for services rendered.

When drafting the initial order approving funds, the judge may want to consider whether defense counsel should be permitted to shift funds from one category to another (*e.g.*, from investigation to psychological examination) without prior court approval, keeping in mind that the primary responsibility for seeing that funds are spent in an appropriate manner remains with the court. If counsel finds that the approved funds are not sufficient, he or she must submit a supplemental request before incurring costs that exceed the amount initially approved by the court. At the conclusion of the case, all funds allotted but not spent must be returned to the funding agency. Counsel should be required, no more than 30 days after the conclusion of the matter, to (1) provide an accounting of all advanced funds and (2) return the balance to the court or funding agency.

N. Conclusion

These are only guidelines; the judge will have to consult local rules and precedents to determine what specific procedures are appropriate. Judges must recognize their dual responsibilities in making sure that the defendant is competently represented and in monitoring the litigation from a financial standpoint.

Chapter 2

Counsel in Capital Cases

Chapter 2. Counsel in Capital Cases

by The Honorable F. Harold Entz, Jr., District Court, Dallas, Texas

A. Background

The right to counsel is fundamental to our system of criminal justice. The Constitution guarantees a fair trial, not a perfect one. *Lutwalk v. United States*, 344 U.S. 604 (1953). The right to counsel can be viewed as a way to ensure that criminal defendants are afforded fair trials. In *Adams v. United States ex rel McCann*, 317 U.S. 269 (1942), the Court noted that the defendant's access to counsel is essential to his ability to meet the state's case. As important as the right to counsel might be in the typical criminal case, both the basic right and the actual performance of counsel take on even greater significance in cases where the state seeks the ultimate penalty. *See Gardner v. Florida*, 430 U.S. 349 (1977); *Stanley v. Zant*, 697 F.2d 955 (11th Cir. 1983).

In *Powell v. Alabama*, 287 U.S. 45 (1932), the Court held that, as a matter of due process, an indigent defendant in a capital case is entitled to the assistance of appointed counsel. In *Johnson v. Zerbst*, 304 U.S. 458 (1938), the Court held that the Sixth Amendment mandates that federal courts appoint counsel for indigent defendants in felony cases. In *Gideon v. Wainwright*, 372 U.S. 335 (1963), the Court held, in effect, that *Johnson* was applicable to the states via the due process clause of the Fourteenth Amendment.

The significance of counsel's role in a death penalty case is illustrated by *People v. Chadd*, 621 P.2d 837 (Cal. 1981), in which the court held, pursuant to section 1018 of the California Penal Code, that a defendant cannot enter a plea of guilty over counsel's objection under circumstances where the plea subjects the defendant to a potential death sentence. Other cases highlighting the role of counsel who represent capital defendants are

Estelle v. Smith, 451 U.S. 454 (1981) (defendant's right to counsel was violated when the state, during the penalty phase, introduced a psychiatrist's unfavorable diagnosis regarding defendant's future dangerousness; counsel was not forewarned that the examination might focus on this question and, in any event, defendant did not waive right to counsel); and *Strickland v. Washington*, 466 U.S. 668, 686-87 (1984) (a capital sentencing hearing is sufficiently similar to a trial to require the same protections for the defendant, including the effective assistance of counsel).

The significance of counsel's role in the context of capital litigation is further underscored in several cases where counsel, by virtue of either statute or court order, was not permitted to fully represent his or her client. *See Geders v. United States*, 425 U.S. 80 (1976) (trial judge's order preventing attorney-client consultation during 17-hour overnight recess, which started immediately after defense counsel completed direct examination of the defendant, violated defendant's right to counsel; *contra, Perry v. Leeke*, 488 U.S. 272 (1989) (Court held that the trial judge did not violate the defendant's right to counsel by forbidding attorney-client consultation during a 15-minute afternoon recess, which, as in *Geders*, took place at the end of the defendant's direct examination)); *Herring v. New York*, 422 U.S. 853 (1975) (statute permitting judge, presiding over trial to the bench, to deny defense counsel the right to make a closing argument violated the defendant's right to counsel); *Brooks v. Tennessee*, 406 U.S. 605, 612-13 (1972) (statute requiring a defendant who wanted to testify at trial to take the stand before any other defense witnesses are called violated not only the defendant's privilege against self-incrimination but his due process right to rely on "the guiding hand of counsel"); *Ferguson v. Georgia,* 365 U.S. 570 (1961) (Fourteenth Amendment protects defendant's right to be examined by his own lawyer before being

cross-examined by state's counsel; Court notes that same result would ensue in a non-capital case). It should be noted that, among those five cases, *Ferguson* is the only capital case. If the Supreme Court is inclined to protect a non-capital defendant's right to counsel in the ways suggested by these cases, it can be assumed that it will be no less diligent in capital cases.

B. Right to Counsel in Appellate and Post-Conviction Proceedings

Although the primary focus of this chapter is the capital defendant's right to counsel at the trial level, it should be noted that the right to counsel applies to any right of appeal. *Evitts v. Lucey,* 469 U.S. 387 (1985). However, the right to counsel does not extend to discretionary appeals (*Ross v. Moffitt*, 417 U.S. 600 (1974)) or to state post-conviction proceedings (*Murray v. Giarratano*, 492 U.S. 1 (1989)). *See also Pennsylvania v. Finley*, 481 U.S. 551 (1987). Of course, the fact that the Sixth Amendment does not provide a right to counsel in state post-conviction proceedings does not mean that a state cannot create such a right. *See* Chapter 7.

C. Effective Assistance of Counsel

The right to counsel would be a hollow guarantee if there were no mechanism for evaluating counsel's performance and ensuring that the defendant in a given case is afforded adequate legal representation. The right to counsel means "the right to the effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771, n.14 (1970). In *Strickland v. Washington,* 466 U.S. 668 (1984) the Supreme Court set forth a two-pronged test for determining whether a particular criminal defendant was afforded the effective assistance of counsel. To be entitled to relief on the basis of a claim of ineffective assistance, a defendant must first show that

counsel's performance was deficient. If the defendant cannot make this showing, a reviewing court need not address the second prong of the inquiry, resulting prejudice to the defendant. In *Strickland*, the Court noted that there is a "strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance." 466 U.S. at 689. Because *Strickland* was a capital case, it might be suggested that it laid to rest the conflict concerning whether a higher standard should be utilized in assessing the performance of counsel in capital cases. The school of thought that a higher standard should apply is typified by *Blake v. Zant*, 513 F.Supp. 772, 779 (S.D.Ga. 1981) (reasonably effective assistance standard is to be "applied with particular care" in capital cases), and *Voyles v. Watkins*, 489 F.Supp. 901, 910 (N.D. Miss. 1980) (courts must "strictly scrutinize" counsel's performance in a capital case). The opposing position, *i.e.*, that the adequacy of representation in capital cases should be evaluated on the basis of the same standard used in any criminal case, is expressed in cases such as *Stanley v. Zant, supra,* and *Washington v. Watkins*, 655 F.2d 1346 (5th Cir. 1981). Whether one agrees or disagrees with the notion that *Strickland* settles the matter, one should never lose *da, supra.*sight of the legal and moral reality that "death is different." *See Gardner v. Florida, supra.* Even if the same standard is used for all criminal cases, judges may subconsciously hold defense counsel to a higher standard in cases where the ultimate penalty has been, or may be, imposed.

Having addressed the standard that applies to claims of ineffective assistance of counsel, a review of several cases will assist the reader in understanding the right to counsel and the kinds of claims that are cognizable under the ineffective assistance "umbrella." *Cuyler v. Sullivan*, 446 U.S. 335 (1980), involved the most obvious type of ineffective assistance claim: an actual conflict of interest. Two privately retained

lawyers represented Sullivan and his two codefendants; at no time did Sullivan object to the multiple representation. Sullivan was tried first and convicted. The other defendants were acquitted. Sullivan's ineffective assistance claim was denied in the Pennsylvania courts and the federal district court. The Third Circuit reversed, concluding that the arrangement violated Sullivan's right to the effective assistance of counsel. *United States ex rel. Sullivan v. Cuyler*, 593 F.2d 512 (3rd Cir. 1979). The U.S. Supreme Court vacated the Third Circuit's opinion, holding that, to be entitled to relief on this basis, a defendant must show both (1) an actual conflict of interest, and (2) an adverse effect on the adequacy of the representation. A similar claim was rejected in *Burger v. Kemp*, 483 U.S. 776 (1987), in which law partners represented two defendants in a single capital case. While recognizing the potential for prejudice inherent in such an arrangement, the Court affirmed the principle articulated in *Holloway v. Arkansas,* 435 U.S. 475 (1982), i.e., a joint representation arrangement does not constitute a per se violation of the right to counsel. The Court also rejected Burger's claim that counsel failed to conduct a sufficient investigation into Burger's troubled family background. Evidently, defense counsel made an informed tactical choice not to offer this potentially mitigating evidence; his concern was that any such effort would result in the introduction of devastating rebuttal evidence by the state.

In *People v. Deere,* 808 P.2d 1181 (1991) defense counsel's failure to present any mitigating evidence during the penalty phase resulted in a reversal of the death penalty on the basis of a denial of the effective assistance of counsel. Similar results obtained in *Pickens v. Lockhart*, 714 F.2d 1455 (8th Cir. 1983), and *Jones v. Thigpen,* 555 F.Supp. 870 (S.D.Miss. 1983). In *Hopkinson v. State*, 632 P.2d 79 (Wyo. 1981), the court affirmed the defendant's convictions but remanded for a new sentencing trial. Chief Justice Rose, concurring in part and dissenting in

part, urged that the defendant was denied the effective assistance of counsel during the penalty phase when his lawyer informed the judge that the defense needed only "two minutes" to present mitigating evidence. Apparently, defense counsel was of the opinion that the jurors had already made up their minds regarding the penalty; thus, the presentation of mitigating evidence would not benefit the defendant. In *People v. Jackson*, 618 P.2d 149 (Cal. 1980), the defendant claimed ineffective assistance based on his lawyer's conduct during the penalty phase. The court rejected the claim, concluding that defense counsel's decision to concede his client's complicity in the murders did not compel the conclusion that ineffective assistance had been rendered. In *King v. Strickland*, 748 F.2d 1462, 1464 (11th Cir. 1984), defense counsel's failure to present available character evidence, in conjunction with his statement that he had "reluctantly" undertaken the defense of his client, constituted ineffective assistance.

D. Counsel's Duty to Investigate

Counsel's duty to conduct an adequate investigation is a recurring theme in capital cases. In *People v. Ledesma*, 729 P.2d 839 (Cal. 1987), counsel's failure to make adequate factual investigation and conduct legal research in connection with a potential diminished capacity defense led to an order granting a writ of habeas corpus based on the ineffective assistance of counsel. In *Thompson v. Wainwright*, 787 F.2d 1447 (11th Cir. 1986), the court noted that, although defense counsel's obligation does not go beyond conducting a reasonable investigation, the failure to conduct *any* investigation constituted ineffective assistance. However, the court denied relief on the ground that the ultimate result would not have changed even if counsel had conducted a reasonably thorough investigation.

E. Counsel's Duty to Make Objections and Otherwise Preserve the Record

As is clear from Chapters 6 and 7 (dealing with State Post-Conviction Proceedings and Federal Habeas Corpus), defense counsel's role in preserving the record on behalf of his or her client by making timely, appropriate objections is a significant concern. In *Smith v. Kemp,* 715 F.2d 1459 (11th Cir. 1983), the failure to raise a claim relating to the composition of the jury constituted a waiver of the issue for the purpose of a later petition for writ of habeas corpus in the federal district court. This, of course, is a typical application of the waiver doctrine; however, as the next two cases demonstrate, courts do not always consider themselves bound by this doctrine in capital cases. In *Williams v. State*, 445 So.2d 798 (Miss. 1984), the court made reference to the "prerogative of relaxing our contemporaneous objection and plain error rules" that exists in capital cases, which is "ultimately rooted in our awareness of the uniqueness and finality of the death penalty." 445 So.2d at 810. In *Stynchcombe v. Floyd,* 311 S.E.2d 828 (Ga. 1984), the court held that the defendant's failure to object to the wording of a critical jury instruction given during the sentencing phase did not constitute a waiver of his claim in view of the fact that the death penalty was ultimately imposed.

F. Compensation of Counsel

A recurring issue in capital litigation is compensation of counsel. In *Makemson v. Martin County*, 491 So.2d 1109 (Fla. 1986), the court noted that it had the "duty to firmly and unhesitatingly resolve any conflicts between the treasury and fundamental constitutional rights in favor of the latter." 491 So.2d at 1113. The application of that maxim to the issue raised led the court to conclude that a statute setting a maximum fee limitation for counsel appointed to represent criminal defendants was unconstitutional when applied in a way that encroached upon the inherent authority of the

court to ensure adequate legal representation of those charged with crime. In *In Re Berger*, 112 L.Ed.2d 710 (1991), counsel who was appointed to represent a capital defendant before the United States Supreme Court sought compensation in excess of the maximum permitted by the Criminal Justice Act of 1964, which was $2500. The Court granted counsel's request and awarded a sum of $5,000 based, at least in part, on the notion that adherence to the limitation contained in the Act would have the effect of discouraging qualified counsel from undertaking representation of capital defendants.

G. Appointment of Multiple Counsel

Should the trial judge consider appointing more than one lawyer to represent a capital defendant? According to Guideline 2.1, ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, the judge should assign two qualified trial attorneys to represent a defendant charged with a capital crime. In California, the trial court has discretion to appoint two lawyers to represent capital defendants; a showing of genuine need gives rise to a presumption that a second lawyer is required. *Keenan v. Superior Court*, 640 P.2d 108 (Cal. 1982).

H. Self-Representation

What if the defendant wants to waive counsel and represent himself or herself? *Faretta v. California*, 422 U.S. 806 (1975), stands for the proposition that a defendant has a constitutional right to self-representation; the state does not have the power to force counsel upon the defendant. However, the court is authorized to, and should, deny a defendant's request for self-representation if it finds that the decision is not made knowingly, intelligently, and voluntarily. The author suggests that the trial judge require a defendant seeking permission for self-representation to read and sign a written waiver of the right to counsel. It is further suggested that the

judge make every effort to determine whether the defendant's decision in this regard is made knowingly, intelligently, and voluntarily. The judge should advise the defendant of a number of things, including the risks involved in self-representation, the potential consequences, the fact that the defendant will be responsible for doing all the things that counsel is normally expected to do (asserting defenses, interviewing witnesses, filing motions, examining witnesses at trial, making an opening statement and closing argument, arguing jury instructions, etc.), and the fact that the defendant will be held to the same standards as a licensed attorney. Assuming the defendant is in custody, he or she should be advised of concerns that may arise by virtue of custody status (access to legal research materials, jail policies and procedures relating to witness interviews, etc.). The defendant should also be advised that his or her present decision to waive counsel will not preclude requesting the assistance of counsel at a later point; however, the court should inform the defendant that it will not be under any obligation to "start over" or even reconsider any decisions made while the defendant was self-represented.

I. Advisory or "Standby" Counsel

Some jurisdictions allow the trial judge to appoint advisory counsel to assist a defendant who has made the knowing, intelligent, and voluntary decision to represent himself. A review of the law suggests that any doubt regarding the defendant's competency to represent himself should be resolved in favor of the right to self-representation. *See, e.g., State v. Binder*, 826 P.2d 816 (Ariz. App. 1992). This preference should not necessarily be abandoned in capital cases, but common sense suggests that greater caution is warranted when the death penalty is involved.

A judge who grants a defendant's request for self-representation should consider appointing "advisory" or "standby" counsel. Counsel who is appointed in this capacity is expected to "advise or to give the accused

meaningful technical assistance in presentation of the defense" and to preserve the record in the event of a later appeal. *United States v. Gaines*, 416 F.Supp.1047, 1050 (N.D. Ind. 1976). The judge need not wait for the defendant to request advisory counsel; in fact, such an appointment can be made over the defendant's objection. In *Faretta v. California*, 422 U.S. 806, 835 n.46 (1975), the Court made the following observation:

> Of course, a state may—even over objection by the accused—appoint a "standby counsel" to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant's self-representation is necessary.

Whether advisory counsel is appointed at the defendant's request or over his or her objection, the defendant is in control of the case. The judge must not permit advisory counsel to interfere with the defendant's efforts at self -representation. *See McKaskle v. Wiggins*, 465 U.S. 168 (1984).

The appointment of advisory counsel is within the discretion of the trial judge. *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971); *United States v. Gigax*, 605 F.2d 507 (10th Cir. 1979). The case law reflects a preference for such appointments where the defendant opts for self-representation. *Neal v. State of Texas*, 870 F.2d 312 (5th Cir. 1989); *United States v. Padilla*, 819 F.2d 952 (10th Cir. 1987). Should the judge exercise his or her discretion in favor of such an appointment in a capital case? The answer is an unequivocal "yes" unless there is some circumstance that militates against such an appointment. Both the defendant and the system benefit by the fact that counsel is available in the event that the defendant needs advice at any particular point during the proceedings. It is suggested that the judge appoint counsel who has sufficient experience to provide meaningful assistance in a capital case. There are several reasons for this; one is that the defendant may decide, in the middle of trial, that he is incapable of defending himself adequately. If this happens, it makes much

more sense to simply permit counsel who has been acting in an advisory capacity to assume full representation than to appoint an experienced lawyer who has no prior association with the defendant and may know nothing about the case.

Chapter 3

Free Press vs. Fair Trial

Chapter 3. Free Press vs. Fair Trial

by The Honorable Harl H. Haas, Circuit Court, Portland, Oregon

A. The Problem

Traditionally, capital cases bring more problems to trial management than do run-of-the-mill criminal cases. Therefore, the assignment of a highly publicized case should be undertaken immediately so the trial judge will have total control over the bail hearing; motions to suppress; motions to change venue; motions of the media; control of the pretrial statements of counsel, defendants, and witnesses; press motions for right to sidebar meetings; releases of prior records of the defendant or witnesses; and off-the-record meetings. The trial judge should also meet with counsel early to discuss the extent and the nature of pretrial and trial press coverage.

B. Constitutional Issues

The problems presented to the trial court are the almost inevitable clashes between the First, Fifth and Sixth Amendments of the United States Constitution.

Adverse publicity concerning a defendant before and during a trial may be so extensive and prejudicial as to deny a defendant the right to a fair trial and require a reversal of the conviction, especially if the trial court did not take all reasonable steps to protect the defendant's Sixth Amendment right to a fair trial. *Shepard v. Maxwell*, 384 U.S. 33 (1966); *Rideau v. Louisiana*, 373 U.S. 723 (1963). While the Sixth Amendment affords the defendant the right to a trial, it does not grant the defendant a right to a secret or closed trial. *Phoenix Newspaper Inc. v Superior Court of Maricopa County*, 101 Ariz. 257, 418 P.2d 594 (1966).

The First Amendment grants the public and the press access to the defendant's trial, *Richmond Newspaper, Inc v. Virginia,* 448 U.S. 555

(1980). The press has no greater right to access than the public itself. *Nixon v. Warner,* 435 U.S. 589 (1978). The First Amendment rights of the media are not absolute. "Although the right of access to criminal trials is of constitutional stature, it is not, however, absolute. . . . [A] trial judge may, in the interest of justice, impose reasonable limitations upon access to a trial. . . .[and] the right is limited by the constitutional right of defendants to a fair trial and by the need of the government to obtain just convictions and to preserve the confidentiality of sensitive information and the identity of informants." *U.S. v. Raffoul*, 826 F.2d 218, 223 (3d Cir. 1987). In *Raffoul*, the court noted trial judges may consider that the risk of serious injury to third parties from disclosure may outweigh the interest of the public in access to a limited portion of the trial.

The press's right of access applies equally to pretrial proceedings:

1. Plea and Sentencing; *see In re Washington Post Co.*, 807 F.2d 383 (4th Cir. 1986).
2. Juvenile Hearings; *see Oklahoma Pub. Co. v. District Ct.*, 430 U.S. 380 (1977).
3. Suppression Hearings; *see Waller v. Georgia*, 467 U.S. 39 (1984), *U.S. v. Criden*, 675 F.2nd 383 (3rd Cir. 1982).
4. Bail hearings; *see In re Globe Newspaper Co*, 729 F.2d 47 (1st Cir. 1984).
5. Preliminary hearings; *see Press Enterprises Co. v. Superior Ct. of Cal.*, 478 U.S. 1 (1986).
6. Voir Dire; *see Press Enterprise v. Superior Ct. of Cal.*, 464 U.S. 501 (1984).
7. Juror's names and list; *see Des Moines Register and Tribune Co. v. Osmundsen*, 248 NW 2d 493, (Iowa 1976); *but see Central South Carolina Chapter Society of Professional Journalism v.*

Martin, 556 F.2d 706, (4th Cir. 1977), 434 U.S. 1022, (cert. denied 1978): no right prior to the seating of the jury.

The same balancing test applies to trial and pretrial proceedings. This balancing of rights carries with it a presumption of openness that may only be overcome by finding that "closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982).

C. Consideration of Closure

When the trial court believes some form of closure, however limited, is necessary, it should remember that absolute or extensive closures are rarely upheld on appeal. *Nebraska Press Services v. Stuart*, 427 U.S. 539, 570 (1960). "We reaffirm that the guarantees of freedom of expression are not an absolute prohibition under all circumstances, but the barriers to prior restraint remain high and the presumption against its use continue intact."

The trial court must make a complete record on the closure hearing. The record should reflect (1) the extent and nature of the pretrial and trial coverage, (2) whether, and what, other measures could mitigate the effects of the publicity, and (3) how effective a restraining order would be to prevent the harm.

As pointed out in *In re Globe Newspaper,* 729 F.2d 47, (1st Cir. 1984), the judge should first allow members of the public and press who are present at the time the closure motion is made an opportunity to be heard on the question of their exclusion. Second, the trial judge must weigh the competing interests involved and consider reasonable alternatives to closure, stating on the record the reason for rejecting the alternatives. Third, if the court determines that closure is necessary, it must draft the closure order as narrowly as possible in order to minimize the intrusion on

the public's First Amendment right to access. *Accord News Press v. Stuart supra.* The Supreme Court in *Gannett v. DePasquale*, 443 U.S. 368, (1979), noted that the closure hearing need not take the form of an evidentiary hearing and need not encompass extended legal arguments that result in delay. It further noted that the public need not be notified that a particular closure hearing will be held at a particular place and time.

The Third Circuit spelled out a more particular procedure when ruling in *U.S. v. Criden*, 675 F.2d 550 (3d Cir. 1982) that a closure motion must be placed on the docket and the public must be given notice of the hearing. It followed that directive in *U.S. v. Raffoul*, 826 F.2d 218 (3d Cir. 1987), in which the court stated that there must be provided an effective individual notice so as to permit an adequate preparation for the impending hearing along with the opportunity to be heard at a meaningful time and in a meaningful way.

In making the decision on closure, the court is allowed to consider that it was the defendant who created a portion of the pretrial publicity, *U.S. v. Bakker,* 925 F.2d 728 (4th Cir. 1991). The right to a fair trial is not exclusively the defendant's because the public also has an overwhelming interest in seeing that justice is done. In *U.S. v. Tijerina*, 412 F.2d 661 (10th Cir.1969), *cert. denied* 396 U.S. 990 (1969), the finding of the trial court holding the defendants in contempt for violating a gag order was upheld. However, see *U.S. v. Ford*, 830 F.2d 596 (6th Cir. 1987), for other considerations regarding a defendant's extrajudicial statements when the defendant is a political figure.

D. Alternatives to Closure

In a closure determination, the trial court should consider at least the following:

1. Limiting the number of the press members present and strictly supervising their courtroom conduct;
2. Isolating witnesses;
3. Controlling the release of leads, information and gossip to the press by police, witnesses, counsel and court personnel;
4. Imposing gag orders on attorneys, parties, witnesses and court officials;
5. Requesting the assistance of appropriate city, county and state officials to regulate the release of information by their employees;
6. Granting a delay of trial;
7. Granting a change of venue;
8. Sequestering the jurors;
9. Isolating the jurors from members of the press;
10. Exercising control over the entire courthouse to prevent press-juror-witness contact;
11. Warning the press on inaccurate accounts;
12. Barring the release of inadmissible evidence to the press; and
13. Firmly instructing the jury not to consider anything other than the evidence that was admitted;

See Report of the Committee on Operations of the Jury System on the "Free Press-Fair Trial Issue," 45 F.R.D 391 (1968).

E. Other Trial Problem Areas

1. *In camera hearings.* The trial court's denial of press access was reversed and the Supreme Court held there must be notice to the public and a balancing test applied in *U.S v. Criden*, 675 F.2d 550 (3d Cir. 1982)
2. *Bench conferences and sidebars.* In *U.S. v. Smith*, 787 F.2d 111 (3d Cir. 1986), the issue was the court's ruling on admissibility of evidence at a sidebar conference. The appellate court noted that "the common law right of access to judicial records enunciated in

Criden is fully applicable to transcripts of sidebar or chamber conferences in criminal cases where evidentiary or other substantial rulings have been made." (at 115). The release does not have to be contemporaneous. See also *Application of the Washington Post*, 576 F. Supp 76 (D.C. 1983).

3. *Matters not in evidence.* In *U.S. V. Gurney,* 558 F.2d 1202 (5th Cir. 1977), the court denied the press access to exhibits not received in evidence, as well as defendant's grand jury testimony, in camera hearings, and written communications between the trial court and the jury. That action was affirmed on appeal with the court noting that the trial judge merely refused press inspection of matters not of public record.
4. *Exhibits in evidence.* Release of copies of tapes received in evidence was proper with the appellate court noting that the copies had the same status as any other portion of the record. *In re National Broadcasting Co*, 635 F.2d 945 (2d Cir. 1980). However, in *Nixon v. Warner Communications, supra,* refusal to release tapes was upheld where the tapes might be a vehicle for improper purposes.

In *United States v. Beckman*, 789 F.2d 401 (6th Cir. 1986), while the court recognized the general common law right to inspect and copy public records and documents including judicial records and documents, it held that it is not an absolute right and the court may exercise supervisory powers over the material in its custody. The matter is "best left to the sound discretion of the trial court, a decision to be exercised in light of the relevant facts and circumstances of the particular case." (at 409).

The court held that other factors to be weighed include the court's supervisory powers, the amount of benefit to the public from the incremental gain in knowledge that would result from hearing the tapes

themselves, the degree of danger to the defendants or persons speaking on the tapes, the possibility of improper motives on the part of the media such as promoting public scandal or gratifying private spite and any special circumstances in the particular case." (at 409).

5. *Court protection of crime victims.* Massachusetts has a statute barring the press and public from the courtroom when the victim was under the age of eighteen and is testifying in a sexual assault case. The Appellate Court held that despite the statute, the balancing test applies. *Globe Newspaper Co. v Superior Court*, 457 U.S. 596 (1982).
6. *Contact with defendants.* In *Pell v Procunier* 417 U.S. 817 (1974), the court dealt with a federal regulation prohibiting reporters from interviewing inmates. The court said that news gathering may be hampered but that newsmen have no greater constitutional rights to access to inmates beyond that afforded the general public, and it upheld the press regulation.
7. *Television.* The United States Supreme Court refused to invalidate Florida's statute allowing cameras in the courtroom and televising of trials, holding that the rules are the same for print, radio, and TV coverage. *Chandler v. Florida*, 449 U.S. 560 (1981). Most states that allow cameras in the courtroom have canons or statutes regulating, in varying degrees, their presence in the courtroom. Well before the time of trial, the trial judge should advise the media that any request for television should be made as early as possible. The court should conduct a conference with the press, the television media, defense counsel, defendant, and prosecution. Basic understandings should be laid out by the court in a firm and

fair fashion. While a failure to regulate conduct of the media in a precise way may not rise to the level of an appealable issue or cause a case reversal, it could result in other sanctions or criticism of a judge.

F. Practice Tip

When the court is besieged with requests from the press to enter a courtroom that will not accommodate all the press, much less other members of the public, it may consider allowing a cable TV company to televise the entire trial and make its transmission available to other press members. The court should also think in terms of closed circuit TV to other rooms in the courthouse to accommodate a larger number of media personnel.

These conflicts between the press, defendant, prosecution, and the court are almost inevitable in a high publicity trial. Often solutions have to be written on a clean slate because there is little authority or experience to rely on. They often require creative thinking. In Oregon, for instance, there is a group called the Fire Brigade. It is composed of journalists, television and radio reporters, defense lawyers, prosecutors, and judges. When there is a deadlock between a court and the media over access, the Fire Brigade offers its services to mediate and attempt to come up with a solution. Oregonians say it works.

Chapter 4

Judicial Management and the Capital Case

Chapter 4. Judicial Management and the Capital Case

by The Honorable William F. Dressel, District Court, Fort Collins, Colorado and The Honorable Ricardo Jackson, Court of Common Pleas, Philadelphia, Pennsylvania

A. In General

A great deal has been written recently on the subject of case management. The need for judges to take a more active role in controlling their dockets has become more pronounced with ever-increasing caseloads. Most of the research and writing in this area has involved civil litigation; however, many of the principles can be readily adapted to capital cases. The Handbook of Recommended Procedures for the Trial of Protracted Cases, 25 F.R.D. 351, 373–74 (1960), makes several recommendations for managing "big cases." In the context of a capital case, the recommendations might be as follows:

1. Early identification of the case as a "capital case;"
2. Early assignment to the judge, who should promptly assume control of the case;
3. Identification and definition of the issues, much of which can be accomplished through pretrial conferences;
4. Scheduling of motions—deadlines for filing, responding, and identification of those motions that will require evidentiary hearings; and
5. Careful planning of trial procedures.

B. Judicial Supervision

Early and continuous judicial supervision is a primary objective of these recommendations. The Standards Relating to Trial Delay Reduction, promulgated in 1984 by the National Conference of State Court Judges,

recognize the need for court supervision and control of the complex case from its inception through final disposition. To assist the court in maintaining control, the Standards call for the establishment of time limits for each phase of pretrial preparation. An explanatory comment to the Standards provides as follows:

> Once such a complex case is identified from its pleadings, a case management plan must be tailored by a judge to apply close and continuous supervision over its procedural progress and development. Management of complex cases involves the judge learning about the issues and exerting control over the trial preparation by the attorneys. Ultimately, the judge must choose a case management plan for each case that best achieves proportionality among its procedural needs, its stakes, its case processing time, and its cost in terms of judge and lawyer time.

Defeating Delay: Developing and Implementing a Court Delay Reduction Program, pp. 177–78 (American Bar Association, 1986)

In complex civil litigation, the judicial manager may focus on discovery and facilitation of settlement. This is where the analogy between complex civil litigation and capital cases breaks down; even though problems sometimes arise, discovery is not as likely to become an issue in the criminal arena because of the obligations placed on state's counsel by the federal and state constitutions. Moreover, most jurisdictions restrict the judge in terms of the role that he or she can play in the plea bargaining process. However, assuming that applicable court rules do not prohibit the judge assigned to hear a capital case from asking state's counsel if he or she has made a final decision to seek the death penalty, he or she should do so as soon as practicable after assignment, . The answer to this question is likely to affect the role that the judge will play in managing the case.

Given the nature of capital litigation and the likelihood of greater media involvement, the judge should consider modifying whatever protocol he or she generally uses both for pretrial matters and trial itself. Courtroom

decorum and security are always important; in a capital case, they require special attention.

C. Pretrial Supervision

1. Motion Practice — Supervision

Experience shows that one difference between the typical criminal case and a capital case involves motion practice. A capital case can be expected to involve a greater variety of motions than the ordinary case. The following list identifies some motions and requests that may be urged in a capital case:

1. Discovery-related motions;
2. Motions seeking the appointment of experts and/or investigators;
3. Motions seeking to compel the state to obtain, preserve, and/or test various evidentiary items;
4. Motions to suppress (physical evidence, statements, identification of the perpetrator, etc.);
5. Motions challenging the process by which the charging document came into being, *i.e.*, procedural motions relating to the preliminary or grand jury hearing that resulted in a finding of probable cause to believe that the defendant committed murder;
6. Motions for change of venue;
7. Requests to use jury questionnaires;
8. Motions to strike state's notice of intent to seek death penalty (defendant may seek to have state's death penalty statute declared unconstitutional or an order precluding the prosecution from attempting to prove a particular aggravating circumstance);
9. Motions to reconsider conditions of release
10. Motions to sever (trials and/or counts, depending on whether more than one individual is charged and how many counts have been filed against the defendant);

11. Motions relating to the defendant's mental state at the time of the killing (sanity) and/or defendant's ability to understand the nature of the proceedings and ability to assist counsel in his order defense (competency)
12. If the jurisdiction has enacted "victims' rights" legislation and/or rules of procedure, motions relating to the role of the victim's family in the litigation, the role of the "victim advocate" who is assigned to the case, and other matters.

2. Motion Management — Methods

The motions listed above are only a sampling of the wide range of motions and issues confronting the judge in a capital case.. As in any complex case, the judge must identify the specific issues. A pretrial timetable for the filing of motions and the presentation of evidence necessary to resolve them should be set, with enough time left for the judge to review authorities before ruling. Simply allowing the clerk's office to place pleadings in the court file in chronological order may not provide sufficient organization. The judge may well need to create an indexed system of notebooks containing his or her own copies of the motions, responses, and rulings. This step can reduce duplication of effort when an issue already resolved is raised again later in the proceedings. Ideally, a law clerk will assist the judge in checking authorities and insuring that rulings from the bench contain all necessary findings.

The judge must create a complete record: every decision will be reviewed, both by state appellate courts and the federal courts. All conferences with counsel, whether in chambers, at the bench, or in open court must be included in the record.

Working through the pretrial motions, the judge should be mindful of the balance between the parties' need to prepare and the right to a speedy trial. Thorough pretrial preparation and organization will create an

atmosphere in which counsel and the court are ready for trial. Therefore, a firm trial date should not be set until the judge has identified the major issues to be resolved and estimated the time needed to prepare. Regularly scheduled status conferences should be held to avoid or more easily manage last minute surprises and requests for continuances.

D. Trial Management

The Handbook of Recommended Procedures for the Trial of Protracted Cases talks about "careful planning of the procedure to be followed at the trial, and full utilization of tested trial techniques." 25 F.R.D. at 374. The trial management standards recommended by the National Conference of State Trial Judges and approved by the American Bar Association in February 1992 apply to all trials, including capital cases:

> Judicial trial management — general principle: The trial judge has the responsibility to manage the trial proceedings. The judge shall be prepared to preside and take appropriate action to ensure that all parties are prepared to proceed, the trial commences as scheduled, all parties have a fair opportunity to present evidence, and the trial proceeds to conclusion without unnecessary interruption.

1. Trial Management Conference

The commentary under this general principle states that in acting as the trial manager, the trial judge is responding not only to the public's expectations but to those of the litigants. The Standards also discuss the need for a "trial management conference" before trial. In a capital case, the judge and the attorneys should hold such a conference to preview what will occur at trial. Subjects of the conference will include the following:

a. *Witnesses.* Prepare a witness schedule to ensure there will not be significant breaks in the presentation of testimony. Address any legal problems or conflicts with potential witnesses and review the substance of the testimony to avoid repetition.

b. *Exhibits.* Have counsel review them and make sure they are appropriately marked. Clarify any objections to their admissibility. If possible, obtain stipulations regarding authenticity or admissibility. Discuss the use of exhibits and their presentation to jurors during the trial.

c. *Trial issues.* Review the legal and factual issues that will be presented during the trial.

d. *Motions.* Rule on any pending motions and identify those that will require rulings during the trial.

e. *Time or content limitations.* Decide whether to impose time limitations during the trial on voir dire questioning, opening statements, presentation of evidence, etc. Also decide whether evidence on certain subjects will be limited. If evidence will be limited, clearly state your ruling and the reasons supporting it.

f. *Jury instructions and verdicts.* Local practice varies, but try to settle the majority of the jury instructions well before submitting the case to the jury.

g. *Jury selection.* Conduct a final review of the voir dire procedure, including the "death qualifying" of the jury.

h. *Special trial needs.* Is an interpreter needed? Equipment to assist the hearing impaired? Special equipment to display evidence, etc.?

2. Consideration of Other Cases on Docket

A capital case will absorb much of a judge's time and energy, so he or she must make appropriate arrangements for the other cases on the docket. If assistance from other judges cannot be obtained, the capital trial may be held four days a week, with the fifth day reserved for the other cases on the judge's docket. It is a good idea to prepare a trial schedule for the attorneys and the jurors, outlining the anticipated days and hours on those

days that trial will be conducted. It is important to arrange your docket so that the trial starts on schedule and that the number of hours set each day is indeed provided for trial.

3. Conducting the Trial

The National Center for State Courts studied civil and criminal trials in three states and published its findings in *On Trial: The Length of Civil and Criminal Trials*. The Center concluded that trial length can be shortened without sacrificing fairness by increasing continuity in trial days and by judicial management of each phase of the trial. Lawyers who were surveyed in the Center's study listed the following characteristics of judges who manage trials effectively: decisiveness, punctuality, control over the trial (especially voir dire), minimal trial recesses, avoidance of interruptions, and knowledge of the law. The Center's study also emphasized the importance of maintaining momentum throughout the trial:

1. Consecutive and longer trial days lead to the ability to conduct trials in fewer total hours;

2. Courts may improve individual trial time and overall calendar productivity by utilizing a judge's time to maximize the number of hours per day in an ongoing trial;

3. Protecting the day-to-day momentum of a trial enhances prospects for a more expeditious trial; and

4. Trial interruptions, either through nonconsecutive or short trial days, tend to lengthen the total time needed to complete a trial.

E. Conclusion

A judge can put in endless hours getting a case ready for trial by ruling on motions, studying applicable law, and holding status conferences with counsel. If the judge has not "planned and walked through the trial with counsel," however, he or she may spend weeks presiding over a trial that could have been concluded not only in a shorter time but in a more clear and concise manner. Effective judicial management helps the jurors understand the issues and enables them to more effectively perform their role as triers of fact. It also enhances fairness and affords the parties due process. Effective judicial management of a capital case should achieve:

1. Fair treatment of the parties;
2. A timely disposition;
3. Higher quality litigation; and
4. Public confidence in the judicial system.

Chapter 5

Jury Selection

Chapter 5. Jury Selection

by Honorable Connie Petterson, Denver, Colorado

A. The Panel

1. Size

If the case has received little publicity and is not expected to last more than a week, you can probably pick your jury from a panel of fewer than 100. However, an initial panel of more than 100 people may be necessary if it is a high-publicity case and the trial is expected to be lengthy.

If a large panel is required, coordinate with jury commissioner and develop a procedure for summoning a large panel, handling "call-backs" from many of those summoned who either have questions or wish to be excused, and coordinating the selection process.

Determine the number of summonses necessary to have a large panel on the first day. What is the return ratio in the county or district? (For example, if 400 summonses are sent, does local experience indicate that at least 300 prospective jurors will appear as directed?) The summons should indicate date, time, and specific location of first appearance.

2. Management of the "Crowd"

You've just invited a large number of people to a major event. Now, what do you do with them? Although the process of voir dire in a capital case is similar to that of the average case, there are some critical differences. One is that it can take much longer to accomplish, making it critical that the judge utilize the most efficient and effective voir dire procedure available. Another difference is that, because it is a death penalty case, the procedure utilized will be combed very finely for error. Judges have taken many different approaches to the voir dire process in death penalty cases; the individual judge should consider all methods and develop a procedure. The procedure must be planned well in advance of

trial; this is not a situation to "play by ear." The judge must be certain the voir dire method utilized complies with all applicable constitutional provisions, statutes, rules of procedure, and case law.

Where should the "crowd" first report? The courtroom may not be large enough to accommodate over 100 people. It may be necessary to locate a larger room (*e.g.*, auditorium, city council chambers, college lecture hall, legislative chamber, school gymnasium). A location in or very near the courthouse is preferable.

Voir dire should be open to the public to the greatest extent possible. Closed proceedings in a criminal trial, although not absolutely precluded, must be rare and only for cause shown that outweighs the value of openness. *Press-Enterprise Co. v.* 464 U.S. 501, 509, 104 S.Ct. 819, 823 (1984).

Caveats: (a) Remember that *the defendant must be present*, this is a critical phase of the trial; and (b) Obtain additional bailiffs for the trial.

3. Use of Questionnaire

Questionnaires in a capital case can be very helpful. If you use a questionnaire, a decision must be made concerning its length. The longer the questionnaire, the greater the challenge to the court, court staff, and counsel. Provide a brief statement of the case on a separate cover sheet. This statement should include information concerning the parties, charges, date of the alleged offense, and a summary of the facts, phrased in as neutral a way as possible. This cover sheet can be discarded after the questionnaire is completed, thus reducing the number of pages that will have to be copied. Distribute the questionnaires when the panel is called. It is recommended that the judge confer with counsel concerning the content of the questionnaire.

An issue to be considered is the confidentiality of the questionnaire.

4. Impaneling Procedures—A Suggested Method

a. When the prospective jurors arrive:

(1) If you are using questionnaires and they have not been sent to jurors in advance, make sure there is someone to pass them out and have extra pens or pencils.

(2) Give the panel a very brief statement of the case: parties, charges and anticipated length of trial.

(3) Give the panel the initial oath for voir dire and allow prospective jurors to complete questionnaire.

(4) Ask those who *cannot serve* as jurors to raise their hands. (Do not explore reasons at this point.)

(5) Have bailiffs collect questionnaires from those who *cannot serve.* Keep these questionnaires in a stack near you.

(6) Have the bailiffs collect questionnaires of those who *can serve* and keep these near you in a separate stack.

(7) From the *"can serve"* and *"can't serve"* stacks, take approximately 15-20 questionnaires from *each* stack—this is now "Group A." Read the names and instruct these people to return to (location [probably the trial courtroom]) on (date) at (time). Tell them roll will be taken. Instruct them **not** to discuss the case with other prospective jurors or with anyone else. They should also be admonished that they are not to read, watch or listen to any media reports concerning the case. As Group A leaves the room, have the bailiffs give each group member a note specifying the date, time and location of his or her scheduled return.

(8) Continue this procedure through the *"can serve"* and *"can't serve"* stacks of questionnaires (Group B, Group C, Group D, etc.). The advantage of grouping *"can serves"* and *"can't serves"* is that it ensures a sufficient number of prospective

jurors in any given Group who believe they can serve on the jury, thus saving valuable time. Why not just select solely from the those prospective jurors who have indicated they can serve? If only these prospective jurors are selected to return, the following criticism may arise: those willing to serve on a capital case are called back first and selected first. Why are they so willing to serve? Does their enthusiasm to serve indicate that will they be inclined to return a verdict of guilt and/or death?

(9) No more than three groups should return in one day. Two groups, one in the morning and one in the afternoon, is probably better. Assess your own capabilities.

b. You may commence general voir dire whenever you have available 75 to 80 prospective jurors who (1) do not have hardships, (2) have not been tainted by publicity concerning the case, and (3) have been "death qualified."

A sample "Order Re: Trial Schedule" for a high profile case can be found in Appendix A.

B. Voir Dire

1. Return of Groups—Questions as to Hardship or Knowledge of the Case

The purpose of the first return of individual groups is to identify those prospective jurors who are "without hardship" and "publicity free" and therefore remain to be "death qualified." When group A returns, proceed as follows:

(1) Swear group again or remind them that they are still under oath to truthfully answer the questions that are asked of them. Opening comments to the group should include information regarding the procedures that apply in capital cases, sequestration of the jury during

trial, and the anticipated length of trial. These comments should be reviewed with counsel ahead of time and, of course, the procedure based upon the state's statutory requirements must be explained to the jury.

(2) Ask group who among them would have a hardship serving on the jury. Although many members of the group have indicated, during the initial session, that they can serve, they have now had additional time to reflect and may have "remembered" reasons why they cannot serve. The judge should conduct this aspect of voir dire, but should give counsel the opportunity to suggest questions.

(3) Out of the presence of the jury but on the record, discuss hardship excuses with counsel. Reach an agreement or, if no agreement can be reached, decide which jurors should be excused on the basis of hardship.

(4) The next issue to confront is "publicity." As indicated by answers on the questionnaires, question prospective jurors from Group A on the record concerning:

   (a) Their knowledge regarding the case.

   (b) The source(s) of their knowledge.

   (c) Whether this knowledge will prevent them from following the court's instructions on burden of proof, standard of proof, presumption of innocence and other matters. Will they be able to listen to the evidence and reach a verdict based on the evidence?

Here again, it is most efficient if the judge conducts this aspect of the voir dire. You may request input and/or supplemental questions from counsel.

Reach agreement, or decide, which panel members should be excused by reason of exposure to publicity.

(5) Return to Group A. Excuse appropriate panel members on grounds of exposure to publicity and "hardship."

2. "Capital Qualification" of Remaining Members of Group A

At this stage, *only* questions pertaining to "death qualification" should be asked; do not go back to questions concerning hardship or publicity or jump ahead to "general" voir dire questions.

The judge must decide whether to conduct voir dire, allow counsel to conduct it, or make it a shared responsibility. It is undoubtedly true that the court can conduct this portion more efficiently. If counsel are to be involved in the process, the judge should consider imposing reasonable content and time restrictions. In any event, because this is a very critical phase of the voir dire process, you must be certain that the prospective jurors are thoroughly examined. Consider using the following (or similar) instructions:

The trial of this case will occur in two distinct phases. The first phase is limited to the question whether the state has proven beyond and to the exclusion of every reasonable doubt, the guilt of the accused. Should the accused be found guilty of the capital felony described in the accusatory pleading, a second phase addressed to what type of penalty the jury will recommend to the court will be held.

Although the verdict of the penalty jury is advisory in nature and not binding upon the court, the jury recommendation is given great weight and deference when the court determines which punishment is appropriate. Because your verdict could lead to imposition of the death penalty, your attitude towards the death penalty is a proper subject of inquiry by the court and the attorneys.

The fact that you may have reservations about, or conscientious or religious objections to, capital punishment does not automatically disqualify you as a juror in a capital case. Of primary importance is whether you can subordinate your personal philosophy to your duty to abide by your oath as a jury and follow the law as I give it to you. If you are willing to render a verdict that speaks the truth as you find it to exist, even though such verdict may lead to the imposition of the death penalty, you are qualified

to serve as a juror in this case. If, however, you are possessed of such strong opinions regarding capital punishment--no matter what those opinions may be--that you would be prevented from or substantially impaired in the performance of your duties as a juror, you are not qualified to serve as a juror.

It is up to each one of you, using the standard described, to search your conscience to determine whether you are in a position to follow the law as I give it to you and render a verdict as the evidence warrants. Only by your candor can either the accused or the State of Florida be assured of having this extremely serious case resolved by a fair and impartial jury.

Mr./Ms. _____, are you opposed to or in favor of the death penalty?

If the juror is opposed to the death penalty, ask the following question:

Would your opposition to the death penalty prevent or substantially impair your finding the defendant guilty if the evidence and the law so warranted because the death penalty could be imposed?

If the answer is yes, this juror may be excused for cause.

If the answer is no, ask the following questions:

If this case should reach a penalty phase, would you automatically vote against the death penalty, regardless of the evidence and the law?

Would your views on the death penalty prevent or substantially impair your ability to follow the law in deciding (recommending) the sentence?

If the answer to the first question is yes, the juror can be excused for cause. If the answer to the second question is yes, you will need to follow up with same additional questions and then probably allow a cause challenge on the basis of *Wainwright v. Witt*, 469 U.S. 412 (1985) (see later discussion of the *Witherspoon/Witt* problems).

If the juror is in favor of the death penalty, you should ask the following questions:

If this case should reach a penalty phase, would you automatically vote for the imposition of the death penalty, regardless of the evidence and the law?

Would your views on the death penalty prevent or substantially impair your ability to follow the law in deciding (recommending) the sentence?

If the answer to the first question is yes, the juror may be excused for cause. If the answer to the second question is yes, you will need to follow up with some additional questions and then probably allow a cause challenge on the basis of *Wainwright v. Witt*, 469 U.S. 412 (1985). (See later discussion of the *Witherspoon/Witt* problems.)

3. Individual or Collective Voir Dire

Should individual or group voir dire be utilized for death qualification? The procedure varies from state to state. Even in those states where the decision for individual or collective voir dire is left to the discretion of the judge, the facts of the case or the nature of a prospective juror's response may require some individual voir dire.

Alabama: Generally, the trial court has discretion whether to voir dire prospective jurors individually or collectively, even in death penalty cases. *Smith v. State*, 588 So.2d 561 (Ala. Cr. App. 1991); *Brown v. State*, 571 So.2d 345 (Ala. Cr. App. 1990), *writ quashed*, 571 So.2d 353 (1990). However, the court cautioned that this discretion is limited by requirements of due process.

Division of panel into smaller groups of 13 or 14 was an acceptable compromise despite pretrial publicity surrounding capital murder cases. *Henderson v. State*, 583 So.2d 276 (Ala. Cr. App. 1990), *aff'd*, 583 So.2d

305 (1990), and *Perry v. State,* 586 So.2d 236 (Ala.Cr.App. 1990), *remanded on other grounds*, 586 So.2d 242 (1990).

Arizona: Method of voir dire is left to the judge's discretion. Rule 18.5(d), A.R.Crim.P.

Arkansas: Both sequestration of jury for voir dire purposes and voir dire in general are within broad discretion of trial judge. Sequestered voir dire is the normal practice in capital cases. A.C.A. §§16-33-101, 16-33-302 to 16-33-308; Rules Crim. Proc., Rule 32.2; *Felty v. State*, 306 Ark. 634, 816 S.W.2d 872 (1991).

California: Cal. Penal Code §1078 provides that the judge must conduct the examination of prospective jurors in a criminal case. However, on a showing of good cause, the court may permit the parties to supplement the examination by such further inquiry as it deems proper or may itself submit such additional questions by the parties as it deems proper. (*See also* Cal. Rules of Ct., 228.1-228.2.)

In *Hovey v. Superior Court,* 28 Cal.3d 1, 168 Cal. Rptr. 128, 616 P.2d 1301 (1980), the California Supreme Court held that the death-qualification portion of the voir dire should be done individually and in sequestration. The court reasoned that prospective jurors who observe the death-qualification of other prospective jurors may have an altered state of mind regarding the appropriateness of the death penalty and the defendant's guilt, leading them to favor the death penalty more than they would otherwise. In *People v. Anderson*, 43 Cal.3d 1104, 240 Cal. Rptr. 585, 742 P.2d 1306 (1987), the court held that the rule announced in *Hovey* was (1) not of constitutional dimension and (2) to be accorded prospective application only.

The judge must conduct even the death-qualifying portion of voir dire in open court unless there is an overriding interest, supported by adequate

findings, that closure is necessary to preserve that interest. The judge must also consider alternatives to closure that might harmonize the rights of the public and the defendant before any narrowly-tailored order for closure is made. *Press-Enterprise Co. v. Superior Court, supra.*

Colorado: Method of voir dire is within the discretion of the judge. C.R.Crim.P. 24.

Florida: Trial judge has the discretion to voir dire prospective jurors either individually or collectively in capital cases. FAS R.Cr.P. Rule 3.300 (b). However, in *Francis v. State*, 579 So. 2d 286 (Fla. App. 3 Dist. 1991), the court reversed the conviction because the trial judge did not permit defense counsel to examine any prospective jurors on an individual basis.

Georgia: Individual voir dire: O.C.G.A. §15-12-133. *State v. Hutter*, 251 Ga. 615, 307 S.E.2d 910 (1983). Sequestered voir dire is not mandatory. *Sanborn v. State*, 251 Ga. 169, 304 S.E.2d 377 (1983).

Illinois: The decision to conduct voir dire individually, and outside the presence of other prospective jurors, is left to the sound discretion of the trial court. *People v. Neal*, 111 Ill. 2d 180, 489 N.E.2d 845, 852 (1985), *cert. denied*, 476 U.S. 1165, 106 S.Ct. 2292, 90 L.Ed. 2d 733 (1986); 87 Ill. 2d Rules 431, 234.

Indiana: Trial judge has discretion whether to allow collective or individual voir dire. Even in a capital case, the defendant must show "highly unusual or potentially damaging circumstances" before individual voir dire is warranted. *Conner v. State*, 580 N.E.2d 214 (Ind. 1991).

Kentucky: Trial judge has discretion to voir dire prospective jurors either individually or collectively in capital cases; however, individual voir

dire outside the presence of other prospective jurors is required when inquiry involves either capital punishment or pretrial publicity. Kentucky Rule of Criminal Procedure 9.38.

Louisiana: Trial judge has discretion to permit individual voir dire if defendant can demonstrate special circumstances. The fact that the case is a capital case does not, in and of itself, establish special circumstances for purposes of permitting individual voir dire. *State v. Caston*, 583 So.2d 42 (La.App. 2 Cir. 1991).

Maryland: Trial judge has discretion to voir dire prospective jurors either individually or collectively in capital cases. *Colvin v. State,* 299 Md. 88, 472 A.2d 953, *cert. denied,* 469 U.S. 873, 105 S.Ct. 226, 83 L.Ed.2d 155 (1984).

Missouri: Trial judge has broad discretion in the control and conduct of voir dire. Rule of Criminal Procedure 27.02; *State v. Byrne,* 595 S.W.2d 301 (Mo. 1979), *cert. denied*, 449 U.S. 951, 101 S.Ct. 355, 66 L.Ed.2d 215 (1980).

Nebraska: A party has no right to examine a prospective juror out of presence of all other panel members absent a showing that, without sequestration, that party would be prejudiced. Individual or collective voir dire is left to the discretion of the trial judge. *State v. Bradley*, 236 Neb. 371, 461 N.W.2d 524 (Neb. 1990).

Nevada: Trial judge has discretion to voir dire prospective jurors either individually or collectively in capital cases. Individual voir dire outside the presence of remaining prospective jurors is not mandatory. *Summers v. State*, 102 Nev. 195, 718 P.2d 676 (1986); *see also* N.R.S. §175.031.

New Jersey: The trial judge must voir dire prospective jurors individually under oath. There is no discretion to conduct the voir dire collectively. R. 1:8-3(a). In *State v. Marshall,* 123 N.J. 1, 586 A.2d 85 (1991), as a result of a strategic and informed request by *defense counsel,* the judge's decision to eliminate individual voir dire during the death-qualification phase was affirmed. The court stated that, in death penalty cases, the better practice is to submit all potential jurors to thorough and searching inquiry as to their attitudes concerning the death penalty because this approach guarantees a complete record. However, a judge's decision to eliminate individualized death-qualification inquiry does not necessarily constitute error. *Marshall* at 131-32.

Oklahoma: Individual voir dire is within the discretion of the trial judge. *Sellers v. State*, 809 P.2d 676 (Okl. Cr. 1991). Defendant did not establish that he was prejudiced by judge's refusal to allow individual questioning of prospective jurors concerning pretrial publicity; thus, judge did not abuse discretion in refusing to take that extraordinary measure. *Tibbs v. State*, 819 P.2d 1372 (Okl. Cr. 1991).

Oregon: Trial judge has discretion to voir dire prospective jurors either individually or collectively in capital cases.

Pennsylvania: The individual voir dire method must be used unless waived. Pa.R.Crim.P. 1106(e).

South Carolina: A capital defendant has the right, under S.C. Code Ann. §16-3-20, to examine prospective jurors on an individual basis. This right can be waived. *St. v. Norris*, 285 S.C. 86, 328 S.E.2d 339 (1985).

Tennessee: The trial judge has discretion to voir dire prospective jurors either individually or collectively. *State v. Smith*, 695 S.W.2d 954 (Tenn. 1985).

Texas: The trial court propounds applicable comments to the entire panel on the matters of "reasonable doubt, burden of proof, return of indictment by grand jury, presumption of innocence, and opinion;" thereafter, "on demand of the state of the defendant, either is entitled to examine each juror on voir dire individually and apart from the entire panel. . . ." Texas Code of Criminal Procedure, Article 35.17 (2).

Utah: It is important for trial judges to adequately and completely probe jurors on all possible issues of bias, including press coverage, and to conduct voir dire proceedings in a way that meets constitutional requirements and enables litigants and their counsel to intelligently exercise peremptory challenges and attempts to eliminate bias and prejudice.

Even in a case involving extensive publicity and controversy, there is no specific form of questioning that must be followed in voir dire to ensure that the defendant's constitutional rights are not violated; furthermore, there is no requirement that jurors be questioned individually, by counsel in the case, or in any other particular arrangement. *State v. James*, 819 P.2d 781, 797-98 (Utah 1991).

Virginia: A capital defendant has no right to individualized, sequestered voir dire. *Buchanan v. Commonwealth*, 238 Va. 389, 384 S.E.2d 757 (1989), *cert. denied*, 493 U.S. 1063 (1990).

"Death qualifying" the jury does not render the jury "conviction prone" *Lockhart v. McCree*, 476 U.S. 162 (1986); there is no authority requiring that the trial judge be "death-qualified."

C. Challenges for Cause in the Capital-Qualifying Stage of Voir Dire

1. The *Witherspoon* Standard: Improper Exclusion Is Reversible Error

In *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770 (1968), the petitioner urged that the Sixth and Fourteenth Amendments compelled reversal of his conviction and death sentence because the prosecutor successfully challenged every prospective juror who expressed reservations regarding the death penalty. Almost one half of the venire was excused on this basis. In upholding Witherspoon's claim, but only as to the death sentence, a five-member majority of the Court said this (at 521):

> . . . a State may not entrust the determination of whether a man should live or die to a tribunal organized to return a verdict of death. Specifically, we hold that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. No defendant can constitutionally be put to death at the hands of a tribunal so selected.

The Court went on to hold that the *Witherspoon* rationale would be applied retroactively.

Under *Witherspoon*, a trial judge should sustain a prosecutor's challenge for cause only if the challenged prospective juror (1) would *automatically* vote against imposition of the death penalty without regard to the evidence that might be developed during trial *or* (2) manifested an attitude toward the death penalty that would prevent him or her from making an impartial decision concerning the defendant's guilt. 391 U.S. at 522-23, n. 21. The *Witherspoon* standard was examined and reaffirmed in *Davis v. Georgia*, 429 U.S. 122 (1976). In *Adams v. Texas*, 448 U.S. 38 (1980), the Court employed some language suggesting that it might consider relaxing the *Witherspoon* standard in some respects; however, Adams' death sentence

was reversed on the basis of a *Witherspoon* violation. The *Witherspoon* standard was eventually modified in *Wainwright v. Witt,* 469 U.S. 412 (1985), In *Witt*, a juror was excused after she stated that she had "personal beliefs" against the death penalty. Relying to some extent on *Adams*, the Supreme Court held that it is not necessary that the judge find it to be "unmistakably clear" that a juror would automatically vote against the death penalty; thus, the exclusion of this prospective juror was permissible. Under *Witt*, exclusion for cause is permissible when a prospective juror's statements and demeanor indicate that his or her views would "prevent or substantially impair" his or her ability to be neutral and to follow the judge's instructions. 469 U.S. at 424, 105 S.Ct. at 852, 83 L.Ed.2d at 851.

2. The *Witherspoon* Standard: Improper Exclusion, Not Harmless Error

The improper exclusion for cause of a prospective juror, based on his or her opposition to the death penalty, constitutes reversible error under all circumstances; the appellate court need not conduct a "harmless error" analysis. *Gray v. Mississippi*, 481 U.S. 648 (1987). However, an erroneous ruling concerning a challenge for cause that results in the temporary inclusion of a prospective juror, which forces the defendant to exercise a peremptory challenge, *is* subject to the harmless error analysis. *Ross v. Oklahoma*, 487 U.S. 81 (1988).

In *Gray v. Mississippi*, the question was whether the improper exclusion of a juror could ever be harmless error in a death penalty case. Gray was charged with murder in the course of a kidnapping. During jury selection, the trial judge excluded a juror, Mrs. Bounds, who should not have been excluded for cause. Although she had some hesitance about imposing the death penalty, she stated that she would have no scruples against imposing it and thought she could impose it. Defendant was convicted and sentenced to death.

On appeal, a divided Mississippi Supreme Court affirmed the death sentence. The majority held that although the trial judge erroneously excluded Mrs. Bounds, he did so in an effort to correct his earlier error in denying the State's motion to exclude five jurors for cause. The State was, therefore, improperly required to exhaust its peremptories. However, the minority opinion of the Mississippi Court was that it could never be harmless error to improperly exclude a juror. The United States Supreme Court granted certiorari.

A plurality of the Supreme Court reversed. Justices Blackmun, Brennan, Marshall, and Stevens agreed with the minority of the Mississippi Supreme Court, holding that under *Davis v. Georgia*, 429 U.S. 122 (1976), the improper exclusion of a juror could never be harmless error. Justice Powell concurred.

Justices Scalia, Rehnquist, White, and O'Connor dissented. They reasoned that the trial court erred with respect to five jurors who should have been excluded for cause, but were instead excluded on prosecutorial peremptories. Assuming that Mrs. Bounds was not constitutionally excludable, the same jury still would have been picked, had even one of those jurors been excluded for cause, since the State, which had exhausted its peremptory challenges, would have used one of them on Mrs. Bounds. They also argued that the plurality had in effect announced a new rule; *i.e.*, maybe potential jurors would reveal under further questioning that their opposition to the death penalty was not as strong as originally perceived.

It is further clear from the line of Supreme Court cases reversed in 1971 in per curiam opinions that, merely because the State has not exhausted its peremptory challenges, there is no justification for improper exclusion of scrupled jurors. Where the court improperly excludes even a single juror, the case must be reversed regardless of the number of peremptories that are not utilized. *Speck v. Illinois*, 403 U.S. 946 (1971); *Bernette v. Illinois* and *Tajra v. Illinois*, 403 U.S. 47 (1971); *Mathis v. New Jersey*, 403 U.S. 946 (1971); *Wigglesworth v. Ohio*, 403 U.S. 947 (1971)

The same rule applies where defense counsel does not exhaust his or her peremptory challenges. *See Child v. North Carolina*, 403 U.S. 948, (1971). It should also be noted that failure by defense counsel to object to an improper exclusion does not constitute a waiver of *Witherspoon* rights and cannot prevent a reversal. *See Wigglesworth, supra*. The law leaves trial courts with the difficult task of distinguishing between prospective jurors whose opposition to capital punishment will not allow them to apply the law or view the facts impartially and jurors who, though opposed to capital punishment, will nevertheless conscientiously apply the law to the facts.

In *Davis v. Georgia*, 429 U. S. 122 (1976), the United States Supreme Court in effect established a per se rule requiring the vacation of a death sentence imposed by a jury from which a potential juror, who has conscientious scruples against the death penalty but who nevertheless under *Witherspoon* is eligible to serve, had been erroneously excluded for cause. In *Gray v. Mississippi, supra*, which is subsequent to *Wainwright v. Witt, supra,* the United States Supreme Court reaffirmed the *Davis* standard and held that *Witherspoon* violations constitute reversible constitutional error and cannot be subjected to harmless error review. *Gray* reaffirms the *Witherspoon* rule and states that,

> We have re-examined the *Witherspoon* rule on several occasions, one of them being *Wainwright v. Witt*, . . . where we clarified the standard for determining whether prospective jurors may be excluded for cause based on their views on capital punishment. We there held that the relevant inquiry is "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath.'"

Gray v. Mississippi, 481 U.S. 648, 658 (1987). The court then cited the following language from the majority opinion in *Lockhart v. McCree*, 476 U.S. 162, 176 (1986):

> [T]hose who firmly believe that the death penalty is unjust may nevertheless serve in capital cases so long as they state *clearly* that they are willing to temporarily set aside their own beliefs in deference to the rule of law. (emphasis added)

It would appear that the *Witherspoon* standards have been loosened only slightly if one accepts the interpretation of *Gray v. Mississippi.* Even more interesting is the fact that the two factions of the United States Supreme Court interpret *Wainwright v. Witt* differently from the Chief Justice, who is the author of *Wainwright v. Witt*, and who is in the minority in *Gray*.

It appears that the reconciliation of *Witherspoon* and *Witt* and *Gray* is found in *Gray* and *Adams v. Texas*. In other words, a prospective juror must clearly state that he or she is willing to set aside his or her own beliefs in deference to the rule of law and, in evaluating the prospective juror's statements, that the court must determine whether the juror's views would prevent or substantially impair the performance of his or her duties as a juror in accordance with the instructions and oath. While this apparently eliminates *Witherspoon's* reference to automatic decision making, it leaves the Court with making the determination that is set forth in *Wainwright v. Witt, i.e.*, the trial court is left with the "difficult task of distinguishing between prospective jurors whose opposition to capital punishment will not allow them to apply the law or view the facts impartially and jurors who, though opposed to capital punishment, will nevertheless conscientiously apply the law to the facts adduced at trial."

3. *Witherspoon* Standard: States' Application

It appears that *Witherspoon* standards have been minimally loosened and that the real change has to do with the amount of deference that will be paid to the trial court's determination of bias. In this regard, the trial court makes a specific finding that the jurors' responses demonstrate to the

court's satisfaction that the jurors' views would prevent or substantially impair the performance of their duties as jurors in accordance with their instructions and their oath. Such a finding will support the "deference" that will be paid to the trial judge's determination to excuse a prospective juror. Such a finding will be made only on a record that strongly supports a determination of bias. If a juror states that he or she can temporarily set aside his or her own beliefs in deference to the rule of law, then a finding of bias will not be supported and there will be *Witherspoon* error. But compare *Ross v. Oklahoma,* 487 U.S. 81 (1988), in which the Court held that refusal to remove a juror who should have been removed under *Witherspoon* and who was then removed by a defense peremptory strike, was harmless error.

In Georgia, excusal of a juror is error unless he or she states clearly and unequivocally either that he or she will not consider, or cannot impose a death sentence in any case, regardless of the facts. *Blankenship v. State*, 247 Ga. 490 (4) (1981); *Cofield v. State,* 247 Ga. 98 (2) (1981). *See also Jordan v. State*, 247 Ga. 328 (6) (1981).

In Pennsylvania, only where inquiry reveals that a juror would be unalterably opposed to the imposition of the death penalty under any circumstances may he or she be excused for cause. *Commonwealth v. Lewis*, 567 A.2d 1376 (1989). The propriety of exclusions, however, based upon a juror's reluctance to render the death penalty has been accepted by the Pennsylvania Supreme Court. *Commonwealth v. Young,* 572 A.2d 1217 (1990).

People v. Lanphear, 36 Cal.3d 163 (1984). Statements such as, "I think" or "I don't think" or "I don't believe" do not warrant exclusion on *Witherspoon* grounds;

People v. Osuna, 70 Cal.2d 759, 769 (1969). Statement that "I guess I feel strongly that I could not [impose a death penalty]" are not grounds for exclusion under *Witherspoon;*

People v. Chacon, 69 Cal.2d 765, 772-773 (1968). Answer of "I don't think so" not grounds for exclusion under *Witherspoon*;

People v. Vaughn, 71 Cal.2d 406, 412-413 (1969). "I really feel that I object so strongly that I could not consider the death penalty" was not held to be grounds for exclusion under *Witherspoon*;

People v. Washington, 71 Cal.2d 1061 (1969). Answer such as "It would be difficult for me to vote for the death penalty" or "I am almost sure it would be difficult" or "I doubt very much whether I could," held to be insufficient;

People v. Schader, 71 Cal.2d 761, (1969). Juror stated, "I'm afraid I would be prejudiced. I have very strong opinions on the death penalty." Reversed based on *Witherspoon* error; and

People v. Goodridge, 70 Cal.2d 824, 839-40, (1969). Accepting the prospective juror's conclusion as to his disqualification to serve without ascertaining the basis for such belief was an insufficient basis for exclusion.

A federal case which deals with *Witherspoon* exclusions is *Maxwell v. Bishop*, 389 U.S. 262, (1970). Removal of prospective jurors was impermissible under *Witherspoon* where both questions and answers were equivocal: "Do you have any conscientious scruples about capital punishment that might prevent you from returning such a verdict?" Answer: "I think I do."

People v. Varnum, 70 Cal.2d 48 (1969); *People v. Teale*, 70 Cal.2d 497 (1969); and *People v. King*, 1 Cal.3d, 791 (1970), involve the "*proper case*" question in captial trials. The "proper case" terminology is basically considered by the courts to be ambiguous. The line of reasoning is that the juror is not told what a "proper case" for imposition of the death penalty

is. For example, he or she does not know whether a simple case of rape without a homicide is a "proper case" or whether there are any standards to determine what is a "proper case." Therefore, the prospective juror may conclude that he or she could not vote for a death penalty in such a "proper case" of rape and, therefore, he could not serve. Yet, that prospective juror is not one who would automatically vote against the infliction of capital punishment without regard to any evidence that might be developed at the trial of the case. *People v. Ketchel,* 71 Cal.2d 635, 646-47 (1969). These cases suggest that the "proper case" terminology is dangerous; thus, it would be more appropriate to couch the question in terms of "Would you automatically vote against the infliction of capital punishment without regard to any evidence that might be developed at the trial of the case?"

The "*me too*" response poses another risk of reversible error. In *In Re Seiterle*, 71 Cal.2d 698 (1969), the argument was made that the court should be able to rely on a statement from a juror who had been excluded, and the response by the California Supreme Court was that under *Witherspoon*, the juror must state unequivocally his or her inability to vote for the death penalty in any case, and that statements from other prospective jurors and questions and rulings by the trial court on other challenges for cause cannot be allowed to stand as the equivalent of a statement by a particular juror.

The California Supreme Court rejected the standard of self-evaluation of a juror's ability to serve impartially where the juror acknowledged having certain feelings or ideas concerning the death penalty which the juror believed would interfere with sitting fairly and impartially as a juror. However, it should be noted that there was no further questioning as to whether the juror's ideas or feelings concerning the death penalty were in opposition to, or in favor of, the death penalty. *In re Eli,* 71 Cal.2d 214 (1969).

The trial judge may prohibit voir dire on actual or hypothetical cases not before the jury, and may excuse a juror for cause who would automatically vote against the death penalty in the case before the Court regardless of his or her willingness to consider the penalty in another case. This case addresses questions such as, "Would you give the death penalty to Adolph Hitler?" *People v. Fields*, 35 Cal.3d 329, 354 (1983).

People v. Texas, 448 U.S. 38, 45 (1980), involved an arson-murder. The defense wished to question the jurors about their attitudes concerning the death penalty and the particular facts of the arson. Further, the defense wished to determine whether the evidence of serious burn injuries suffered by the victims would cause a juror to automatically vote for the death penalty. In overruling the People's objection, the trial court held that counsel must be permitted to ask questions of prospective jurors that might lead to questions for cause. However, the inquiry related to the facts is not relevant to the death qualification process. *Witherspoon* voir dire seeks to determine only the views of the prospective jurors about capital punishment *in the abstract* to determine if they have any opposition to the death penalty and would vote against the death penalty without regard to the evidence produced at trial or vice versa. *Witherspoon* inquiry is directed to *whether, without knowing the specifics of the case, the juror has an open mind on the penalty determination.*

Caveat: The distinction that must be drawn is between sustaining a challenge for cause based upon *Witherspoon/Witt* for attitudes about the death penalty *in general.* In sustaining a challenge for cause concerning a juror who, for example, announces he or she would automatically vote against death in the case because he or she has been told (whether true or not) the prosecution's case rests entirely on circumstantial evidence, the juror would not be casting a vote *without* regard to the evidence and could not be excluded under the *Witherspoon/Witt* formula. (*See People v. Fields*, 35 Cal.3d 329, 358 (1983).) That is to say that the juror might be excused

for cause because he or she could not be fair in the instant case, but that is a matter for general voir dire as opposed to *Witherspoon/Witt* voir dire.

Where a juror has clearly expressed an inability to vote for the death penalty regardless of the evidence that may be produced at trial, the court has discretion to limit further voir dire directed toward persuading the juror that there may be some circumstances he or she has not considered that would cause the juror to modify his or her conscientious or moral attitude toward the death penalty. The trial court did not abuse its discretion in preventing defendant from asking prospective jurors who clearly had expressed an inability or unwillingness to vote for imposition of the death penalty if they would be able to impose the death penalty if the People proved beyond a reasonable doubt that the defendant would pose a danger to guards or other inmates if sentenced to life without possibility of parole. *People v. Matson*, 50 Cal.3d 826 (1990).

4. The Reverse - *Witherspoon* Juror

Just as jurors who would never vote for the death penalty or whose opinions against the death penalty are so strong they would substantially impair the juror's ability to perform his or her duties as a juror must be excluded under the *Witherspoon/Witt* standard, so must the jurors be excluded whose opinions in *favor* of the death penalty are so strong that he or she feels that the death penalty should always be imposed if a defendant is convicted of murder. *Ross v. Oklahoma,* 108 S.Ct. 2273 (1988). The trial judge must allow voir dire questioning to identify these prospective jurors who would either never vote for a life sentence and also those whose views in favor of the death penalty are so strong they would substantially impair their ability to consider a life sentence. *Morgan v. Illinois*, 112 S.Ct. 222 (1992). Failure to do so is reversible error.

5. Summary of Procedures Immediately Subsequent to Capital-Qualifying Stage

After the "death qualification" aspect of voir dire is completed, give counsel the opportunity to raise challenges for cause. This should be done on the record and out of the presence of the prospective jurors. Decide each challenge on the basis of the standards enunciated in *Witherspoon* and *Witt*. In the presence of the prospective jurors, excuse those who have been successfully challenged for cause.

Have the remaining members of Group A return to the courtroom at the assigned time for general voir dire. Once again, admonish them concerning discussion of case and news accounts.

Repeat this procedure for other groups until there are approximately 75-80 prospective jurors who will return when general voir dire begins. Advise the other Groups to remain on call.

D. General Voir Dire

1. Scope of Proper Questioning

The panel that returns for general voir dire is "publicity free," "capital qualified" and "hardship free," and is ready for general voir dire common to all criminal cases: burden of proof, presumption of innocence, etc.

Do not revisit areas already covered. However, be prepared for some additional and "newly discovered" hardships. The case will have already become too long and too inconvenient for some jurors.

During any supplemental examination conducted by counsel for the parties, the trial judge should permit liberal and probing examination calculated to discover possible bias or prejudice with regard to the circumstances of the case. A question fairly phrased and legitimately directed at obtaining knowledge for the intelligent exercise of *peremptory* challenges may not be precluded merely because of its additional tendency to indoctrinate or educate the jury. However, avoid questioning tending to (1) educate the jury panel to the particular facts of the case; (2) compel the

jurors to commit themselves to vote a particular way; (3) prejudice the jury for or against a particular party; (4) argue the case; (5) indoctrinate the jury; or (6) instruct the jury in matters of the law. The court need allow only *reasonable* questions. Although the court cannot exclude questions proper in scope, it is free to require that they be phrased in neutral, nonargumentative form.

A checklist for voir dire and an example of extensive colloquy between the judge and jury from the Pennsylvania Bench Book can be found in Appendix B.

2. The *Batson* Challenge: Racially Motivated Peremptory Challenges

The United States Supreme Court has held that "The Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." *Batson v. Kentucky*, 476 U.S. 79, 89, 106 S.Ct. 1712, 1719, 90 L.Ed. 2d 69, 83 (1986). A defendant may make a *Batson* objection even though he is not of the same race as the excluded potential jurors, *Powers v. Ohio*, 499 U.S. ___, 111 S.Ct. 1364, 113 L.Ed 2d 411 (1991) (white defendant, black potential jurors). The Equal Protection Clause also prohibits a defendant from engaging in purposeful racial discrimination in the exercise of his peremptory challenges. *Georgia v. McCollum*, 505 U.S. ___, 112 S.Ct. 2348, 120 L.Ed. 2d 33 (1992).

A defendant may make a *Batson*-type objection based on the Sixth Amendment's requirement that a venire represent a fair cross-section of the community. An allegation sufficient to make a *prima facie* case of purposeful discrimination based on the Fourteenth Amendment, however, is insufficient under the Sixth Amendment. The fair cross-section

requirement of the Sixth Amendment is designed to assure an impartial jury, not a representative jury.

a. Procedure for analyzing a *Batson* claim

(a) The party making the claim must establish a *prima facie* case of purposeful discrimination in the other party's use of peremptory challenges

(b) If a *prima facie* case is made, the burden shifts to the other party, who must then articulate a race neutral reason for striking the jurors in question.

(c) The trial judge must then evaluate the race neutral reason and determine whether the objecting party has met his burden of proving purposeful discrimination.

(d) If the trial judge sustains the *Batson* objection, he/she must disallow the racially motivated peremptory challenges.

Caveat: A *Batson* objection must be made in a timely manner, *i.e.*, before the jury is sworn, or the objection is waived. A *Batson* objection cannot be raised for the first time on appeal.

b. *Prima facie* showing of discrimination against a cognizable group required to defeat challenge

It is presumed that a party is exercising peremptory challenge in a constitutionally permissible manner. To rebut this presumption, the party objecting must establish a *prima facie* case of purposeful discrimination. This may be done in a number of ways. The most obvious is where a party uses his peremptory challenges to remove all members of a racial group from the venire. The trial judge should consider other relevant factors as well, such as the race of the defendant and the race of the victim, the number of members of a racial group in the venire, the extent and nature of voir dire questions by the party exercising the peremptory challenge, the

nature of the crime, the sequence of peremptory challenges (*i.e.*, did the party fail to use additional peremptory challenges after removing all members of a racial group), and the historical pattern of peremptory challenges by the party. See *United States v. Clemons*, 843 F.2nd 741 (3d. Cir. 1988), for a good discussion of what is required to make a *prima facie* showing. Also, a party's failure to use all of its peremptory challenges which resulted in a black venireman being eliminated from service on the petit jury may be sufficient to make a *prima facie* case. See *State v. Scholl*, 743 P. 201 406 (Ariz. Ct. App., 1987).

The objecting party must also show that the excluded veniremen are members of a cognizable group. A cognizable group must have a definite composition. A group defined only in terms of shared attitudes is not a cognizable group. *Lockhart v. McCree*, 476 U.S. 162, 106 S. Ct. 1758, 90 L.Ed. 137 (1986). Racial groups are definitely cognizable, but the Eleventh Circuit has held that black males, as opposed to blacks generally, were not a cognizable group. *United States v. Dennis*, 804 F.2d 1208 (11th Cir. 1986).

Once the *prima facie* case is made, the party exercising the peremptory challenge must provide a race neutral reason for striking the jurors in question. The trial judge need not accept the offered race neutral reason at face value and should make an effort to ferret out sham excuses. This involves determinations of credibility, and appellate courts will give deference to the trial judge's findings. *Hernandez v. New York*, ___ U.S. ___, 111 S. Ct. 1589, 1871, 72, 114 L.Ed. 2d 395 (1991). The race neutral reason, however need not rise to the level justifying exercise of a challenge for cause.

E. Examples of Other General Voir Dire Procedures

1. California

(a) Prospective jurors are first hardship-qualified as a group and then the judge outlines the case for those remaining.

(b) Those remaining are divided into groups of ten or so (however many the Court feels it can death-qualify in a day) and each group is scheduled to return on a designated date.

(c) A juror questionnaire is given to those prospective jurors not excused for hardship, to be completed and returned to the Court before the jurors return for voir dire.

(d) As each group returns on the designated date, each prospective juror is death-qualified individually and in sequestration.

(e) After a prospective juror is death-qualified, some judges continue with the general voir dire of that person. Other judges excuse each prospective juror after being death-qualified, to return on a designated date when the general voir dire of all the remaining prospective jurors will be done as a group.

(f) As a goal, a group of 75-80 prospective jurors should remain for the exercise of peremptory challenges.

(g) Some judges suggest obtaining a stipulation from the parties to use a variation of the "six-pack" method of jury selection in which all of the prospective jurors remaining for the exercise of peremptory challenges are drawn in a specified sequence so that counsel will always know the prospective juror who will replace the one being challenged.

See California Benchbook: Criminal Trials, Chap 4: Death Penalty Trials §4.32 (1991).

2. Pennsylvania

(a) The Court gives the entire panel preliminary instructions.

(b) The Court conducts an individual sequestered voir dire. Counsel exercise challenges immediately after each voir dire.

(c) Each side is entitled to twenty peremptory challenges on the original 12 jurors and one peremptory challenge for alternates.

(d) This procedure continues until 12 jurors and at least 2 alternates are selected.

3. "Struck" Versus "Sequential" Method

The basic principal of the "struck" system is that the peremptory challenges are not exercised until after a large number of prospective jurors have been questioned and qualified. In a complete "struck" system, jurors are questioned and qualified until the total number qualified is equal to the number needed for both sides. Only after this number is qualified are peremptory challenges exercised. Then, a list of the qualified jurors' names are passed back and forth between the parties, with each side exercising challenges, one at a time, by crossing out the name of the challenged juror, until the number of people needed remains on the list or until both parties pass.

F. Waiver of Jury

Several states allow a defendant to waive the jury in the guilt or penalty phase, but the defendant does not have an absolute right to do so. *See Ellis v. State*, 570 So.2d 744 (Ala. Cr. App. 1990); *Williams v. State*, 573 So.2d 875 (Fla. App. 4 Dist. 1990). Consent of the prosecution is necessary to waive the jury in both the guilt and penalty phase. F.S.A.R.Cr.P. Rule 3.260; *Riley v. State*, 808 P.2d 551 (Nev. 1991); *Trimble v. State*, 582 A.2d 794 (Md. 1990); *State v. Mahurin*, 799 S.W.2d 840 (Mo. 1990).

A defendant cannot waive the right to jury in some states. *Archie v. State*, 799 S.W.2d 340 (Tex. App. 14 Dist. 1990); *Johnson v. State*, 806 P.2d 1282 (Wyo. 1991).

Statute and case law in other states varies on jury waiver; for example:

Alabama: the defendant may *not* waive a jury in either the guilt or penalty phase.

Arizona: There are no juries in penalty phases in Arizona, which is one of four states where a jury does not make the penalty determination in a death case. Ariz. Rev. Stat. Ann. §13-703.

Arkansas: A defendant may waive either the trial by jury on the issue of guilt or the right to have the penalty determined by a jury providing: (1) the waiver is voluntary, or (2) the prosecution waives the death penalty, and (3) the prosecution assents to the waiver; *e.g.*, a defendant cannot plead guilty and then have a jury determine whether to give the death sentence or life without parole. *Hill v. State*, 713 S.W. 2d 233 (1986); *Ruiz v. State*, 630 S.W. 2d 44 (1982) Rule 31.4, Ark. R. Crim. P.

California: Penal Code § 190.4 (a) and (b) expressly provide that a waiver of the right to a jury trial in any particular phase of a capital case does not constitute a waiver of any other phase. *People v. Memro*, 700 P.2d 446 (1985). If the defendant wishes to waive the right to a jury trial as to the entire case, the court must obtain the defendant's separate waiver on each of the following phases: guilt, special circumstances, prior murder convictions, sanity, and penalty. The jury must be waived by both the prosecution and the defendant. Penal Code §190.4 (a) and (b). When the prosecution initially determines not to seek the death penalty in a capital case and obtains the defendant's waiver of the right to a jury or court trial on the penalty but then decides to seek the death penalty, the defendant retains the right to a jury trial on the penalty. *Leo v. Superior Court*, 179 Cal. App. 3d 274, 225 Cal. Rptr. 15 (Cal. App. 2 Dist. 1986).

Colorado: Defendant cannot waive the jury in a trial of a class 1 felony. First degree murder is a class 1 felony. Rule 23(A)(5), Colo. R. Crim. P.

Florida: The defendant, with the consent of the prosecution and the court, may waive a jury either in the guilt phase or the penalty phase in capital cases. Waiver of a jury recommendation may be made at any time prior to the sentencing phase including after the guilt phase of a trial heard before a duly constituted jury. Waiver of a sentencing jury may not be presumed and failure of the defendant to affirmatively request a sentencing jury does not constitute a waiver. The trial judge has the right to deny the waiver and empanel a jury. Fla. Stat. Ann. §921.141 (1).

Illinois: The defendant may waive a jury either in the guilt phase or the penalty phase in capital cases. Ill. Rev. Stat. ch. 38, para. 9-1(d) (Supp. 1992).

Indiana: The defendant may waive a jury in the guilt phase in capital cases only if the prosecution agrees and the judge assents. Ind. Code §35-37-1-2. Since the jury only makes a recommendation to the court at the penalty phase, it would appear the defendant could waive the jury hearing and recommendation.

Kentucky: Generally, a defendant may waive a jury in guilt or penalty phase of trial. Ken. Rev. Stat. §532.025 and Cr. 9.84 (2).

Maryland: The defendant may waive a jury either in the guilt phase or the penalty phase in capital cases. Md. Cts. & Jud. Proc. Code Ann. §8-305 and Md. Ann. Code Art., 27 Sec. 413 (b)(3).

Missouri: The defendant may waive a jury either in the guilt phase or the penalty phase in capital cases.

Montana: the defendant may waive a jury in the guilt phase if the waiver is written. Mont. Code Ann. §46-16-110 (3). The penalty phase is tried to the court in all cases.

Nebraska: Defendant may waive jury in the guilt phase. The Penalty phase is conducted only by the court.

Nevada: The defendant may waive a jury in the guilt phase. If there is no jury (or if the defendant should plead guilty), a three-judge panel determines the penalty.

New Jersey: The defendant may waive the jury in the guilt phase of the trial. The defendant may also, with the consent of the prosecutor, waive the jury in the penalty phase. N.J. State. Ann. §2C: 11-3 (c).

Oregon: In all but capital cases, the defendant may waive the jury and have the case tried by the judge, provided the election is in writing and the judge consents. Oregon Constitution, Art. I, §11.

Pennsylvania: The defendant may waive the jury in the guilt or penalty phase, but a defendant who is tried by a jury may not waive a jury in the penalty phase. *Commonwealth v. Bryant, supra;* 42 Pa.C.S.A. §9711.

South Carolina: If trial by jury has been waived by the defendant and the state, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before the court. S.C. Code §16-3-20 (B).

Tennessee: The defendant may waive the jury in either the guilt or penalty phase of the trial with the consent of the prosecutor and the Court. Tenn. Code Ann. §39-13-205.

Texas: The defendant may not waive a jury in either the guilt or penalty phase of the trial if the state has made known its intent to seek the death penalty. Tex. Code Crim. P., Art. 1.13 (a).

Virginia: The defendant may waive the jury either in the guilt phase or the penalty phase with the concurrence of the prosecutor and the court.

A sample colloquy for waiver of the jury in a capital case from the Pennsylvania Bench Book can be found in Appendix C.

G. Penalty Phase of Trial Tried to Same or Different Jury

State law varies on whether the same jury that tried the guilt phase will try the penalty phase; for example:

Arizona: No jury in penalty phase; judge decides life or death. Ariz. Rev. Stat. Ann. 13-703

Arkansas: The same trial jury as in the guilt phase determines guilt or innocence and determines the penalty. A sentence of death may only be imposed *by a jury* after certain unanimous written findings, including: (1) that the aggravating circumstances exist beyond a reasonable doubt; (2) that the aggravating circumstances outweigh beyond a reasonable doubt all mitigating circumstances found to exist; and (3) that the aggravating circumstances justify beyond a reasonable doubt the sentence of death. The trial judge is not required to impose the death penalty in every case in which the jury verdict prescribes it. *Ruiz v. State, supra;*

Whitmore v. State, 771 S.W.2d 266 (Ark. 1989); Ark. Code Ann. §5-4-602 and §5-4-603

California: Penal Code §190.4 (c) provides that the same jury must consider and determine the issues at each phase of a death penalty trial, including the penalty hearing, unless for good cause shown the trial court discharges that jury, in which case a new jury must be drawn. The court must state facts in support of the finding of good cause on the record and cause them to be entered in the minutes. *See People v. Fields*, 673 P. 2d 680 (1983); *Hovey v. Superior Court, supra.*

If the jury at the penalty hearing is unable to reach a unanimous verdict on the penalty, the court must dismiss the jury and order a new jury impaneled to try the penalty issue. Cal. Penal Code §190.4 (b); *People v. Thompson*, 785 P.2d 857 (1990) (retrial after first jury deadlock is mandatory). If second jury is also unable to reach a unanimous verdict on the penalty, the Court may in its discretion either order a third jury or impose a sentence of life without the possibility of parole. Cal. Penal Code §190 .4 (b).

Colorado: Same jury. If jury cannot reach unanimous verdict in penalty phase, life sentence is automatically imposed. C.R.S. §18-11-802 (1)(a).

Florida: Although not the usual procedure, a separate jury may be selected for the penalty phase in a capital case. If at all practical, the sentencing phase jury should be the same jury as in the guilt phase; however, it is *not necessary* to have the same jury during the sentencing phase. Fla. Stat. Ann. §921.141 (1); *Richardson v. State*, 437 So.2d 1091 (Fla. 1983). The Constitution does not prohibit a state court judge from overruling a jury's recommendation of life and imposing a death sentence. The Constitution does not require a death sentence to be imposed by a

jury. *Spaziano v. Florida*, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984).

Illinois: The same trial jury that determined the defendant's guilt generally will be required to hear the sentencing phase of the trial. A defendant may waive his or her right to a jury at sentencing or the court may impanel a new jury for good cause. Ill. Rev. Stat. ch 38, ¶9-1 (d) (1) and ¶9-1 (d) (2) (c) & (3).

Indiana: The same trial jury that heard the guilt phase hears the penalty phase. The jury is *advisory* only. Ind. Code §35-50-2-9 (e). *See Martinez Chavez v. State*, 534 N.E. 2d 731 (Ind. 1989), concerning burden on court to override jury.

Kentucky: The same trial jury that heard the guilt phase of the trial is not always required to hear the penalty phase. *See*, Rule 9.84 (2), Ken. R. Crim. P. and *Smith v. Commonwealth*, 599 SW2d 900 (1980).

Maryland: The same jury that heard the guilt phase of the trial is required to hear the penalty phase unless that jury has been discharged for good cause. The court decides life or death only if the defendant waives a jury for the penalty phase. Md. Code Ann. Art. 27 §413b.

Missouri: The same jury that heard the guilt phase is required to hear the penalty phase.

Montana: No jury in penalty phase; judge decides life or death. Mont. Code Ann. §46-18-301 .

Nebraska: No jury in the penalty phase; judge decides life or death.

Nevada: If guilt phase tried to the Court, or defendant pled guilty, then the penalty phase is heard by three judges. If guilt phase tried to a jury, the penalty phase is heard by the same trial judge.

New Jersey: The usual procedure is for the same jury that heard the guilt phase to hear the penalty phase. That is not a requirement, however. There may be a second jury impaneled specially for the sentencing phase or on motion of the defendant and, with the consent of the prosecutor, the court may conduct the penalty phase without a jury. A juror who was an alternate in the trial may participate in the sentencing phase if a juror who participated in the guilt phase of the trial is unable to proceed. N.J. Stat. Ann. 2C: 11-3(c).

Oklahoma: The same jury that heard the guilt phase is required to hear the penalty phase. Oklahoma Rules of Criminal Procedure §701.10

Oregon: The same jury that heard the guilt phase is required to hear the penalty phase. ORS 163.150 (1).

Pennsylvania: After a verdict of murder in the first degree is recorded and before the jury is discharged, the court shall conduct a separate hearing in which the jury shall determine whether the defendant shall be sentenced to death or life imprisonment. 42 Pa. C.S.A. §9711 (a) (1). A defendant is not entitled to separate juries, one for the guilt stage and one for the penalty stage of the proceeding. *Commonwealth v. Bryant,* 574 A.2d 590.

South Carolina: The same jury hears the guilt phase and the penalty phase. When a recommendation of death is made, the trial court, prior to imposing the death penalty, is required to find as an affirmative fact that the death penalty was warranted under the evidence of the case and was

not a result of prejudice, passion, or any other arbitrary factor. S.C. Code §16-3-20.

Tennessee: The same jury as the trial jury determines a sentence of life or death. Tenn. Code Anno. §39-13-204.

Texas: The same jury that decides guilt hears the penalty phase. The court has no decision-making responsibility or opportunity to override the jury's decision. Tex. Code Crim. P., Article 37.071, §2(a).

Virginia: The same jury that heard the guilt phase is required to hear the penalty phase.

H. Jury Management

1. Sequestration Requirements

Law differs among the states as to whether the jury must be sequestered.

Alabama: Sequestration is required.

Arizona: Sequestration of the jury is not required and is not the usual procedure. Rule 19.4, Ariz. R. Crim. P.

Arkansas: In the exercise of its discretion, the trial court may order the jury to be sequestered at any time. The trial court may also allow for separation since sequestration is not mandatory. *Henderson v. State*, 652 S.W. 2d 26 (1983); *Owens v. State*, 777 S.W. 2d 205 (1989)

Colorado: There is no requirement to sequester jury in a capital case. Rule 24(f), Colo. R. Crim. P.; *Jones v. People*, 711 P.2d 1270 (Colo. 1984).

Florida: Jurors are required to be sequestered during deliberation in a capital case.

Illinois: The determination of whether the jury in a capital case should be sequestered is within the trial court's discretion. *People v. Flores*, 538 N.E. 2d 481, 494 (1989), *cert. denied*, 497 U.S. 1031 (1990); *People v. Hendricks*, 495 N.E. 2d 85, 111 (1986) (citing *People v. Yonder*, 256 N.E. 2d 321 (1969)), *cert. denied*, 397 U. S. 975 (1970), *rev'd on other grounds* 560 N.E. 2d 611 (1990).

Indiana: Jurors are required to be sequestered upon request of the parties. *Lowry v. State,* 434 N.E.2d 868 (Ind. 1982).

Kentucky: Sequestration is at the discretion of the court until the case is submitted to the jury. Thereafter, sequestration of the jury is required in a capital case unless otherwise agreed upon by the parties. Rule 9.66, Ken. Rule Crim. P.

Maryland: The issue of sequestration of the jury is left to the discretion of the trial court. Md. Cts. & Jud. Proc. Code Ann. §8-304.

Missouri: Sequestration of the jury is required in a capital case.

Montana: Sequestration is at the discretion of the court. Mont. Code Ann. §46-16-501.

Nebraska: No requirement for sequestration.

Nevada: Sequestration of the jury is not required.

New Jersey: Sequestration of the jury is not required. The decision to sequester the jury is discretionary with the trial court. Sequestration prior to instructing the jury is permitted only if there is a finding of extraordinary circumstances requiring sequestration. Code of Criminal Justice, R. 1:8-6

Oklahoma: Sequestration of the jury is not required. The decision to sequester the jury is discretionary with the trial court.

Oregon: Sequestration of the jury is not required.

Pennsylvania: Sequestration of the jury is not required except during voir dire. The trial court is required to conduct "individual sequestered voir dire", which means the voir dire of the jurors is conducted one-by-one out of the hearing of the other jurors.

South Carolina: The statute does not speak to sequestration, but sequestration is common. S.C. Code §16-3-20.

Tennessee: Sequestration is mandatory in capital cases. Tenn. Code Ann. §40-18-116.

Texas: Sequestration of the jury is not required in a capital case, but after the charge is given to the jury, the court, on its own motion if either party requests it, shall ". . . order that the jury not be allowed to separate. . ." Texas Code Crim. P., Article 35.23.

Virginia: Sequestration of the jury is not required.

A sample memorandum to the jury concerning sequestration can be found in Appendix D.

2. A Suggested Recess Procedure

The logistics for recess and entry of the jury into the courthouse and courtroom, and then exit should be planned in advance of trial. Everyone in the courtroom should remain seated while the jury leaves the courtroom escorted by one or more bailiffs. It is best for the jury not to have to pass through or near a crowd or past the spectators in the courtroom. Time for recess should be scheduled and the schedule adhered to. A recommended amenity is to provide a stock pile of juror's favorite snacks.

3. Post-Trial Considerations

Following a recent death-penalty case in Golden, Colorado, after the jury returned a verdict of death and the court took the verdict, the jury went back to the jury room, locked themselves in, and refused to leave or talk to anyone until they were provided psychological counseling. The point is that death-penalty cases are often very emotional and sometimes traumatic experiences for jurors. Therefore, the judge should consider some post-trial procedure to psychologically assist the jurors. Of course, state resources must also be considered. Can professional counseling be provided if requested? Would post-trial meeting(s) for jurors to discuss experience and reflections be helpful?

DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO

Case No. 85 CR 112 Courtroom 16

ORDER RE: TRIAL SCHEDULE

THE PEOPLE OF THE STATE OF COLORADO, Plaintiff,
v.
FRANK D. RODRIQUEZ, Defendant.

Counsel are advised of the following schedule to be followed during this trial and are ordered to be prepared to proceed according to the following schedule:

November 21, 1986, 8:30 a.m.: City Council Chambers:

Commencement of jury selection

The Court, Counsel and the Defendant will meet with all prospective jurors in City Council Chambers. Jurors who may be unable to meet the time commitment required by this trial will be identified. Jurors who will be able to meet the time commitment will be placed in groups of fifteen and given definite times to return to Courtroom 16. The remaining jurors will then be interviewed by the Court individually to determine if they are to be excused or instructed to return for further voir dire. (These jurors will be included among all returning groups; i.e., Group A through Group H, etc.)

There will be approximately two and one-half hours initially spent with each group. Knowledge of this case including exposure to publicity, personal attitudes that would prevent sitting as a juror, bias and other bases for disqualification for cause shall be taken up at this time during voir dire by the Court. The Court will conduct individual voir dire in chambers of all prospective jurors who indicate prior knowledge of the case regarding their prior knowledge of the case. Counsel shall be allowed to voir dire jurors regarding publicity if the juror's response to the Court's voir dire is unusual or evasive. Voir dire of jurors by counsel concerning attitudes toward the death penalty will then be conducted in the courtroom. The order of voir dire on the death penalty issue shall alternate by group between the prosecution and defense. Any record of a juror's demeanor by counsel shall be submitted to the Court in writing. All challenges for cause shall only be made in chambers following each group's voir dire.

Groups of eighteen prospective jurors shall be assembled voir dire as follows:

Group A -	Friday, November 21, 1986 at 2:30 p.m.
Group B -	Monday, November 24, 1986 at 8:30 a.m.
Group C -	Monday, November 24, 1986 at 12:30 p.m.
Group D -	Monday, November 24, 1986 at 3:00 p.m.
Group E -	Tuesday, November 25, 1986 at 8:30 a.m.
Group F -	Tuesday, November 25, 1986 at 12:30 p.m.
Group G -	Tuesday, November 25, 1986 at 3:00 p.m.
Group H -	Wednesday, November 26, 1986 at 8:30 a.m.

Additional groups will be scheduled if necessary.

Prospective jurors who have passed the initial screening for cause will be reassembled in Courtroom 16 on Thursday, November 26, 1986, at 1:30 p.m. for jury selection. Counsel will have additional opportunities for voir dire, but areas of inquiry previously covered with the jurors in groups of eighteen shall not be repeated.

Prospective jurors will be called forward for voir dire in the following groups:

	Maximum Time for Voir Dire by Each Side
Group 1 (26 jurors)	78 minutes
Group 2 (12 jurors)	36 minutes
Group 3 (if necessary)	

November 27 and 28, 1986: Trial of this matter will be in recess.

Trial on the Merits: Jury trial will begin at 9:00 a.m. each morning in Courtroom 16. Any matters of record by counsel outside the presence of the jury will be addressed from 8:30 a.m. to 9:00 a.m. The morning recess will be from 10:30 a.m. through 10:45 a.m. Luncheon recess will be from 12:00 noon to 1:30 p.m. The afternoon recess will be from 3:15 p.m. through 3:45 p.m., and daily adjournnent will be at 5:30 p.m. Counsel are ordered to have sufficient witnesses available in the hallway outside of Courtroom 16 to insure that there need be no delays between witnesses' testimony. The Court may exclude the subsequent testimony of witnesses who are not available when called.

Saturday, December 6, 13, 20 and 27, 1986: The Court will be in session from 9:00 a.m. to 5:30 p.m. unless the trial has been completed.

Penalty Phase: If the Defendant is found guilty of a Class 1 felony, counsel shall be prepared to proceed directly to the Sentencing Hearing following the receipt of the verdict by the Court.

Objections to this Order and the voir dire process followed by the Court shall be made only in writing.

Dated: November 19, 1986.

BY THE COURT:

CONNIE L. PETERSON
District Court Judge

Copies served upon counsel of record
by the Court in open Court on
November 19, 1986.

CHECKLIST FOR OPENING REMARKS TO PANEL OF PROSPECTIVE JURORS AND COLLECTIVE VOIR DIRE

I. Purpose of Jury Panel

A. ____Opening statement concerning case.

1. ____ Defendant's name.

2. ____ Offense(s) alleged:

(a) date;

(b) time;

(c) place.

3. ____ Complainant's name.

B. Basic principals of criminal law.

1. ____ U.S. Constitution.

2. ____ Pa. Constitution.

3. ____ Pa. Laws.

4. ____ Pa. Criminal Procedure Rules.

II. Duty of Judge

A. ____ Follow judge's instructions and rulings regarding rules of law.

III. Duty of Jurors

A. ____ Do not view criminal charge as evidence of guilt.

B. ____ Presume defendant is innocent.

1. ____ Burden on Commonwealth to establish each element with its own evidence.

2. ____ Burden: proof beyond a reasonable doubt.

3. ____ Defendant need not present evidence and jury must not draw any adverse inference therefrom.

C. ____ Decide entirely on evidence presented.

1. ____ Do not refer to previous knowledge.

D. ___ Keep an open mind as to defendant's innocence or guilt until:

1. ____ all evidence is presented;

2. ____ closing arguments are heard;

3. ____ judge gives his instruction.

E. ____ Do not consider the nature of the charges:

1. ____ Determine whether a crime was committed and if the defendant committed it.

F. ____ Determine the credibility of witnesses.

1. ____ Use same standard for all witnesses, including the defendant if he takes stand.

2. ____ Consider the witness' opportunity to see/hear/understand.

G. ____ Do not discuss the case or the people involved.

1. ____ report to the court if anyone approaches you.

2. ____ do not read/watch/listen to any media coverage of the case.

IV. Jury Selection

A. ____ Jury is composed of (12) jurors and (2) alternates.

B. ____ Your objective is to be fair, impartial and unprejudiced.

C. ____ You will be questioned first as a group and later individually.

1. ____ Answer with candor and honesty.

2. ____ DO NOT try to avoid serving or try to get on jury.

3. ____ You may be excused by one of the attorneys:

(a) challenge for cause;

(b) peremptory challenge.

You will be questioned about your background/qualfications.

V. Panel Sworn in by Crier

VI. Questions

A. ____ Stand if any question applies to you and give the crier your name.

1. ____ If you are uncertain, please rise.

2. ____ If you fail to rise when a question applies to you, you may be found in contempt of court, or you may have committed perjury.

B. 1. ____ Is anyone under 18, not a US citizen not a resident of Philadelphia or is a convict, i.e. in prison more than one year without a pardon or immunity?

2. ____ Is anyone unable to understand the English language?

3. ____ Does anyone have any physical, mental or emotional disability?

4. ____ Is anyone related by blood, marriage or by close association to: defendant, the defendant's counsel, the district attorney, myself or any of the witnesses?

5. ____ Has anyone heard or read anything concerning this incident?

6. ____ Has anyone, anyone's family or anyone's close friend been a victim or been present when a crime occurred?

7. ____ Has anyone or anyone's family ever been charged, arrested or convicted of a crime?

8. ____ Is anyone related to or a friend of a police officer or other law enforcement officer?

9. ____ Does anyone have doubts or reservations about evaluating the credibility of police officers in the same manner as other witnesses?

10. ____ Does anyone have any doubts or reservation about presuming that the defendant is innocent?

11. ____ Does anyone have any doubts or reservation about being able to consider the evidence fairly because the charge is_____?

12. ____ As you all now know, the defendant is charged with murder. Under certain circumstances, if the defendant is convicted of first degree murder the jury will be required to consider whether or not to impose the death penalty during the penalty phase of the trial. Assuming of course that the death penalty is warranted and that a proper case for the death penalty is made out, do you have any moral, religious, or ethical beliefs which would prevent you from considering the imposition of the death penalty?

13. ____ Does anyone have any doubts or reservations about accepting the fact that the defendant's arrest is not evidence?

14. ____ Does anyone have any doubts or reservations about accepting the fact that the defendant need not present any evidence and that you are not to infer anything therefrom?

15. ____ Does anyone have any doubts or reservations about applying the law as I instruct?

16. ____ Does anyone have a fixed opinion on the guilt of the defendant?

17. ____ Is there anyone who could not give the defendant a fair trial?

18. ____ The trial will last ____ days there will be no sequestration and no one will be excused during this time.

    (a) ____Is there anyone who has any extraordinary hardship?

19. ____ You will be polled after the verdict is read.

    (a) ____Is there anyone unwilling to be polled?

20. ____ Does anyone live or work or has anyone ever lived or worked in the neighborhood of the crime?

OPTIONAL

21. ____ Defendant white/black—Complainant is black/white.

(a) ____Would anyone be prejudiced due to this fact?

OPENING REMARKS TO JURY PANEL AND COLLECIVE VOIR DIRE

GENERAL INSTRUCTIONS

THE COURT: MY NAME IS JUDGE _____. THE ASSISTANT DISTRICT ATTORNEY TRYING THIS CASE IS MR./MS. _____. THE DEFENSE COUNSEL IS/ARE MR./MS. _____, WHO REPRESENTS MR./MS. _____ AND MR./MS. _____, WHO REPRESENTS MR./MS. _____.

YOU HAVE BEEN SUMMONED TO THIS COURTROOM TO PARTICIPATE IN A CASE IN WHICH MR./MS. _____ (AND MR./MS. _____) HAVE BEEN CHARGED WITH _____ (AND RELATED OFFENSES) ARISING OUT OF AN INCIDENT WHICH IS ALLEGED TO HAVE OCCURRED ON (DATE) AT APPROXIMATELY (TIME) AT (LOCATION) IN THE CITY OF PHILADELPHIA, AND IN WHICH THE COMPLAINANT IS A MR./MS. _____.

THIS IS A MATTER OF THE GRAVEST IMPORTANCE TO THESE DEFENDANT(S) AND TO THE COMMONWEALTH OF PENNSYLVANIA.

BASIC PRINCIPLES OF LAW

I SHALL PROCEED TO DISCUSS WITH YOU CERTAIN BASIC PRINCIPLES THAT APPLY TO A CRIMINAL TRIAL. I URGE YOU TO LISTEN VERY, VERY CAREFULLY TO WHAT I HAVE TO SAY. LATER, YOU WILL BE QUESTIONED BY ME ABOUT THESE PRINCIPLES.

AT THE BEGINNING, I MUST TELL YOU THAT IF YOU ARE SELECTED TO BE A MEMBER OF THE TRIAL JURY, IT WILL BE YOUR DUTY TO APPLY THE LAW AS I EXPLAIN IT TO YOU. THAT WILL BE PART OF YOUR OATHS AS JURORS IN THIS MATTER IT WOULD BE HIGHLY IMPROPER TO PERMIT EACH JUROR TO DECIDE FOR HIMSELF OR HERSELF WHAT LAW TO APPLY IN THE TRIAL OF A CRIMINAL CASE. THE LAW WHICH APPLIES IN THE TRIAL OF A CRIMINAL CASE MUST BE IN ACCORDANCE WITH THE CONSTITUTION OF THE UNITED STATES, THE CONSTITUTION OF THE COMMONWEALTH OF PENNSYLVANIA, THE LAWS OF THE COMMONWEALTH OF PENNSYLVANIA AND THE RULES OF CRIMINAL PROCEDURE ESTABLISHED BY THE SUPREME COURT OF PENNSYLVANIA.

DUTY OF JUDGE AND JURY

SO, IT IS THE RESPONSIBILITY OF THE JUDGE TO TELL THE JURY WHAT THE LAW IS, AND IT WILL BE YOUR DUTY TO-APPLY THE LAW AS I GIVE IT TO YOU IF YOU ARE SELECTED TO BE A MEMBER OF THE TRIAL JURY.

IF YOU CANNOT OR IF YOU WILL NOT DO THIS, YOU SHOULD NOT BE A JUROR IN THIS CASE.

CHARGES NOT EVIDENCE

THE DEFENDANT(S) HERE IS (ARE) CHARGED WITH CRIMES, BUT CHARGES ARE NOT EVIDENCE. JUST BECAUSE A PERSON HAS BEEN ARRESTED, HELD FOR COURT BY A JUDGE, HAD INFORMATION ISSUED BY A DISTRICT ATTORNEY AND WAS BROUGHT HERE FOR TRIAL IS NOT EVIDENCE OF GUILT. CHARGES ARE ONLY CHARGES. THIS IS BECAUSE ALL PERSONS WHO COME BEFORE THE COURT FOR TRIAL ARE PRESUMED TO BE INNOCENT, AND THIS PRESUMPTION OF INNOCENCE REMAINS UNTIL SUCH TIME AS THE COMMONWEALTH OF PENNSYLVANIA, THROUGH THE DISTRICT ATTORNEY, PRESENTS EVIDENCE IN OPEN COURT WHICH PROVES THE DEFENDANT'S GUILT BEYOND A REASONABLE DOUBT.

REASONABLE DOUBT

WHAT A REASONABLE DOUBT IS WILL BE EXPLAINED TO YOU IF YOU ARE SELECTED TO BE A MEMBER OF THE TRIAL JURY. AT THIS TIME I WILL JUST MENTION THAT REASONABLE DOUBT DOES NOT MEAN BEYOND ANY DOUBT; IT MEANS BEYOND A REASONABLE DOUBT.

BURDEN OF PROOF

THE BURDEN OF PROOF IS ON THE COMMONWEALTH THROUGHOUT THE TRIAL AND RELATES TO ALL OF THE ELEMENTS OF THE CRIMES CHARGED AGAINST EACH OF THESE DEFENDANTS.

EVIDENCE

IN DETERMINING THE GUILT OR INNOCENCE OF THE DEFENDANTS, THE

ONLY EVIDENCE THAT MAY BE CONSIDERED IS THE EVIDENCE THAT COMES FROM THE WITNESS STAND HERE IN OPEN COURT. THE CHARGES THEMSELVES ARE NOT SUCH EVIDENCE.

PRETRIAL PUBLICITY (WHERE CASE IS NOT A HIGH PUBLICITY CASE)

IT IS UNLIKELY, BUT SOME OF YOU MAY HAVE READ ABOUT THIS CASE AND YOU MAY HAVE HEARD ABOUT IT. IF SO, YOU MUST PUT OUT OF YOUR MINDS ANYTHING THAT YOU REMEMBER ABOUT THE CASE OR ANYTHING THAT YOU THINK YOU KNOW ABOUT THE CASE, BECAUSE IF YOU ARE SELECTED TO BE JURORS FOR THE TRIAL, IT WILL BE YOUR DUTY TO DECIDE THE CASE SOLELY AND ENTIRELY ON THE BASIS OF THE EVIDENCE OFFERED FROM THIS STAND.

PRESUMPTION OF INNOCENCE

THE LAW SAYS THAT THE DEFENDANT(S) IS (ARE) PRESUMED TO BE INNOCENT UNTIL SUCH TIME AS THE COMMONWEALTH PROVES HIM (THEM) GUILTY BEYOND A REASONABLE DOUBT, AND THAT CLOAK OF INNOCENCE REMAINS WITH THE DEFENDANT(S) THROUGHOUT THE ENTIRE TRIAL AND RIGHT INTO THE JURY ROOM WHERE THE JURY BEGINS DELEBIRATING ON ITS VERDICT.

THIS IS A PRINCIPLE WHICH EACH OF YOU MUST BE ABLE TO ACCEPT, OR YOU SHOULD NOT SERVE ON A JURY IN A CRIMINAL CASE. (WHERE THE CASE IS A HIGH PUBLICITY CASE—TAILOR REMARKS APPROPRIATELY.)

DEFENDANT'S SILENCE

THERE IS ANOTHER IMPORTANT POINT OF CONSTITUTIONAL LAW THAT I WANT TO EXPLAIN TO YOU. A DEFENDANT DOES NOT HAVE TO PRODUCE EVIDENCE IN HIS OR HER DEFENSE. NEITHER DOES SHE HAVE TO TAKE THE WITNESS STAND. THIS MUST BE CLEARLY UNDERSTOOD AND ACCEPTED BY YOU. DEFENDANTS HAVE A CONSTITUTIONAL RIGHT TO SAY, "YOU HAVE MADE THE CHARGES, DISTRICT ATTORNEY; YOU HAVE THE BURDEN OF PROVING THEM. GO AHEAD AND TRY TO DO THAT."

YOU MUST UNDERSTAND THAT A DEFENDANT DOES NOT HAVE TO TESTIFY, SHE/HE DOES NOT HAVE TO PRODUCE EVIDENCE AND THE TRIAL JURY MUST NOT DRAW ANY INFERENCE ADVERSE TO THE DEFENDANT(S) IF THAT TURNS OUT TO BE THE SITUATION IN THIS CASE.

JURORS MUST KEEP A COMPLETELY OPEN MIND DURING THE TRIAL WITH RESPECT TO THE GUILT OR INNOCENCE OF (EACH OF) THE DEFENDANT(S) UNTIL ALL OF THE EVIDENCE HAS BEEN PRESENTED, UNTIL THE LAWYERS HAVE MADE THEIR CLOSING SPEECHES AND I HAVE INSTRUCTED THE JURORS IN THE LAW WHICH THEY WILL APPLY TO THE FACTS AS THEY FIND THEM. UNTIL THEN, MEMBERS OF THE JURY WILL NOT BE SUFFICIENTLY INFORMED ABOUT THE CASE TO DELIBERATE ON THEIR VERDICT.

SOME OF YOU MAY SAY TO YOURSELVES, "WELL, BEFORE I COULD MAKE UP MY MIND, I WOULD HAVE TO HEAR BOTH SIDES." THAT IS NOT PROPER IN A CRIMINAL CASE, BECAUSE AS I HAVE ALREADY INSTRUCTED YOU, A DEFENDANT DOES NOT HAVE TO PRESENT EVIDENCE. HE DOES NOT HAVE TO TAKE THE WITNESS STAND HIMSELF. HE DOES NOT HAVE TO PRESENT HIS SIDE AND THE JURY CANNOT HOLD IT AGAINST HIM. THE BURDEN IS ON THE COMMONWEALTH TO PROVE A DEFENDANT GUILTY BEYOND A REASONABLE DOUBT BY ITS OWN EVIDENCE.

IF THE COMMONWEALTH'S EVIDENCE DOES NOT CONVINCE THE JURY THAT THE DEFENDANT(S) IS (ARE) GUILTY BEYOND A REASONABLE DOUBT, THE VERDICT OF THE JURY MUST BE NOT GUILTY, EVEN THOUGH THE DEFENDANT(S) DID NOT TAKE THE STAND AND SHE/HE (THEY) PRESENTED NO EVIDENCE.

DEFENSE EVIDENCE

OF COURSE, IF A DEFENDANT DOES TAKE THE WITNESS STAND, OR IF A DEFENDANT PRESENTS EVIDENCE, THE JURY MAY ALSO CONSIDER THAT EVIDENCE IN DETERMINING WHETHER OR NOT THE COMMONWEALTH HAS PROVED THE DEFENDANT GUILTY BEYOND A REASONABLE DOUBT.

NATURE OF CHARGES

SOME OF YOU MAY BE CONCERNED ABOUT THE NATURE OF THE CHARGES AGAINST THIS (THESE) DEFENDANT(S); THAT IS, (STATE CHARGES). I MUST TELL YOU THAT IF YOU ARE SELECTED AS A MEMBER OF THE TRIAL JURY, IT WILL BE NO PART OF YOUR DUTY TO CONSIDER THE NATURE OF THE CHARGES. THE ONLY FUNCTION OF THE JURY WILL BE TO DETERMINE FAIRLY AND IMPARTIALLY, FROM THE EVIDENCE IN THIS CASE, WHETHER /ANY OF/ THE CRIME(S) CHARGED HAS (HAVE) BEEN COMMITTED; AND IF SO, WHETHER OR NOT THE DEFENDANT(S) HAS (HAVE) COMMITTED THE (ANY OF) (THOSE) CRIME(S).

CREDIBILITY

JURORS HAVE THE DUTY OF DETERMINING WHAT THE FACTS ARE IN A CASE. TO DO SO, THEY HAVE TO PASS UPON THE CREDIBILITY, THAT IS, THE BELIEVABILITY OF THE TESTIMONY OF THE WITNESSES IN THE CASE. WHAT WERE THEIR OPPORTUNITIES TO SEE, TO HEAR AND TO UNDERSTAND? NO ONE COMES BEFORE A JURY WITH A TICKET ENTITLING HIM OR HER TO BE BELIEVED. THE JURY IS THE FINAL AND ONLY AUTHORITY TO DETERMINE WHO IS TO BE BELIEVED AND TO WHAT EXTENT. HENCE, THE TRIAL JURY MAY NOT CONSIDER THE CREDIBILITY, THAT IS, THE BELIEVABILITY OF ANY PARTICULAR WITNESS BY ANY DIFFERENT STANDARD THAN IT DETERMINES THE CREDIBILITY OF ANY OTHER WITNESS IN A CASE.

LAW ENFORCEMENT OFFICIALS

ALL WITNESSES CALLED BY THE DISTRICT ATTORNEY AND BY THE DEFENDANT(S), IF ANY, ARE TO HAVE THEIR CREDIBILITY AS TO TRUTHFULNESS AND ACCURACY EVALUATED BY THE SAME STANDARDS. FOR EXAMPLE, THE JURY SHOULD NOT BELIEVE THE TESTIMONY OF A LAW ENFORCEMENT OFFICIAL JUST BECAUSE THAT PERSON IS A LAW ENFORCEMENT OFFICER; NOR SHOULD THE JURY DISBELIEVE THE TESTIMONY OF A LAW ENFORCEMENT OFFICIAL JUST BECAUSE THAT PERSON IS A LAW ENFORCEMENT OFFICER. THE JURY SHOULD, THEREFORE, EVALUATE THE CREDIBILITY OF THE TESTIMONY OF A LAW ENFORCEMENT OFFICER IN THE SAME WAY AND TO THE SAME EXTENT AS THE TESTIMONY OF A CIVILIAN.

ADMONITION RE DISCUSSION, TV, RADIO, ETC.

WE WILL SOON BEGIN THE ACTUAL SELECTION OF THE JURY FOR THE TRIAL, BUT BEFORE WE DO I WOULD LIKE TO CAUTION YOU CONCERNING ONE MATTER.

STARTING NOW, AND REGARDLESS OF WHETHER OR NOT YOU ARE SELECTED AS A JUROR FOR THE TRIAL OF THIS CASE, YOU ARE NOT TO DISCUSS THIS CASE OR ANY OF THE PEOPLE INVOLVED IN IT, WITH ANYONE, AND NOT EVEN AMONG YOURSELVES, UNTIL YOU RETIRE TO DELIBERATE UPON YOUR VERDICT. JUST DO NOT SPECULATE OR TALK ABOUT IT. CERTAINLY DO NOT PERMIT ANYONE TO SPEAK TO YOU ABOUT THIS CASE. IF THAT SHOULD OCCUR, DO NOT ANSWER; BUT REPORT THAT

TO ME IMMEDIATELY SO THAT I MAY BE AWARE OF IT AND TAKE WHATEVER STEPS ARE NECESSARY TO ENSURE A FAIR AND IMPARTIAL TRIAL.

YOU MUST ALSO CAREFULLY AVOID READING, WATCHING OR LISTENING TO ANY NEWS ACCOUNTS OF THE CASE OR THE TRIAL. THE CASE MUST BE DECIDED SOLELY UPON WHAT YOU SEE AND HEAR IN THIS COURTROOM DURING THE COURSE OF THE TRIAL.

PROCEDURE ON VOIR DIRE

FROM THIS PANEL, OR FROM ADDITIONAL PANELS IF NECESSARY, FOURTEEN JURORS WILL BE SELECTED BY THE COMMONWEALTH AND THE DEFENDANT(S). OF THESE FOURTEEN JURORS, THE FIRST TWELVE SELECTED WILL CONSTITUTE THE JURY FOR THE TRIAL, THE OTHER TWO JURORS WILL BE ALTERNATE JURORS. THEY WILL ONLY SERVE IF ONE OF THE ORIGINAL JURORS IS UNABLE TO SERVE UNTIL THE END OF THE TRIAL. IF THE ORIGINAL TWELVE JURORS ARE INTACT AT THE TIME THE JURY IS ABOUT TO RETIRE TO DELIBERATE UPON THEIR VERDICT IN THIS CASE, THEY WILL DECIDE THE MATTER OF THE GUILT OR INNOCENCE OF EACH OF THE DEFENDANTS, AND THE ALTERNATE JURORS WILL BE EXCUSED.

WE ARE GOING TO GO THROUGH A SELECTION PROCEDURE HERE WHICH IS ROUTINE IN THE SENSE THAT THIS IS WHAT OCCURS IN THE PREPARATION OF ALL JURY TRIALS IN CRIMINAL CASES. THE OBJECTIVE IS TO OBTAIN A FAIR AND IMPARTIAL AND UNPREJUDICED JURY.

IT IS FOR THAT REASON THAT YOU WILL BE QUESTIONED ABOUT YOUR BACKGROUND, YOUR ACTIVITIES, YOUR KNOWLEDGE AND SO FORTH. NO ONE SHOULD DELIBERATELY ATTEMPT TO AVOID SERVING ON THIS JURY. ALSO, NO ONE SHOULD DELIBERATELY ATTEMPT TO MAKE A SPECIAL EFFORT TO GET ON THE JURY.

YOU SHOULD ANSWER THE QUESTIONS THAT ARE PUT TO YOU WITH COMPLETE CANDOR AND, OF COURSE, HONESTY.

WE ARE GOING TO SEND YOU OUT OF THE ROOM SHORTLY, AND YOU WILL BE BROUGHT IN BY GROUPS. THEN YOU WILL UNDERGO INDIVIDUAL QUESTIONING. THE QUESTIONS ARE DESIGNED TO DISCLOSE WHETHER YOU ARE QUALIFIED TO SERVE AS A JUROR IN THIS CASE OR WHETHER YOU SHOULD BE EXCUSED FOR CAUSE.

IN ADDITION, THE DISTRICT ATTORNEY AND THE ATTORNEY(S) FOR THE DEFENDANT(S) EACH HAVE THE RIGHT TO A LIMITED NUMBER OF WHAT ARE KNOWN AS PEREMPTORY CHALLENGES; THAT IS, THE RIGHT WHICH COUNSEL MAY EXERCISE TO EXCUSE INDIVIDUAL JURORS WITHOUT DISCLOSING ANY REASON THEREFOR. PLEASE BEAR IN MIND THAT THESE QUESTIONS ARE NOT INTENDED TO BE INVASION OF YOUR PRIVACY OR AN IMPROPER INQUIRY INTO PERSONAL AFFAIRS. THIS IS AN IMPORTANT PROCEDURE THAT IS SIMPLY A NECESSARY PART OF THE PREPARATION FOR THE TRIAL OF THIS CASE.

FOR THE PURPOSE OF SAVING TIME IN THE SELECTION OF THE TRIAL JURY FROM THIS PANEL, I WILL ADDRESS CERTAIN QUESTIONS TO YOU AS A GROUP. YOUR ANSWERS TO THE QUESTIONS I AM ABOUT TO ADDRESS TO YOU WILL INDICATE HOW YOU SHOULD BE FURTHER QUESTIONED BY THEM AS TO YOUR QUALIFICATIONS TO BE MEMBERS OF THE TRIAL JURY WHEN YOU ARE LATER QUESTIONED INDIVIDUALLY.

I WILL NOW DIRECT THE CRIER TO COLLECTIVELY SWEAR OR AFFIRM THE ENTIRE PANEL OF PROSPECTIVE JURORS UPON THEIR VOIR DIRE.

THE CRIER: WILL THE JURY PANEL PLEASE RISE AND RAISE YOUR RIGHT HANDS?

EACH OF YOU DO SOLEMNLY SWEAR, AND THOSE OF YOU WHO DO AFFIRM DO DECLARE AND AFFIRM, THAT YOU WILL ANSWER TRUTHFULLY ALL QUESTIONS THAT MAY BE PUT TO YOU CONCERNING YOUR QUALIFICATIONS AS JURORS?

JURORS: I DO.

THE CRIER: YOU MAY BE SEATED.

THE COURT: THANK YOU.

MEMBERS OF THE PANEL, IF ANY OF THE QUESTIONS WHICH I AM ABOUT TO ASK APPLIES TO ANY OF YOU, I DIRECT SUCH PERSON OR PERSONS TO RISE AND ANNOUNCE HIS OR HER NAME AND JUROR NUMBER TO THE COURT OFFICER, AND REMAIN STANDING UNTIL THE COURT OFFICER CALLS OUT YOUR NAME AND NUMBER. IF NO MEMBER OF THE PANEL RISES, OR IF SOMEONE DOES AND NO ADDITIONAL MEMBER OF THE PANEL RISES, I WILL CONCLUSIVELY ASSUME THAT THE QUESTION DOES NOT APPLY TO ANY PANEL MEMBER.

IT IS MOST IMPORTANT, THEREFORE, THAT IF ANY OF THESE QUESTIONS APPLIES TO ANY OF YOU, YOU MUST RISE AND IDENTIFY YOURSELVES TO THE COURT OFFICER. IF YOU ARE NOT CERTAIN AS TO WHETHER OR NOT YOU SHOULD RISE IN RESPONSE TO A PARTICULAR QUESTION, I DIRECT YOU TO RISE ANYHOW, AND IT CAN BE EXPLORED LATER.

PLEASE REMEMBER THAT YOU ARE UNDER OATH TO RISE IF ANY OF MY QUESTIONS APPLY TO ANY OF YOU. IF YOU FAIL TO RISE WHEN YOU SHOULD, IT MAY CONSTITUTE CONTEMPT OF COURT OR PERJURY.

TO EXPLAIN FURTHER, I WILL ASK QUESTIONS OF YOU AS A GROUP. WE WILL NOT ASK FOR INDIVIDUAL RESPONSES AT THIS TIME, BUT IF THE QUESTION APPLIES TO YOU, YOU SHOULD RISE AND GIVE YOUR NAME AND NUMBER TO THE COURT OFFICER. AFTER THAT QUESTIONING IS DONE, WE WILL QUESTION YOU INDIVIDUALLY AS A GROUP OF TWELVE JURORS. AT THAT TIME, COUNSEL FOR BOTH SIDES WILL PURSUE THE ANSWERS YOU HAVE GIVEN TO MY QUESTIONS AND MAY ASK SOME OTHER QUESTIONS.

YOU SHOULD UNDERSTAND AT THIS POINT, AS I SAID, NO ONE IS ATTEMPTING TO EMBARRASS ANYONE, AND I AM CERTAIN THAT THE GREAT MAJORITY OF THE QUESTIONS AND ANSWERS WILL NOT BE EMBARRASSING TO ANYONE. IF THERE IS ANY PARTICULAR QUESTION THAT YOU ARE ASKED WHEN WE GET TO THE INDIVIDUAL VOIR DIRE THAT YOU WOULD RATHER NOT ANSWER IN OPEN COURT, BUT AT SIDEBAR, ALL YOU HAVE TO DO IS INDICATE THAT YOU WOULD RATHER NOT ANSWER A PARTICULAR QUESTION IN OPEN COURT, AND WE WILL ALLOW YOU TO ANSWER AT SIDEBAR (EXPLAIN "SIDEBAR").

[PROCEED TO ASK THE FOLLOWING QUESTIONS. IF JURORS RISE IN RESPONSE TO QUESTION, TAKE NAMES AND NUMBERS ON RECORD THEN STATE: "LET THE RECORD SHOW THAT NO OTHER JURORS ROSE IN RESPONSE TO THIS QUESTION." IF NO JURORS RISE, THEN STATE: "LET THE RECORD SHOW THAT NO JURORS ROSE IN RESPONSE TO THIS QUESTION.]

1. IS ANY MEMBER OF THE PANEL UNDER THE AGE OF EIGHTEEN OR IS ANY MEMBER OF THE PANEL NOT A CITIZEN OF THE UNITED STATES OR NOT A RESIDENT OF THE CITY OF PHILADELPHIA, OR HAS ANY MEMBER OF THE PANEL BEEN CONVICTED OF A CRIME PUNISHABLE BY IMPRISONMENT FOR MORE THAN ONE YEAR AND HAS NOT BEEN GRANTED A PARDON OR AMNESTY THEREFOR? IF ANY OF THOSE THINGS APPLY TO ANY OF YOU, PLEASE RISE.

2. ARE ANY OF YOU UNABLE TO UNDERSTAND OR HAVE DIFFICULTY UNDERSTANDING THE ENGLISH LANGUAGE? IF SO, PLEASE RISE.

3. DO ANY OF YOU HAVE ANY PHYSICAL, MENTAL OR EMOTIONAL DISABILITY WHICH WOULD MAKE IT DIFFICULT FOR YOU TO HEAR AND CONCENTRATE UPON THE TESTIMONY OF THE WITNESSES IN THIS CASE? IF SO, PLEASE RISE.

4. THE DEFENDANT(S) IN THIS CASE IS MR./MS. _____. MR./MS._____ WILL YOU STAND FOR A MOMENT AND FACE THE PANEL?

COUNSEL FOR MR./MS. _____ IS MR./MS. _____. PLEASE RISE AND FACE THE PANEL.

[REPEAT UNTIL ALL COUNSEL AND DEFENDANTS HAVE BEEN INTRODUCED TO THE PANEL.]

THE NAME OF THE ASSISTANT DISTRICT ATTORNEY WHO WILL REPRESENT THE COMMONWEALTH IN THIS CASE IS MR./MS._____.

ARE ANY OF YOU RELATED, BY BLOOD OR MARRIAGE TO, OR DO YOU HAVE ANY CLOSE ASSOCIATION WITH THE DEFENDANTS; THE DEFENSE COUNSEL; THE ASSISTANT DISTRICT ATTORNEY; THE COMPLAINANT, WHOSE NAME I HAVE ALREADY MENTIONED, MR./MS._____; OR TO ME, JUDGE _____. IF SO, WOULD YOU PLEASE RISE?

5. I WILL NOW ASK THE DISTRICT ATTORNEY TO TELL YOU THE NAMES OF THE WITNESSES SHE/HE MAY CALL, OR PERSONS WHOSE NAMES MAY BE MENTIONED IN THE TRIAL OF THIS CASE. (D.A. RECITES NAMES.) IF ANY OF YOU ARE RELATED, BY BLOOD OR MARRIAGE TO, OR HAVE ANY CLOSE ASSOCIATION WITH ANY OF THESE POTENTIAL WITNESSES, PLEASE RISE.

6. HAVE ANY OF YOU EVER HEARD OR READ ANYTHING CONCERNING THIS ALLEGED INCIDENT, WHICH IS ALLEGED TO HAVE OCCURRED ON (DATE) AT (LOCATION) IN (COUNTY) IF SO PLEASE RISE.

7. HAVE YOU, ANY MEMBER OF YOUR FAMILY OR ANY CLOSE FRIENDS BEEN A VICTIM OF ANY CRIME OR HAVE YOU BEEN PRESENT WHEN ANY CRIME WAS COMMITTED? IF SO, PLEASE RISE.

8. HAVE YOU OR ANY MEMBER OF YOUR FAMILY EVER BEEN CHARGED WITH, ARRESTED FOR, OR BEEN CONVICTED OF ANY CRIME OTHER THAN A TRAFFIC VIOLATION? IF SO, PLEASE RISE.

9. ARE ANY OF YOU RELATED TO OR FRIENDLY OR ASSOCIATED WITH A POLICE OR LAW ENFORCEMENT OFFICER OR ARE ANY OF YOU OR HAVE ANY OF YOU EVER BEEN A POLICE OR OTHER LAW ENFORCEMENT OFFICER? IF SO, PLEASE RISE.

10. DO ANY OF YOU HAVE ANY DOUBTS OR RESERVATIONS ABOUT FOLLOWING MY INSTRUCTION THAT YOU SHOULD EVALUATE THE CREDIBILITY OF THE TESTIMONY OF A POLICE OFFICER AS TO TRUTHFULNESS AND ACCURACY BY THE SAME STANDARD AS ANY CIVILIAN WITNESS, NO MORE AND NO LESS? IF YOU HAVE ANY DOUBTS ABOUT FOLLOWING THAT INSTRUCTION, PLEASE RISE.

11. WOULD ANY OF YOU BELIEVE THE TESTIMONY OF A POLICE OFFICER JUST BECAUSE HE OR SHE IS A POLICE OFFICER? IF SO, PLEASE RISE.

12. WOULD ANY OF YOU DISBELIEVE THE TESTIMONY OF A POLICE OFFICER MERELY BECAUSE HE OR SHE IS A POLICE OFFICER? IF SO, PLEASE RISE.

13. DO ANY OF YOU HAVE ANY DOUBTS OR RESERVATIONS ABOUT FOLLOWING MY INSTRUCTION THAT EACH OF THE DEFENDANTS IS PRESUMED TO BE INNOCENT UNTIL PROVEN GUILTY BEYOND A REASONABLE DOUBT BY EVIDENCE PRESENTED IN THIS COURT? IF SO, PLEASE RISE.

14. DO ANY OF YOU HAVE ANY DOUBTS OR RESERVATIONS ABOUT BEING ABLE TO CONSIDER THE EVIDENCE IN THIS CASE FAIRLY AND IMPARTIALLY BECAUSE ONE OF THE CHARGES IS [MURDER], IF SO, PLEASE RISE.

14(a). AS YOU ALL NOW KNOW, THE DEFENDANT IS CHARGED WITH MURDER. UNDER CERTAIN CIRCUMSTANCES, IF THE DEFENDANT IS CONVICTED OF FIRST DEGREE MURDER, THE JURY WILL BE REQUIRED TO CONSIDER WHETHER OR NOT TO IMPOSE THE DEATH PENALTY DURING THE PENALTY PHASE OF THE TRIAL. ASSUMING OF COURSE THAT THE DEATH PENALTY IS WARRANTED AND THAT A PROPER CASE FOR THE DEATH PENALTY IS MADE OUT, DO YOU HAVE ANY MORAL, RELIGIOUS, OR ETHICAL BELIEFS WHICH WOULD PREVENT YOU FROM CONSIDERING THE IMPOSITION OF THE DEATH PENALTY? IF SO, PLEASE RISE.

15. DO ANY OF YOU HAVE ANY DOUBTS OR RESERVATIONS ABOUT FOLLOWING MY INSTRUCTIONS THAT THE MERE ARREST OF THE DEFENDANT(S) AND HIS/HER/THEIR PRESENCE HERE FOR TRIAL IS NOT TO BE CONSIDERED AS EVIDENCE AGAINST HIM/HER/THEM IN THIS CASE? IF SO, PLEASE RISE.

16. DO ANY OF YOU HAVE ANY DOUBTS OR RESERVATIONS ABOUT FOLLOWING MY INSTRUCTION THAT IF (ANY OF) THE DEFENDANT(S) DOES/DO NOT TAKE THE STAND OR PRESENT EVIDENCE, IT IS NOT TO BE CONSIDERED AS EVIDENCE AGAINST HIM/HER/THEM?

17. DO ANY OF YOU HAVE ANY DOUBTS OR RESERVATIONS ABOUT YOUR WILLINGNESS TO ACCEPT AND APPLY THE LAW AS I INSTRUCT YOU? IF SO, PLEASE RISE.

18. DO ANY OF YOU HAVE ANY FIXED OPINION ABOUT THE GUILT OR INNOCENCE OF THESE/THIS DEFENDANT(S) ON THE CHARGES MADE AGAINST HIM/HER/THEM? IF YOU DO, PLEASE RISE.

19. DO ANY OF YOU KNOW OF ANY REASON WHY, IF YOU WERE SELECTED AS A TRIAL JUROR IN THIS CASE, YOU COULD NOT GIVE THE (EACH OF THESE) DEFENDANT(S) AND THE COMMONWEALTH A FAIR AND IMPARTIAL TRIAL? IF SO, PLEASE RISE. [WHERE JURY IS SEQUESTERED OMIT PARAGRAPH 21.1.]

20. IT IS ESTIMATED, THAT THIS TRIAL WILL LAST APPROXIMATELY UNTIL __(DAY)__ WE ARE NOT ALWAYS ABSOLUTELY CERTAIN ABOUT THESE THINGS. MAYBE IT WILL END A LITTLE EARLIER THAN THAT; MAYBE IT WILL END A LITTLE LATER. BUT THE JURY WILL NOT BE SEQUESTERED OR LOCKED UP DURING THE COURSE OF THE TRIAL. THAT IS, THE MEMBERS OF THE JURY WILL BE PERMITTED TO GO HOME AT THE CLOSE OF COURT EACH DAY, AND ALSO WILL BE PERMITTED TO SEPARATE AND GO HOME UNDER APPROPRIATE INSTRUCTIONS OF THE COURT IF THE JURY IS DELIBERATING ON ITS VERDICT AND HAS NOT REACHED AGREEMENT BY THE CLOSE OF THE DAY.

21. IF YOU ARE SELECTED AS A MEMBER OF THE TRIAL JURY, YOU WILL NOT BE EXCUSED TO KEEP DOCTOR'S APPOINTMENTS, TO TAKE EXAMINATIONS, TO ATTEND CLASSES OR FOR ANY SIMILAR REASON. ACCORDINGLY, WOULD IT CREATE ANY EXTRAORDINARY HARDSHIP, AND I EMPHASIZE THE WORD EXTRAORDINARY, ON YOU OR ANY MEMBER OF YOUR FAMILY TO SERVE AS A MEMBER OF THE TRIAL JURY IN THIS CASE? IF SO, PLEASE RISE.

22. AFTER THE JURY'S VERDICT IS ANNOUNCED IN OPEN COURT, THE MEMBERS OF THE JURY MAY BE CALLED UPON TO INDIVIDUALLY STAND UP AND STATE IF THEY AGREE WITH THE VERDICT. WOULD ANY OF YOU BE UNWILLING TO DO SO IF YOU WERE SELECTED TO SERVE ON THE TRIAL JURY? IF SO, PLEASE RISE.

23. HAVE ANY MEMBERS OF THE PANEL EVER SERVED ON JURY DUTY AND BEEN SELECTED AS AND SERVED ON A CRIMINAL JURY BEFORE? IF SO PLEASE RISE. [ASK QUESTION 24 ONLY WHEN REQUESTED BY DEFENSE.]

24. MEMBERS OF THE PANEL, YOU WILL NOTE THAT EACH OF THE DEFENDANTS IN THIS CASE IS BLACK, AND I WILL ADVISE YOU THAT THE COMPLAINANT IS A CAUCASIAN. WOULD THIS TEND TO PREJUDICE YOU AGAINST THE COMPLAINANT OR AGAINST THE DEFENDANT IN THIS CASE, OR MAKE IT DIFFICULT FOR YOU TO RENDER A FAIR AND IMPARTIAL VERDICT BASED SOLELY ON THE EVIDENCE AND THE LAW? IF SO, PLEASE RISE.

[SELECT 12 NAMES AT RANDOM AND SEAT IN JURY BOX, THEN CONDUCT INDIVIDUAL VOIR DIRE.]

INDIVIDUAL VOIR DIRE (CAPITAL CASE)

THE COURT: IF ANY JURY PANEL MEMBER WOULD PREFER TO ANSWER A QUESTION PRIVATELY, PLEASE RAISE YOUR HAND AND WE WILL ALLOW THAT ANSWER TO BE TAKEN IN CHAMBERS.

1. IN WHAT SECTION OF THE CITY DO YOU LIVE? WE DO NOT NEED YOUR ADDRESS, JUST YOUR SECTION.

2. HOW LONG HAVE YOU LIVED IN THAT AREA?

3. DO YOU LIVE ALONE OR WITH OTHER PEOPLE?

4. HOW MANY CHILDREN DO YOU HAVE? WHAT IS THEIR SEX AND RANGE IN AGES?

5. OF THOSE PEOPLE THAT YOU LIVE WITH, ARE ANY OF THOSE INDIVIDUALS OR SPOUSES AND FAMILY INVOLVED IN LAW ENFORCEMENT?

   (a) WILL THAT INFLUENCE YOUR DECISION?

6. WHAT TYPE OF EMPLOYMENT HAVE YOU HAD AND HOW LONG HAVE YOU HAD THAT EMPLOYMENT?

7. IF YOU ARE MARRIED WHAT IS YOUR SPOUSE'S OCCUPATION?

   [AT THIS POINT, IF THE JUROR HAS RISEN IN RESPONSE TO ANY GENERAL QUESTION ASK APPROPRIATE FOLLOW-UP QUESTIONS] (SEE NEXT PAGE).

   N.B. IF JUROR INDICATES THEY KNOW ONE OF THE PEOPLE INVOLVED IN THIS CASE, ASK FOLLOW-UP QUESTIONS IN CAMERA TO AVOID POSSIBLE PREJUDICE.

8. WILL YOU LISTEN TO ALL OF THE EVIDENCE AND WILL YOU MAKE YOUR DECISION ON THE BASIS OF THAT EVIDENCE NOT ON THE BASIS OF SYMPATHY, FAVORITISM, OR PREJUDICE?

9. WILL YOU BE ABLE TO FOLLOW MY INSTRUCTIONS ON THE LAW REGARDLESS OF YOUR BELIEF?

10. WILL YOU BE FAIR AND IMPARTIAL IF YOU ARE PICKED TO SERVE ON THE JURY?

SAMPLE FOLLOW-UP QUESTIONS FOR INDIVIDUAL VOIR DIRE

1. IF THE JUROR HAS RISEN IN RESPONSE TO QUESTION NO. 4[1] ASK THE FOLLOWING:

Note: Where the juror has responded to question No. 4, it is best to conduct the individual voir dire out of the hearing of the other jurors so that they won't be tainted by possible prejudicial answers such as "I met the defendant in prison."

(a) YOU INDICATED DURING THE GENERAL QUESTIONING THAT YOU HAVE A CLOSE ASSOCIATION WITH SOMEONE CONCERNED IN THIS CASE. WHO IS THAT?

(b) HOW OFTEN DO YOU SEE THAT PERSON?

(c) HAVE YOU DISCUSSED THIS CASE WITH THAT PERSON? (WHERE IT IS DEFENSE COUNSEL OR THE DISTRICT ATTORNEY OR THE JUDGE: HAVE YOU DISCUSSED THE PERSON'S OCCUPATION WITH THEM?)

(d) HOW DO YOU THINK THIS WILL AFFECT YOUR ABILITY TO BE A FAIR AND IMPARTIAL JUROR IN THIS CASE?

2. IF THE JUROR HAS RISEN IN RESPONSE TO QUESTION NO. 7 (A) ASK THE FOLLOWING: YOU INDICATED DURING THE GENERAL QUESTIONING THAT EITHER YOU, A MEMBER OF YOUR FAMILY OR A CLOSE FRIEND HAS BEEN THE VICTIM OF A CRIME OR THAT YOU HAVE BEEN PRESENT WHEN A CRIME WAS COMMITTED. CAN YOU PLEASE TELL ME WHOM YOU ARE REFERRING TO.

3. WHERE THE JUROR ANSWERS THAT IT WAS THE JUROR HIMSELF OR HERSELF THAT WAS INVOLVED, ASK THE FOLLOWING:

(a) HOW LONG AGO DID THIS HAPPEN?

(b) DID AN ARREST RESULT?

(c) WERE YOU A WITNESS AT THE TRIAL?

(d) WAS THERE A CONVICTION?

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[1]Numbers relate to questions in collective voir dire.

(e) HOW DO YOU THINK THAT EXPERIENCE WOULD AFFECT YOUR ABILITY TO BE A FAIR AND IMPARTIAL JUROR IN THIS TRIAL?

OR

4. IF THE JUROR ANSWERS THAT IT WAS A RELATIVE OR FRIEND WHO WAS THE VICTIM OF THE CRIME, ASK THE FOLLOWING:

(a) WHAT IS THE IDENTITY OF THE RELATIVE OR FRIEND?

(b) WHAT WAS THE NATURE OF THE CRIME?

(c) HOW OFTEN DO YOU SEE THAT PERSON?

(d) HAVE YOU DISCUSSED THE INCIDENT WITH HIM/HER?

(e) HOW LONG AGO WAS THE INCIDENT?

(f) HOW DO YOU THINK YOUR KNOWING ABOUT YOUR FRIEND'S (OR RELATIVE'S) EXPERIENCE WOULD AFFECT YOUR ABILITY TO BE A FAIR AND IMPARTIAL JUROR IN THIS CASE?

5. IF THE JUROR HAS RISEN IN RESPONSE TO QUESTION NO. 8, ASK THE FOLLOWING:

(a) DURING THE GENERAL QUESTIONING YOU INDICATED THAT EITHER YOU OR A MEMBER OF YOUR FAMILY WAS CHARGED, ARRESTED OR CONVICTED OF A CRIME OTHER THAN A TRAFFIC VIOLATION. WHO IS THE PERSON INVOLVED?

(b) HOW LONG AGO WAS THE OFFENSE?

(c) IS THE PERSON CURRENTLY SERVING A SENTENCE?

(d) ASK ANY OTHER QUESTIONS THAT APPEAR TO BE APPROPRIATE UNDER THE CIRCUMSTANCES DEPENDING ON INDIVIDUAL FACTS OF THE CASE.

(e) HOW DO YOU THINK YOUR EXPERIENCE (OR YOUR RELATIVE'S OR FRIEND'S EXPERIENCE) WOULD AFFECT YOUR ABILITY TO BE AN IMPARTIAL JUROR IN THIS CASE.

6. IF THE JUROR HAS RISEN IN RESPONSE TO QUESTION NO. 9, ASK THE FOLLOWING:

(a) DURING THE GENERAL QUESTIONING YOU INDICATED THAT A RELATIVE OR A FRIEND IS A LAW ENFORCEMENT OFFICER. WHO IS THAT PERSON?

(b) DO YOU SEE THAT PERSON OFTEN?

(c) HOW DO YOU THINK YOUR RELATIONSHIP WITH (OR YOUR FRIENDSHIP WITH) A LAW ENFORCEMENT OFFICER WOULD AFFECT YOUR ABILITY TO BE A FAIR AND IMPARTIAL JUROR IN THIS CASE?

7. IF THE JUROR HAS RISEN IN RESPONSE TO QUESTION NO. 14(A), ASK THE FOLLOWING:

(a) THE JURY WILL ONLY BE CONCERNED WITH THE QUESTION OF SENTENCING AFTER THE GUILT OR INNOCENCE PORTION OF THE TRIAL IS CONCLUDED, AND THEN ONLY IF THE DEFENDANT HAS BEEN FOUND GUILTY OF FIRST DEGREE MURDER. SHOULD THAT OCCUR, THE COURT WILL INSTRUCT YOU AS TO THE LAW CONCERNING WHEN THE SENTENCE SHOULD BE LIFE IMPRISONMENT AND WHEN THE DEATH PENALTY APPLIES.

(b) I WILL INSTRUCT YOU AS TO THE CIRCUMSTANCES UNDER WHICH THE DEATH PENALTY CAN BE IMPOSED IN ACCORDANCE WITH THE LAW OF PENNSYLVANIA. AFTER YOU HEAR MY INSTRUCTIONS AND AFTER YOU HAVE HEARD ALL OF THE EVIDENCE, WOULD YOU BE WILLING TO CONSIDER IMPOSITION OF THE DEATH PENALTY IN A PROPER CASE?

7(a). IF THE JUROR HAS RESPONDED IN THE NEGATIVE TO QUESTION NO. 7(b), ASK THE FOLLOWING:

SO, IN ESSENCE, YOU ARE SAYING THAT AS A RESULT OF YOUR BELIEFS YOU COULD NOT BRING YOURSELF TO CONSIDER IMPOSITION OF THE DEATH PENALTY UNDER ANY CIRCUMSTANCES. AM I CORRECT?

7(b). IF THE JUROR HAS RESPONDED IN THE AFFIRMATIVE TO QUESTION NO. 7 (b), ASK THE FOLLOWING:

IF YOU FOUND UNDER THE FACTS PRESENTED AND THE LAW AS I EXPLAINED IT THAT THE DEATH PENALTY WAS APPROPRIATE, YOU WOULD BE WILLING TO CONSIDER IMPOSING THE DEATH PENALTY.

The above questions are samples only. Obviously in each case the follow-up questions will have to be tailored to fit the exact facts surrounding the individual juror. It is suggested that after asking a number of questions the juror be asked "How do you think that will affect your ability to serve as an impartial juror in the trial of this case." It has been found that this question, although open ended, will not get the court into trouble and is most likely to produce an honest answer on the part of the juror. Some judges feel that it is better to ask the question as a leading question, thus assuring a proper answer that will not require an excuse for cause. For instance: "Despite the fact that all of your brothers and sisters are police officers will you follow my instruction that a police officer's testimony is to be judged by the same standard as the testimony of a civilian." You will have to let your own style and experience be your guide in conducting the voir dire.

CHECKLIST FOR PRELIMINARY INSTRUCTIONS PRIOR TO COMMENCEMENT OF TRIAL

I. Swear the Jury

II. Arraign the Defendant

III. Opening Instructions to Empaneled Jury

IV. Introduction

A. Purpose and Function of Juror

1. ____ Civic Duty

2. ____ Listen to the Evidence and from That Determine

a. ____ if crime(s) charged have been committed

b. ____ if so, is the defendant guilty

3. ____ Follow Judge's Instructions and Rulings Regarding Rules of Law

4. ____ Sole Judges of Facts

B. ____ Trial Procedures

1. ____ Opening Statement(s)

2. ____ Commonwealth Case

3. ____ Defense Case

4. ____ Closing Statements

5. ____ Charge of the Court

6. ____ Retirement of the Jury

C. ____ Purpose and Function of Judge—decide all questions of law

V. Juror's Responsibilities

A. ____ Juror's Badge

B. ____ Rely On Your Own Recollection and Keep a Clear and Independent Recollection and Understanding of Everything Said and Done in the Courtroom

C. ____ Ask Questions if Something Is Unclear or Uncertain

D. ____ Determine the Credibility, Accuracy and Weight to be Given to All Evidence

E. ____ Avoid Sympathy for Any of the Participants in the Case

F. ____ Keep a Completely Open Mind Throughout the Trial

G. ____ Do Not Discuss the Case with

1. ____ each other until retirement to the jury room to deliberate on the verdict;

2. ____ anyone or listen to others talk about the case, including family

H. ____ Avoid Having Casual Conversation with the Defendant(s), Counsel for Both Sides, the Witnesses and Myself About Subjects Which Have Nothing to Do with the Case.

I. ____ Do Not Read Newspapers or Other Stories About the Trial or Defendant(s)

J. ____ Avoid Radio and Television Broadcasts About the Trial or Defendant(s)

K. ____ Do Not Visit the Scene of the Alleged Crime, Investigate on Your Own, or Conduct an Experiment of Any Kind

VI. Rules of Court

A. ____ Unresponsive Answers Will Be Stricken from the Record

B. ____ Evidence

1. ____ Answers Given by the Witnesses are Evidence

2. ____ Statements Made by Counsel or Myself Are Not Evidence

C. ____ Side Bar Conference

D. ____ Questions of Guilt and Questions of Penalty are Bifurcated

E. ____ Trial Schedule

VII. Trial Begins

PRELIMINARY INSTRUCTIONS PRIOR TO COMMENCEMENT OF TRIAL

THE COURT MEMBERS OF THE JURY, YOU HAVE BEEN SELECTED TO PERFORM ONE OF THE MOST IMPORTANT AND SOLEMN DUTIES OF CITIZENSHIP. YOU ARE TO SIT IN JUDGMENT UPON CRIMINAL CHARGES MADE BY THE COMMONWEALTH AGAINST ONE OF YOUR FELLOW CITIZENS.

THE SERVICES YOU RENDER AS JURORS IN THIS CASE ARE AS IMPORTANT TO THE ADMINISTRATION OF JUSTICE AS THOSE RENDERED BY ME, AS JUDGE, AND BY THE ATTORNEYS.

YOU SHOULD PAY VERY CLOSE ATTENTION TO EVERYTHING THAT IS SAID AND TO EVERYTHING THAT OCCURS THROUGHOUT THIS TRIAL SO THAT YOU CAN FAITHFULLY PERFORM YOUR SWORN DUTY AS JURORS.

I SHALL DESCRIBE, IN A GENERAL WAY, WHAT WILL TAKE PLACE.

FIRST, THE ASSISTANT DISTRICT ATTORNEY WILL MAKE AN OPENING STATEMENT IN WHICH SHE/HE OUTLINES THE COMMONWEALTH'S CASE AGAINST THIS DEFENDANT. THE DEFENDANT'S ATTORNEY MAY MAKE A STATEMENT OUTLINING THE DEFENSE EITHER IMMEDIATELY FOLLOWING THE DISTRICT ATTORNEY'S STATEMENT, OR LATER IN THE TRIAL.

SECOND, THE DISTRICT ATTORNEY WILL PRESENT EVIDENCE. SHE/HE WILL CALL WITNESSES TO TESTIFY, AND MAY OFFER EXHIBITS SUCH AS DOCUMENTS OR PHYSICAL OBJECTS. COUNSEL FOR THE DEFENDANT, OF COURSE, HAS A RIGHT TO CROSS-EXAMINE WITNESSES CALLED BY THE COMMONWEALTH IN ORDER TO TEST THE TRUTHFULNESS AND THE ACCURACY OF THEIR TESTIMONY.

AT THE CLOSE OF THE COMMONWEALTH'S CASE, THE ATTORNEY FOR THE DEFENDANT MAY PRESENT EVIDENCE FOR THE DEFENDANT; BUT AS I TOLD YOU BEFORE, THE DEFENDANT HAS NO OBLIGATION TO OFFER EVIDENCE OR TO TESTIFY. UNDER THE LAW, EVERY DEFENDANT IS PRESUMED TO BE INNOCENT, AND HAS THE RIGHT TO REMAIN SILENT. THE BURDEN IS ON THE COMMONWEALTH TO PROVE THE DEFENDANT GUILTY BEYOND A REASONABLE DOUBT. THE DISTRICT ATTORNEY MAY, OF COURSE, CROSS-EXAMINE ANY WITNESSES CALLED BY THE DEFENSE.

AFTER ALL OF THE EVIDENCE HAS BEEN PRESENTED, THE ATTORNEYS FOR EACH SIDE WILL HAVE THE OPPORTUNITY TO ADDRESS ARGUMENTS TO YOU. I SHALL THEN GIVE YOU MY FINAL CHARGE, WHICH WILL INCLUDE INSTRUCTIONS ON THE RULES OF LAW PERTINENT TO THIS CASE,

AND WHATEVER ADDITIONAL GUIDANCE THAT I THINK YOU MAY NEED FOR YOUR DELIBERATIONS.

YOU WILL THEN RETIRE TO THE JURY ROOM TO DELIBERATE AND TO DECIDE UPON YOUR VERDICT IN THIS CASE.

IT IS THE RESPONSIBILITY OF THE JUDGE TO DECIDE ALL QUESTIONS OF LAW; THEREFORE, AS I TOLD YOU EARLIER, YOU MUST ACCEPT AND FOLLOW MY RULINGS AND INSTRUCTIONS ON MATTERS OF LAW. I AM NOT, HOWEVER, THE JUDGE OF THE FACTS, AND THIS IS A KEY DISTINCTION. IT IS NOT FOR ME TO DECIDE WHAT ARE THE TRUE FACTS CONCERNING THE CHARGES AGAINST THIS DEFENDANT. YOU, THE JURORS, ARE THE SOLE JUDGES OF THE FACTS. IT WILL BE YOUR RESPONSIBILITY TO WEIGH THE EVIDENCE, TO FIND THE FACTS FROM THAT EVIDENCE AND THEN, APPLYING THE RULES OF LAW WHICH I GIVE TO YOU TO THE FACTS AS YOU FIND THEM, TO DECIDE WHETHER OR NOT THE DEFENDANT HAS BEEN PROVEN GUILTY OF THE CHARGES MADE AGAINST HIM.

I AM LIKELY TO GIVE OTHER INSTRUCTIONS DURING THE TRIAL, IN ADDITION TO THESE PRELIMINARY INSTRUCTIONS AND MY FINAL CHARGE, BUT YOU SHOULD CONSIDER ALL OF MY INSTRUCTIONS, INCLUDING THIS ONE, AS A CONNECTED SERIES. TAKEN TOGETHER, THEY CONSTITUTE THE LAW WHICH YOU MUST FOLLOW.

HEREAFTER, I MAY SOMETIMES REFER TO THE DISTRICT ATTORNEY AND TO DEFENSE COUNSEL AS "COUNSEL."

YOU ARE NOT PERMITTED TO TAKE NOTES ON THE EVIDENCE OR ON ANYTHING SAID BY ME OR BY COUNSEL DURING THE COURSE OF THIS TRIAL.

WHEN YOU DELIBERATE ON YOUR VERDICT, YOU WILL HAVE TO RELY ON YOUR OWN RECOLLECTIONS OF WHAT WAS SAID AND WHAT OCCURRED HERE IN THE COURTROOM.

WE HAVE A COURT REPORTER WHO WILL MAKE A RECORD OF THE TESTIMONY. IF YOU FAIL TO HEAR A QUESTION OR AN ANSWER WHILE A WITNESS IS TESTIFYING, PLEASE RAISE YOUR HAND IMMEDIATELY. THE COURT REPORTER CAN READ BACK WHATEVER YOU HAVE MISSED.

SOMETIMES WITNESSES DON'T SPEAK CLEARLY. SOMETIMES THEY SPEAK VERY SOFTLY. SOMETIMES THEY TEND TO DROP THEIR VOICE. SOMETIMES THEY SPEAK VERY RAPIDLY. AT TIMES, THEY SPEAK, WITH AN

UNFAMILIAR ACCENT, OR THEY MAY USE WORDS, THE MEANINGS OF WHICH ARE UNFAMILIAR TO YOU. DO NOT TAKE A CHANCE ON NOT KNOWING OR NOT UNDERSTANDING WHAT A WITNESS SAID. DO NOT RELY ON ONE OF YOUR FELLOW JURORS TO REFRESH YOUR MEMORY. EACH OF YOU SHOULD HAVE A CLEAR AND INDEPENDENT RECOLLECTION AND UNDERSTANDING OF EVERYTHING THAT WAS SAID AND EVERYTHING THAT OCCURRED HERE IN THIS COURTROOM.

SO I REPEAT, IF YOU DID NOT HEAR IT OR IF YOU DID NOT HEAR IT CLEARLY OR IF YOU DID NOT UNDERSTAND IT, PLEASE RAISE YOUR HAND RIGHT THEN AND THERE, AND IT CAN BE READ BACK BY THE REPORTER OR EXPLAINED TO YOU.

AFTER YOU GO TO THE JURY ROOM TO DELIBERATE ON YOUR VERDICT, IF YOU FIND THAT YOUR RECOLLECTION OF PARTICULAR TESTIMONY HAS BECOME CONFUSED OR UNCERTAIN, I MAY, THAT IS I MAY, AT YOUR REQUEST, PERMIT THE REPORTER TO READ THAT TESTIMONY TO YOU; BUT YOU OUGHT NOT TO RELY ON GETTING THAT KIND OF HELP FROM THE REPORTER.

YOU MUST LISTEN ATTENTIVELY TO EVERY WITNESS SO THAT THE TESTIMONY WILL BE CLEAR IN EACH OF YOUR MINDS.

I WOULD LIKE TO DISCUSS WITH YOU PROBLEMS WHICH MAY OCCUR WHEN QUESTIONING WITNESSES. OCCASIONALLY, WITNESSES SPEAK IN A MANNER WHICH IS DIFFICULT TO UNDERSTAND. AT SUCH TIMES, IT MAY BECOME NECESSARY FOR THE COURT OR COUNSEL OR THE COURT REPORTER TO ASK A WITNESS TO SLOW DOWN OR TO REPEAT AN ANSWER. THE COURT REPORTER IS REQUIRED BY LAW TO MAKE AN ACCURATE AND COMPLETE RECORD OF THE TESTIMONY OF THIS TRIAL FOR LATER REVIEW.

IF THE ANSWER GIVEN BY THE WITNESS IS UNINTELLIGIBLE TO THE REPORTER, THE RECORD SHE/HE MAKES WILL NOT BE COMPLETE OR CORRECT. SOMETIMES A WITNESS TENDS TO RAMBLE OR FAILS TO GIVE A RESPONSIVE ANSWER TO A QUESTION. IN THAT CASE, THE WITNESS MAY BE INTERRUPTED BY COUNSEL OR BY ME, AND THE UNRESPONSIVE ANSWER WILL BE STRICKEN FROM THE RECORD.

YOU SHOULD NOT BE DISTURBED BY THESE PROCEDURES. THEY ARE NECESSARY SO THAT THE TRIAL MAY BE CONDUCTED IN AN ORDERLY FASHION AND ACCORDING TO THE LAW, THEREBY INSURING A FAIR AND IMPARTIAL TRIAL.

YOU SHOULD NOT PERMIT ANY SYMPATHY YOU FEEL FOR ANY OF THE WITNESSES OR FOR THE VICTIM OR FOR THE DEFENDANT TO DIVERT YOU FROM YOUR SWORN DUTY TO CONSIDER ALL OF THE EVIDENCE FAIRLY AND IMPARTIALLY WHEN DELIBERATING UPON YOUR VERDICT.

AS I SAID, YOU ARE THE SOLE JUDGES OF THE CREDIBILITY AND THE WEIGHT TO BE GIVEN TO ALL OF THE EVIDENCE, INCLUDING THE TESTIMONY OF THE WITNESSES.

BY "CREDIBILITY OF TESTIMONY OR OTHER EVIDENCE," I MEAN ITS TRUTHFULNESS AND ACCURACY. IN JUDGING CREDIBILITY AND WEIGHT, YOU SHOULD USE YOUR UNDERSTANDING OF HUMAN NATURE AND YOUR OWN COMMON SENSE. OBSERVE EACH WITNESS CAREFULLY AS HE OR SHE TESTIFIES. BE ALERT FOR ANYTHING IN HIS OR HER WORDS, DEMEANOR OR BEHAVIOR ON THE WITNESS STAND, OR FOR ANYTHING IN THE OTHER EVIDENCE IN THE CASE, WHICH MIGHT HELP YOU JUDGE THE TRUTHFULNESS, THE ACCURACY AND THE WEIGHT OF THE WITNESS' TESTIMONY.

I SHALL GIVE YOU FURTHER INSTRUCTIONS ON THIS SUBJECT MATTER LATER IN THE CASE.

EACH OF YOU MUST KEEP A COMPLETELY OPEN MIND THROUGHOUT THE TRIAL. IN THE OATH THAT YOU JUST TOOK, YOU SWORE TO DO JUST THAT. IT IS IMPOSSIBLE TO GIVE YOU ALL OF THE EVIDENCE IN THIS CASE IN ANY ONE INSTANT. IT HAS TO BE GIVEN TO YOU WITNESS BY WITNESS, QUESTION BY QUESTION, AND ANSWER BY ANSWER. THEREFORE, YOU WILL NOT HAVE ALL THE EVIDENCE IN THE CASE UNTIL ALL OF THE EVIDENCE HAS BEEN PRESENTED; SO YOU SHOULD NOT TALK TO EACH OTHER ABOUT THE EVIDENCE OR ABOUT ANY OTHER MATTERS RELATING TO WHETHER OR NOT THE DEFENDANT HAS BEEN PROVEN GUILTY UNTIL I SEND YOU TO THE JURY ROOM TO DELIBERATE UPON YOUR VERDICT.

EVEN AFTER YOU HAVE HEARD ALL OF THE EVIDENCE, YOU STILL WILL NOT BE IN A POSITION TO MAKE UP YOUR MINDS ABOUT THE GUILT OR INNOCENCE OF THE DEFENDANT, BECAUSE YOU WILL NOT YET HAVE HEARD THE ARGUMENTS BY COUNSEL, NOR WILL YOU HAVE RECEIVED MY CLOSING INSTRUCTIONS ON THE LAW WHICH YOU WILL APPLY TO THE FACTS AS YOU FIND THEM.

YOU WILL NOT KNOW ENOUGH ABOUT THE EVIDENCE AND THE LAW IN THIS CASE TO DISCUSS THE CASE INTELLIGENTLY AND FAIRLY UNTIL I SEND YOU TO THE JURY ROOM TO DELIBERATE ON YOUR VERDICT. THEN

AND ONLY THEN WILL YOU BE IN A POSITION TO DISCUSS THE CASE WITH YOUR FELLOW JURORS.

DURING THE TRIAL YOU MUST NOT TALK WITH ANYONE ABOUT THE CASE OR LISTEN TO OTHERS TALK ABOUT THE CASE, INCLUDING MEMBERS OF YOUR OWN FAMILY. THERE ARE SOME PERSONS WITH WHOM YOU MUST AVOID EVEN CASUAL CONVERSATIONS HAVING NOTHING TO DO WITH THE CASE. THESE PERSONS ARE THE DEFENDANT, COUNSEL FOR BOTH SIDES, THE WITNESSES AND MYSELF.

DO NOT FEEL HURT IF, DURING ANY RECESS OR AT ANY OTHER TIME, COUNSEL OR I SHOULD SEE YOU IN THE HALLWAY OR IN AN ELEVATOR, OR ANYWHERE ELSE, AND NOT RETURN YOUR GREETING. WE SIMPLY ARE NOT PERMITTED TO DO SO.

DO NOT READ NEWSPAPERS OR OTHER STORIES ABOUT THE TRIAL OR ABOUT THE DEFENDANT. YOU SHOULD ALSO AVOID RADIO AND TELEVISION BROADCASTS WHICH MIGHT REFER TO THE TRIAL OR TO THE DEFENDANT.

DO NOT VISIT THE SCENE OF THE ALLEGED CRIME, OR MAKE AN INVESTIGATION OF YOUR OWN OR CONDUCT ANY EXPERIMENT OF ANY KIND WITH REGARD TO THIS TRIAL. YOUR ONLY INFORMATION ABOUT THIS CASE SHOULD COME TO YOU WHILE YOU ARE ALL PRESENT TOGETHER HERE, ACTING AS A JURY, IN THE PRESENCE OF THE JUDGE, THE ATTORNEYS AND THE DEFENDANT.

AS I TOLD YOU EARLIER, ALTHOUGH YOU MUST FOLLOW MY INSTRUCTIONS REGARDING RULES OF LAW, YOU ARE THE SOLE JUDGES OF THE FACTS. IT IS YOUR RECOLLECTION OF THE EVIDENCE, AND NOT MINE OR COUNSEL'S, ON WHICH YOU MUST RELY DURING YOUR DELIBERATIONS. YOU ARE NOT BOUND BY, NOR SHOULD YOU CONSIDER ANY OPINION WHICH YOU MIGHT THINK COUNSEL OR I HAVE EXPRESSED CONCERNING EITHER GUILT OR INNOCENCE, CREDIBILITY OF THE WITNESSES, WEIGHT OF THE EVIDENCE, FACTS PROVEN BY THE EVIDENCE OR INFERENCES TO BE DRAWN FROM THE FACTS.

STATEMENTS MADE BY COUNSEL DO NOT CONSTITUTE EVIDENCE. THE QUESTIONS WHICH COUNSEL PUT TO WITNESSES ARE NOT, THEMSELVES, EVIDENCE. LET ME REPEAT THAT AGAIN. THE QUESTIONS WHICH COUNSEL PUT TO WITNESSES ARE NOT, THEMSELVES, EVIDENCE. IT IS THE WITNESS' ANSWERS WHICH PROVIDE THE EVIDENCE FOR YOU.

YOU SHOULD NOT SPECULATE OR GUESS THAT A FACT MAY BE TRUE MERELY BECAUSE ONE OF THE LAWYERS ASKS A QUESTION WHICH ASSUMES OR SUGGESTS THAT A FACT IS TRUE.

I MAY QUESTION SOME OF THE WITNESSES MYSELF. THE QUESTIONS WILL NOT REFLECT, AND ARE NOT INTENDED TO REFLECT ANY OPINION ON MY PART ABOUT THE EVIDENCE OR ABOUT THE CASE. MY ONLY PURPOSE WILL BE TO INQUIRE ABOUT MATTERS WHICH, IN MY OPINION, SHOULD BE MORE FULLY EXPLORED.

THE ADMISSION OF EVIDENCE AT TRIAL IS GOVERNED BY RULES OF LAW, AND IT IS MY DUTY TO RULE ON OBJECTIONS TO THE EVIDENCE MADE BY THE ATTORNEYS; THUS, IF I OVERRULE AN OBJECTION TO A QUESTION, THAT MEANS THE WITNESS IS REQUIRED TO ANSWER THE QUESTION, AND YOU, OF COURSE, ARE ENTITLED TO CONSIDER THAT ANSWER AS EVIDENCE IN THIS CASE.

IF I SUSTAIN AN OBJECTION, THAT MEANS THE WITNESS IS NOT PERMITTED TO ANSWER THE QUESTION, AND YOU HAVE NOTHING TO CONSIDER BECAUSE ALL YOU HAVE HEARD IS A QUESTION; AND AS I HAVE SAID, QUESTIONS ARE NOT EVIDENCE, ONLY THE ANSWERS ARE EVIDENCE.

YOU MUST NOT CONCERN YOURSELVES WITH THE OBJECTIONS OR WITH THE REASONS FOR MY RULINGS. YOU MUST DISREGARD EVIDENCE, OR ANY OTHER MATTERS TO WHICH I SUSTAIN AN OBJECTION OR WHICH I ORDER STRICKEN FROM THE RECORD.

COUNSEL AND I ARE REQUIRED, BY LAW, TO TAKE UP CERTAIN MATTERS OUT OF YOUR HEARING. WE MAY DO THIS AT THE BENCH OR IN THE ANTEROOM, OR I MAY ASK YOU TO LEAVE SO THAT WE MAY DO THIS IN THE OPEN COURTROOM. THESE DISCUSSIONS MAY DEAL WITH THE PROPRIETY OF EVIDENCE THAT IS PROPOSED TO BE INTRODUCED AT THIS TRIAL, OR SOME MATTERS THAT ARE NOT IN EVIDENCE, OR IT MAY INVOLVE A DISCUSSION OF THE LAW. IF THIS WERE DONE IN THE HEARING OF THE JURY, IT WOULD TEND TO CONFUSE THE JURY AND TO DIVERT YOU FROM BEING GUIDED SOLELY BY THE EVIDENCE GIVEN FROM THE WITNESS STAND AND THE LAW AS I GIVE IT TO YOU.

YOU SHOULD NOT CONCERN YOURSELVES WITH ANY SUCH PROCEEDING.

DO NOT CONCERN YOURSELVES DURING THE TRIAL, OR IN YOUR DELIBERATIONS, ABOUT WHAT THE PENALTY MIGHT BE IF YOU SHOULD FIND THE DEFENDANT GUILTY OF THE CHARGES MADE AGAINST HIM. THE

QUESTION OF GUILT AND THE QUESTION OF PENALTY ARE DECIDED SEPARATELY IN THIS TYPE OF CASE. IT IS THE DUTY OF THE JUDGE TO FIX THE PENALTY WHENEVER A DEFENDANT IS FOUND GUILTY OF CRIMES CHARGED IN THIS MATTER. YOU ARE HERE SOLELY FOR THE PURPOSE OF LISTENING TO THE EVIDENCE; AND FROM THAT EVIDENCE ALONE, DETERMINING WHETHER THE CRIMES CHARGED HAVE BEEN COMMITTED, AND IF YOU FIND THAT THE CRIMES CHARGED HAVE BEEN COMMITTED, DETERMINING WHETHER THE DEFENDANT IS GUILTY OR NOT GUILTY OF HAVING COMMITTED THOSE CRIMES.

YOU ARE NOT HERE TO DETERMINE OR TO CONSIDER WHETHER OR NOT THE ALLEGED CRIMES ARE SERIOUS. OF COURSE THEY ARE SERIOUS. ALL CRIMES ARE SERIOUS MATTERS. NOR ARE YOU HERE TO CONSIDER, IN YOUR DELIBERATIONS, WHAT THE CRIMINAL SITUATION IS IN PHILADELPHIA, IN PENNSYLVANIA OR IN THE UNITED STATES. THAT ISSUE IS NOT BEFORE YOU.

I REPEAT, THE ONLY THING YOU ARE HERE TO DETERMINE IS WHETHER FROM THE EVIDENCE, YOU FIND THAT ANY OF THE CRIMES HAVE BEEN COMMITTED; AND IF YOU SO FIND, WHETHER OR NOT THE DEFENDANT IS OR IS NOT GUILTY OF HAVING COMMITTED ANY OF THESE CRIMES, AND THAT IS ALL.

EACH OF YOU HAS A GREAT RESPONSIBILITY AS A JUROR WHICH YOU CANNOT SHIRK. YOU MUST DO YOUR VERY BEST, THROUGHOUT THE TRIAL, TO FULFILL THIS GREAT RESPONSIBILITY.

NOW, I WILL TELL YOU A LITTLE BIT ABOUT OUR TRIAL SCHEDULE. WE TRY AND HOPE TO START PROMPTLY AT 9:30 A.M. AS YOU KNOW, SOMETIMES THAT DOESN'T WORK OUT; BUT I AM GENERALLY GOING TO ASK YOU TO BE HERE AT 9:15 A.M. SO THAT WE CAN GET STARTED ON TIME. HOPEFULLY, WE CAN DO THAT ON MONDAY. WE WILL CONTINUE UNTIL ABOUT 12:30 P.M., AND RECESS FOR LUNCH UNTIL ABOUT TWO O'CLOCK. WE WILL THEN CONTINUE UNTIL APPROXIMATELY 4:30 P.M. DURING THE MORNING AND THE AFTERNOON WE WILL NORMALLY RECESS FOR BRIEF PERIODS AT ABOUT ONE-HOUR INTERVALS. IF ANY OF YOU SHOULD FEEL THE NEED FOR A RECESS AT ANY OTHER TIME, SIMPLY RAISE YOUR HAND AND WE WILL HOLD A RECESS IMMEDIATELY.

I ALSO INSTRUCT YOU TO WEAR YOUR JURORS' BADGES IN A CONSPICUOUS PLACE AT ALL TIMES DURING THE COURSE OF THE TRIAL AND WHILE YOU ARE EITHER IN THE COURTROOM OR IN (THE COURT HOUSE) TO SIMPLY HELP AVOID SOME PROBLEMS THAT MIGHT OTHERWISE ARISE.

WITH THAT, I WILL CLOSE MY OPENING INSTRUCTIONS, AND I TRUST THAT YOU WILL FOLLOW THEM CAREFULLY.

THE NEXT STEP IN THE TRIAL OF THIS CASE, AS I MENTIONED TO YOU EARLIER, IS FOR COUNSEL TO GIVE AN OPENING STATEMENT TELLING YOU WHAT IS EXPECTED TO BE PROVED IN THE TRIAL OF THE CASE.

THE OPENING STATEMENTS, AS WITH ANY OTHER STATEMENTS MADE BY COUNSEL, DO NOT CONSTITUTE EVIDENCE, AND YOU ARE NOT TO CONSIDER THESE OPENING STATEMENTS AS ESTABLISHED FACTS. THE ONLY PURPOSE OF AN OPENING STATEMENT IS TO GIVE YOU A GENERAL OUTLINE OF WHAT THE CASE IS ABOUT SO THAT YOU WILL HAVE A BETTER UNDERSTANDING OF HOW EACH PIECE OF EVIDENCE FITS IN, SUBJECT, OF COURSE, TO YOUR EVALUATION OF THE EVIDENCE AS TO ITS CREDIBILITY, ITS ACCURACY AND THE WEIGHT TO BE GIVEN TO THE EVIDENCE.

YOU ARE NOT TO CONCLUDE THAT COUNSEL WILL, NECESSARILY, BE ABLE TO PROVE WHAT THEY SAY THEY EXPECT TO PROVE; NOR THAT THE COURT WILL, NECESSARILY, PERMIT SUCH EVIDENCE TO BE INTRODUCED.

MR./MS._____ (ATTORNEY FOR THE COMMONWEALTH) YOU MAY ADDRESS THE JURY.

[When Commonwealth's attorney finishes his/her opening statement, ask defense counsel if she/he wishes to address the jury. Counsel may do so, or may reserve his/her opening statement until presentation of defense evidence.]

MISCELLANEOUS JURY INSTRUCTIONS

1. UPON SEPARATING FOR LUNCH

THE COURT: MEMBERS OF THE JURY, WE HAVE NOW REACHED THE LUNCHEON RECESS. I AM GOING TO EXCUSE YOU SO THAT YOU CAN GO AND EAT YOUR LUNCH. I AM ASKING YOU TO RETURN TO THE JURY DELIBERATION ROOM AT _____M. SO THAT WE MAY RESUME THE TRIAL WITHOUT UNDUE DELAY. PLEASE REMEMBER THAT YOU ARE NOT TO DISCUSS THE CASE WITH YOURSELVES OR WITH ANYONE ELSE DURING THE LUNCHEON RECESS. FURTHERMORE YOU ARE TO WEAR YOUR JUROR BADGES IN A CONSPICUOUS PLACE ON YOUR CLOTHING WHILE YOU ARE IN (THE COURTHOUSE) AND YOU ARE TO AVOID READING ANY NEWSPAPER ARTICLES OR LISTENING TO ANY MEDIA COMMUNICATIONS REGARDING THIS CASE.

2. UPON SEPARATING FOR THE DAY DURING THE COURSE OF THE TRIAL

THE COURT: MEMBERS OF THE JURY I AM NOW GOING TO EXCUSE YOU UNTIL TOMORROW MORNING WHEN THE TRIAL WILL RESUME AT_____A.M. PLEASE REMEMBER THAT YOU ARE NOT TO DISCUSS THE CASE AMONG YOURSELVES OR WITH ANYONE ELSE. YOU ARE NOT TO CONDUCT ANY EXPERIMENTS OR MAKE ANY INDIVIDUAL INVESTIGATIONS OF ANY OF THE FACTS OF THE CASE. YOU ARE NOT TO READ ANY NEWSPAPER ACCOUNTS OF THE CASE OR LISTEN TO ANY RADIO OR TELEVISION ACCOUNTS OF THE CASE. PLEASE WEAR YOUR JUROR BADGES IN A CONSPICUOUS PLACE ON YOUR CLOTHING AT ALL TIMES WHILE YOU ARE IN THE (COURT HOUSE).

3. INSTRUCTION TO THE JURORS IF THEY ARE PERMITTED TO SEPARATE AND RETURN HOME AFTER DELIBERATIONS

THE COURT: MEMBERS OF THE JURY IT IS NOW _____M. AND I AM GOING TO PERMIT YOU TO SEPARATE AND RETURN HOME AND RETURN HERE TOMORROW AT _____ M. TO RESUME YOUR DELIBERATIONS. PLEASE REMEMBER THAT YOU ARE NOT TO DISCUSS THIS CASE WITH ANYONE OUTSIDE OF THE JURY DELIBERATION ROOM. YOU ARE TO AVOID READING ANY NEWSPAPER ACCOUNTS OR LISTENING TO ANY RADIO OR TELEVISION REPORTS OF THIS MATTER. YOU ARE NOT TO CONDUCT ANY

INDIVIDUAL INVESTIGATION OF THE FACTS OF THIS CASE NOR ARE YOU TO MAKE ANY ATTEMPT TO VISIT THE LOCALE OF THE INCIDENT. IN THE EVENT THAT ANYONE ATTEMPTS TO INTERFERE WITH YOU, YOU ARE TO REPORT THAT MATTER TO MYSELF OR ONE OF THE COURT OFFICERS IMMEDIATELY. ALSO REMEMBER THAT YOU MAY NOT DISCUSS THIS CASE WITH YOUR FELLOW JURORS OUTSIDE OF THE JURY DELIBERATION ROOM SO CEASE ALL DISCUSSIONS OF THIS CASE UNTIL YOU RETURN TO THE JURY DELIBERATION ROOM TOMORROW AT _____.M. FURTHERMORE, YOU ARE NOT TO RESUME YOUR DELIBERATIONS TOMORROW UNTIL YOU HAVE BEEN SPECIFICALLY INSTRUCTED TO DO SO BY THE CRIER.

[INCLUDE ANY OTHER ADMONISHMENTS THAT ARE NECESSARY BECAUSE OF THE PARTICULAR FACTS OF THE CASE.]

INSTRUCTIONS TO BE GIVEN TO THE JURY JUST PRIOR TO CLOSING ARGUMENTS

THE COURT: LADIES AND GENTLEMEN OF THE JURY, NOW YOU HAVE HEARD ALL OF THE EVIDENCE WHICH IS TO BE PRESENTED IN THIS CASE.

THE NEXT STEP IS FOR COUNSEL TO GIVE YOU THEIR CLOSING ARGUMENTS. EVEN THOUGH THOSE ARGUMENTS DO NOT CONSTITUTE EVIDENCE, YOU SHOULD CONSIDER THEM VERY CAREFULLY.

IN THEIR ARGUMENT, COUNSEL WILL CALL TO YOUR ATTENTION THE EVIDENCE WHICH THEY CONSIDER MATERIAL AND WILL ASK YOU TO DRAW CERTAIN INFERENCES FROM THAT EVIDENCE.

PLEASE KEEP IN MIND, HOWEVER, THAT YOU ARE NOT BOUND BY THEIR RECOLLECTION OF THE EVIDENCE. IT IS YOUR RECOLLECTION OF THE EVIDENCE AND YOUR RECOLLECTION ALONE WHICH MUST GUIDE YOUR DELIBERATIONS. IF THERE IS A DISCREPANCY BETWEEN COUNSEL'S RECOLLECTION AND YOUR RECOLLECTION, YOU ARE BOUND BY YOUR OWN RECOLLECTION. NOR ARE YOU LIMITED IN YOUR CONSIDERATION OF THE EVIDENCE TO THAT WHICH IS MENTIONED BY COUNSEL. YOU MUST CONSIDER ALL OF THE EVIDENCE WHICH YOU CONSIDER MATERIAL TO THE ISSUES INVOLVED.

TO THE EXTENT THAT THE INFERENCES WHICH COUNSEL ASK YOU TO DRAW ARE SUPPORTED BY THE EVIDENCE AND APPEAL TO YOUR REASON AND JUDGMENT, YOU MAY CONSIDER THEM IN YOUR DELIBERATIONS.

COUNSEL MAY ALSO CALL TO YOUR ATTENTION CERTAIN PRINCIPLES OF LAW IN THEIR ARGUMENTS. PLEASE REMEMBER, HOWEVER, THAT YOU ARE NOT BOUND BY ANY PRINCIPLES OF LAW MENTIONED BY COUNSEL YOU MUST APPLY THE LAW IN WHICH YOU ARE INSTRUCTED BY ME, AND ONLY THAT LAW, TO THE FACTS AS YOU FIND THEM.

UNDER THE RULES OF CRIMINAL PROCEDURE OF THE SUPREME COURT OF PENNSYLVANIA THE LAWYER(S) FOR THE DEFENDANT(S) MAKES (MAKE) HIS/HER/THEIR CLOSING ARGUMENT(S) FIRST, FOLLOWED BY THE CLOSING ARGUMENT BY THE DISTRICT ATTORNEY. THEN I WILL INSTRUCT YOU IN THE LAW WHICH YOU WILL APPLY TO THE FACTS AS YOU FIND THEM.

JURY CHARGE FOLLOWING COMPLETION OF THE EVIDENCE

THE CRIER: ANYONE WISHING TO LEAVE THE COURTROOM, PLEASE DO SO NOW. NO ONE WILL BE PERMITTED TO ENTER OR LEAVE DURING THE JUDGE'S CHARGE TO THE JURY.

THE COURT: MEMBERS OF THE JURY, NOW THAT ALL OF THE EVIDENCE HAS BEEN PRESENTED AND THE ATTORNEYS FOR BOTH SIDES HAVE MADE THEIR CLOSING ARGUMENTS, IT BECOMES MY DUTY TO INSTRUCT YOU IN THE LAW WHICH YOU WILL APPLY TO THE FACTS AS YOU FIND THEM IN REACHING YOUR VERDICT.

IN DOING THIS, I AM GOING TO BE READING FROM A WRITTEN CHARGE, AS ALMOST ALL JUDGES DO, TO MAKE CERTAIN THAT WHAT I'M TELLING YOU IS IN ACCORDANCE WITH THE LAW AND IS STANDARD AND UNIFORM. I ADVISE YOU OF THAT BECAUSE THERE IS A VERY TYPICAL AND UNDERSTANDABLE TENDENCY NOT TO PAY ATTENTION TO ANYBODY WHO IS READING FROM ANYTHING. I AM NOT ABLE, AS THE ATTORNEYS ARE, TO PRESENT INTERESTING ARGUMENTS WITHOUT READING. I'M NOT ABLE TO DO IT, BECAUSE IT IS VERY IMPORTANT THAT THE LAW THAT I NOW INSTRUCT YOU ABOUT IS ACCURATE AND IS IN ACCORDANCE WITH THE LAW OF THIS COMMONWEALTH.

I GIVE YOU THIS AS A WARNING, AND I ASK YOU TO PAY ATTENTION, EVEN THOUGH I WILL BE READING TO YOU; AND I THINK YOU CAN DO THAT AND YOU CAN PAY ATTENTION IF YOU UNDERSTAND THAT WHAT I'M ABOUT TO SAY TO YOU FOR PROBABLY THE NEXT HALF AN HOUR, PERHAPS A LITTLE LESS, PROVIDES YOU WITH THE TOOLS THAT YOU WILL NEED TO MAKE YOUR DECISION IN THIS CASE. IF YOU THINK OF IT IN THOSE TERMS, I THINK YOU WILL UNDERSTAND THE IMPORTANCE OF

WHAT I AM ABOUT TO SAY, AND THE NECESSITY FOR YOU TO PAY ATTENTION TO WHAT I HAVE TO SAY.

AS I HAVE SAID, YOU WILL APPLY ONLY THE LAW IN WHICH I INSTRUCT YOU. YOU WILL NOT APPLY ANY OTHER LAW WHICH ANY OF YOU KNOW, OR THINK YOU KNOW. IF YOU WISH INSTRUCTIONS IN THE LAW IN ADDITION TO THOSE GIVEN TO YOU BY ME, OR IF YOU WISH CLARIFICATION OF THOSE INSTRUCTIONS, YOU MAY, THROUGH YOUR FOREMAN OR FORELADY, SEND AN APPROPRIATE REQUEST.

AS I MENTIONED TO YOU AT THE OUTSET, IT IS MY RESPONSIBILITY TO DECIDE ALL QUESTIONS OF LAW, AND YOU MUST ACCEPT AND FOLLOW MY RULINGS AND INSTRUCTIONS ON MATTERS OF LAW. I AM NOT, HOWEVER, THE JUDGE OF THE FACTS. IT IS NOT FOR ME TO DECIDE WHAT ARE THE TRUE FACTS CONCERNING THE CHARGES AGAINST THE DEFENDANT. YOU, THE JURY, ARE THE SOLE AND ONLY JUDGES OF THE FACTS. IT IS YOUR RESPONSIBILITY TO WEIGH THE EVIDENCE, AND BASED ON THAT EVIDENCE AND THE LOGICAL INFERENCES WHICH FLOW FROM THAT EVIDENCE, TO FIND THE FACTS, TO APPLY THE RULES OF LAW WHICH I GIVE YOU TO THE FACTS AS YOU FIND THEM, AND THEN TO DECIDE WHETHER THE DEFENDANT HAS OR HAS NOT BEEN PROVEN GUILTY OF ANY OF THE CHARGES.

IN DETERMINING THE FACTS, YOU ARE TO CONSIDER ONLY THE EVIDENCE WHICH HAS BEEN PRESENTED IN COURT, AND THE LOGICAL INFERENCES WHICH ARE DERIVED FROM THAT EVIDENCE. YOU ARE NOT TO RELY UPON SUPPOSITION OR GUESS ON ANY MATTERS WHICH ARE NOT IN EVIDENCE. YOU SHOULD NOT REGARD AS TRUE ANY EVIDENCE WHICH YOU FIND TO BE INCREDIBLE, EVEN IF IT IS UNCONTRADICTED.

YOUR DETERMINATION OF THE FACTS SHOULD NOT BE BASED ON EMPATHY FOR OR PREJUDICE AGAINST EITHER THE DEFENDANT OR THE VICTIM, NOR ON WHICH ATTORNEY MADE THE BETTER SPEECH, NOR ON WHICH ATTORNEY YOU LIKE BETTER.

IN MY INSTRUCTIONS TO YOU I MAY, BUT IF I DO AT ALL IT WILL ONLY BE TO A VERY LIMITED EXTENT, I MAY REFER TO SOME PARTICULAR EVIDENCE. I CERAINLY DON'T PROPOSE TO REFER TO ALL OF THE EVIDENCE, BUT WILL LEAVE THIS TO YOUR RECOLLECTION; FOR AS I HAVE SAID, IT IS YOUR RECOLLECTION, AND YOURS ALONE THAT GOVERNS. YOU ARE NOT BOUND BY MY RECOLLECTION, NOR BY THE RECOLLECTION OF COUNSEL IN THEIR ARGUMENTS TO YOU. NOR ARE YOU TO CONCLUDE THAT ANY EVIDENCE WHICH I CALL TO YOUR ATTENTION OR WHICH COUNSEL HAS CALLED TO YOUR ATTENTION IS THE ONLY EVIDENCE

WHICH YOU SHOULD CONSIDER. IT IS YOUR RESPONSIBILITY TO CONSIDER ALL THE EVIDENCE THAT YOU BELIEVE MATERIAL IN DELIBERATING UPON YOUR VERDICT.

PRESUMPTION OF INNOCENCE

A FUNDAMENTAL PRINCIPLE OF OUR SYSTEM OF CRIMINAL LAW IS THAT A DEFENDANT IS PRESUMED TO BE INNOCENT. THE MERE FACT THAT HE WAS ARRESTED AND IS CHARGED WITH CRIMES IS NOT EVIDENCE OF HIS GUILT. FURTHERMORE, A DEFENDANT IS PRESUMED TO REMAIN INNOCENT THROUGHOUT THE TRIAL, UNLESS AND UNTIL YOU CONCLUDE, BASED UPON CAREFUL AND IMPARTIAL CONSIDERATION OF THE EVIDENCE, THAT THE COMMONWEALTH HAS PROVEN HIM GUILTY BEYOND A REASONABLE DOUBT OF THE CHARGES MADE AGAINST HIM.

IT IS NOT THE DEFENDANT'S BURDEN TO PROVE THAT HE IS NOT GUILTY. INSTEAD, IT IS THE COMMONWEALTH THAT ALWAYS HAS THE BURDEN OF PROVING EACH AND EVERY ELEMENT OF THE CRIMES CHARGED, AND THAT THE DEFENDANT IS GUILTY OF THOSE CRIMES BEYOND A REASONABLE DOUBT.

A PERSON ACCUSED OF A CRIME IS NOT REQUIRED TO PRESENT EVIDENCE OR TO PROVE ANYTHING IN HIS OWN DEFENSE.

IF THE EVIDENCE PRESENTED FAILS TO MEET THE COMMONWEALTH'S BURDEN, THEN YOUR VERDICT MUST BE "NOT GUILTY." ON THE OTHER HAND, IF THE EVIDENCE DOES PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT IS GUILTY OF THE CRIMES CHARGED, THEN YOUR VERDICT SHOULD BE "GUILTY."

REASONABLE DOUBT

ALTHOUGH THE COMMONWEALTH HAS THE BURDEN OF PROVING THAT THE DEFENDANT IS GUILTY, THIS DOES NOT MEAN THAT THE COMMONWEALTH MUST PROVE ITS CASE BEYOND ALL DOUBT, OR TO A MATHEMATICAL CERTAINTY; NOR MUST IT DEMONSTRATE THE COMPLETE IMPOSSIBILITY OF INNOCENCE.

A REASONABLE DOUBT IS A DOUBT THAT WOULD CAUSE A REASONABLY CAREFUL AND SENSIBLE PERSON TO PAUSE, HESITATE OR REFRAIN FROM ACTING UPON A MATTER OF HIGHEST IMPORTANCE IN HIS

OR HER OWN AFFAIRS, OR TO HIS OR HER OWN INTERESTS. A REASONABLE DOUBT MUST FAIRLY ARISE OUT OF THE EVIDENCE THAT WAS PRESENTED, OR OUT OF THE LACK OF EVIDENCE PRESENTED WITH RESPECT TO SOME ELEMENT OF EACH OF THE CRIMES CHARGED.

A REASONABLE DOUBT MUST BE A REAL DOUBT. IT MAY NOT BE AN IMAGINED ONE. NOR MAY IT BE A DOUBT MANUFACTURED TO AVOID CARRYING OUT AN UNPLEASANT DUTY.

SO TO SUMMARIZE, YOU MAY NOT FIND THE DEFENDANT GUILTY BASED UPON A MERE SUSPICION OF GUILT. THE COMMONWEALTH HAS THE BURDEN OF PROVING THE DEFENDANT GUILTY BEYOND A REASONABLE DOUBT. IF THE COMMONWEALTH HAS MET THAT BURDEN, THEN THE DEFENDANT IS NO LONGER PRESUMED TO BE INNOCENT, AND YOU SHOULD FIND HIM GUILTY. ON THE OTHER HAND, IF THE COMMONWEALTH HAS NOT MET ITS BURDEN, THEN YOU MUST FIND HIM NOT GUILTY.

WEIGHT OF TESTIMONY

YOU MUST CONSIDER AND WEIGH THE TESTIMONY OF EACH WITNESS AND GIVE IT SUCH WEIGHT AS, IN YOUR JUDGMENT, IT IS FAIRLY ENTITLED TO RECEIVE. THE MATTER OF THE CREDIBILITY OF A WITNESS; THAT IS, WHETHER HIS OR HER TESTIMONY IS BELIEVABLE AND ACCURATE, IN WHOLE OR IN PART, IS SOLELY FOR YOUR DETERMINATION. I WILL, MENTION SOME OF THE FACTORS WHICH MIGHT BEAR ON THAT DETERMINATION. WHETHER THE WITNESS HAS ANY INTEREST IN THE OUTCOME OF THE CASE, OR HAS FRIENDSHIP OR ANIMOSITY TOWARD OTHER PERSONS CONCERNED IN THE CASE; THE BEHAVIOR OF THE WITNESS ON THE WITNESS STAND, AND HIS OR HER DEMEANOR, HIS OR HER MANNER OF TESTIFYING AND WHETHER HE OR SHE SHOWS ANY BIAS OR PREJUDICE WHICH MIGHT COLOR HIS OR HER TESTIMONY; THE ACCURACY OF HIS OR HER MEMORY AND RECOLLECTION; HIS OR HER ABILITY AND OPPORTUNITY TO ACQUIRE KNOWLEDGE OF OR TO OBSERVE THE MATTERS CONCERNING WHICH HE OR SHE TESTIFIES; THE CONSISTENCY OR INCONSISTENCY OF HIS OR HER TESTIMONY, AS WELL AS ITS REASONABLENESS OR UNREASONABLENESS IN LIGHT OF ALL OF THE EVIDENCE IN THE CASE.

DEFENDANT TESTIMONY (IF APPLICABLE)

THE DEFENDANT TOOK THE STAND AS A WITNESS IN THIS CASE. IN CONSIDERING THE DEFENDANT'S TESTIMONY, YOU ARE TO FOLLOW THE

GENERAL INSTRUCTIONS I GAVE YOU FOR JUDGING THE CREDIBILITY OF ANY WITNESS. YOU SHOULD NOT DISBELIEVE THE DEFENDANT'S TESTIMONY MERELY BECAUSE HE IS THE DEFENDANT. IN WEIGHING HIS TESTIMONY, HOWEVER, YOU MAY CONSIDER THE FACT THAT HE HAS A VITAL INTEREST IN THE OUTCOME OF THIS TRIAL. YOU MAY TAKE THE DEFENDANT'S INTEREST INTO ACCOUNT ALONG WITH ALL OTHER FACTS AND CIRCUMSTANCES BEARING ON CREDIBILITY IN DECIDING WHAT WEIGHT HIS TESTIMONY DESERVES.

FALSUS IN UNO, FALSUS IN OMNIBUS

IF YOU CONCLUDE THAT ONE OF THE WITNESSES TESTIFIED FALSELY AND DID SO INTENTIONALLY, ABOUT ANY FACT WHICH IS NECESSARY TO YOUR DECISION IN THIS CASE, THEN FOR THAT REASON ALONE YOU MAY, IF YOU WISH, DISREGARD EVERYTHING THAT WITNESS SAID. HOWEVER, YOU ARE NOT REQUIRED TO DISREGARD EVERYTHING THAT THE WITNESS SAID FOR THIS REASON: IT IS ENTIRELY POSSIBLE THAT THE WITNESS TESTIFIED FALSELY AND INTENTIONALLY SO IN ONE RESPECT, BUT TRUTHFULLY ABOUT EVERYTHING ELSE. IF YOU FIND THAT TO BE THE SITUATION, THEN YOU MAY ACCEPT THAT PART OF HIS OR HER TESTIMONY WHICH YOU FIND TO BE TRUTHFUL AND WHICH YOU BELIEVE, AND YOU MAY REJECT THAT PART WHICH YOU FIND TO BE FALSE AND NOT WORTHY OF BELIEF.

CONFLICTING TESTIMONY

IF YOU FIND THERE WERE CONFLICTS IN THE TESTIMONY YOU, THE JURY, HAVE THE DUTY OF DECIDING WHICH TESTIMONY TO BELIEVE. BUT YOU SHOULD FIRST TRY TO RECONCILE, THAT IS, FIT TOGETHER ANY CONFLICTS IN THE TESTIMONY IF YOU CAN FAIRLY DO SO. DISCREPANCIES IN AND CONFLICTS BETWEEN THE TESTIMONY OF DIFFERENT WITNESSES MAY OR MAY NOT CAUSE YOU TO DISBELIEVE SOME OR ALL OF THEIR TESTIMONY. REMEMBER THAT TWO OR MORE PERSONS WITNESSING AN INCIDENT MAY SEE OR HEAR IT HAPPEN DIFFERENTLY. ALSO, IT IS NOT UNCOMMON FOR A WITNESS TO BE INNOCENTLY MISTAKEN IN HIS OR HER RECOLLECTION OF HOW SOMETHING HAPPENED. IF YOU CANNOT RECONCILE A CONFLICT IN THE TESTIMONY, IT IS UP TO YOU TO DECIDE WHICH TESTIMONY, IF ANY, TO BELIEVE, AND WHICH TO REJECT AS UNTRUE OR INACCURATE. IN MAKING THIS DECISION, CONSIDER WHETHER THE CONFLICT INVOLVES A MATTER OF IMPORTANCE TO YOUR DECISION IN THIS CASE, OR MERELY SOME UNIMPORTANT DETAIL, AND WHETHER

THE CONFLICT IS BROUGHT ABOUT BY AN INNOCENT MISTAKE OR BY AN INTENTIONAL FALSEHOOD.

YOU SHOULD ALSO KEEP IN MIND THE OTHER FACTORS ALREADY DISCUSSED WHICH GO INTO DECIDING WHETHER OR NOT TO BELIEVE A PARTICULAR WITNESS.

IN DECIDING WHICH OF CONFLICTING TESTIMONY TO BELIEVE, YOU SHOULD NOT NECESSARILY BE SWAYED BY THE NUMBER OF WITNESSES ON EITHER SIDE. YOU SHOULD CONSIDER WHETHER THE WITNESSES APPEAR TO BE BIASED OR UNBIASED, WHETHER THEY ARE INTERESTED OR DISINTERESTED PERSONS, AND YOU SHOULD CONSIDER ALL OTHER FACTORS WHICH GO TO THE RELIABILITY OF THEIR TESTIMONY.

THE IMPORTANT THING IS THE QUALITY OF THE TESTIMONY OF EACH WITNESS. YOU SHOULD ALSO CONSIDER THE EXTENT TO WHICH CONFLICTING TESTIMONY IS SUPPORTED BY OTHER EVIDENCE.

DIRECT & CIRCUMSTANTIAL EVIDENCE

EVIDENCE MAY BE OF TWO DIFFERENT TYPES IN A CRIMINAL CASE. ON THE ONE HAND, THERE IS DIRECT EVIDENCE, WHICH IS TESTIMONY BY A WITNESS FROM HIS OR HER OWN PERSONAL KNOWLEDGE, SUCH AS SOMETHING HE OR SHE SAW OR HEARD HIMSELF OR HERSELF. THE OTHER TYPE IS CIRCUMSTANTIAL EVIDENCE, WHICH IS TESTIMONY ABOUT FACTS WHICH POINT TO THE EXISTENCE OF OTHER FACTS WHICH ARE IN QUESTION.

SUPPOSE YOU RETIRED ON A WINTER NIGHT, AND THE STREETS WERE CLEAR. WHEN YOU AWOKE, SNOW WAS ON THE STREET AND ON THE SIDEWALKS, AND YOU SAW FOOTSTEPS IN THE SNOW. YOU WOULD PROPERLY CONCLUDE THAT SNOW HAD FALLEN DURING THE NIGHT, ALTHOUGH YOU DIDN'T SEE IT SNOW, AND THAT SOMEBODY HAD WALKED IN THE SNOW, THOUGH YOU DIDN'T SEE ANYBODY. THAT IS AN EXAMPLE OF CIRCUMSTANTIAL EVIDENCE. WHETHER OR NOT CIRCUMSTANTIAL EVIDENCE IS PROOF OF OTHER FACTS IN QUESTION DEPENDS, IN PART, ON THE APPLICATION OF COMMON SENSE AND HUMAN EXPERIENCE.

IN DECIDING WHETHER OR NOT TO ACCEPT CIRCUMSTANTIAL EVIDENCE AS PROOF OF THE FACTS IN QUESTION, YOU MUST BE SATISFIED, FIRST, THAT THE TESTIMONY OF THE WITNESS WHO IS PRESENTING THE CIRCUMSTANTIAL EVIDENCE IS TRUTHFUL AND ACCURATE; AND SECOND,

THAT THE EXISTENCE OF THE FACTS THE WITNESS TESTIFIES TO LEADS TO THE CONCLUSION THAT THE FACTS IN QUESTION ALSO HAPPENED.

[AT THIS POINT REFER TO SUGGESTED STANDARD CRIMINAL JURY INSTRUCTIONS FOR RELEVANT POINTS RE EVIDENCE, WITNESSES AND TESTIMONY, CULPABILITY AND JUSTIFICATION.]

CHANGE ON SPECIFIC OFFENSES

THE DEFENDANT IN THIS CASE, (NAME) IS ON TRIAL BEFORE YOU ON INFORMATION CHARGING HIM/HER WITH (STATE CRIMES). TO EACH OF THESE CHARGES THE DEFENDANT HAS PLED NOT GUILTY AND ELECTED TO BE TRIED BY A JURY.

I HAVE ALREADY INSTRUCTED YOU CONCERNING THE MANNER IN WHICH YOU ARE TO CONSIDER THE EVIDENCE AND THE GENERAL RULES OF LAW CONCERNING THE SAME. I WILL NOW INSTRUCT YOU ON THE SPECIFIC CHARGES MADE AGAINST THE DEFENDANT.

[INCLUDE ANY RELEVANT MATERIAL BELOW.]

CRIMINAL HOMICIDE-INTRODUCTION[2]

(1) THE DEFENDANT IS CHARGED WITH TAKING THE LIFE OF_____ BY CRIMINAL HOMICIDE. THERE ARE (SIX)(____) POSSIBLE VERDICTS THAT YOU MIGHT REACH IN THIS CASE: NOT GUILTY OR GUILTY OF ONE OF THE FOLLOWING CRIMES (MURDER OF THE FIRST DEGREE) (MURDER OF THE SECOND DEGREE) (MURDER OF THE THIRD DEGREE) (VOLUNTARY MANSLAUGHTER) (INVOLUNTARY MANSLAUGHTER).

(2) BEFORE DEFINING EACH OF THESE CRIMES, I SHALL TELL YOU ABOUT MALICE, WHICH IS AN ELEMENT OF MURDER BUT NOT OF MANSLAUGHTER. A PERSON WHO KILLS MUST ACT WITH MALICE TO BE GUILTY OF ANY DEGREE OF MURDER. THE WORD "MALICE," AS I AM USING IT, HAS A SPECIAL LEGAL MEANING. IT DOES NOT MEAN SIMPLY HATRED, SPITE OR ILL WILL. MALICE IS A SHORTHAND WAY OF REFERRING TO ANY

[2]This material is taken from the *Suggested Standard Jury Instructions* published by the Pennsylvania Bar Institute 15.2501 A through 15.2504. It is reproduced with the permission of the PBI. It is recommended that you consult the complete Volume of Suggested Standard Instructions for important notes and comments.

OF THREE DIFFERENT MENTAL STATES THAT THE LAW REGARDS AS BEING BAD ENOUGH TO MAKE A KILLING MURDER. THUS, A KILLING IS WITH MALICE IF THE KILLER ACTS WITH: FIRST, AN INTENT TO KILL, OR SECOND, AN INTENT TO INFLICT SERIOUS BODILY HARM; OR THIRD, (A WICKEDNESS OF DISPOSITION, HARDNESS OF HEART, CRUELTY, RECKLESSNESS OF CONSEQUENCES AND A MIND REGARDLESS OF SOCIAL DUTY INDICATING AN UNJUSTIFIED DISREGARD FOR THE PROBABILITY OF DEATH OR GREAT BODILY HARM AND AN EXTREME INDIFFERENCE TO THE VALUE OF HUMAN LIFE) (A CONSCIOUS DISREGARD OF AN UNJUSTIFIED AND EXREMELY HIGH RISK THAT HIS ACTIONS MIGHT CAUSE DEATH OR SERIOUS BODILY HARM).

(3) THERE IS A SPECIAL RULE FOR HOW MALICE CAN BE PROVEN FOR SECOND DEGREE MURDER. I SHALL TELL YOU ABOUT IT WHEN I DEFINE SECOND DEGREE MURDER.

(4) ON THE OTHER HAND, A KILLING IS WITHOUT MALICE IF THE KILLER ACTS UNDER CIRCUMSTANCES THAT REDUCE THE KILLING TO VOLUNTARY MANSLAUGHTER. I SHALL TELL YOU WHAT THOSE CIRCUMSTANCES ARE WHEN I DEFINE VOLUNTARY MANSLAUGHTER.

(5) A KILLING IS (LIKEWISE) WITHOUT MALICE IF THE KILLER ACTS WITH LAWFUL JUSTIFICATION OR EXCUSE. LAWFUL JUSTIFICATION OR EXCUSE NOT ONLY NEGATES MALICE BUT ALSO IS A COMPLETE DEFENSE TO ANY CHARGE OF CRIMINAL HOMICIDE. I SHALL SAY MORE ABOUT THIS WHEN I CHARGE YOU ON THE DEFENSE OF (SELF DEFENSE) (_____).

CRIMINAL HOMICIDE-FINDING LESSER TYPE

(1) I HAVE DEFINED THE ELEMENTS OF THE (FIVE)(_____)TYPES OF CRIMINAL HOMICIDE THAT YOU MIGHT POSSIBLY FIND IN THIS BEGINNING WITH THE MOST SERIOUS. THEY ARE IN ORDER OF SERIOUSNESS (FIRST DEGREE MURDER) (SECOND DEGREE MURDER) (THIRD DEGREE MURDER) (VOLUNTARY MANSLAUGHTER) (INVOLUNTARY MANSLAUGHTER). YOU HAVE THE RIGHT TO BRING IN A VERDICT FINDING THE DEFENDANT NOT GUILTY OR FINDING HIM GUILTY OF ONE OF THESE TYPES OF CRIMINAL HOMICIDE.

(2) IT MAY HELP YOU REMEMBER EACH TYPE OF CRIMINAL HOMICIDE IF I REVIEW SOME HIGHLIGHTS. (MURDER REQUIRES MALICE, MANSLAUGHTER DOES NOT. FIRST DEGREE MURDER REQUIRES A SPECIFIC INTENT TO KILL. SECOND DEGREE MURDER IS FELONY MURDER. THIRD DEGREE MURDER IS ANY OTHER MURDER. VOLUNTARY MANSLAUGHTER IS

BASICALLY AN INTENTIONAL KILLING FOR WHICH MALICE IS NOT PROVEN BECAUSE OF [PASSION AND PROVOCATION. AN UNREASONABLE MISTAKEN BELIEF IN JUSTIFYING CIRCUMSTANCES]. INVOLUNTARY MANSLAUGHTER REQUIRES A RECKLESS OR GROSSLY NEGLIGENT KILLING.)(___)

CRIMINAL HOMICIDE-CAUSATION

(1) YOU CANNOT FIND THAT THE DEFENDANT KILLED ____ UNLESS YOU ARE SATISFIED BEYOND A REASONABLE DOUBT THAT THE DEFENDANT'S CONDUCT WAS A DIRECT CAUSE OF HIS DEATH.

(2) IN ORDER TO BE A DIRECT CAUSE OF A DEATH, A PERSON'S CONDUCT MUST BE A DIRECT AND SUBSTANTIAL FACTOR IN BRINGING ABOUT THE DEATH. THERE CAN BE MORE THAN ONE DIRECT CAUSE OF A DEATH. A DEFENDANT WHO IS A DIRECT CAUSE OF A DEATH MAY BE CRIMINALLY LIABLE EVEN THOUGH THERE ARE OTHER DIRECT CAUSES.

(3) A DEFENDANT IS NOT A DIRECT CAUSE OF A DEATH IF (THE ACTIONS OF THE VICTIM) (THE ACTIONS OF A THIRD PERSON) (THE OCCURRENCE OF ANOTHER EVENT) (_____) PLAYS SUCH AN INDEPENDENT, IMPORTANT AND OVERRIDING ROLE IN BRINGING ABOUT THE DEATH, COMPARED WITH THE ROLE OF THE DEFENDANT, THAT THE DEFENDANT'S CONDUCT DOES NOT AMOUNT TO A DIRECT AND SUBSTANTIAL FACTOR IN BRINGING ABOUT THE DEATH.

(4) A DEFENDANT'S CONDUCT MAY BE THE DIRECT CAUSE OF A DEATH EVEN THOUGH HIS CONDUCT WAS NOT THE LAST OR IMMEDIATE CAUSE OF THE DEATH. THUS A DEFENDANT'S CONDUCT MAY BE THE DIRECT CAUSE OF A DEATH IF IT INITIATES AN UNBROKEN CHAIN OF EVENTS LEADING TO THE DEATH OF THE VICTIM.

(5) A DEFENDANT WHOSE CONDUCT IS A DIRECT CAUSE OF A DEATH CANNOT AVOID LIABILITY ON THE GROUNDS THAT THE VICTIM'S PRE-EXISTING PHYSICAL INFIRMITIES CONTRIBUTED TO HIS DEATH.

HOMICIDE BY MISADVENTURE

(1) IT FOLLOWS FROM MY DEFINITIONS OF THE VARIOUS TYPES OF CRIMINAL HOMICIDE THAT A KILLING WHICH IS ACCIDENTAL AND THAT OCCURS WHILE THE SLAYER IS ACTING LAWFULLY AND WITHOUT ANY CARELESS OR RECKLESS CONDUCT CAN NEVER AMOUNT TO A CRIMINAL

HOMICIDE. THE SLAYER IN SUCH A CASE HAS THE DEFENSE OF EXCUSABLE HOMICIDE BY MISADVENTURE. THE DEFENDANT IN THE PRESENT CASE ASSERTS THAT DEFENSE.

(2) THERE ARE THREE ELEMENTS TO THE DEFENSE OF EXCUSABLE HOMICIDE BY MISADVENTURE: FIRST, THAT THE ACT RESULTING IN DEATH WAS LAWFUL; SECOND, THAT THE ACT WAS DONE WITH REASONABLE CARE AND DUE REGARD FOR THE LIVES AND PERSONS OF OTHERS; AND THIRD, THAT THE KILLING WAS ACCIDENTAL AND NOT INTENTIONAL, OR WAS WITHOUT UNLAWFUL INTENT, OR WAS WITHOUT EVIL DESIGN OR INTENTION ON THE PART OF THE DEFENDANT.

(3) ALL THREE ELEMENTS MUST BE PRESENT FOR THE DEFENSE OF HOMICIDE BY MISADVENTURE TO BE AVAILABLE TO A DEFENDANT. [THUS, EVEN THOUGH A KILLING IS UNINTENTIONAL, THE DEFENSE IS NOT AVAILABLE WHERE IT IS THE RESULT OR INCIDENT OF AN UNLAWFUL ACT SUCH AS (POINTING A GUN AT ANOTHER PERSON IN A WAY THAT CONSTITUTES A CRIME UNDER PENNSYLVANIA LAW) (UNLAWFULLY STRIKING ANOTHER WITH AN INTENT TO HURT, ALTHOUGH NOT WITH AN INTENT TO KILL) (DRIVING AN AUTOMOBILE AT AN UNLAWFUL RATE OF SPEED)(_____).

(4) THE COMMONWEALTH HAS THE BURDEN OF DISPROVING THE DEFENSE OF EXCUSABLE HOMICIDE BY MISADVENTURE. THUS YOU CANNOT CONVICT THE DEFENDANT OF ANY TYPE OF CRIMINAL HOMICIDE UNLESS YOU ARE SATISFIED BEYOND A REASONABLE DOUBT THAT ONE OR MORE ELEMENTS OF THAT DEFENSE ARE LACKING.

FIRST DEGREE MURDER

(1) FIRST DEGREE MURDER IS A MURDER IN WHICH THE KILLER HAS THE SPECIFIC INTENT TO KILL. YOU MAY FIND THE DEFENDANT GUILTY OF FIRST DEGREE MURDER IF YOU ARE SATISFIED THAT THE FOLLOWING THREE ELEMENTS HAVE BEEN PROVEN BEYOND A REASONABLE DOUBT:

FIRST, THAT _____ IS DEAD;
SECOND, THAT THE DEFENDANT KILLED HIM; AND
THIRD, THAT THE DEFENDANT DID SO WITH THE SPECIFIC INTENT TO KILL AND WITH MALICE.

(2) A PERSON HAS THE SPECIFIC INTENT TO KILL IF HE HAS A FULLY FORMED INTENT TO KILL AND IS CONSCIOUS OF HIS OWN INTENTION. AS MY EARLIER DEFINITION OF MALICE INDICATES, A KILLING BY A PERSON WHO HAS THE SPECIFIC INTENT TO KILL IS A KILLING WITH MALICE (PROVIDED THAT IT IS ALSO WITHOUT [CIRCUMSTANCES REDUCING THE KILLING TO VOLUNTARY MANSLAUGHTER] [OR] [ANY LAWFUL JUSTIFICATION OR EXCUSE]).

(3) STATED DIFFERENTLY, A KILLING IS WITH SPECIFIC INTENT TO KILL IF IT IS (WILLFUL, DELIBERATE AND PREMEDITATED) (BY MEANS OF POISON) (BY LYING IN WAIT).

(4) THE SPECIFIC INTENT TO KILL (INCLUDING THE PREMEDITATION) NEEDED FOR FIRST DEGREE MURDER DOES NOT REQUIRE PLANNING OR PREVIOUS THOUGHT OR ANY PARTICULAR LENGTH OF TIME. IT CAN OCCUR QUICKLY. ALL THAT IS NECESSARY IS THAT THERE BE TIME ENOUGH SO THAT THE DEFENDANT CAN AND DOES FULLY FORM AN INTENT TO KILL AND IS CONSCIOUS OF THAT INTENTION.

(5) WHEN DECIDING WHETHER THE DEFENDANT HAD THE SPECIFIC INTENT TO KILL YOU SHOULD CONSIDER ALL THE EVIDENCE REGARDING HIS WORDS AND CONDUCT AND THE ATTENDING CIRCUMSTANCES THAT MAY SHOW HIS STATE OF MIND, INCLUDING _____. (IF YOU BELIEVE THAT THE DEFENDANT INTENTIONALLY USED A DEADLY WEAPON ON A VITAL PART OF THE VICTIM'S BODY, YOU MAY REGARD THAT AS AN ITEM OF CIRCUMSTANTIAL EVIDENCE FROM WHICH YOU MAY, IF YOU CHOOSE, INFER THAT THE DEFENDANT HAD THE SPECIFIC INTENT TO KILL.)

SECOND DEGREE MURDER

(1) SECOND DEGREE MURDER IS OFTEN CALLED FELONY MURDER BECAUSE IT INVOLVES A KILLING INCIDENTAL TO A FELONY. YOU MAY FIND THE DEFENDANT GUILTY OF SECOND DEGREE MURDER IF YOU ARE SATISFIED THAT THE FOLLOWING FIVE ELEMENTS HAVE BEEN PROVEN BEYOND A REASONABLE DOUBT:

FIRST,	THAT _____ IS DEAD;
SECOND,	THAT (THE DEFENDANT) (OR) (AN ACCOMPLICE OF THE DEFENDANT) KILLED HIM;
THIRD,	THAT THE KILLING WAS COMMITTED WHILE THE DEFENDANT WAS (ENGAGED) (OR) (AN ACCOMPLICE) IN (THE COMMISSION OF) (AN ATTEMPT TO COMMIT) (FLIGHT AFTER

COMMITTING OR ATTEMPTING TO COMMIT) THE FELONY OF (ROBBERY) (RAPE) (DEVIATE SEXUAL INTERCOURSE BY FORCE OR THREAT OF FORCE) (ARSON) (BURGLARY) (KIDNAPPING);

FOURTH, THAT THE ACT OF (THE DEFENDANT) (OR) (THE DEFENDANT'S ACCOMPLICE) THAT KILLED _____ WAS DONE IN THE FURTHERANCE OF THAT FELONY; AND

FIFTH, THAT THE KILLING WAS WITH MALICE ON THE PART OF THE DEFENDANT. LIKE ALL MURDERS, SECOND DEGREE MURDER REQUIRES MALICE, BUT MALICE (IS PRESUMED) (MAY BE INFERRED) IF A DEFENDANT (ENGAGES) (OR) (IS AN ACCOMPLICE) IN THE COMMISSION OR ATTEMPTED COMMISSION OF A FELONY DANGEROUS TO HUMAN LIFE SUCH AS _____. NO OTHER PROOF OF MALICE IS NECESSARY.

(2) FOR PERSONS TO BE ACCOMPLICES IN COMMITTING OR ATTEMPTING TO COMMIT A FELONY THEY MUST HAVE A COMMON DESIGN, IN OTHER WORDS, A SHARED INTENT, TO COMMIT THAT FELONY.

(3) [I SHALL DEFINE THE FELONY OF ____ (AN ATTEMPT TO COMMIT ___) FOR YOU SHORTLY.] [THE FELONY OF____ (AN ATTEMPT TO COMMIT ___) MAY BE DEFINED AS FOLLOWS: ___.] [TO BE GUILTY OF____ (ATTEMPT TO COMMIT_____) A DEFENDANT MUST ___.]

(4) A KILLING INCIDENTAL TO A FELONY CAN, OF COURSE, BE FIRST DEGREE MURDER IF ALL THE ELEMENTS OF FIRST DEGREE MURDER ARE PRESENT.

THIRD DEGREE MURDER

(1) THIRD DEGREE MURDER IS ANY KILLING WITH MALICE (THAT IS NOT FIRST OR SECOND DEGREE MURDER). YOU MAY FIND THE DEFENDANT GUILTY OF THIRD DEGREE MURDER IF YOU ARE SATISFIED THAT THE FOLLOWING THREE ELEMENTS HAVE BEEN PROVEN BEYOND A REASONABLE DOUBT:

FIRST, THAT _____ IS DEAD;

SECOND, THAT THE DEFENDANT KILLED HIM; AND

THIRD, THAT THE DEFENDANT DID SO WITH MALICE.

(2) THE WORD "MALICE' AS I AM USING IT HAS A SPECIAL LEGAL MEANING. IT DOES NOT MEAN SIMPLY HATRED, SPITE OR I WILL. MALICE IS A SHORTHAND WAY OF REFERRING TO THREE DIFFERENT MENTAL STATES THAT THE LAW REGARDS AS BEING BAD ENOUGH TO MAKE A KILLING MURDER. THUS A KILLING IS WITH MALICE IF THE KILLER ACTS WITH FIRST, AN INTENT TO KILL, OR SECOND, AN INTENT TO INFLICT SERIOUS BODILY HARM, OR THIRD, (A WICKEDNESS OF DISPOSITION, HARDNESS OF HEART, CRUELTY, RECKLESSNESS OF CONSEQUENCES AND A MIND REGARDLESS OF SOCIAL DUTY, INDICATING AN UNJUSTIFIED DISREGARD FOR THE PROBABILITY OF DEATH OR GREAT BODILY HARM AND AN EXTREME INDIFFERENCE TO THE VALUE OF HUMAN LIFE.) (A CONSCIOUS DISREGARD OF AN UNJUSTIFIED AND EXTREMELY HIGH RISK THAT HIS ACTIONS MIGHT CAUSE DEATH OR SERIOUS BODILY HARM.) (ON THE OTHER HAND, A KILLING IS WITHOUT MALICE IF THE KILLER ACTS [WITH A LAWFUL JUSTIFICATION OR EXCUSE] [OR] [UNDER CIRCUMSTANCES THAT REDUCE THE KILLING TO VOLUNTARY MANSLAUGHTER].)

(3) WHEN DECIDING WHETHER THE DEFENDANT ACTED WITH MALICE, YOU SHOULD CONSIDER ALL THE EVIDENCE REGARDING HIS WORDS, CONDUCT AND THE ATTENDING CIRCUMSTANCES THAT MAY SHOW HIS STATE OF MIND INCLUDING _____ (IF YOU BELIEVE THAT THE DEFENDANT INTENTIONALLY USED A DEADLY WEAPON ON A VITAL PART OF _____`S BODY YOU MAY REGARD THAT AS AN ITEM OF CIRCUMSTANTIAL EVIDENCE FROM WHICH YOU MAY, IF YOU CHOOSE, INFER THAT THE DEFENDANT ACTED WITH MALICE).

PENALTIES FOR MURDER (only applies to offenses committed prior to 1978 Death Penalty Law Act 141 of 1978)

OUR LAW REQUIRES THAT PRIOR TO YOUR DELIBERATIONS I INFORM YOU AS TO THE PENALTIES FOR MURDER OF THE FIRST DEGREE, (MURDER OF THE SECOND DEGREE) AND MURDER OF THE THIRD DEGREE.

A PERSON WHO IS CONVICTED OF MURDER OF THE FIRST DEGREE SHALL BE SENTENCED TO A TERM OF LIFE IMPRISONMENT.

IN MURDER OF THE FIRST DEGREE THE COURT HAS NO DISCRETION AND MUST IMPOSE A SENTENCE OF LIFE IMPRISONMENT. (A PERSON WHO IS CONVICTED OF MURDER OF THE SECOND DEGREE SHALL BE SENTENCED TO A TERM OF LIFE IMPRISONMENT. IN MURDER OF THE SECOND DEGREE THE COURT HAS NO DISCRETION AND MUST IMPOSE A SENTENCE OF LIFE IMPRISONMENT.)

A PERSON WHO IS CONVICTED OF MURDER OF THE THIRD DEGREE IS SUBJECT TO A SENTENCE OF NOT LESS THAN TEN NOR MORE THAN TWENTY YEARS IN AN APPROPRIATE STATE CORRECTIONAL INSTITUTION. IN MURDER OF THE THIRD DEGREE THE COURT MAY IMPOSE THE SENTENCE OR ANY LESSER SENTENCE WHICH, IN ITS DISCRETION, THE COURT DEEMS APPROPRIATE.

VOLUNTARY MANSLAUGHTER-MURDER IN ISSUE

(1) AS MY EARLIER DEFINITION OF MALICE INDICATES, THERE CAN BE NO MALICE WHEN CERTAIN REDUCING CIRCUMSTANCES ARE PRESENT. WHEN THESE CIRCUMSTANCES ARE PRESENT, A KILLING MAY BE VOLUNTARY MANSLAUGHTER, BUT NEVER MURDER. THIS IS TRUE WHEN A DEFENDANT KILLS (IN HEAT OF PASSION FOLLOWING SERIOUS PROVOCATION) (OR) (KILLS UNDER AN UNREASONABLE MISTAKEN BELIEF IN JUSTIFYING CIRCUMSTANCES).

(2) ACCORDINGLY, YOU CAN FIND MALICE AND MURDER ONLY IF YOU ARE SATISFIED BEYOND A REASONABLE DOUBT THAT THE DEFENDANT WAS NOT ACTING (UNDER A SUDDEN AND INTENSE PASSION RESULTING FROM SERIOUS PROVOCATION BY [THE VICTIM] [ANOTHER PERSON WHOM THE DEFENDANT WAS TRYING TO KILL WHEN HE NEGLIGENTLY OR ACCIDENTALLY KILLED THE VICTIM]) (OR) (UNDER AN UNREASONABLE BELIEF THAT THE CIRCUMSTANCES WERE SUCH THAT, IF THEY EXISTED, WOULD HAVE JUSTIFIED THE KILLING).

(3) A DEFENDANT ACTS UNDER AN "INTENSE PASSION" IF HE ACTS UNDER AN EMOTION SUCH AS ANGER, RAGE, SUDDEN RESENTMENT OR TERROR THAT IS SO STRONG THAT IT RENDERS HIM INCAPABLE OF COOL REFLECTION. A DEFENDANT ACTS UNDER A "SUDDEN" PASSION IF THE TIME BETWEEN THE PROVOCATION AND THE KILLING IS NOT LONG ENOUGH FOR THE PASSION OF A REASONABLE PERSON TO COOL A DEFENDANT'S PASSION RESULTS FROM "SERIOUS PROVOCATION" IF IT RESULTS FROM CONDUCT OR EVENTS THAT ARE SUFFICIENT TO EXCITE AN INTENSE PASSION IN A REASONABLE PERSON. THUS, THE EXISTENCE OF "INTENSE PASSION" TURNS ON THE ACTUAL MENTAL AND EMOTIONAL STATE OF THE DEFENDANT. WHILE THE EXISTENCE OF "SUDDEN PASSION" AND "SERIOUS PROVOCATION" TURN ON HOW A REASONABLE PERSON CONFRONTED BY THE SAME PROVOCATION WOULD REACT, REMEMBER, YOU CAN FIND MALICE AND MURDER, ONLY IF YOU ARE SATISFIED BEYOND A REASONABLE DOUBT THAT THE DEFENDANT WAS NOT ACTING UNDER A SUDDEN AND INTENSE PASSION RESULTING FROM SERIOUS PROVOCATION

(BY THE VICTIM) (ANOTHER PERSON WHOM THE DEFENDANT WAS TRYING TO KILL WHEN HE NEGLIGENTLY OR ACCIDENTALLY KILLED THE VICTIM).

(4) THE LAW RECOGNIZES THAT THE CUMULATIVE IMPACT OF A SERIES OF RELATED EVENTS CAN LEAD TO SUDDEN PASSION AND AMOUNT TO SERIOUS PROVOCATION. THE TEST IS WHETHER A REASONABLE PERSON, CONFRONTED WITH THE SAME SERIES OF EVENTS, WOULD BECOME SO IMPASSIONED THAT HE WOULD BE INCAPABLE OF COOL REFLECTION.

(5) IF YOU DO NOT FIND THE DEFENDANT HAD MALICE AND COMMITTED MURDER, YOU MAY FIND HIM GUILTY OF VOLUNTARY MANSLAUGHTER AS LONG AS YOU ARE SATISFIED THAT THE FOLLOWING THREE ELEMENTS HAVE BEEN PROVEN BEYOND A REASONABLE DOUBT:

FIRST, THAT _____ IS DEAD;
SECOND, THAT THE DEFENDANT KILLED HIM; AND
THIRD, THAT THE DEFENDANT HAD THE INTENT TO KILL.

VOLUNTARY MANSLAUGHTER-MURDER NOT IN ISSUE

IN ORDER TO FIND THE DEFENDANT GUILTY OF VOLUNTARY MANSLAUGHTER YOU MUST BE SATISFIED THAT THE FOLLOWING THREE ELEMENTS HAVE BEEN PROVEN BEYOND A REASONABLE DOUBT:

FIRST, THAT _____ IS DEAD;
SECOND, THAT THE DEFENDANT KILLED HIM; AND
THIRD, THAT THE DEFENDANT HAD THE INTENT TO KILL.

INVOLUNTARY MANSLAUGHTER

(1) YOU MAY FIND THE DEFENDANT GUILTY OF INVOLUNTARY MANSLAUGHTER IF YOU ARE SATISFIED THAT THE FOLLOWING THREE ELEMENTS HAVE BEEN PROVEN BEYOND A REASONABLE DOUBT:

FIRST, THAT _____ IS DEAD;
SECOND, THAT THE DEFENDANT'S CONDUCT WAS A DIRECT CAUSE OF HIS DEATH; AND
THIRD, THAT THE DEFENDANT'S CONDUCT WAS RECKLESS OR GROSSLY NEGLIGENT.

(2) A DEFENDANT'S CONDUCT IS RECKLESS WHEN HE CONSCIOUSLY DISREGARDS A SUBSTANTIAL AND UNJUSTIFIABLE RISK THAT DEATH WILL RESULT FROM HIS CONDUCT, THE RISK BEING SUCH THAT IT IS GROSSLY UNREASONABLE FOR HIM TO DISREGARD IT. A DEFENDANT'S CONDUCT IS GROSSLY NEGLIGENT WHEN HE SHOULD BE AWARE OF A SUBSTANTIAL AND UNJUSTIFIABLE RISK THAT DEATH WILL RESULT FROM HIS CONDUCT, THE RISK BEING SUCH THAT IT IS GROSSLY UNREASONABLE FOR HIM TO FAIL TO PERCEIVE, THAT IS RECOGNIZE, THE RISK. [I SHALL NOW RESTATE THESE DEFINITIONS IN MORE DETAIL. A DEFENDANT'S CONDUCT IS RECKLESS OR GROSSLY NEGLIGENT WHEN—I AM NOW SPEAKING OF RECKLESS CONDUCT—THE DEFENDANT IS AWARE OF AND CONSCIOUSLY DISREGARDS A SUBSTANTIAL AND UNJUSTIFIABLE RISK THAT DEATH WILL RESULT FROM HIS CONDUCT OR WHEN—I AM NOW SPEAKING OF GROSSLY NEGLIGENT CONDUCT—THE DEFENDANT SHOULD BE AWARE OF SUCH A RISK EVEN THOUGH HE DOES NOT ACTUALLY PERCEIVE IT. THE RISK OF DEATH MUST BE OF SUCH A NATURE AND DEGREE THAT THE DEFENDANT'S DISREGARD OF THE RISK OR FAILURE TO PERCEIVE IT, CONSIDERING THE NATURE AND INTENT OF HIS CONDUCT AND THE CIRCUMSTANCES KNOWN TO HIM, INVOLVES A GROSS DEVIATION FROM THE STANDARD OF CONDUCT OR CARE THAT A REASONABLE PERSON WOULD OBSERVE IN THE DEFENDANT'S SITUATION.

(3) AS THE DEFINITIONS I JUST GAVE YOU INDICATE, THE RECKLESSNESS OR GROSS NEGLIGENCE REQUIRED FOR INVOLUNTARY MANSLAUGHTER IS A GREAT DEPARTURE FROM THE STANDARD OF ORDINARY CARE EVIDENCING A DISREGARD FOR HUMAN LIFE OR AN INDIFFERENCE TO THE POSSIBLE CONSEQUENCES OF ONE'S CONDUCT.

(4) COMPARED WITH RECKLESSNESS AND GROSS NEGLIGENCE, THE MALICE REQUIRED FOR THIRD DEGREE MURDER IS A MORE CULPABLE, THAT IS A MORE BLAMEWORTHY, STATE OF MIND. THE ESSENCE OF MALICE IS AN EXTREME INDIFFERENCE TO THE VALUE OF HUMAN LIFE.

(5) IN DETERMINING WHETHER THE DEFENDANT'S CONDUCT WAS RECKLESS OR GROSSLY NEGLIGENT YOU SHOULD CONSIDER ALL THE RELEVANT FACTS AND CIRCUMSTANCES THAT YOU FIND FROM THE EVIDENCE INCLUDING _____.

MANNER OF DELIBERATION

I WANT TO ADVISE YOU AS TO THE STANDARDS BY WHICH YOU MUST BE GUIDED AS YOU DELIBERATE. IN ORDER TO RETURN A VERDICT, EACH

JUROR MUST AGREE. YOUR VERDICT MUST BE UNANIMOUS. A MAJORITY VOTE IS NOT PERMISSIBLE. YOU, AS JURORS, HAVE A DUTY TO CONSULT WITH ONE ANOTHER AND TO DELIBERATE WITH A VIEW TO REACHING A UNANIMOUS AGREEMENT, IF IT CAN BE DONE WITHOUT VIOLENCE TO INDIVIDUAL JUDGMENT. THAT IS TO SAY, EACH JUROR MUST DECIDE THE CASE FOR HIMSELF OR HERSELF, BUT ONLY AFTER AN IMPARTIAL CONSIDERATION OF THE EVIDENCE WITH HIS AND HER FELLOW JURORS.

IN THE COURSE OF SUCH DELIBERATIONS, A JUROR SHOULD NOT HESITATE TO RE-EXAMINE HIS OR HER OWN VIEWS AND TO CHANGE HIS/HER OPINION IF CONVINCED THAT IT IS ERRONEOUS. BUT NO JUROR SHOULD SURRENDER HIS/HER HONEST CONVICTIONS AS OF THE WEIGHT OR EFFECT OF THE EVIDENCE OR AS TO THE GUILT OR INNOCENCE OF THE (ANY OF THE) DEFENDANT(S) SOLELY BECAUSE OF THE OPINION OF HIS OR HER FELLOW JURORS, OR FOR THE MERE PURPOSE OF RETURNING A UNANIMOUS VERDICT. (COMMONWEALTH V. SPENCER 442 PA 328, 275 a.2D 299 (1971).)

(IN DELIBERATING ON YOUR VERDICT, YOU MUST NOT BE INFLUENCED BY ANYTHING OUTSIDE OF THE EVIDENCE PRESENTED IN THIS CASE AND THE LAW AS GIVEN BY THE COURT).

POINTS FOR CHARGE AND EXCEPTIONS

I SHALL NOW CONFER WITH COUNSEL (AS TO POINTS FOR CHARGE WHICH THEY HAVE SUBMITTED TO THE COURT) AND ASK FOR ANY SUGGESTIONS THEY MAY HAVE WITH RESPECT TO MY CHARGE.

[CONFER WITH COUNSEL RE CHARGE. DETERMINE WHICH EXHIBITS WILL GO OUT WITH JURY.]

FOREPERSON

WHEN YOU RETIRE TO DELIBERATE ON YOUR VERDICT, YOU WILL, SELECT ONE OF YOUR NUMBER AS A FOREMAN OR FORELADY, WHO WILL LEAD YOU IN YOUR DISCUSSIONS AND WHO WILL ANNOUNCE YOUR VERDICT TO THE COURT. PLEASE KEEP IN MIND, HOWEVER, THAT THE FOREMAN OR FORELADY HAS ONLY ONE VOTE, THE SAME AS THE REST OF YOU.

FINAL INSTRUCTION

IN CLOSING I WOULD ALSO LIKE TO SUGGEST TO YOU THAT YOU WILL BE ABLE TO DELIBERATE MORE EASILY AND IN A WAY THAT WILL BE BETTER FOR ALL CONCERNED IF EACH OF YOU TREATS YOUR FELLOW JURORS AND THEIR VIEWS WITH THE SAME COURTESY AND RESPECT AS YOU WOULD TREAT OTHER PERSONS IN YOUR EVERY DAY LIFE.

JURY INSTRUCTIONS
HUNG JURY

THE COURT: MEMBERS OF THE JURY, YOU HAVE NOW HAD THIS CASE FOR HOURS. OBVIOUSLY, YOU ARE HAVING SOME DIFFICULTY RESOLVING THE ISSUES RAISED IN THE CASE. ON THE ONE HAND, THAT DIFFICULTY IS AN INDICATION OF THE SINCERITY AND OBJECTIVITY WITH WHICH YOU HAVE APPROACHED YOUR DUTIES. ON THE OTHER HAND, IT MAY BE THE RESULT OF CONFUSION IN YOUR MINDS ABOUT THE INSTRUCTION I GAVE YOU ON THE LAW AND ABOUT ITS APPLICATION TO THE FACTS OF THIS CASE.

MR. OR MS._____ (FOREPERSON), DOES THE JURY REQUIRE ANY ADDITIONAL OR CLARIFYING INSTRUCTIONS ON THE LAW AS IT APPLIES TO THIS CASE?

IN YOUR JUDGMENT IS THERE A REASONABLE PROBABILITY OF THE JURY REACHING A UNANIMOUS VERDICT?

[EXPLAIN IMPORTANCE OF A VERDICT TO THE DEFENDANT AND TO THE COUNTY—TIME, ANXIETY, EXPENSE—INVOLVED IN RETRIAL.]

YOU WILL REALIZE, OF COURSE, THAT: (1) ANY VERDICT YOU RETURN MUST BE A UNANIMOUS VERDICT; (2) THAT YOU HAVE A DUTY TO CONSULT WITH ONE ANOTHER AND DELIBERATE WITH A VIEW TO REACHING AN AGREEMENT, IF IT CAN BE DONE WITHOUT VIOLENCE TO INDIVIDUAL JUDGMENT; (3) THAT EACH JUROR MUST DECIDE THE CASE FOR HIMSELF BUT ONLY AFTER AN IMPARTIAL CONSIDERATION OF THE EVIDENCE WITH HIS FELLOW JURORS; (4) THAT A JUROR SHOULD NOT HESITATE TO RE-EXAMINE HIS OWN VIEWS AND TO CHANGE HIS OPINION IF HE THINKS IT ERRONEOUS; AND (5) THAT NO JUROR SHOULD SURRENDER HIS HONEST CONVICTIONS TO THE WEIGHT OR THE EFFECT OF THE EVIDENCE BECAUSE OF THE OPINION OF HIS FELLOW JURORS OR FOR THE MERE PURPOSE OF RETURNING A VERDICT.

KEEPING THESE INSTRUCTIONS IN MIND, THE COURT IS SENDING YOU BACK TO THE DELIBERATION ROOM TO GIVE FURTHER CONSIDERATION TO THE EVIDENCE AND THE CHARGE OF THE COURT TO SEE IF YOU CAN ARRIVE AT A VERDICT. IF THE COURT CAN BE OF ANY ASSISTANCE TO YOU IN THIS EFFORT, WE WILL BE HAPPY TO OBLIGE.

JURY INSTRUCTIONS—PENALTY PHASE
DEATH PENALTY, INSTRUCTION BEFORE HEARING

(1) YOU HAVE FOUND THE DEFENDANT GUILTY OF FIRST DEGREE MURDER. WE ARE NOW GOING TO HOLD A SENTENCING HEARING. COUNSEL MAY PRESENT ADDITIONAL EVIDENCE AND MAKE FURTHER ARGUMENTS; THEN YOU WILL DECIDE WHETHER TO SENTENCE THE DEFENDANT TO DEATH OR LIFE IMPRISONMENT.

(2) THE SENTENCE YOU IMPOSE WILL DEPEND ON WHETHER YOU FIND ANY OF THE THINGS THAT THE PENNSYLVANIA SENTENCING CODE CALLS AGGRAVATING OR MITIGATING CIRCUMSTANCES. LOOSELY SPEAKING, AGGRAVATING CIRCUMSTANCES ARE THINGS ABOUT THE KILLING AND THE KILLER WHICH MAKE A FIRST DEGREE MURDER CASE MORE TERRIBLE AND DESERVING OF THE DEATH PENALTY WHILE MITIGATING CIRCUMSTANCES ARE THOSE THINGS WHICH MAKE THE CASE LESS TERRIBLE AND LESS DESERVING OF DEATH. AGGRAVATING CIRCUMSTANCES MUST BE PROVEN BY THE COMMONWEALTH BEYOND A REASONABLE DOUBT WHILE MITIGATING CIRCUMSTANCES MUST BE PROVEN BY THE DEFENDANT BY A PREPONDERANCE OF THE EVIDENCE, THAT IS, BY THE GREATER WEIGHT OF THE EVIDENCE.

(3) IT MAY HELP YOU TO HAVE IN MIND SOME OF THE THINGS THAT THE PENNSYLVANIA SENTENCING CODE SAYS ARE AGGRAVATING AND MITIGATING CIRCUMSTANCES. (ENUMERATE POTENTIALLY RELEVANT AGGRAVATING AND MITIGATING CIRCUMSTANCES.) MITIGATING CIRCUMSTANCES ALSO INCLUDE ANY OTHER MITIGATING MATTERS CONCERNING THE CHARACTER AND RECORD OF THE DEFENDANT OR THE CIRCUMSTANCES OF HIS OFFENSE.

DEATH PENALTY. GENERAL INSTRUCTION

(1) MEMBERS OF THE JURY, YOU MUST NOW DECIDE WHETHER TO SENTENCE THE DEFENDANT TO DEATH OR LIFE IMPRISONMENT. YOUR SENTENCE WILL DEPEND UPON WHAT YOU FIND ABOUT AGGRAVATING AND MITIGATING CIRCUMSTANCES. THE SENTENCING CODE DEFINES AGGRAVATING AND MITIGATING CIRCUMSTANCES. THEY ARE THINGS THAT MAKE A FIRST DEGREE MURDER CASE EITHER MORE TERRIBLE OR LESS TERRIBLE. YOUR VERDICT MUST BE A SENTENCE OF DEATH IF YOU UNANIMOUSLY FIND, THAT IS, ALL OF YOU FIND, AT LEAST ONE AGGRAVATING AND NO MITIGATING CIRCUMSTANCE OR IF YOU UNANIMOUSLY FIND ONE OR MORE AGGRAVATING CIRCUMSTANCES WHICH OUTWEIGH ANY MITIGATING CIRCUMSTANCES. IF YOU DO NOT ALL AGREE ON ONE OR THE OTHER OF THESE FINDINGS, THEN THE ONLY VERDICT THAT YOU MAY RETURN IS A SENTENCE OF LIFE IMPRISONMENT.

(2) THE COMMONWEALTH MUST PROVE ANY AGGRAVATING CIRCUMSTANCE BEYOND A REASONABLE DOUBT. (THIS DOES NOT MEAN THAT THE COMMONWEALTH MUST PROVE THE AGGRAVATING CIRCUMSTANCE BEYOND ALL DOUBT AND TO A MATHEMATICAL CERTAINTY. A REASONABLE DOUBT IS THE KIND OF DOUBT THAT WOULD CAUSE A REASONABLE AND SENSIBLE PERSON TO HESITATE BEFORE ACTING UPON AN IMPORTANT MATTER IN HIS OWN AFFAIRS. A REASONABLE DOUBT MUST BE A REAL DOUBT; IT MAY NOT BE ONE THAT A JUROR IMAGINES OR MAKES UP TO AVOID CARRYING OUT AN UNPLEASANT DUTY.) BY CONTRAST, THE DEFENDANT MUST PROVE ANY MITIGATING CIRCUMSTANCE. HOWEVER, HE ONLY HAS TO PROVE IT BY A PREPONDERANCE OF THE EVIDENCE, THAT IS, BY THE GREATER WEIGHT OF THE EVIDENCE.

(3) IN THIS CASE, UNDER THE SENTENCING CODE, ONLY THE FOLLOWING MATTERS, IF PROVEN TO YOUR SATISFACTION BEYOND A REASONABLE DOUBT, CAN BE AGGRAVATING CIRCUMSTANCES:

HERE THE COURT SHOULD STATE THE AGGRAVATING CIRCUMSTANCES RAISED IN THE EVIDENCE.

(4) IN THIS CASE, UNDER THE SENTENCING CODE, THE FOLLOWING MATTERS IF PROVEN TO YOUR SATISFACTION BY A PREPONDERANCE OF THE EVIDENCE, CAN BE MITIGATING CIRCUMSTANCES:

HERE THE COURT SHOULD STATE THE MITIGATING CIRCUMSTANCES RAISED IN THE EVIDENCE.

ANY OTHER MITIGATING MATTER CONCERNING THE CHARACTER AND RECORD OF THE DEFENDANT OR THE CIRCUMSTANCES OF HIS OFFENSE (INCLUDING BUT NOT LIMITED TO _____).

(5) YOU HAVE BEEN GIVEN A SENTENCING VERDICT SLIP ON WHICH TO RECORD YOUR VERDICT AND FINDINGS. I SHALL NOW GIVE YOU FURTHER DIRECTIONS ON HOW TO GO ABOUT REACHING A VERDICT, MAKING FINDINGS AND USING THE VERDICT SLIP.

(6) NOW YOU MUST DECIDE. CONSIDER ALL THE EVIDENCE AND ARGUMENTS OF BOTH COMMONWEALTH AND DEFENDANT, INCLUDING THE EVIDENCE YOU HEARD DURING THE EARLIER TRIAL (AND THE STATEMENT THAT THE DEFENDANT PERSONALLY MADE WHEN HE ADDRESSED YOU). BE FAIR AND DO NOT LET YOURSELF BE INFLUENCED BY PASSION OR PREJUDICE. (IT WAS ENTIRELY UP TO THE DEFENDANT WHETHER TO [TESTIFY] [OR] [PRESENT EVIDENCE]. YOU MUST NOT DRAW ANY ADVERSE INFERENCE FROM [HIS SILENCE] [OR] [THE FACT THAT HE DID NOT PRESENT EVIDENCE].)

(7) REMEMBER THAT YOUR VERDICT IS NOT MERELY A RECOMMENDATION; IT ACTUALLY FIXES THE PUNISHMENT AT DEATH OR LIFE IMPRISONMENT. YOUR VERDICT, WHETHER IT BE DEATH OR LIFE IMPRISONMENT, MUST BE UNANIMOUS. IT MUST BE THE VERDICT OF EACH AND EVERY ONE OF YOU.

DEATH PENALTY, STATING AGGRAVATING AND MITIGATING ... CIRCUMSTANCES

THE COURT SHOULD USE THE STATUTORY LANGUAGE WHEN STATING AGGRAVATING AND MITIGATING CIRCUMSTANCES AS PART OF SUBDIVISION (3) OF PENALTY PHASE INSTRUCTION, OR SUBDIVISIONS (3) AND (4) OF DEATH PENALTY GENERAL INSTRUCTION. THE COURT, HOWEVER, SHOUID USE ONLY THAT PART OF THE DEFINITION OF THE PARTICULAR CIRCUMSTANCE THAT IS RELEVANT TO THE CASE ADDING ANY EXPLANATION THAT THE JURORS MIGHT NEED TO UNDERSTAND AND APPLY THE STATUTORY LANGUAGE. SOME POSSIBLY USEFUL EXPLANATIONS FOLLOW:

(1) TO BE USED WITH AGGRAVATING CIRCUMSTANCE FROM S9711(d)(5): THE COMMONWEALTH DOES NOT HAVE TO PROVE THAT THE

DEFENDANT ACTUALLY COMMITTED THE OTHER FELONY. IT DOES HAVE TO PROVE HOWEVER, THAT THERE WERE CRIMINAL PROCEEDINGS PENDING AGAINST THE DEFENDANT FOR ALLEGEDLY COMMITTING THE OTHER FELONY AND THAT THE DEFENDANT KILLED THE VICTIM TO PREVENT HIM FROM TESTIFYING AS A PROSECUTION WITNESS IN THOSE PROCEEDINGS.

(2) TO BE USED WITH AGGRAVATING CIRCUMSTANCE FROM S9711(d)(8): FOR A PERSON TO COMMIT FIRST-DEGREE MURDER BY MEANS OF TORTURE, HE MUST INTEND TO DO MORE THAN KILL HIS VICTIM. HE MUST INTEND TO INFLICT UNNECESSARY PAIN OR SUFFERING, AND HE MUST DO SO IN A MANNER OR BY MEANS THAT ARE HEINOUS, ATROCIOUS OR CRUEL AND SHOW EXCEPTIONAL DEPRAVITY.

(3) TO BE USED WITH AGGRAVATING CIRCUMSTANCE FROM S9711(d)(9): IN DECIDING THE DEFENDANT HAS A "SIGNIFICANT HISTORY," THE FACTORS YOU SHOULD CONSIDER INCLUDE THE NUMBER OF PREVIOUS CONVICTIONS, THE NATURE OF THE PREVIOUS CRIMES AND THEIR SIMILARITY TO, OR RELATIONSHIP WITH, THE MURDER IN THIS CASE. (THE FACT THAT ALL OF THE PREVIOUS CONVICTIONS WERE BASED ON A SINGLE INCIDENT OR TRANSACTION OR OCCURRED AT A SINGLE TRIAL DOES NOT, BY ITSELF, PREVENT THEM FROM BEING A SIGNIFICANT HISTORY OF CONVICTIONS.)

DEATH PENALTY, PROCESS OF DECISION AND VERDICT SLIP[3]

(1) AS I TOLD YOU EARLIER, YOU MUST AGREE UNANIMOUSLY ON ONE OF TWO GENERAL FINDINGS BEFORE YOU CAN SENTENCE THE DEFENDANT TO DEATH. THEY ARE A FINDING THAT THERE IS AT LEAST ONE AGGRAVATING CIRCUMSTANCE AND NO MITIGATING CIRCUMSTANCES OR A FINDING THAT THERE ARE ONE OR MORE AGGRAVATING CIRCUMSTANCE WHICH OUTWEIGH ANY MITIGATING CIRCUMSTANCES. (IN DECIDING WHETHER AGGRAVATING OUTWEIGH MITIGATING CIRCUMSTANCES, DO NOT SIMPLY COUNT THEIR NUMBER. COMPARE THE SERIOUSNESS AND IMPORTANCE OF THE AGGRAVATING WITH THE MITIGATING CIRCUMSTANCES.) IF YOU ALL AGREE ON EITHER ONE OF THE TWO GENERAL FINDINGS THEN YOU CAN AND MUST SENTENCE THE DEFENDANT TO DEATH.

(2) WHEN VOTING ON THE GENERAL FINDINGS, YOU ARE TO REGARD A PARTICULAR AGGRAVATING CIRCUMSTANCE AS PRESENT ONLY IF YOU

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[3]For form of verdict slip, *See* Pa.R.Crim.P. 358A, 358B, *infra* at p. XII-A-5 and XII-A-6.

ALL AGREE THAT IT IS PRESENT. ON THE OTHER HAND, EACH OF YOU IS FREE TO REGARD A PARTICULAR MITIGATING CIRCUMSTANCE AS PRESENT DESPITE WHAT OTHER JURORS MAY BELIEVE. (THIS DIFFERENT TREATMENT OF AGGRAVATING AND MITIGATING CIRCUMSTANCES IS ONE OF THE LAW'S SAFEGUARDS AGAINST UNJUST DEATH SENTENCES. IT GIVES A DEFENDANT THE FULL BENEFIT OF ANY MITIGATING CIRCUMSTANCES. IT IS CLOSELY RELATED TO THE BURDEN OF PROOF REQUIREMENTS. REMEMBER, THE COMMONWEALTH MUST PROVE ANY AGGRAVATING CIRCUMSTANCES BEYOND A REASONABLE DOUBT WHILE THE DEFENDANT ONLY HAS TO PROVE ANY MITIGATING CIRCUMSTANCES BY A PREPONDERANCE OF THE EVIDENCE.)

(3) IF YOU DO NOT AGREE UNANIMOUSLY ON A DEATH SENTENCE AND ON ONE OF TWO GENERAL FINDINGS THAT WOULD SUPPORT IT, THEN YOU HAVE TWO IMMEDIATE OPTIONS. YOU MAY EITHER CONTINUE TO DISCUSS THE CASE AND DELIBERATE THE POSSIBILITY OF A DEATH SENTENCE, OR IF ALL OF YOU AGREE TO DO SO, YOU MAY STOP DELIBERATING AND SENTENCE THE DEFENDANT TO LIFE IMPRISONMENT. IF YOU SHOULD COME TO A POINT WHERE YOU HAVE DELIBERATED CONSCIENTIOUSLY AND THOROUGHLY AND STILL CANNOT ALL AGREE EITHER TO SENTENCE THE DEFENDANT TO DEATH OR TO STOP DELIBERATING AND SENTENCE HIM TO LIFE IMPRISONMENT, REPORT THAT TO ME. IF IT SEEMS TO ME THAT YOU ARE HOPELESSLY DEADLOCKED, IT WILL BE MY DUTY TO SENTENCE THE DEFENDANT TO LIFE IMPRISONMENT.

(4) YOU HAVE BEEN GIVEN A VERDICT SLIP ON WHICH TO RECORD YOUR SENTENCING VERDICT AND FINDINGS. YOU HAVE ALSO BEEN GIVEN A SET OF WRITTEN DIRECTIONS WHICH EXPLAIN HOW TO COMPLETE THE VERDICT SLIP. READ BOTH THE VERDICT SLIP AND THE SET OF DIRECTIONS BEFORE YOU BEGIN DELIBERATING. USE THE VERDICT SLIP ONLY TO RECORD YOUR SENTENCING VERDICT AND FINDINGS. DO NOT COMPLETE THE VERDICT SLIP UNLESS AND UNTIL YOU HAVE FINISHED DELIBERATING AND HAVE AGREED ON YOUR SENTENCE.

HERE THE COURT SHOULD GIVE ANY FURTHER ORAL INSTRUCTIONS ON USING AND COMPLETING THE VERDICT SLIP THAT IT THINKS ARE NEEDED IN THE PARTICULAR CASE.

DIRECTIONS FOR COMPLETING SENTENCING VERDICT SLIP

(to be given to Jury with the Verdict Slip)

1. READ THE VERDICT SLIP AND THESE DIRECTIONS BEFORE YOU BEGIN TO DELIBERATE.

2. KEEP IN MIND THESE POINTS;

   A. THE COMMONWEALTH MUST PROVE AGGRAVATING CIRCUMSTANCES BEYOND A REASONABLE DOUBT. YOU CAN REGARD AN AGGRAVATING CIRCUMSTANCE AS PRESENT ONLY IF YOU ALL AGREE THAT IT IS PRESENT.

   B. THE DEFENDANT MUST PROVE MITIGATING CIRCUMSTANCES BY A PREPONDERANCE OF THE EVIDENCE, THAT IS BY THE GREATER WEIGHT OF THE EVIDENCE. EACH OF YOU IS FREE TO REGARD A MITIGATING CIRCUMSTANCE AS PRESENT, REGARDLESS OF WHAT THE OTHER JURORS BELIEVE ABOUT THAT CIRCUMSTANCE.

3. FOLLOW THESE DIRECTIONS WHEN COMPLETING PART II OF THE VERDICT SLIP ENTITLED "SENTENCING VERDICT AND FINDINGS."

   A. YOU MUST AGREE UNANIMOUSLY ON THE GENERAL FINDING IN B.1. OR ON THE GENERAL FINDING IN B.2. BEFORE YOU CAN SENTENCE THE DEFENDANT TO DEATH. IF ALL JURORS AGREE ON ONE OR MORE AGGRAVATING CIRCUMSTANCES AND ALL AGREE THAT THERE ARE NO MITIGATING CIRCUMSTANCES, THEN CHECK B.1. ALSO, COPY FROM PART I THE AGGRAVATING CIRCUMSTANCES ON WHICH YOU ALL AGREE. IF ALL JURORS AGREE ON ONE OR MORE AGGRAVATING CIRCUMSTANCES AND, ALTHOUGH ONE OR MORE JURORS FINDS MITIGATING CIRCUMSTANCES, ALL JURORS AGREE THAT AGGRAVATING OUTWEIGH MITIGATING CIRCUMSTANCES, THEN CHECK B.2. ALSO COPY FROM PART I THE AGGRAVATING CIRCUMSTANCES ON WHICH YOU ALL AGREE AND THE MITIGATING CIRCUMSTANCES THAT ONE OR MORE OF YOU FIND ARE PRESENT.

   B. YOU MAY STOP DELIBERATING AND SENTENCE THE DEFENDANT TO LIFE IMPRISONMENT ONLY IF ALL JURORS AGREE TO DO SO. IF YOUR SENTENCE IS LIFE IMPRISONMENT, YOU SHOULD CHECK THE FINDING, C.1. OR C.2., WHICH EXPLAINS WHY YOUR JURY REJECTS THE DEATH PENALTY AND IMPOSES A LIFE SENTENCE. IF THE

REASON FOR REJECTING THE DEATH PENALTY IS THAT ONE OR MORE JURORS FIND NO AGGRAVATING CIRCUMSTANCES, THEN. CHECK C.1. IF THE REASON FOR REJECTING DEATH IS THAT, ALTHOUGH ALL JURORS AGREE ON AT LEAST ONE AGGRAVATING CIRCUMSTANCE, ONE OR MORE JURORS FIND THAT MITIGATING ARE NOT OUTWEIGHED BY AGGRAVATING CIRCUMSTANCES, THEN. CHECK C.2. ALSO COPY FROM PART I ANY MITIGATING CIRCUMSTANCES FOUND BY ONE OR MORE JURORS AND ANY AGGRAVATING CIRCUMSTANCES ON WHICH YOU ALL AGREE.

SAMPLE ORAL COLLOQUY FOR WAIVER OF JURY TRIAL IN A CAPITAL CASE

1. MY NAME IS JUDGE _____ AND YOUR CASE IS LISTED BEFORE ME TODAY FOR TRIAL. I UNDERSTAND FROM YOUR ATTORNEY _____ THAT YOU ASK TO GIVE UP YOUR RIGHT TO A JURY TRIAL AND YOU WISH TO BE TRIED BEFORE ME TODAY SITTING WITHOUT A JURY. IS THAT CORRECT?

BEFORE I CAN ALLOW YOU TO DO THAT I HAVE TO ASK YOU SOME QUESTIONS. THE PURPOSE OF THESE QUESTIONS IS TO MAKE SURE THAT YOU UNDERSTAND ALL THE RIGHTS YOU ARE GIVING UP WHEN YOU GIVE UP YOUR RIGHTS TO A JURY TRIAL AND THAT YOU ARE DOING IT OF YOUR OWN FREE WILL.

2. HOW OLD ARE YOU?

3. HOW FAR DID YOU GO IN SCHOOL? (DEFENDANT DOES NOT SPEAK ENGLISH: IN WHICH COUNTRY WERE YOU EDUCATED?)

4. DO YOU READ, WRITE AND UNDERSTAND ENGLISH? (IF THE DEFENDANT DOES NOT SPEAK ENGLISH AND IS BEING COMMUNICATED WITH THROUGH THE COURT INTERPRETER STATE: I UNDERSTAND THAT YOU DO NOT READ, WRITE OR UNDERSTAND ENGLISH, IS THAT CORRECT? LET, THE RECORD SHOW THAT WE ARE COMMUNICATING WITH THE DEFENDANT THROUGH THE OFFICIAL INTERPRETER.)

5. ARE YOU PRESENTLY UNDER THE INFLUENCE OF ANY DRUGS, ALCOHOL OR MEDICATION?

6. HAVE YOU EVER BEEN TREATED FOR A MENTAL ILLNESS? (IF ANSWER IS "YES" THEN GET DETAILS OF TREATMENT THEN ASK ARE YOU SUFFERING FROM ANY MENTAL ILLNESS TODAY? OR, IF DEFENDANT IS PRESENTLY RECEIVING TREATMENT SUCH AS PSYCHOTROPIC MEDICATION ASK DOES THE MEDICINE YOU ARE TAKING INTERFERE WITH YOUR ABILITY TO UNDERSTAND WHAT'S HAPPENING HERE TODAY? IF NECESSARY ASK DEFENDANT: DO YOU KNOW WHERE YOU ARE? WHY ARE YOU HERE? WHAT DAY IS THIS? ETC.)

7. I WANT YOU TO UNDERSTAND THAT YOU HAVE AN ABSOLUTE RIGHT TO HAVE A JURY TRIAL ON THESE CHARGES AND IF YOU CHOOSE TO HAVE A JURY TRIAL WE WOULD SEND FOR A PANEL OF THIRTY OR FORTY PROSPECTIVE JURORS ALL DRAWN AT RANDOM FROM THE VOTER REGISTRATION POLLS OF THE (CITY AND) COUNTY OF _____.

8. THEY WOULD COME DOWN TO THE COURTROOM AND THEN YOU, YOUR LAWYER, THE DISTRICT ATTORNEY AND I WOULD PICK A JURY OF TWELVE PERSONS FROM THIS GROUP OF THIRTY OR FORTY PEOPLE. WE WOULD ALSO SELECT TWO ALTERNATE JURORS WHO WOULD ONLY SERVE IN CASE ANY OF THE ORIGINAL JURORS BECAME SICK.

9. IN THE PROCESS OF PICKING THE JURY WE WOULD FIRST QUESTION ALL OF THE PROSPECTIVE JURORS TO SEE IF THEY COULD BE FAIR AND IMPARTIAL IF THEY WERE SELECTED TO SERVE ON YOUR JURY.

10. AFTER THAT YOU WOULD HAVE AN OPPORTUNITY TO TELL ME THROUGH YOUR ATTORNEY WHICH JURORS YOU FOUND ACCEPTABLE, MEANING YOU WANTED THEM ON THE JURY, AND WHICH JURORS YOU WANTED TO CHALLENGE, MEANING YOU DID NOT WANT THEM ON THE JURY.

11. YOU WOULD HAVE 20 CHANCES TO CHALLENGE JURORS WITHOUT GIVING ANY REASON AS TO WHY YOU DID NOT WANT THEM ON THE JURY.

12. YOU WOULD HAVE AN UNLIMITED NUMBER OF CHANCES TO CHALLENGE JURORS IF YOU COULD GIVE ME A GOOD ENOUGH REASON AS TO WHY THEY SHOULD NOT BE ALLOWED TO SERVE ON THE JURY.

13. AT THE END OF THE JURY SELECTION PROCESS, WE WOULD HAVE OUR JURY OF TWELVE PEOPLE AND THEY WOULD HEAR THE EVIDENCE. THEN THEY WOULD GO INTO A SEPARATE ROOM ALL BY THEMSELVES AND DISCUSS YOUR CASE AND VOTE ON WHETHER TO FIND YOU GUILTY OR NOT GUILTY.

14. IN ANY CRIMINAL TRIAL WHETHER YOU HAVE A JURY TRIAL OR A NON-JURY TRIAL YOU, AS THE DEFENDANT, DO NOT HAVE TO PROVE YOURSELF INNOCENT. YOU DO NOT HAVE TO TAKE THE WITNESS STAND IN YOUR OWN DEFENSE NOR DO YOU HAVE TO CALL WITNESSES OR PRESENT EVIDENCE IN YOUR OWN DEFENSE, AND IT CANNOT BE HELD AGAINST YOU BECAUSE YOU ARE PRESUMED TO BE INNOCENT UNLESS AND UNTIL YOU ARE PROVEN GUILTY BY THE DISTRICT ATTORNEY.

15. IT IS AT ALL TIMES THE DISTRICT ATTORNEY'S RESPONSIBILITY TO PROVE YOU GUILTY AND HE/SHE WOULD HAVE TO PROVE YOU GUILTY BEYOND A REASONABLE DOUBT. A REASONABLE DOUBT IS THE KIND OF DOUBT THAT WOULD MAKE AN ORDINARY PERSON HESITATE IN MAKING AN IMPORTANT DECISION IN THEIR EVERY DAY LIFE SUCH AS THE DECISION TO GET MARRIED OR THE DECISION TO BUY A HOUSE. DO YOU UNDERSTAND THE DEFINITION OF REASONABLE DOUBT?

16. IN THE CASE OF A JURY TRIAL YOU CANNOT BE FOUND GUILTY UNLESS ALL TWELVE JURORS ARE CONVINCED BEYOND A REASONABLE DOUBT THAT YOU ARE GUILTY. THE REASON FOR THIS IS THAT A JURY VERDICT IS REQUIRED TO BE UNANIMOUS, WHICH MEANS THAT ALL TWELVE JURORS MUST AGREE. THUS, IF ALL TWELVE VOTE GUILTY, THE VERDICT IS GUILTY. IF ALL TWELVE VOTE NOT GUILTY, THE VERDICT IS NOT GUILTY. IF ALL TWELVE CANNOT AGREE, THEN WE CALL THEM A HUNG JURY WHICH IS A FANCY LEGAL TERM FOR A JURY THAT IS UNABLE TO AGREE ON A UNANIMOUS VERDICT.

17. WHEN THIS HAPPENS THE COURT DECLARES A MISTRIAL AND SAYS THAT YOUR TRIAL IS NULL AND VOID AS IF IT NEVER TOOK PLACE. THE DISTRICT ATTORNEY CAN THEN TRY YOU AGAIN TO A DIFFERENT JURY.

18. THE MAIN DIFFERENCE BETWEEN A JURY TRIAL AND A NON-JURY TRIAL IS THAT WHERE THE JUDGE SITS ALONE WITHOUT A JURY THE JUDGE ALONE DECIDES WHETHER OR NOT YOU ARE GUILTY. THEREFORE, THE DISTRICT ATTORNEY ONLY HAS TO CONVINCE ONE PERSON, THE JUDGE, AS OPPOSED TO TWELVE JURORS, THAT YOU ARE GUILTY BEYOND A REASONABLE DOUBT BEFORE YOU CAN BE CONVICTED. ALSO, AT THE END OF THE CASE, THE JUDGE WILL EITHER FIND YOU GUILTY OR NOT GUILTY. IT IS UNLIKELY THAT YOU WILL GET A MISTRIAL BECAUSE THE JUDGE CANNOT MAKE UP HIS OR HER MIND.

19. OTHERWISE YOU HAVE THE SAME RIGHTS AS YOU WOULD HAVE AT A JURY TRIAL.

20. AT THIS TIME I AM GOING TO EXPLAIN TO YOU THE OFFENSES WITH WHICH YOU ARE CHARGED TODAY AND THE MAXIMUM PENALTIES ALLOWED BY LAW FOR THOSE OFFENSES.

21. YOU ARE CHARGED WITH MURDER IN THE FIRST DEGREE. THE SENTENCE FOR MURDER IN THE FIRST DEGREE IS EITHER LIFE IMPRISONMENT OR DEATH. IF YOU ARE FOUND GUILTY OF MURDER IN THE FIRST DEGREE THEN THERE WILL BE A SEPARATE HEARING TO DECIDE WHAT THE PENALTY SHOULD BE. AT THIS HEARING THE COMMONWEALTH WILL PRESENT EVIDENCE OF THE AGGRAVATING CIRCUMSTANCES THAT THEY HAVE GIVEN YOU NOTICE OF AND YOU WILL HAVE AN OPPORTUNITY TO PRESENT EVIDENCE OF ANY MITIGATING CIRCUMSTANCES. YOU HAVE THE RIGHT TO BE REPRESENTED BY COUNSEL AT THE PENALTY HEARING AND TO TESTIFY IN YOUR OWN BEHALF, TO CALL ANY WITNESSES OR PRESENT ANY EVIDENCE IN YOUR OWN BEHALF. FURTHERMORE EVEN IF YOU DECIDE TO GIVE UP YOUR RIGHT TO A JURY TRIAL ON THE QUESTION OF GUILT OR INNOCENCE YOU ARE ENTITLED TO HAVE A JURY TRIAL FOR THE PENALTY PHASE ONLY, OR IF YOU SO CHOOSE, AND IF THE COMMONWEALTH AGREES, I WILL HEAR THE PENALTY PHASE SITTING WITHOUT A JURY.

AT THE PENALTY PHASE AFTER THE COMMONWEALTH AND YOU HAVE PRESENTED EVIDENCE AND AFTER THE COMMONWEALTH AND YOUR LAWYER HAVE PRESENTED ARGUMENT, IT WILL BE UP TO THE JURY OR MYSELF TO DECIDE WHAT THE PENALTY WILL BE. THE FINDINGS OF THE JURY OR MYSELF CONCERN AGGRAVATING AND/OR MITIGATING CIRCUMSTANCES. IF THE FINDING IS NO AGGRAVATING AND NO MITIGATING CIRCUMSTANCES THE PENALTY MUST BE LIFE. IF THE FINDING IS ONE MITIGATING CIRCUMSTANCE AND NO AGGRAVATING CIRCUMSTANCES THE PENALTY MUST BE LIFE. IF THE FINDING IS ONE AGGRAVATING CIRCUMSTANCE AND NO MITIGATING CIRCUMSTANCES THE PENALTY MUST BE DEATH. IF THE FINDING IS THAT THERE ARE ONE OR MORE AGGRAVATING CIRCUMSTANCES AND ONE OR MORE MITIGATING CIRCUMSTANCES, THEN IF THE FINDING IS THAT THE MITIGATING CIRCUMSTANCES OUTWEIGH THE AGGRAVATING CIRCUMSTANCES THE PENALTY MUST BE LIFE. IF THE FINDING IS THAT THE AGGRAVATING CIRCUMSTANCES OUTWEIGH THE MITIGATING CIRCUMSTANCES, THE PENALTY MUST BE DEATH. DO YOU UNDERSTAND WHAT I HAVE JUST EXPLAINED ABOUT THE PENALTY PHASE?

22. (EXPLAIN ANY OTHER CHARGES FACING THE DEFENDANT AND THE PENALTIES AND ANY MANDATORY SENTENCES FOR THOSE CHARGES.)

23. DO YOU UNDERSTAND THE CHARGES AGAINST YOU? KNOWING THOSE CHARGES AND YOUR RIGHTS TO A JURY TRIAL AS I HAVE EXPLAINED THEM, DO YOU STILL WISH TO BE TRIED BY ME TODAY SITTING WITHOUT A JURY?

24. HAS ANYBODY PROMISED YOU ANYTHING OR USED ANY FORCE OR THREATENED YOU IN ORDER TO GET YOU TO GIVE UP YOUR RIGHTS TO A JURY TRIAL TODAY? ARE YOU DOING IT OF YOUR OWN FREE WILL?

25. HAVE YOU DISCUSSED YOUR CASE WITH YOUR ATTORNEY MR./MS. _____.

26. ARE YOU SATISFIED THAT YOUR ATTORNEY IS PREPARED TO REPRESENT YOU IN COURT TODAY?

27. MR./MS._____, DO YOU KNOW OF ANY REASONS WHY_____ SHOULD NOT BE PERMITTED TO WAIVE A JURY TRIAL? DO YOU HAVE ANY QUESTIONS YOU WISH TO ASK YOUR CLIENT? DOES THE DISTRICT ATTORNEY HAVE ANY QUESTIONS AT THIS TIME?

28. AT THIS TIME I AM GOING TO SHOW YOU WHAT IS CALLED A JURY TRIAL WAIVER FORM. READ IT OVER CAREFULLY. IF YOU HAVE ANY PROBLEMS READING IT OR ANY QUESTIONS ABOUT IT, CONSULT YOUR ATTORNEY. WHEN YOU FINISH READING IT, IF YOU AGREE WITH WHAT IT SAYS, SIGN IT ON THE LINE THAT SAYS "SIGNATURE OF DEFENDANT."

29. I AM NOW SHOWING YOU THIS SIGNED JURY TRIAL WAIVER FORM AND DIRECTING YOUR ATTENTION TO THE LINE WHERE IT SAYS "SIGNATURE OF THE DEFENDANT (NAME OF DEFENDANT)." IS THAT YOUR SIGNATURE? DID YOU JUST SIGN THAT AT THE BAR OF THE COURT TODAY? DID YOU DO IT OF YOUR OWN FREE WILL?

30. DO YOU UNDERSTAND THAT IF AT SOME FUTURE TIME YOU SHOULD CLAIM THAT YOU REALLY WANTED TO HAVE A JURY TRIAL TODAY, WE WILL TAKE THIS SIGNED WAIVER FORM AND POINT TO IT AS PROOF OF FACT THAT YOU KNEW YOUR RIGHTS TO A JURY TRIAL AND GAVE THEM UP AND ASKED TO BE TRIED BY ME TODAY SITTING WITHOUT A JURY?

31. I ACCEPT THE WAIVER AND ASK THAT THE DEFENDANT BE ARRAIGNED.

CHAMBERS
DISTRICT COURT
SECOND JUDICIAL DISTRICT
CITY AND COUNTY BUILDING
DENVER, COLORADO 80202

CONNIE L. PETERSON
JUDGE

TO: Sequestered Jurors
FROM: Judge Connie Peterson, Court Bailiffs
RE: Sequestration Information

1. Accommodations:

a. You will have private rooms at the Radisson Hotel (1 1/2 blocks from the courthouse).

b. No free parking is available. Please leave your cars at home.

c. An athletic room with hot tub and steam room is available for your use.

d. You may receive and send letters, business papers, and packages; however, all materials must be screened and/or censored by the Bailiffs.

e. Phones are in the Bailiffs' rooms and the Court. Contacts with home or business must be made through the Bailiffs.

f. Meals will be eaten together as a group and paid for by the State.

g. Court will be held on Saturdays. Leisure activities will be avaliable for Sundays.

2. What to Bring:

a. Appropriate, casual clothing for courtroom setting. Laundering information will be given by the Bailiffs.

b. After-hours clothing, warm-up/athletic clothing, bathing suit, walking shoes.

c. Toilet articles, medicines, shampoo, drier, cigarettes, favorite coffee mug.

d. Pasttime articles for hotel/jury room: games, cards, books, needle-work, holiday cards, stamps.

e. Supplies may be supplemented by family members or friends.

3. What NOT to Bring:

a. Radios or Walkman type of tape players that contain radios (those that play only tapes are OK).

b. Books or reading materials that contain violence or crime. Reading materials will be censored by the Judge and attorneys.

c. Newspapers.

4. EMERGENCY PHONE NUMBERS to give to your family/significant others:

CTRM 16 - 575-2425 (days)

Radisson Hotel - 893-3333 (nights/Sundays)

5. Address for mail:

Radisson Hotel
1550 Court Place
Denver, CO 80202

We will endeavor to make your sequestration as easy and comfortable as possible. Please ask about any special needs.

Chapter 6

Conducting the Penalty Phase

Chapter 6. Conducting the Penalty Phase

by The Honorable Susan F. Schaeffer, Circuit Court, Clearwater, Florida

A. Introduction

If your case reaches the penalty stage, a jury or you (non-jury trial) have determined that the defendant is guilty of the crime and now the remaining decision of what penalty the defendant shall receive — shall he/she live or die — must be made. There is no more difficult decision for a jury or judge to make than this one. And because of death's severity and finality, there is no decision that will receive more judicial scrutiny. There are more reversals of cases involving death sentences than any other type case in criminal law. Therefore, it is essential that the trial judge be exceedingly familiar with his/her state's death penalty laws and the federal body of law as well.

To fully understand the Circuit Courts of Appeals' decisions and the United States Supreme Court's decisions, you must often determine if the state law being reviewed follows the Georgia scheme, the Florida scheme, or the Texas scheme in determining what the sentencer can consider in aggravation. Briefly, the Georgia scheme requires the sentencer to find at least one statutory aggravating circumstance to make a defendant eligible for the death penalty. If one or more such factors is found, then all relevant evidence in aggravation may be considered. The jury is not limited to the statutory aggravating factors. The Florida scheme limits the aggravating factors the jury or judge may consider to the statutory list. So, if the jury or judge has found one or more statutory aggravating factors, they are still limited to what may be considered in aggravation by the statute. If a factor is not listed in the statute as an aggravating factor, it cannot be considered. The Texas scheme requires answers to various questions, and only if all questions are answered against the defendant may

the death penalty be imposed. These three schemes were originally approved by the U.S. Supreme Court in the 1976 trilogy of cases: *Gregg v. Georgia,* 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); and *Jurek v. Texas*, 428 U.S. 262 (1976). Almost every state has patterned its death penalty scheme after the Georgia, Florida, or Texas schemes of aggravation.

All states recognize that the Constitution requires, as does the U.S. Supreme Court, that the defendant be permitted to allow the sentencer to consider in mitigation any aspect of the defendant's character, record, or background, and any aspect of the capital crime.

Although almost all states follow one of the three schemes of aggravation discussed above, and although all states are uniform in recognizing that the defendant must be allowed to present any aspect of his/her character, record or background, and any other aspect of the offense in mitigation, there are other differences among the states, and you must know your state's law to properly preside over your penalty phase trial. Examples of some of the differences among the states:

(1) How much discretion does the prosecutor have to even seek the death penalty?

(2) Does the prosecutor have to give notice to the defendant of his/her intent to seek the death penalty and, if so, how and when?

(3) Does the prosecutor have to give notice of what he/she will rely on in aggravation? If so, how and when?

(4) Who makes the sentencing decision — the jury exclusively, the judge exclusively, or the judge after receiving a jury's recommendation?

(5) If a jury makes the decision, does it have to be unanimous or by some majority vote (and, if by a majority vote, how much of a majority)?

(6) Is yours a "balancing" or "weighing" state where aggravators and mitigators are balanced or weighed to determine the proper sentence? If not, how does the jury/judge make this decision?

(7) Jury instructions differ greatly from state to state, and some have been reviewed by the U.S. Supreme Court already and approved or disapproved. More importantly, some are ripe for review and may be struck down by the U.S. Supreme Court. You may follow your state supreme court's pronouncements and still end up re-trying the penalty phase because your supreme court may be reversed by the federal courts. What are these potential pitfalls?

(8) What is the burden of proof in deciding aggravation and mitigation?

(9) In a state where the judge decides the sentence after a jury recommendation, what is the standard for overriding the jury's recommendation?

(10) If a written order must be issued by the judge, what should and should not be included?

This list is partial. There are other differences. However, there is much in common in all states, or most states, which will be discussed in this Chapter. Some of the differences will also be discussed. However, this is not a treatise, but a bench book. You *must not* accept everything you read here as pertaining to your state. Hopefully, your state has its own bench book which details your law, your nuances, and your pitfalls. If not, and you are going to preside over one of these cases, you must do your own research, using this bench book as a starting point — not the last word.

B. Do I Have to Conduct a Penalty Phase Trial — or — Is There a Clear Prohibition Against the Death Penalty in This Case?

Before you even begin to prepare yourself for the sentencing phase (and in some instances even prior to the trial itself), you should know whether your case is one for which the laws of your state or the case law of the United States Supreme Court is going to prohibit a death sentence. At least four categories of prohibitions exist.

1. The Age of the Defendant

Various states have laws that prohibit a death sentence for a defendant under a certain age. Seven states (California, Colorado, Connecticut, Illinois, New Hampshire, New Jersey, and Ohio) have statutes that prohibit executing a defendant who was under the age of eighteen when the murder was committed. Two states (Nevada and Wyoming) have statutes prohibiting the execution of a defendant who was under the age of sixteen when the murder was committed. The United States Supreme Court has rejected the proposition that it is cruel and unusual punishment to execute both a sixteen-year-old and a seventeen-year-old. *Stanford v. Kentucky*, 492 U.S. 361 (1989). But a plurality of the Court said a defendant who is fifteen years old when the crime was committed is too young. *Thompson v. Oklahoma*, 487 U.S. 815 (1988). In 1992, the U.S. Supreme Court had the opportunity to revisit *Thompson* in the Alabama case of Clayton Joel Flowers. Flowers was fifteen years old when he committed a murder during the course of sodomy. The jury recommended a life sentence, but the trial judge, who is the ultimate sentencer in Alabama, sentenced Flowers to death. The Alabama Court of Criminal Appeals reversed the death sentence on the authority of *Thompson*,. The Alabama Supreme Court denied certiorari, and the Alabama Attorney General petitioned for certiorari before the newly constituted U.S. Supreme Court, inviting them

to revisit *Thompson*. The Supreme Court denied certiorari, thus allowing *Thompson* to stand. *Alabama v. Flowers*, 112 S.Ct. 1995 (1992).

Of course, a state has the right to limit the age of execution to a higher age than fifteen as some seven states have done. Accordingly, if you are trying a defendant who was fifteen or younger when he /she committed the murder in any state, or are trying a defendant who was sixteen or seventeen in the seven previously mentioned states, the defendant is not eligible to be executed. Why hold a penalty phase unless your statute requires it for some reason other than death?

2. A Mentally Retarded Defendant

Two states (New Mexico and Tennessee) have statutes that prohibit a death sentence for a mentally retarded defendant. There is no Eighth Amendment prohibition. The Supreme Court has found that while the sentencing jury or court must be permitted to consider mental retardation as a mitigating factor, it is not cruel and unusual punishment to execute a mentally retarded person. *Penry v. Lynaugh,* 492 U.S. 302 (1989). But, if you are a judge in New Mexico or Tennessee, and a proper determination has been made that the defendant is mentally retarded, there is no reason to hold a penalty phase, unless the statute requires it for some reason other than death.

3. The *Enmund/Tison* Exclusion

Enmund v. Florida, 458 U.S. 782 (1982), says the Eighth Amendment does not permit the imposition of the death penalty on a defendant who aids and abets a felony (in *Enmund,* a robbery) in the course of which a murder is committed by others, but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force be employed. *Tison v. Arizona*, 481 U.S. 137 (1987), says that major participation in a

felony that resulted in murder, combined with defendant's reckless indifference to human life is sufficient to satisfy the *Enmund* culpability requirement even if the defendant is not the killer. The Supreme Court has stated that the *Enmund/Tison* decision can be made by a jury, the trial judge, or an appellate court, even a federal habeas court. *Cabana v. Bullock*, 474 U.S. 376 (1986). If you are not prohibited by statute or case law from making this decision prior to the penalty phase, and if it is quite obvious the *Enmund/Tison* culpability requirement cannot be met, why not make the decision prior to holding the penalty phase trial unless it is required by your law for some purpose other than death, or unless your state law requires the jury to make this determination originally?

4. No Aggravating Factors Are Present

If you are in the vast majority of states that require at least one statutory aggravating factor to exist before the defendant is even eligible for the imposition of the death penalty, and clearly none exists, why hold a penalty phase trial unless your statute requires it for some reason other than a life/death decision? Even if you are in a state where the jury determines the sentence and the judge is bound by their decision, if you have no aggravating factor(s) to give them for consideration, it seems a tremendous waste of time and money to take testimony, hear argument, etc., if there is any way to avoid it. If you are in a state where the judge sentences either alone, or after a non-binding recommendation, you can surely avoid the penalty phase portion of the trial, hopefully by stipulation of the state attorney.

C. Death Is Different

One thing that you must understand when you begin your penalty trial is that DEATH IS DIFFERENT. Do not believe it is the same or treat it

like every other trial you have conducted. If you do, you are inviting reversal. Consider what Justice Stewart said in his concurring opinion in *Furman v. Georgia*, 408 U.S. 238, 306 (1972):

> ...[T]he penalty of death differs from all other forms of criminal punishment, not in degrees but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice, and it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.

The principal differences in death penalty proceedings from all others can be broken down into three main categories:

1. Higher (Sometimes Called "Super") Due Process Standards

Consider *Gardner v. Florida*, 430 U.S. 349 (1977). It was customary in many cases in Florida for a judge to order a pre-sentence investigation prior to sentencing a defendant. It was customary for the probation officer to include a confidential section in the PSI for the judge's eyes only. In *Gardner*, the judge asked for a PSI. There was the customary confidential section. Neither the state attorney nor the defense attorney requested to read the confidential section, nor was there any evidence anything in the confidential section was used to the detriment of the defendant. However, the U.S. Supreme Court said while this may be permissible in other cases, death is different. They stated the defendant was denied due process because the trial judge could not read any confidential material without also giving the defendant and his attorney a chance to read the confidential material and respond to it.

Continuances. We are all familiar with the vast body of case law that says granting or denying of a motion to continue rests within the sound discretion of the trial court and will not be disturbed on appeal unless an

abuse of discretion is found. In a regular trial, trial judges are rarely reversed for failing to grant a continuance. But in a death penalty trial — including the penalty phase itself — you will have to bend a little and be overly cautious in denying the defense a continuance, especially if it appears the death penalty is likely. This does not mean you have to grant an unreasonable request. But if the request is reasonable, and was not brought on by the defendant's dilatory conduct, a better practice is to bite your tongue and grant the request. This author has seen too many reversals when the death penalty was imposed and a continuance was denied. "Super" due process means you have to grant continuances you would otherwise deny. Haste will not be tolerated in a death penalty case, including the penalty phase trial.

2. Different Evidentiary Standards.

Consider *Green v. Georgia*, 442 U.S. 95 (1979). The defendant and a codefendant raped and killed the victim. In the penalty phase of Green's trial, Green attempted to introduce a cellmate's testimony that the codefendant told him that he killed the victim after telling Green to go on an errand. There was nothing in Georgia's law that would allow this hearsay testimony, and so the trial judge excluded it. (**Note**: other states provide for hearsay in the penalty phase under certain conditions, but Georgia had no such provision.) The Georgia Supreme Court affirmed the death sentence and Green petitioned for certiorari assigning as error the trial court's refusal to allow the hearsay testimony. In a short, two-page opinion, including Justice Rehnquist's dissent, the U.S. Supreme Court reversed Green's death sentence. The per curiam opinion said the hearsay testimony was relevant to Green's punishment and stated: "In these unique circumstances, the hearsay rule may not be applied mechanistically to defeat the ends of justice." *Green* at 97. There was no thought in the opinion that the testimony was somehow not hearsay, nor was there any

suggestion that the testimony was somehow admissible as an exception to the hearsay rule provided by Georgia's rules of evidence. The Court simply found death to be different and, therefore, fairness required the proffered testimony to be admitted. Justice Rehnquist, in his singular dissent, suggested the court made its decision only because of the death sentence imposed on Green:

> I think it impossible to find any justification in the Constitution for today's ruling, and take comfort only from the fact that since this is a capital case, it is an example of the maxim that "hard cases make bad law." *Green* at 98.

The *Green* decision would clearly have been different if Green had not been sentenced to die. Therefore, it should be seen that strict evidentiary standards that apply to other cases cannot be blindly followed in a penalty phase where a defendant can be sentenced to death.

3. Intense and Multiple Scrutiny of the Court's Rulings and of Defense Counsel's Performance

No case will be reviewed as meticulously , as often, and by as many courts as a death case. Defense counsel's performance will be scrutinized for effectiveness as in no other case. The trial judge will be required to monitor that performance. Defense counsel's performance in the closing arguments of the penalty phase will be covered later in this chapter. Ineffective assistance of counsel will be covered in the chapter on post-conviction proceedings.

D. Preliminary Matters

Assuming you have the same jury in the penalty phase that decided the guilt of the defendant, there may be little preliminary instruction necessary since you will have covered this in the initial voir dire. However, it is

advisable to begin with preliminary instructions such as you would use before any trial to tell the jury what will be forthcoming in the penalty phase. Also your preliminary instructions should clue them in as to what their deliberations will entail, the expected length of the proceeding, any required sequestration, etc.

If you are starting with a new jury, as will usually occur if the case was remanded for a re-sentencing after defendant's successful appeal, successful post-conviction motion, or habeas corpus petition, you will have to review the chapter of this book dealing with voir dire, and the unique problems inherent in selecting juries for death cases. You, of course, will tell the new panel that guilt has already been decided, and they will be deciding or recommending penalty only. You will then introduce them to their sentencing role.

Whenever you are dealing with a jury in the penalty phase, you should review your instructions to be certain there is no minimization of the importance of their decision that would constitute a *Caldwell* violation. *See Caldwell v. Mississippi*, 472 U.S. 320 (1988). The *Caldwell* problem will be discussed in detail in this Chapter under the headings of Closing Arguments: States, and of Jury Instructions.

What if the defendant asks to waive his/her right to a jury determination or recommendation and have the judge alone decide this issue? You will have to examine your state statute, or case law if not determined by statute, to determine if this can be done. If the trial judge alone can make the determination, you should make sure that:

(1) The defendant's waiver is knowing and voluntary.
(2) The defendant's waiver is supported by the record.
(3) The state agrees, if your state law requires this. Generally, if your state law requires the state's concurrence to the defendant's waiver of a jury trial in general, there will be the same requirement at the

penalty stage, unless otherwise stated by your death penalty statute, or by your death penalty case law.

(4) You want the waiver. There are many reasons, which are obvious, why you might not want to decide this very difficult sentence decision of life or death alone. If you don't have to accept a waiver and don't want to, impanel a jury.

E. Opening Statements

Unless your death penalty statute deals with opening statements, it is suggested you follow the same procedure you would use in any other trial. Generally, the state may make an opening statement prior to the introduction of any evidence, as may the defense. The state may waive an opening statement which is not binding on the defense. The defense can generally make an opening statement before the presentation of any evidence, waive it until the state has presented its evidence, and give it prior to the presentation of the defendant's evidence or waive it entirely.

F. State's Evidence in Support of the Death Penalty

If the penalty phase is before the same jury that heard the guilt phase, the testimony or physical evidence from the trial that supports your state's aggravating factors need not be repeated. You will tell the jury at some point in your instructions that they may consider all testimony and other evidence that bears on either an aggravating or a mitigating factor that they heard or saw in the guilt phase of the trial and the penalty phase of the trial. What if it is a new jury? The state will have to put on the witnesses or introduce evidence before the new jury that it believes relates to aggravation — even if that evidence had been introduced before a different jury that determined guilt. Some state statutes allow for the introduction to a new jury of transcripts from the guilt phase. Chances are, however,

unless these witnesses are no longer available, the state will want to use live witnesses. If your statute makes no reference to the use of transcripts and a witness has died, has become incapacitated, or is unavailable, you will have to decide whether a transcript of the previous testimony is permissible, always being mindful of the axiom that Death Is Different.

G. Statutory Aggravating Circumstances

A review of all states' statutes dealing with aggravating circumstances shows many similarities in the types of things the various states deem aggravating and thus narrowing the class of murderers who may be deserving of a death sentence. For this part of the Chapter, the author has not listed the states having each aggravating factor or variation thereof by name, except occasionally. The reason for this is that many of you will be from states that follow the Georgia scheme. That means that if your state attorney proves one or more of your specific statutory aggravating circumstances, the jury will be permitted to consider all relevant aggravating evidence whether or not it is specifically listed in your statute. Therefore, you should familiarize yourself with the problems, etc. of the aggravating factor discussed below, even though it is not listed in your statute, because your state attorney may attempt to introduce evidence of one or more of these factors in your trial. If you are in a Florida-type state (aggravating factors *limited* to those listed in your statute) or Texas-type state (specific questions must be answered), you can easily identify your exact factors by comparing your statute to the lists below.

Circumstances that may constitute factors in aggravation will be discussed under the following three broad categories:

(a) The defendant and his/her past, present or future;.

(b) The circumstances of the crime itself; and

(c) The victim and who he or she was.

1. Category I: The Defendant — Past, Present, and Future

a. The defendant's "freedom status" at the time of the murder

At the time of the murder, was the defendant in prison or jail, had the defendant escaped from custody, or was the defendant on parole or probation?

Almost all states that list aggravating circumstances enumerate some version of the above as an aggravating factor. Examples of some of the states' variations:

(1) The capital felony was committed by a person under sentence of imprisonment (one state adds or on community control).

(2) The capital felony was committed by a person under sentence of imprisonment, including a period of parole, or on probation for a felony (one state adds defendant on probation after receiving a sentence for a felony).

(3) The capital felony was committed by a person imprisoned as a result of a felony (some states say forcible felony) conviction.

(4) The offense was committed while the defendant was in the custody of the State Department of Corrections, a law enforcement agency (one state adds under custody of the county sheriff) or county or city jail (or one state says when defendant was confined in any correctional institution).

(5) The offense was committed by a defendant who was unlawfully at liberty after being sentenced to prison for a felony.

(6) The defendant was serving a life sentence or death sentence at time of the murder.

(7) The defendant was under custody of the Department of Corrections, under custody of county sheriff, on probation after receiving a sentence for a felony, or on parole.

Questions to be asked and answered:

If your aggravating factor mentions custody only, does it include a defendant who has escaped from custody? Does it include a defendant who is on parole? On probation? What about someone on community control (or whatever your state refers to as house arrest)? What if your state has done away with parole, but still releases prisoners early, due to overcrowding, on mandatory conditional release (or whatever your state may call this early release program)? If the defendant is on such a release program and commits a capital murder, does this factor apply to him or her?

The Florida factor was as in example (1) above. Here's how the Florida case law answers the above questions. This aggravating factor applies to a) one incarcerated for a specific or indeterminate term of years, b) persons incarcerated under an order of probation, c) persons under a) and b) above who have escaped from incarceration, and d) persons who are under sentence for a specific or indeterminate period of years and who have been placed on parole. *Peek v. State*, 395 So.2d 492 (Fla. 1981). It also includes a defendant who is on mandatory conditional release. *Haliburton v. State*, 561 So.2d 248 (Fla. 1990). It does not include those on probation unless they are in jail as a condition of probation. It does not include someone on probation following a term of incarceration. *Ferguson v. State*, 417 So.2d 631 (Fla. 1982). It does not include a defendant on community control. *Trotter v. State*, 576 So.2d 691 (Fla. 1991). The Florida Legislature did not like its supreme court's answer to the defendant who was on

community control, so they amended the aggravating factor specifically to include a defendant on community control. Your state's case law will answer these same questions, and the answer will not likely be disturbed by a federal court.

b. The defendant's past criminal convictions of violence

At the time of the murder or the sentencing was the defendant a person who had previously led a relatively law-abiding life, or at least one without violence, or does he/she have a past history of criminal convictions involving violence?

Almost all states include a statutory aggravating factor dealing with the defendant's past criminal convictions of violence. Examples of some of the states' variations:

(1) Defendant previously convicted of another capital felony, or a felony involving the use (some states include "or threat") of violence to the person.

(2) Defendant convicted of another offense for which a sentence of life imprisonment or death was imposable.

(3) Defendant previously convicted of an unrelated murder, aggravated rape, aggravated burglary, aggravated arson, aggravated escape, armed robbery, or aggravated kidnapping.

(4) Defendant previously convicted of a capital felony (one state says convicted previously for another murder).

(5) Defendant previously convicted of two felonies, on different occasions and which involved the infliction of serious bodily injury to another person.

(6) Defendant convicted of two or more murders, at the same or different times.

(7) Defendant has a prior conviction for a capital offense, or has a substantial history of serious assaultive criminal convictions.

Questions to be asked and answered:

What if a conviction is on appeal? What if a conviction is subsequently reversed, or a defendant receives some relief because of a post-conviction motion (ineffective assistance of counsel, for example)? What about a contemporaneous conviction for a violent felony?

Generally, it is not improper to consider a conviction that is on appeal. *But*, if that conviction is reversed, the imposition of the death penalty based on a reversed conviction may violate the Eighth Amendment and the penalty phase will have to be re-tried. *Johnson v. Mississippi*, 486 U.S. 578 (1988). The same would hold true for post-conviction relief reversal, unless, of course, the defendant was retried and convicted again, which might save the day.

The contemporaneous conviction problem is one of state law and will probably not be reversed by the federal courts whichever way your state rules. Most states have determined that a contemporaneous conviction cannot generally be used. Example: Defendant rapes and robs his/her murder victim and is convicted of all three crimes by the jury. The rape and robbery, although crimes of violence cannot generally be used to support a previous violent conviction. However, if two or more victims are involved, a contemporaneous conviction can generally be used.

There should be no problem, except as noted above regarding reversals, in using a conviction of a separate crime of violence, even if the date of the crime was after the capital crime. The term "previously convicted" refers to a conviction prior to the penalty trial you are conducting, not a crime committed previous in time to the date of the crime you are trying. This is again a matter of state law interpretation.

Caveat: If your state statute requires a conviction for a crime of violence, and the live testimony in the penalty phase regarding the prior crime shows it was a crime of violence, but the Judgment and Sentence does not clearly show defendant was convicted of a crime of violence, this can cause problems. See *Mann v. State,* 420 So.2d 578 (Fla. 1982) for an example of this problem. Larry Mann had previously been charged with burglarizing a victim's home and raping her. The victim of the prior crime testified at the penalty phase trial for a subsequent murder. The Judgment and Sentence for the prior crime said the defendant had been convicted of "burglary." The death penalty in the murder case was reversed by the Florida Supreme Court and remanded to determine if the defendant was previously convicted of a crime of violence or of a burglary only, as the Judgment and Sentence stated, without any violence. The prosecutor, in the second sentencing before the judge, introduced the charging document that charged the defendant with burglary during which a rape occurred. The verdict showed the defendant had been found guilty of burglary "as charged." This was found sufficient to satisfy the prior violent crime aggravator. See *Mann v. State,* 453 So.2d 784 (Fla. 1984).

c. The defendant's past criminal, non-violent convictions, or other violent criminal activity with no convictions

Only two states appear to allow aggravating circumstances to be based on violent crimes where the defendant has not been convicted, or on crimes where a conviction has been obtained but the crimes might not be violent ones:

(1) Defendant committed another murder, at any time, regardless of whether convicted. (Indiana)

(2) Defendant has previously been convicted of two or more state or federal offenses punishable by a term of imprisonment of

more than one year, committed on different occasions, involving the distribution of a controlled substance. (New Hampshire)

This author sees possible Constitutional problems in using another murder "committed" for which no conviction has been obtained as an aggravating circumstance. If the U. S. Supreme Court mandates a new sentencing when a conviction is reversed (although obviously one *had* been obtained), it is questionable whether they would allow death based on criminal allegations for which a conviction had *never* been obtained. It appears Indiana has limited this aggravating factor to murders that are related to the principal charge being tried (multiple victims) and has determined that it would not be proper for the judge or jury to consider another murder not related to the principal charge if the defendant has not been convicted of that other murder. See *State v. McCormick*, 397 N.E.2d 276 (Ind. 1979); *Judy v. State*, 416 N.E. 2d 95 (Ind. 1981); *Moore v. State*, 479 N.E.2d 1264 (Ind. 1985).

If a state wants to make previous convictions of drug distributions an aggravating circumstance, such as New Hampshire has done, this is most likely permissible. No New Hampshire cases on this factor could be found.

d. The defendant's future dangerousness

We have dealt with the defendant's past (his/her criminal record), his/her present (is he/she in prison or an escapee or parolee), but what of his/her future?

Several states list the future dangerousness of the defendant as a statutory aggravating factor or as a question to be answered in determining sentence. Some variations are:

(1) There is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.

(2) The defendant, by prior conduct or conduct in the commission of the murder at hand, has exhibited a propensity to commit murder that will probably constitute a continuing threat to society.

(3) There is a probability based upon the evidence of the prior history of the defendant, or of the circumstances surrounding the commission of the offense of which he/she is accused that he/she would commit criminal acts of violence that would constitute a continuing serious threat to society.

(4) The defendant poses a substantial and continuing threat of future dangerousness or is likely to commit continued acts of criminal violence.

Also, several states following the Georgia scheme, which allows the jury to consider any relevant evidence in aggravation once at least one statutory aggravating factor is found, have quite a body of case law that allows the jury to consider the future dangerousness of the defendant in determining sentence even though it is not specifically listed as a statutory aggravator. *See Gillard v. Scroggy*, 847 F.2d 1141 (5th Cir. 1988) where the Fifth Circuit Court of Appeals says the state can argue future dangerousness to the jury even though it is not specified in Mississippi's statute.

Questions to be asked and answered:

Should experts be allowed to testify concerning the future dangerousness factor? If experts are going to examine the defendant at the request of the state or the court, does the defendant need to be

advised of his/her Fifth Amendment rights? What about his/her Sixth Amendment right to counsel? Must the defendant's attorney be notified of the examination? What is a "propensity"?

Fortunately, the United States Supreme Court has dealt with most of these questions and has answered them.

The United States Supreme Court has held that psychiatrists can give their opinions on this issue. *See Barefoot v. Estelle*, 463 U.S. 880 (1983). Three justices dissented. Justice Blackman's dissent, and the American Psychiatric Association's research that concludes that psychiatric predictions of long-term future violence are wrong more often than they are right (in fact, the best research indicates psychiatrists and psychologists are accurate in no more than one out of three predictions of violent behavior), have occasioned the Nevada Supreme Court to recently rule they will no longer allow psychiatric evidence purporting to predict the future dangerousness of a defendant because such evidence is "highly unreliable and therefore inadmissible at death penalty sentencing hearings." *Redman v. Nevada,* 828 P.2d 395, 400 (Nev. 1992). California, while not adopting the absolute bar to experts that Nevada did, has limited the use of expert testimony to very limited circumstances that would rarely exist. Except in those very rare instances, experts cannot be used to predict future dangerousness. *People v. Murtishaw*, 631 P.2d 446 (Cal. 1981). Based on this author's reading of the APA research, she would suggest other states are apt to follow the lead of Nevada and California.

The defendant has both a Fifth Amendment right and a Sixth Amendment right that must be addressed before a defendant is examined by a psychiatrist or psychologist if any part of the examination or the defendant's statements are to be used against him/her in the determination of his/her future dangerousness. The defendant needs to be told of the rights against self-incrimination and

of the right to an attorney to assist in deciding whether or not to be examined or answer any questions. The attorney, if the defendant already has one, is entitled to be noticed of any attempted examination and to be able to assist his/her client in deciding these issues. Failure to pay heed to these Supreme Court dictates will give the defendant a new sentencing hearing without any such unconstitutionally obtained testimony being admitted. *Estelle v. Smith*, 451 U.S. 454 (1981); *Satterwhite v. Texas*, 486 U.S. 249 (1988); *Powell v. Texas*, 492 U.S. 680 (1989).

Idaho is the only state that speaks of "propensities." The Idaho Supreme Court has defined this term in *State v. Creech*, 670 P.2d 463 (Idaho 1983). Since Idaho is a judge-only sentencing state, the problems that will be discussed later in this Chapter regarding vague terms (cruel, heinous, atrocious, depraved, etc.) will not be so problematical as they might be if a jury were involved in the Idaho sentencing scheme.

This concludes the various statutory aggravating factors that deal with the defendant. The next category of aggravators will deal with the murder itself and the circumstances surrounding it.

2. Category II; The Capital Crime and the Events Surrounding It —What, Why, How, and How Many?

a. At the time of the capital crime, was the victim the only person who could have been killed, or were there others either killed or at risk?

Many states have an aggravating factor that speaks to a crime where more than one person was (or could have been) killed or injured. Examples of some variations:

(1) The defendant knowingly created a great risk of death to many (one state says at least several) persons.

(2) The defendant knowingly created a risk of death or great bodily harm to more than one person.

(3) The defendant created a grave risk of death to another person or persons in addition to the victim.

(4) The defendant killed two or more persons.

(5) Defendant's acts of killing were intentional and resulted in multiple deaths.

(6) The defendant created a great risk of death to more than one person in a public place by means of a weapon or device that would normally be hazardous to the lives of more than one person.

(7) The defendant committed "mass murder" which is defined as the murder of three or more persons within the State of Tennessee within a period of 48 months and perpetrated in a similar fashion in a common scheme or plan.

Questions to be asked and answered:

How many is "many"? What is a "great" or "grave" risk? How many persons are "several"? Are two deaths "multiple"?

These questions will be answered by the appellate courts of your state. The answers will probably not be disturbed by the federal courts.

b. What was the defendant doing when the victim was killed – was the defendant engaged in some other felony?

This is the felony murder aggravating circumstance that exists in almost all states. The only thing that makes it different from state to

state is what underlying felonies are included, and whether attempts to commit or flight after committing these felonies are included.

The aggravating circumstance usually reads as follows: The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit any. . .and here the laundry list begins; the felonies included are:

(1) Robbery (armed or otherwise);
(2) Sexual battery (rape, sodomy, oral copulation, unlawful sexual intercourse, rape by instrument, a sex crime);
(3) Arson;
(4) Burglary;
(5) Kidnapping;
(6) Aircraft piracy;
(7) Unlawful throwing, placing, or discharging, detonating of a destructive (explosive) device or bomb;
(8) Lewd and lascivious crimes on a child under the age of 14;
(9) Train wrecking;
(10) Mayhem;
(11) Forcible detention (criminal confinement);
(12) Calculated criminal drug conspiracy;
(13) Child molesting;
(14) Criminal deviant conduct;
(15) Dealing in cocaine or a narcotic drug;
(16) Felony abuse of a child;
(17) Unnatural intercourse with a child;
(18) Battery of a child; and
(19) Unlawful distributing, manufacturing, disposing, selling or possessing with intent to sell a controlled substance.

Several states do not list specific felonies. Examples:

(1) Any Class I, II, or III felony;
(2) Any felony, but a previous conviction of the felony is required;
(3) Another capital felony; and
(4) A felony.

Questions to be asked and answered:

Which felonies are listed in my state? Does the state have to charge the felony for this factor to apply? Is a conviction for this felony a requirement?

Your state statute will answer the first question. The rest of the answers will be found from your case law interpreting your statute. The federal courts are not likely to interfere with your state's interpretation.

c. Why was the victim killed? for money? as part of a contract killing? to avoid arrest or escape from custody? to prevent a person from testifying? because of his/her race or nationality?

Most states have one or more aggravating factors dealing with the "why" question. The most common aggravating factor involves a killing for money or any other pecuniary gain. There are other common "why" aggravators, including the following:

(1) The capital offense was committed for pecuniary gain.
(2) The capital offense was committed for hire or the defendant hired another to commit the offense.

(3) The defendant was a party to an agreement to kill another person in furtherance of which a person had been intentionally killed.

(4) The defendant procured the commission of the offense by payment or promise of payment of anything of pecuniary value.

(5) The defendant caused or directed another to commit murder or committed murder as an agent or employee of another.

(6) The capital offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(7) Defendant committed the murder in furtherance of an escape or attempt to escape from or evade lawful custody, arrest or detention of or by an officer or guard of a correctional institution or by a law enforcement officer.

(8) The murder was committed in an apparent effort to conceal the identity of the perpetrator or to conceal the commission of a crime.

(9) The capital offense was committed to disrupt or hinder the lawful exercise of any governmental function, or the enforcement of laws.

(10) The victim was intentionally killed because of race, color, religion, nationality, or country of origin.

And there is one such aggravation for which the "why" cannot be determined:

(11) The murder was committed upon one or more persons at random and without apparent motive.

Questions to be asked and answered:

Killing for money or other pecuniary reward is fairly obvious, whether the killing is a paid contract killing, or committed during the course of a robbery, burglary, etc. However, if the defendant killed the victim during a robbery, for example, can the jury or judge find both the felony murder aggravator and that the homicide was committed for pecuniary gain? How do you determine if the killing was for the purpose of avoiding or preventing a lawful arrest? If the victim knows the defendant, does this factor always apply? If the victim is a police officer trying to arrest the defendant on a warrant, for example, can you double up aggravating factors such as numbers (6) and (9) above, if your state has both (as many do)? Can you also throw in another aggravator that the victim was a law enforcement officer? How many aggravating circumstances can be counted based on a single aspect of the crime?

Let's take the simpler problem first. In most states that have an aggravating factor such as numbers (6), (7), or (8) above, there is no presumption that this circumstance exists. And the mere fact that a defendant knows the victim (who therefore can identify him/her) is insufficient. There must be proof, usually beyond a reasonable doubt, that this *was* the reason for the murder, not an assumption or innuendo. Often, the defendant's own statement or that of a codefendant is the best source of information as to why a victim was killed. See, for example, two Florida cases: *Caruthers v. State,* 465 So.2d 496 (Fla. 1985) and *Harmon v. State*, 527 So.2d 183 (Fla. 1988). In both cases, the defendant knew the victim and the victim could have identified the defendant had he not been killed. In one case, *Harmon*, the aggravating factor applied. In the other, *Caruthers*, it did not. The distinction appears to be the statements of the defendant. Caruthers said that

during the armed robbery, he panicked and started shooting, whereas Harmon told a cellmate he killed the blind victim during the armed robbery because the victim had heard his name spoken and therefore could identify him. The defendant's own statements have been held to be sufficient to prove this factor in other states as well. *See*, for example, *Berget v. State*, 824 P.2d 364 (Okla. Crim. App. 1991).

Aggravating factor (9) above applies mostly to witnesses who are killed to prevent their testimony before the grand jury or the petit jury.

Aggravating factor (10) must not be presumed solely because a victim is of a different race, nationality, etc., from the defendant. There must be proof that the reason why he/she was killed was because of the difference. See *People v. Sassounian*, 182 Cal. App.3d (2d Dist. 1086). The defendant was Armenian and had come with his family from Lebanon. He had expressed hatred of the Turkish people. The victim was an official representative of the Republic of Turkey. The defendant's statement to an inmate indicated he murdered the victim for no reason other than the fact that he was a Turk and an official representative of the government of Turkey. The defendant's statement indicated the murder was a revenge killing against the Turkish people for what they had done years before to the Armenians. The California appeals court (defendant sentenced to life without possibility of parole because of the finding of the special circumstance) found the application of this circumstance was both constitutional (not vague) and appropriate based on the facts of the case.

A common problem in this area is sometimes referred to as "doubling up" or "double counting" of aggravating factors. A partial solution is to understand your state's sentencing scheme well. In some states, to convict a defendant of capital murder (or first degree murder or whatever your state calls the murder that makes a defendant death eligible), the jury must find one or more special circumstances that

sound very much like or are identical to aggravating factors. For example, Louisiana defines first-degree murder (the only degree of murder which allows a defendant to be sentenced to death) as the killing of a human being:

(1) When the offender has specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of aggravated kidnapping, aggravated escape, aggravated arson, aggravated rape, aggravated burglary, armed robbery, or simple robbery;
(2) When the offender has a specific intent to kill or to inflict great bodily harm upon a fireman or peace officer engaged in the performance of his/her lawful duties;
(3) When the offender has a specific intent to kill or to inflict great bodily harm upon more than
(4) When the offender has specific intent to kill or inflict great bodily harm and has offered, has been offered, has given, or has received anything of value for the killing; or
(5) When the offender has the specific intent to kill or to inflict great bodily harm upon a victim under the age of twelve years.

La. Rev. Stat. Ann. §14.30 (A) (West 1986).

Louisiana next requires the jury that has found the defendant guilty of first degree murder to sentence the defendant to death or life imprisonment without benefit of parole, probation, or suspension of sentence. A sentence of death cannot be imposed unless the jury finds at least one enumerated statutory aggravating circumstance, considers all mitigating circumstances, and unanimously recommends that the defendant be sentenced to death.

All five of the circumstances that make a defendant death eligible are also found in Louisiana's list of eleven aggravating factors. Consider the case of Leslie Lowenfield who killed five people. The jury convicted him of two counts of manslaughter and three counts of first-degree murder. An essential element of the three first-degree murder convictions was a finding that he intended to kill or inflict great bodily harm upon more than one person. (*See* (3) above). The same jury recommended a death sentence, finding as an aggravating circumstance that the defendant "knowingly created a risk of death or great bodily harm to more than one person," an aggravating factor in Louisiana. The defendant cried foul. He took his case to the United States Supreme Court, contending that a sentence of death could not be based on a single aggravating circumstance that was a necessary element of the underlying offense of first-degree murder and which was the only reason he was even eligible for a death sentence. The U.S. Supreme Court in *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988), rejected this argument.

> The use of aggravating circumstances is not an end in itself, but a means of genuinely narrowing the class of death-eligible persons and thereby channeling the jury's discretion. We see no reason why this narrowing function may not be performed by jury findings at either the sentencing phase of the trial or the guilt phase.

And, further at 246:

> [A]nd so the fact that the aggravating circumstance duplicated one of the elements of the crime does not make this sentence constitutionally infirm.

However, the question of "double counting" or "doubling up" of *aggravating factors* has not specifically been addressed by The Supreme Court. For example, if yours is a state that has an aggravating factor that the homicide was committed during the course of a robbery or burglary and it has another aggravating factor that the homicide was committed for pecuniary gain, can the jury or the judge find both aggravating factors?

Here you will have to look to your state law, at least until the U.S. Supreme Court or your federal appeals court decides the issue. Most states will not permit doubling up of aggravating factors. *Cook v. State*, 369 So.2d 1251 (Ala. 1979); *State v. Rust*, 250 N.W.2d 867 (Neb. 1977). *Provence v. State,* 337 So.2d 783 (Fla. 1976), says you can't find both a murder committed during a robbery and a murder committed for pecuniary gain as separate aggravating factors. *Contra, State v. Jones,* 749 S.W.2d 356 (Mo. 1988). *Bello v. State*, 547 So.2d 914 (Fla. 1989), says you can't find both aggravating factors that the murder was committed for purpose of avoiding or preventing a lawful arrest and that the murder was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws when the defendant kills a police officer who was entering his house to arrest the defendant. The same result was reached in *State v. Goodman,* 257 S.E.2d 569 (N.C. 1979). Several states solve this problem by jury instruction, allowing both aggravating factors to be read to the jury for their determination, but in the event they find both to exist, they are instructed to consider them as one for determining the appropriateness of the death penalty, or instructing them they are simply not counting number of aggravators versus number of mitigators in determining sentence and they should be cognizant of double counting. See *People v. Harris*, 679 P.2d 433 (Cal. 1984); *State*

v. Bey, 548 P.2d 887 (N.J. 1988); *State v. Rose,* 548 P2d 1058 (N.J. 1988); *Castro v. State*, 597 So.2d 259 (Fla. 1992).

d. How was the victim killed?

Was deatth quick and painless or torturous and long-suffering? Did the victim know he/she was going to die? What was the defendant's state of mind? depraved? cold and calculated? Did defendant act out of panic?

All states that have aggravating circumstances have at least one that deals with the methods used by the defendant to effect death and how this affected the victim. Some variations are:

(1) The capital offense was especially heinous, atrocious, or cruel.

(2) The capital offense was especially heinous, atrocious, or cruel, manifesting exceptional depravity. (One state adds "by ordinary standards of morality and intelligence").

(3) The defendant committed the offense in an especially heinous, cruel or depraved manner.

(4) The offense was outrageously vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

(5) The murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, use of an explosive devise or poison, or the defendant used such means on the victim prior to murdering him.

(6) The offense was a deliberate homicide and was committed by means of torture.

(7) The murder involved torture, depravity of mind, or the mutilation of the victim.

(8) The capital murder was committed by means of a destructive device, bomb, explosive, or similar device that the person himself planted, or caused to be planted, hid or concealed in any place, area, dwelling, building, or structure, or mailed or delivered (some states add "and the person knew that his/her act or acts would create a great risk of death to human life.")

(9) The defendant intentionally killed the victim while lying in wait (some states — "or ambush")

(10) The defendant intentionally killed the victim by the administration of poison.

(11) The defendant committed the offense by use of an assault weapon (some states — "machine gun").

(12) The capital murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(13) By the murder, or circumstances surrounding its commission, the defendant exhibited utter disregard for human life.

(14) The murder was committed in a cold, calculated, and premeditated manner, pursuant to a preconceived plan, scheme, or design to take a human life by unlawful means and the conduct of the defendant created a reasonable expectation that the death of a human being would result therefrom.

(15) The defendant dismembered the victim.

Questions to be asked and answered:

In light of all the recent flurry of U.S. Supreme Court activity over the heinous, atrocious or cruel aggravator, the heinous, cruel or depraved aggravator, the utter disregard for human life factor and the outrageously or wantonly vile, horrible, or inhuman aggravator, what should I do if I am in a state that has such an aggravating

circumstance, and it seems to apply in my case? What if my state's aggravating factor is not exactly the same as that which has been held unconstitutionally vague, but my aggravating factor has vague terms also? Does my aggravating factor allow the jury/judge to consider what happened to the victim up to unconsciousness, both before and up to death, or what happened to the victim both before and after death?

Read the following U.S. Supreme Court cases:

ARIZONA	*Lewis v. Jeffers*, 497 U.S. 764 (1990)
	Walton v. Arizona, 497 U.S. 639 (1990)
FLORIDA	*Espinosa v. Florida*, 112 S.Ct. 2926 (1992)
	Sochor v. Florida, 112 S.Ct. 2114 (1992)
	Proffitt v. Florida, 428 U.S. 242 (1976)
GEORGIA	*Godfrey v. Georgia*, 446 U.S. 420 (1980)
IDAHO	*Arave v. Creech*, 113 S.Ct. 1534 (1993)
MISSISSIPPI	*Stringer v. Black*, 112 S.Ct. 1130 (1992)
	Shell v. Mississippi, 111 S.Ct. 313 (1990),
	Clemons v. Mississippi, 494 U.S. 738 (1990)
OKLAHOMA	*Maynard v. Cartwright*, 486 U.S. 356 (1988)

Several states have declared their aggravating factor in this category unconstitutional as applied after the United States Supreme Court struck down as unconstitutionally vague the application of Georgia's aggravating factor of outrageously or wantonly vile, horrible, or inhuman (*see Godfrey*

v. Georgia,) and Oklahoma's application of the aggravating factor of especially heinous, atrocious or cruel (*see Maynard v. Cartwright*). A Mississippi and a Florida trial court tried to give its jury a limiting instruction when it defined heinous, atrocious, or cruel, but the Supreme Court said it was not good enough. *see Shell v. Mississippi, Espinosa v. Florida; Sochor v. Florida, supra.* However, the Arizona circumstance of especially heinous, cruel or depraved has recently been upheld as applied. *see Lewis v. Jeffers,*and *Walton v. Arizona.* The Idaho circumstance of committing a murder with utter disregard for human life was recently upheld because the Idaho Supreme Court had adopted a limiting construction that met constitutional standards. *Arave v. Creech, supra.*

After you have read those cases, if you are thoroughly confused, it seems to this author that there are three keys:

(1) Who is the sentencer, the judge or the jury? (Arizona and Idaho – judge only; Florida – judge after a jury recommendation that is to be given great weight; Georgia, Mississippi, and Oklahoma – jury.)
(2) If it is a jury-sentencing state or a jury-recommending state where the recommendation must be given great weight, was the jury given a sufficient limiting definition of the terms in their instructions? and
(3) Does the state appellate court apply a sufficient and appropriate limiting definition of the aggravating circumstance?

You, as the trial judge, have no control over whether the jury decides the sentence, which is binding on the judge, or the judge decides the sentence after receiving a recommendation from the jury, or the judge

alone decides the sentence. Your legislature has decided this for you. You also have no control over whether your appellate court(s) applies an appropriate limiting definition of your state's aggravating circumstance, either in general or to the facts of each individual case it reviews. But you do have control over how you instruct the jury. If you have an aggravating circumstance that is being constitutionally attacked in the federal courts (heinous, atrocious, or cruel; heinous, atrocious, or depraved; outrageously or wantonly vile, horrible, or inhuman) *or* one that is apt to be in the future (a circumstance with terms that are vague or in need of definition), you must be certain you give an instruction to the jury that will properly define the vague terms and tell them what types of cases are meant to be included within this aggravating factor.

Arizona defines "especially cruel" as "when the perpetrator inflicts mental anguish or physical abuse before the victim's death." It further says "mental anguish includes a victim's uncertainty as to his ultimate fate." *Walton v. Arizona,* 769 P.2d 1017, 1032 (Ariz. 1989). The Arizona Supreme Court further limits the cruel circumstance to situations where the suffering of the victim was intended by or foreseeable by the killer. The U.S. Supreme Court approved this definition of "especially cruel" as "constitutionally sufficient because it gives meaningful guidance to the sentencer." *Walton v. Arizona*, 110 S.Ct. 3047, 3058 (1990).

In *Maynard v. Cartwright*, 486 U.S. 356, 364-365, the Supreme Court said they would approve of a definition that would limit Oklahoma's "especially heinous, atrocious, or cruel" aggravating circumstance to murders involving "some kind of torture or physical abuse."

In *Proffitt v. Florida*, 428 U.S. 242 (1976), the United States Supreme Court said the Florida provision of "especially heinous, atrocious or cruel" would not be vague or overbroad so long as it was defined to be "the . .

conscienceless or pitiless crime which is unnecessarily torturous to the victim."

The United States Supreme Court reiterated its approval of that construction in *Walton v. Arizona,* at 3058, holding that Arizona's definition of "depraved" as "when the perpetrator relishes the murder, evidencing debasement or perversion" or "shows an indifference to the suffering of the victim and evidences a sense of pleasure" in the killing is an appropriate construction of its statute.

If your state does not have a standard instruction defining terms such as heinous, atrocious, cruel, depraved, etc., or if the instructions you have are problematical (such as using definitions of terms the U.S. Supreme Court has found unconstitutionally vague), use definitions in your instructions the U.S. Supreme Court *has* approved.

If your aggravating factor uses terms that appear vague and that have not yet been addressed by the U.S. Supreme Court, you define them, or if the defense attorney suggests an instruction that defines the terms, use the instruction.. The best way to avoid an appeal of an instruction is to use the one requested by the defense, so long as it comports with your state case law, or law accepted by your federal court, or the U.S. Supreme Court.

And, finally, you must be aware of whether your state law interprets the "how" aggravating factor as applying to events occurring only prior to death, or whether events occurring after death (such as dismemberment of the body) may also be taken into account. This must be answered by your state appellate court. In Florida, by way of example, *nothing* done to the victim after his or her death can be used to support the aggravating factor of heinous, atrocious, or cruel. *Herzog v. State,* 439 So.2d 1372 (Fla. 1983); *Jackson v. State*, 451 So.2d 458 (Fla. 1984). *See also State v. Sonnier,* 402 So.2d 650 (La. 1981), where Louisiana agrees that torture or the unnecessary infliction of pain on the victim requires the jury to look

at what happened *before* death, not after death. Arizona case law defines especially cruel as that which happens to the victim *before* death. *Walton v. Arizona,* 769 P.2d 1017 (Ariz. 1989).

You must look to your state law to determine if the heinous, atrocious or cruel aggravator can be applied to the defendant's actions once the victim is unconscious. It is generally recognized that once a person loses consciousness, he or she no longer feels any pain. Accordingly, some states hold once the victim loses consciousness, nothing the defendant does to the victim after this time may be considered.

3. Category III: The Victim — Who Was He or She?

The last category of aggravating factors deals with the victim of the homicide. Almost all states have various factors in aggravation that deal with who the victim was. How old was the victim? What was the victim's profession? Did the victim have a special circumstance that made him or her more vulnerable or more worthy of protecting than another victim?

a. The age of the victim

Was the victim young or old? Examples of some of the states' variations:

(1) The victim was under fifteen years of age and the defendant was an adult or tried as an adult.

(2) The victim was under eighteen and this was known or reasonably should have been known by the defendant.

(3) The victim was under the age of twelve and death resulted from exceptionally brutal or heinous behavior indicative of wanton cruelty.

(4) The victim was under the age of twelve.

(5) The victim was sixty-two years of age or older.

(6) The victim was less than sixteen or older than sixty-five and the defendant knew or should have known the victim's age.

Questions to be asked and answered are the same for all the "victim" categories and will be covered at the end of this section.

b. The victim's profession or title

Examples of professions or titles included by the various states:

(1) A law enforcement officer killed in the performance of his/her official duties (almost all states).

Some states include ". . .and the defendant knew or should have known that the victim was a law enforcement officer" while other states do not mention any knowledge requirement.

(2) A law enforcement officer killed in retaliation for performance of his/her duties.

(3) Victim was a fireman engaged in the performance of his/her duties.

Some states include ". . .and the defendant knew or should have known the victim was a fireman" while other states do not include any knowledge requirement.

(4) Victim was a prosecutor (district attorney, state attorney, etc.), an assistant prosecutor, etc., a former prosecutor (some include just state prosecutor, some include a federal prosecutor also) and the murder occurred in retaliation for or to prevent the performance of the victim's duties (one state says during or because of his/her duties).

(5) Victim was an elected or appointed public official (or former public official) (engaged in the performance of his/her official duties, if the motive for the murder was related, in whole or

in part to the victim's official capacity). (Murder carried out in retaliation for or to prevent performance of victim's official duties). (Murder occurred during or because of official duties).

(6) Victim was a judge, former judge, magistrate, hearing officer (with all the variations noted in number 5 above).

Note: From here on only the professions will be listed, not the nuances mentioned above, although they continue to exist.

(7) Victim is a corrections officer or employee.

(8) Victim is a probation or parole officer.

(9) President of the U.S., person in line for the presidency; president-elect, vice-president elect; or a candidate for the office of president or vice president.

(10) Governor of the state or lieutenant governor, governor-elect, lt. governor-elect, or a candidate for governor or lt. governor.

(11) Auditor general of the state, treasurer of the state.

c. Special circumstance of the victim

(1) The victim was a witness (or a potential witness) to a crime (in any criminal or civil proceeding), and was intentionally killed for purpose of preventing his/her testimony in a criminal (or civil) proceeding (and the killing was not committed during the commission or attempted commission of the crime to which he was a witness), or the victim was a witness (to a crime) and was intentionally killed in retaliation for his/her testimony in a criminal (or civil) proceeding.

(2) The victim was an inmate or another on the grounds of the facility with permission.

(3) The victim was a juror or former juror while engaged in his/her duties or because of the exercise of his/her duties.

(4) The victim was pregnant.

(5) The victim was severely handicapped or severely disabled.

(6) The victim was defenseless. (Note, this is a Delaware circumstance, but has been declared unconstitutional).

(7) The victim was particularly vulnerable due to old age, youth, or infirmity.

(8) The victim was especially vulnerable due to significant mental or physical disability.

Questions to be asked and answered

If there is a knowledge requirement included with the aggravating circumstance, is it a "know", or a "should know" requirement? If there is nothing in the aggravating factor that speaks to knowledge, does this mean it is irrelevant whether the defendant knows, or should know of the victim's age, or profession, or title, or special circumstance?

If your state has a knowledge requirement, it should probably be strictly construed as written. The following states have a statutory knowledge requirement in their aggravating factor of the victim being a police officer: Arizona, California, Colorado, Illinois, Nevada, Ohio, Tennessee, and Utah. The statutes in the rest of the states do not speak specifically to a knowledge requirement. If there is no knowledge requirement in your state statute, you will have to look to your state's appellate decisions to see if a knowledge requirement is added by the case law. And if a knowledge requirement is added, is it "know" or "should have known"? The states differ on this. For example, neither the Indiana nor New Mexico statute mentions a knowledge requirement if the victim is a police officer. Indiana's case law says the defendant must know – not should have known – the victim is a police officer for this aggravating factor to apply. *Castor v. State*, 587 N.E. 2d 1281 (Ind. 1992). New

Mexico, on the other hand, says the defendant need not know the victim was a police officer for the aggravating circumstance to apply. *State v. Compton*, 726 P.2d 837 (N.M. 1986). If your statute has no knowledge requirement and your case law has not yet decided this issue, you would be safer to require the state to show actual knowledge or at least that the defendant reasonably should have known the victim's age, profession or title, or special circumstance.

H. Proof Problems: Aggravating Circumstances

1. Burden of Proof

Most states' statutes require the aggravating circumstances be proved beyond a reasonable doubt. Some statutes are silent on the burden of proof required. But this author believes that even if the statute is silent, the burden is on the state to prove the aggravating factors beyond a reasonable doubt. Inferences or probabilities are not enough.

2. Aggravating Factors Proved in the Guilt Phase

Many aggravating factors will not require additional proof at the penalty phase hearing — the proof or lack of it will have been established in the guilt phase of the trial. Thus, to prove these factors, no additional evidence is necessary at the penalty trial *unless* a new jury is hearing the penalty phase. If there is a new jury, the state will be required, unless statute dictates otherwise, to retry parts of the guilt phase with live witnesses, evidence, etc. This is one reason why retrials of the penalty phase are longer than the original penalty phase.

3. Proof of New Aggravating Factors

For those aggravating factors that have not been proven during the guilt phase (*e.g.* defendant's prior convictions for violent crimes), both live

testimony from prior victims, as well as certified copies of judgments and sentences can be used. Business records can be introduced, if a proper predicate is laid, to prove defendant's custody status. Often, a defendant will offer to stipulate to certain aggravating factors to avoid live testimony, particularly from victims of prior crimes of violence. Generally, the state can accept the stipulation or not. If a stipulation is accepted by the state, you will announce both the stipulation and its effect to the jury, *i.e.*, no further proof need be offered.

4. Hearsay Testimony

Look to your state's statute. Many statutes allow both the state and defense to introduce hearsay. Some statutes permit the defense to use hearsay to prove mitigating circumstances but do not allow the state to use hearsay to prove aggravating circumstances. Some statutes do not allow the state to use hearsay to prove aggravating circumstances, but do allow hearsay to be used by the state to rebut mitigating circumstances.

5. Notice to Defense of Aggravating Factor to Be Proved

Once again states vary on this, and the answer will generally be found in the language of your statute. Some require notice to be given in the charging document itself. Some require notice of the specific aggravating factors the state will rely on at some point prior to trial. Some allow the state to amend this notice for good cause shown. Some require no notice at all. If your statute requires notice and the state fails to list a particular aggravating factor, the state would presumably be prohibited from introducing any evidence about it, unless your statute allows the "good cause" exception. Also the imposition of a death sentence by a judge after the state notifies the defense that it will not recommend death and there is no argument at the sentencing hearing regarding the death penalty as a

possible sentence violates the Fourteenth Amendment's due process clause. *Lankford v. Idaho*, 111 S.Ct 1723 (1991).

6. Evidence that Violates Other Constitutional Amendments

A state generally cannot introduce evidence that violates a defendant's other constitutional rights. Most statutes prohibit the introduction of any evidence seized in violation of the defendant's Fourth or Fifth Amendment rights. Further, the fact that a defendant belonged to a white racist group called the "Aryan Brotherhood" and had "Aryan Brotherhood" tattooed on his hand (and used the name "Abaddon") was inadmissible because its introduction would violate the defendant's First Amendment rights. *Dawson v. Delaware*, 112 S.Ct. 1093 (1992). The court said this might have been admissible if it had related to some issue to be decided, for example, if the defendant had killed a black person because of his association with this group, or his beliefs — probably in the guilt phase and in the penalty phase if an aggravating factor was that the victim was killed because of his race. This would then have been admissible despite the fact that defendant's First Amendment rights allow him the freedom to associate with this group.

7. Other Non-Statutory Aggravation

In a Georgia-type sentencing state, if at least one statutory aggravating factor is found, the state is not limited to only statutory aggravating factors; all relevant evidence that might be considered aggravating, though not enumerated in your statute may be admissible. But, in a Florida-type sentencing state, which limits the aggravating factors that may be considered to those enumerated by the state statute, no evidence of anything but evidence pertaining to the specific aggravating factors in your statute can be admitted or considered. Allowing such evidence could cause reversal, especially if it cannot be said such error was harmless beyond a

reasonable doubt. See *Wainwright v. Goode*, 464 U.S. 78 (1986), where the state trial judge improperly considered future dangerousness (not a factor listed in the state's statute). However, since there were other properly found aggravating factors, and the error was harmless, the death sentence did not violate the Eighth Amendment. If it could not have been found harmless, the death sentence would have been reversed and the case remanded for re-sentencing. In a Texas-type state, evidence is limited to that which is relevant to the questions to be presented to the jury. Nothing else is relevant and thus is inadmissible.

8. Victim Impact Evidence

Prior to *Payne v. Tennessee*, 111 S.Ct. 2597 (1991), the U.S. Supreme Court had held that the Eighth Amendment, per se, prohibited victim impact statements from being admitted in a capital sentencing procedure. *Booth v. Maryland,* 482 U.S. 496 (1987). *South Carolina v. Gathers*, 490 U.S. 805 (1989) extended *Booth* to prohibit prosecutorial argument on the victim's personal characteristics. *Payne* overruled *Booth* and *Gathers* to allow this type of testimony and argument. However, this is true only if state law permits this type evidence and argument. States with limited aggravating circumstances may not be affected by the *Payne* decision. Further, *Payne* does not affect *Booth's* additional holding that the Eighth Amendment bars admissions of opinions or characterizations by the victim's family about the crime, the defendant, and the appropriate penalty for the defendant.

9. Newly Discovered Aggravating Circumstances

If yours is a re-trial, after the defendant was sentenced to *death* and won a reversal either on appeal or after receiving collateral post-conviction relief for a new sentencing hearing, and new aggravating evidence has

been found since the first trial, there is no double jeopardy prohibition to your allowing this evidence. The same is true if the state decides to pursue an aggravating factor at the new sentencing hearing that it knew about at the last trial, but elected not to pursue. See *Poland v. Arizona*, 476 U.S. 147 (1986), which says the double jeopardy clause is not violated when the re-sentencer (in Arizona, the judge) finds an aggravating factor it refused to find at the first trial. But if the defendant was sentenced to *life imprisonment* after the first trial, and a new aggravating factor is found, it is too late. Once a sentence of life imprisonment is imposed, a resentence to death violates the double jeopardy clause of the Constitution. *Arizona v. Ramsey*, 467 U.S. 203 (1984); *Bullington v. Missouri*, 451 U.S. 430 (1981).

I. Defendant's Evidence in Support of a Life Sentence

All evidence that is properly considered to be mitigating against a death sentence must be allowed to be brought before the sentencer — jury or judge or both. So although we will start with statutory mitigating factors, the law is clear: Any attempt to prohibit the sentencer from considering any aspect of a defendant's character, or record, or background, or any of the circumstances of the offense that the defendant offers as a basis for a sentence less than death is error. *Lockett v. Ohio*, 438 U.S. 586 (1978); *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Penry v. Lynaugh*, 492 U.S. 302 (1989).

J. Statutory Mitigating Circumstances

Most states list certain statutory mitigating factors that the sentencer must consider. Just as the statutory aggravating factors deal with the defendant, the crime, and the victim, so do the statutory mitigating factors. All of the circumstances discussed under this section come from one or

more of the state statutes and must be considered by the jury, the judge, or both if there is any evidence to support them.

Caveat: Some states do not list statutory mitigating factors, but all of the matters discussed below must still be considered by the sentencer, even if no statutory circumstances are listed.

Just as no specific states were listed by name when discussing aggravating circumstances, state names are rarely mentioned when discussing various statutory mitigating circumstances. Since mitigating circumstances cannot be limited by statute, it is important that you read and understand *all* the states' statutory mitigating circumstances. You will be required to allow the defendant to present evidence of any of the statutory mitigating circumstances discussed below, *whether or not* they are listed in your state's statute unless your state has specifically, by case law, said that a particular statutory mitigating circumstance discussed below is not mitigating. This would be very rare.

1. Category I: The Defendant – Past, Present, and Future.

a. The defendant's past criminal record or activities

Almost all states that list statutory mitigators require the jury/judge to consider the defendant's lack of a past criminal record as a mitigating circumstance. Some variations are:

(1) The defendant has no significant history of prior criminal activity (some states include "delinquency adjudications").

(2) The defendant's record lacks any significant prior conviction.

(3) The defendant has no significant history of prior criminal convictions.

(4) The defendant has not previously been found guilty of a crime of violence, entered a plea of guilty or nolo contendere to a charge of a crime of violence, or had a judgment of probation or stay of entry of judgment enhanced on a charge of a crime of violence.

(5) The defendant has not previously been convicted of another capital offense or of a felony involving violence.

Questions to be asked and answered:

If the circumstance does not say "conviction," what constitutes "history" or "activity"? Can the state introduce a defendant's record of non-violent crimes or testimony thereof before the defendant attempts to put this circumstance in issue? Can juvenile crimes be considered?

Let's begin with states that use the word "convictions." Remember that a defendant who has, as a juvenile, been adjudicated delinquent, has not been "convicted" of a crime, so in states requiring "convictions," juvenile offenses (at least those not certified to adult court) will not count against the defendant, nor will they be admissible to rebut this circumstance. This will not be true if the mitigator speaks of no significant "history" of prior criminal "activity." If a defendant announces he will rely on this mitigator in states with this type mitigator, the state can introduce delinquency adjudications to rebut it.

Unlike the parallel aggravating circumstance of prior criminal activity, the mitigating circumstance of no significant prior criminal activity will not be limited to either convictions or to violent felonies. So if a defendant announces an intention to rely on this mitigator, the state can then introduce convictions of non-violent felonies, and even misdemeanors, and may even possibly introduce evidence short of a conviction in rebuttal, such as evidence of a crime that has not yet been tried.

Generally, if it is announced that a defendant will *not* rely on mitigation, no rebuttal evidence of other crimes, not otherwise admissible as an aggravating factor, is allowed. Nor should prior criminal activity be read to the jury or argued by either side. If there is no evidence about this circumstance one way or the other, the defendant is not entitled to a jury instruction on this mitigating factor. *Delo v. Lashley,* 113 S.Ct. 1222 (1993).

Caveat: If absence of significant prior criminal activity is not a statutory mitigating circumstance in your state, it must be recognized as a non-statutory mitigating circumstance.

b. The defendant's mental status at the time of the crime

Almost all states list at least one mitigating factor – some more than one – that deals with the defendant's mental or emotional state at the time of the crime. Some variations are:

(1) The offense was committed while the defendant was under the influence of (some states say "extreme") mental or emotional disturbance.

(2) The capacity of the defendant to appreciate the criminality (wrongfulness) of his/her conduct or to conform his/her conduct to the requirement of laws was (some states say "substantially" or "significantly") impaired. (Some states add "due to a mental defect, or disease, or illness, or mental incapacity, or mental disorder or emotional disturbance, or drugs, or alcohol, or retardation" or one or more of the above).

(3) The emotional state of the defendant at the time the crime was committed.

(4) The defendant was under the influence of drugs or alcohol.

(5) The mental retardation of the defendant.

No matter how your mitigating circumstance or circumstances read, all of the above have been recognized as mitigating factors – statutory or non-statutory. Therefore, the sentencer needs to consider any or all of the above factors as mitigating the sentence of death.

Questions to be asked and answered:

Do some of these issues require expert testimony? What if the defendant is indigent? Does the state or county have to pay for the expert or experts? What if my state says the emotional disturbance must be "extreme" or the defendant's capacity must be "significantly" or "substantially" impaired and the expert says only that the defendant was impaired but not "substantially" so or that the defendant was under the influence of mental or emotional disturbance, but not "extremely" so?

Expert psychologists and psychiatrists are typically used to discuss the state of mind of the defendant when the crime was committed. So, of course, is lay testimony admissible. If the defendant desires to explore these mental mitigators and has a basis to do so, a clear and complete reading of *Ake v. Oklahoma*, 470 U.S. 68 (1985), makes it clear that the failure of the state to provide such an expert, no matter if the state or county has to pay for it, will probably cause a death sentence to be reversed for a new sentencing, with an expert appointed to assist the defendant.

It is important to understand that these circumstances do not require the establishment of insanity. These factors can be argued to the sentencer – with or without expert testimony – if the facts indicate the impairment of the defendant's mental condition, or that drugs or alcohol contributed to his/her behavior. Whether or not the condition

rises to the level of your statute's wording is a question for the sentencer. If the testimony is in conflict, the sentencer will have to resolve these conflicts. However, if the testimony is not in conflict, it would be error for the sentencer not to find and consider this type mitigating circumstance.

If your state requires "extreme" mental or emotional disturbance or that the defendant's capacity was "substantially" or "significantly" impaired, and the expert's testimony says the defendant was mentally disturbed, but not extremely so, or his/her capacity was impaired, but not substantially so, look to your case law to see if the jury must be allowed to consider the statutory circumstance. See *Stewart v. State*, 558 So.2d 416 (Fla. 1990), where the only expert testified that the defendant's capacity was impaired, but not substantially so. The defendant requested the jury be instructed on the statutory mitigating circumstance of the defendant's substantially impaired capacity. The judge refused to do so, since the only expert testimony was that his impairment was not "substantial" – a requirement under the statute. The Florida Supreme Court reversed for a new sentencing hearing, saying at 420:

> Once a reasonable quantum of evidence is presented showing impaired capacity, it is for the jury to decide whether it shows "substantial" impairment .... To allow an expert to decide what constitutes "substantial" is to invade the province of the jury. Nor may a trial judge inject into the jury's deliberation his views relative to the degree of impairment by wrongfully denying a requested instruction.

This case is cited to suggest that it is better to give an instruction on a requested mitigating circumstance and allow the jury to sort it out (with help from closing arguments) than to refuse an instruction on a statutory mitigating circumstance. You can't be reversed for giving defendant's requested instruction; you can be for refusing it.

Caveat: It is very important to understand that although the proffered testimony may not reach the level of the statutory mitigating circumstance(s) under consideration here, all such testimony must be allowed, if otherwise admissible, because mental factors, alcohol, drugs, mental retardation, etc., are clearly non-statutory mitigating factors that must be considered by the sentencer even if they don't rise to the level of the statutory mitigating factor(s).

c. The age of the defendant when he/she committed the crime

We have already looked at states where the defendant's age acts as an absolute bar to the imposition of the death penalty. See *Do I Have to Conduct a Penalty Phase Trial,supra,* discussing the defendant's age as a prohibition of the death penalty. This discussion concerns a defendant who is death eligible, but may be eligible for a mitigating factor based on his/her age. Almost all states list the defendant's age as a statutory mitigating factor. Some variations are:

(1) The age of the defendant at the time of the crime,

(2) The youth of the defendant at the time of the crime,

(3) The youth or advanced age of the defendant at the time of the crime, and

(4) The defendant was less than eighteen years of age when the murder was committed.

Questions to be asked and answered:

If my state lists only "age" as a mitigating factor does this include the old as well as the young? What about the defendant's emotional age? When is a defendant "old" or "young"? What is "youth"?

Remember, as has already been discussed, the U.S. Supreme Court has effectively prohibited, as an Eighth Amendment violation, the death penalty for any defendant who is less than 16 at the time of the

crime. *Thompson v. Oklahoma,* 487 U.S. 815 (1988). It has also said it is not an Eighth Amendment violation to execute a defendant who was 16 or 17 at the time of the crime. *Stanford v. Kentucky,* 492 U.S. 361 (1989). Further, The Supreme Court has said it is not cruel and unusual punishment to execute a 22-year-old mentally retarded defendant with a mental (emotional) age of 6 1/2 years. *Penry v. Lynaugh*, 492 U.S. 302 (1989). See complete discussion under I *Do I Have to Conduct a Penalty Phase, supra.* But, even if the U.S. Supreme Court does not absolutely prohibit, as an Eighth Amendment violation, the death penalty on a defendant because of his/her age, the defendant is still entitled to have age considered in mitigation of the death penalty if he/she is young or old, or has a young emotional age.

Unless you are in a state which lists the exact age under which it is a definite statutory mitigating circumstance, such as variation (4) above, you should allow the jury to consider the defendant's age, either chronological or emotional, if the defense requests it. If you are in a judge-only sentencing state, or a judge sentencer after receiving a recommendation from a jury and if the defendant is "young" (probably under twenty-one is a good rule of thumb) or has a young mental age, the sentencing judge should certainly discuss this circumstance and give it the weight he or she desires. The same is true for an "aging" defendant (probably over sixty-two is a good rule of thumb). Failure to give this circumstance to a jury to consider or failure of the sentencing judge to consider this has resulted in reversal. Give your prosecutor some credit – he or she can put the defendant's age in perspective in closing argument. Don't be stingy in allowing a jury to consider the defendant's age.

Caveat: If your state has nothing in its statutory mitigating circumstances regarding age, or if your case law says mental age, for example, is not a statutory mitigating circumstance, it would be a non-statutory mitigating circumstance that should be considered by the sentencer if the defendant is young, old, or has a young emotional age.

d. The defendant's cooperation with the police and the prosecutor

Four states list the defendant's cooperation with police or prosecutors as a specific statutory mitigating circumstance. The variations are:

(1) The extent of the defendant's cooperation with law enforcement officers or agencies and with the office of the district attorney (Colorado).

(2) The defendant rendered substantial assistance to the state in the prosecution of another person for the crime of murder (New Jersey).

(3) The defendant cooperated with the authorities (New Mexico).

(4) The defendant aided in the apprehension of another capital felon or testified truthfully on behalf of the prosecution in another prosecution for a felony (North Carolina).

Questions to be asked and answered:

Does defendant's cooperation apply to cases from the past or only the murder in question? Does this factor include a defendant's confession to the police? What about a guilty plea to the crime? Is it constitutional to permit a defendant's truthful testimony for the prosecution to act as a mitigator, but not allow that same truthful testimony for a defendant charged with a felony to be a mitigating factor?

The case law of the above four states will answer these questions. Presumably, a defendant's voluntary confession to the murder would qualify as "cooperation" with the police or authorities. So would a defendant's plea of guilty to the murder satisfy cooperation with the prosecutor. This author would question the constitutionality of a state's provision that would allow the defendant's sentence to be mitigated if he testified truthfully only for the prosecution.

Caveat: The defendant's cooperation with the authorities, such as confessing to the crime or pleading guilty, is recognized as a non-statutory mitigator in states that do not list this as a statutory mitigating circumstance.

e. The defendant's lack of future dangerousness

Just as some states allow the defendant's future dangerousness to be considered in aggravation, three states have a statutory mitigating factor that speaks to the likelihood of the defendant not being a continuing threat to society. The variations are:

(1) The defendant is not a continuing threat to society. (Colorado).

(2) It is unlikely the defendant will engage in further criminal activity that would constitute a continuing threat to society. (Maryland).

(3) The defendant is likely to be rehabilitated. (New Mexico).

Questions to be asked or answered.

See section dealing with future dangerousness as an aggravating circumstance, 3.d. *supra*.

Additional question; If the defense puts on no such mitigation, can the state present testimony concerning defenfendants future dangerousness in anticipation in its case-in-chief? The same problem

with expert testimony that was discussed under the aggravating factor exists here. Is expert testimony reliable? One state (California) seems to suggest that the state cannot introduce expert testimony predicting that the defendant will commit future acts of violence. *People v. Murtishaw*, 631 P.2d 446 (Cal. 1981). But, if the defense wants to introduce expert testimony to predict the unlikelihood of future violence, it must be allowed to do so. *People v. Lucerno,* 750 P.2d 1342 (Cal. 1988). *Lucerno* does say also that if the defense introduces such expert testimony, the state may introduce experts in rebuttal. Remember, the Supreme Court has said use of this type of testimony does not violate the Constitution. *Barefoot v. Estelle*, 463 U.S. 880 (1983). But states have begun to disallow the use of experts for this prediction. *Redmen v. Nevada,* 828 P.2d 395 (Nev. 1992). As indicated earlier, more states and even the Supreme Court may, in the future, disallow this rather dubious "expert" testimony. It is possible that eventually experts will not be allowed to testify in aggravation, but will be allowed to testify in mitigation and then in rebuttal as California has decided. It is possible that eventually no expert testimony will be allowed regarding the defendant's future dangerousness either in aggravation or mitigation.

A critical question here is whether your state law allows the state attorney to present rebuttal evidence prior to and in anticipation of the defendant's presentation of mitigating evidence. If so, this could allow the state to introduce aggravating testimony, otherwise inadmissible as a statutory aggravating factor, even before the defense puts forth such evidence as mitigating. Most states that do not list future dangerousness as an aggravating factor would not allow the state attorney to put forth such rebuttal evidence until the defendant has offered this type of evidence in mitigation. But, in a Georgia

sentencing state (where if one statutory aggravating factor is proved all relevant evidence may be received – not limited to statutory aggravating factors), the prosecutor can present this type of testimony in its case in chief. However, if you are in a Florida sentencing state (states limited to presenting evidence in aggravation only as listed in the state's statute), and future dangerousness is not listed as an aggravating factor in your statute, the defense will have to put this in issue in mitigation before the state can introduce rebuttal evidence of this sort.

Caveat: Whether or not your state lists lack of future dangerousness as a statutory mitigating factor, it would be error to disallow evidence of it by the defense in mitigation because it would qualify as a non-statutory mitigating factor.

2. **Category II: The Crime and the Circumstances Surrounding It**

a. Minor participation in the crime by the defendant

Most states list a mitigating factor that deals with the crime committed by two or more persons where the defendant is a participant, but his/her participation is minor compared to the others. Some variations are:

(1) The defendant was an accomplice in the capital felony committed by another person and his/her participation was relatively minor. (With little or no variation, twenty-four states list this circumstance)

(2) The defendant was not personally present during the commission of the act or acts causing death.

Questions to be asked and answered:

Does this factor apply to one who hires a "hitman" to commit the crime for him/her? Is this the same as the *Enmund/Tison* death penalty prohibition? How does this apply to cases where each co-defendant points the finger for the actual murder at the other defendant?

It can not be said that one who hires another to commit a murder has "minor" participation in it. In Illinois, which is the only state with variation (2) above, this author could find only one case even discussing this mitigating circumstance. See *People v. Ruiz,* 447 N.E.2d 148 (Ill. 1982). It is doubtful that Illinois meant to allow one who hired another to do the killing (and was not personally present) to avail himself/herself of this mitigating factor. It is probably more appropriately applied to a wheel man in a robbery where he/she cannot meet the *Enmund* criteria to avoid the death penalty altogether..

Clearly, this mitigating circumstance is not for an *Enmund* defendant. He/she is not death eligible. If a defendant is death eligible because of the *Tison* extension of *Enmund*, it will probably be a jury/judge question as to whether the defendant's participation in the actual murder itself was relatively minor. See *Do I Need to Conduct a Death Penalty Trial, supra,* for a complete discussion of *Enmund v. Florida*, 458 U.S. 782 (1982) and *Tison v. Arizona*, 481 U.S. 137 (1987). If two or more people commit a murder, it is quite possible that one of them was a minor participant in the murder. He/she should have this mitigation presented to the sentencer for consideration. In a finger-pointing case, presumably each defendant would have the right to have the jury consider this circumstance and resolve the conflict (if in fact any conflict exists, since it may be impossible for the state to present the testimony of the co-defendant to contradict the defendant's statements, especially if the state is seeking the death penalty for both

defendants). Any evidence to support this mitigating factor must be given to the jury for their determination. Failure to do so may result in reversal. It is not for the judge to determine whether to believe or disbelieve the defendant's story, but the jury – in jury-sentencing state or jury-recommending states. In judge-sentencing state, you will have to decide whether this mitigating circumstance exists.

Caveat: This would be a non-statutory mitigating factor if it is not in your state statute as a listed mitigating factor.

b. The defendant committed the crime under duress, or under the influence of another, or because of other extenuating circumstances

This mitigating circumstance exists in almost all states that list mitigating circumstances. It applies generally to murders that are not legally defensible, but there are extenuating circumstances that exist to mitigate against the death penalty being imposed as the sentence. Some variations are:

(1) The defendant acted under (extreme) duress.

(2) The defendant acted under the (substantial) domination of another person.

(3) The defendant acted under unusual and substantial duress.

(4) The defendant acted under unusual pressures or influences, or under the domination of another person.

(5) The defendant acted under extreme duress or under the substantial domination of another person.

(6) The defendant acted under the provocation of another person.

(7) The offense was committed under circumstances that the defendant reasonably believed to be a moral justification or extenuation (or excuse) for his/her conduct.

(8) The defendant had a good faith belief – although mistaken – that circumstances existed which constituted a moral justification for defendant's conduct.

(9) The defendant acted under other circumstances that extenuate the gravity of the crime even though not a legal excuse for the crime.

(10) The defendant acted under the compulsion of threat or menace of the imminent infliction of death or great bodily harm.

Question to be asked and answered

What type of factual bases are included here?

The factual bases suggesting this circumstance are many. One is a so-called mercy killing, when the defendant believes he/she is doing the right thing to put the victim "out of [his or her] misery." Other examples are a suicide-pact, when the defendant kills the other person but can't take his or her own life; a defendant who kills his wife or girlfriend's lover; a son or daughter acting under orders from a parent; a younger person acting under orders from an older person; a subordinate acting under orders from a superior. Another scenario is where the defendant believes, although incorrectly, that he/she needed to kill the victim to avoid his/her own death or serious bodily harm, or the death or serious bodily harm to another. Just because the jury rejects self-defense in the guilt phase does not mean the defendant should not receive the benefit of this mitigating circumstance. And the list goes on and on. Suffice it to say if any evidence is submitted to support this circumstance, the sentencer must be allowed to consider

the existence of this circumstance. Failure to allow the jury to consider it because you, the judge, don't find the defendant's reasoning for the homicide to be extenuating, may result in reversal in a jury-sentencing, or jury-recommending state.

Caveat: Though it is not in your state statute as a listed mitigating circumstance, duress/undue influence would be a non-statutory mitigating circumstance.

c. Lack of foreseeable harm

Three states (Arizona, Colorado, and Connecticut) list as a statutory mitigating circumstance the defendant's lack of foreseeability of the result of his/her actions, as follows:

> The defendant could not reasonably have foreseen that his/her conduct in the course of the commission of the offense for which he was convicted would cause or create a grave risk of causing death to another person.

Question to be asked and answered

What type of facts would bring this circumstance into play?

No cases could be found in the three states whose statutes include this circumstance. One could imagine the type of facts that would be considered to include a defendant who robs a person and the person runs after the defendant and has a heart attack due to the exertion of the chase. Or perhaps a defendant who pushes a victim to grab her purse and she trips, falls, bumps her head, and later dies as a result of an aneurism.

Caveat: Lack of foreseeable harm would be a non-statutory mitigating factor in the states that don't list it in their statute.

3. Category III: The Victim's Conduct.

Many states listing mitigating circumstances include one that addresses the victim's own conduct that might have contributed to his/her death. Some variations are:

(1) The victim was a participant in the defendant's conduct or consented to it.

(2) The defendant was provoked by the victim.

Question to be asked and answered:

What type of factual bases are included here?

As in the mitigating circumstance under II (b) above, there are many factual situations – some of which are included there – that will cause this circumstance to exist. Principally, this circumstance will almost always need to be considered by the sentencer when the defense at the guilt phase was self-defense. Remember that just because the jury rejects self-defense as a legal defense to the crime does not mean this mitigating factor should not be given to the jury for their consideration in the penalty phase. If your state allows the death of a co-perpetrator to a crime, killed by someone other than the defendant, to be a capital offense, this factor would apply. A suicide pact where the defendant kills one party to the pact but reneges on killing himself/herself would be included. A mercy killing where the victim asks the defendant to kill him or her would be included. This mitigator may apply to many other fact scenarios. If there is any evidence to support this mitigating factor, it should be read to the jury and considered by the sentencer, whether jury or judge.

Caveat: Contributing conduct by the victim would be a non-statutory mitigating circumstance even though not listed in your statute.

4. Category IV: Other Mitigating Factors, Not Fitting the Categories of the Defendant, the Crime, or the Victim

Two statutory mitigating factors have been found that do not seem to fit the broad categories of the defendant, the crime, or the victim. They are:

(1) The act of the defendant is not the sole proximate cause of the victim's death.

Presumably this Maryland factor applies if the defendant seriously wounds the victim justifying a conviction of murder but part of the reason for the victim's death is medical malpractice, or the refusal of the victim to accept medical care. See *Evans v. State*, 499 A.2d 1261 (Md. 1985) at footnote sixteen.

Caveat: This would be a non-statutory mitigating factor even though not listed in your statute.

(2) Another defendant in the same case, equally culpable, will not be punished by death.

This New Hampshire factor speaks for itself. If one co-defendant, who is equally culpable, gets a deal from the prosecution, or goes to trial and gets a sentence of life imprisonment, the jury or judge must consider this in deciding the sentence of the other co-defendant.

Caveat: Unlike most of the other statutory mitigating factors, which would have to be considered as non-statutory mitigating factors if not listed in your state's statute, this circumstance has been accepted by some states and federal courts as a non-statutory mitigating circumstance, but rejected as

a mitigating factor by other states and federal courts. See complete discussion under Non-Statutory Mitigating Circumstances, (3) (f) below.

5. Category V: The Catch-all Statutory Mitigator

Some sixteen states, in recognition of *Lockett v. Ohio*, 438 U.S. 586 (1978), *Eddings v. Oklahoma,* 455 U.S. 104 (1982), and *Penry v. Lynaugh,* 492 U.S. 302 (1989), have added a "catch-all" mitigating circumstance to their list of statutory mitigating circumstances. All states now recognize that the jury must be told that they are not limited to the mitigating circumstances specified by the statutes. Sixteen states decided to list the "catch-all," that is, that any other aspect of the defendant's character (or background), record, and any other aspect of the crime may be considered in mitigation of the sentence of death, in their statute listing mitigating circumstances. Whether the "catch-all" is listed in your statute or not, failure to instruct the jury accordingly will result in a new sentencing hearing unless this error is found to be harmless (and this would be very rare). *Hitchcock v. Dugger*, 481 U.S. 393 (1987). The same is true in a judge-sentencing state. The sentencing order must reflect that the court knows it is not limited to the statute in considering mitigating circumstances. Failure of the order in this regard may result in a reversal. *See Graham v. Collins*, 113 S.Ct. 892 (1993) and *Johnson v. Texas*, 113 S.Ct. 2658 (1993) for two recent cases where the Supreme Court had to wrestle with the Texas statute before it was amended to determine whether the Texas scheme allowed the jury to consider all mitigation presented by the defendant. This problem no longer exists in Texas since their statute was amended to specifically require the jury to consider all mitigation in answering one of the required questions.

K. Non-Statutory Mitigating Circumstances

As indicated above, all states now recognize that the sentencer must be allowed to consider mitigating factors, whether or not specifically enumerated by the state's statute, that relate in any way to the defendant's character, record, or background, and those that relate to any other aspect of the crime that the defendant offers as a basis for a sentence less than death. The U.S. Supreme Court has left no doubt about this. *See Lockett v. Ohio*, 438 U.S. 586 (1978); *Eddings v. Oklahoma*, 455 U.S. 104 (1982); and *Penry v. Lynaugh,* 492 U.S. 302 (1989). Failure to so instruct the jury in either a jury-sentencing state or in a state where the jury recommends the sentence will result in reversal for a new penalty hearing, unless the error is harmless (very rare). *See Hitchcock v. Dugger*, 481 U.S. 393 (1987); *Penry v. Lynaugh.* In a judge-only sentencing state or a state where the judge is sentencer, after receiving a non-binding recommendation from the jury, you must recognize this body of law and consider these mitigating factors presented, or you will probably be reversed. Some of these broad categories are as follows:

(1) The Defendant's Character or Background

(a) Family background

Graham v. Collins, 113 S.Ct. 892 (1993)

Hitchcock v. Dugger, 481 U.S. 393 (1987)

Eddings v. Oklahoma, 455 U.S. 104 (1982)

Moore v. Clark, 904 F.2d 1226 (8th Cir. 1990)

(b) Employment background

State v. Leavitt, 822 P.2d 523 (Idaho 1991)

Smalley v. State, 546 So.2d 720 (Fla. 1989)

(c) **Defendant's alcoholism, drug use/dependency**

Booker v. Dugger, 922 F.2d 633 (llth Cir. 1991)

Demps v. Dugger, 874 F.2d 1385 (llth Cir. 1989)

Hargrave v. Dugger, 832 F.2d 1528 (llth Cir. 1987)

(d) **Military service**

Jackson v. Dugger, 931 F.2d 712 (llth Cir. 1991)

Booker v. Dugger, supra

Demps v. Dugger, supra

Note: Defendant's allegation of Vietnam-era veteran post-traumatic stress syndrome would also include. *See Johnson v. Dugger*, 932 F.2d 1360 (11th Cir. 1986); *People v. Lucerno*, 750 P.2d 1342 (Cal. 1988).

(e) **Mental, emotional problems, or retardation that do not reach the level of your statutory mental/emotional mitigating factors**

McKoy v. North Carolina, 494 U.S. 433 (1990)

Penry v. Lynaugh, 492 U.S. 302 (1989)

Eddings v. Oklahoma, 455 U.S. 104 (1982)

Booker v. Dugger, supra

Caveat: It is very important to remember that if your state lists as a statutory mitigator mental/emotional factors that are modified by words such as "substantial" or "extreme" etc., and the testimony/evidence doesn't appear to rise to this level, it still must be considered by the jury/judge as a non-statutory mitigating factor. In other words, a defendant who wants to present this evidence to a jury, must be allowed to do so. If you, as a judge sentencer, have to write a sentencing order, you must not ignore this

in your order just because it doesn't rise to the level of a statutory mitigator. *See Booker v. Dugger*, 922 F2d 633 (llth Cir. 1991)

(f) Abuse (either physical, sexual, or mental) of defendant by parents or others

Penry v. Lynaugh, 492 U.S. 302 (1989)

Eddings v. Oklahoma, 455 U.S. 104 (1982)

(g) Defendant's contributions to society; charitable or humanitarian deeds

Franklin v. Lynaugh, 487 U.S. 164, (1988) (not addressed in majority opinion) (O'Connor, J. concurring; Stevens, J. dissenting)

(h) The quality of being a caring parent

Tafero v. Wainwright, 796 F.2d 1314 (llth Cir. 1986)

(i) Defendant's age (both chronological and emotional)

Johnson v. Texas, 113 S.Ct. 2658 (1993)

Graham v. Collins, 113 S.Ct. 892 (1993)

Penry v. Lynaugh, 492 U.S. 302 (1989)

Thompson v. Oklahoma, 487 U.S. 815 (1988)

Eddings v. Oklahoma, 455 U.S. 104 (1982)

Lockett v. Ohio, 438 U.S. 586 (1978)

Note: An age factor may be listed by your state as a statutory mitigating circumstance. But, if not, it is certainly a non-statutory mitigator.

(j) **Defendant's regular church attendance; defendant's religious devotion**

Franklin v. Lynaugh, 487 U.S. 164 (1988) (not addressed in majority opinion) (O'Connor, J, concurring; Stevens, J., dissenting)

Graham v. Collins, 950 F.2d 1009 (5th Cir. 1992)

Jackson v. Dugger, 931 F.2d 712 (llth Cir. 1991)

(2) The Defendant's Criminal Record (Including His/Her Previous and Forecasted Prison Behavior)

(a) Defendant's lack of prior involvement with the law

Lockett v. Ohio, 438 U.S. 586 (1978)

Jackson v. Dugger, 931 F.2d 712 (llth Cir. 1991)

Note: Most states list this as a statutory mitigator, but if your state does not, lack of prior criminal involvement must still be considered as a non-statutory mitigating circumstance.

(b) Defendant's potential for rehabilitation (defendant's lack of future dangerousness)

Hitchcock v. Dugger, 481 U.S. 393 (1987)

Lockett v. Ohio

Delap v. Dugger, 890 F.2d 285 (llth Cir. 1989)

Note: See other state cases cited under the statutory mitigating section, I (E) above.

(c) Good jail conduct, including death row behavior

Skipper v. South Carolina, 476 U.S. 1 (1986)

Demps v. Dugger, 874 F.2d 1385 (llth Cir. 1989)

(3) Any Other Aspect of the Offense

(a) Defendant's remorse

Booker v. Dugger, 922 F.2d 633 (llth Cir. 1991)

Delap v. Dugger, 890 F.2d 285 (llth Cir. 1989)

Magill v. Dugger, 824 F.2d 879 (llth Cir. 1987)

(b) Defendant's cooperation

This includes defendant's confession to the crime, cooperation in locating evidence, and testimony against others involved.

Wilkerson v. Collins, 950 F.2d 1054 (5th Cir. 1992)

(c) Defendant's lack of intent to kill

This may be argued in a felony murder case where the intent to kill may not be present.

Lockett v. Ohio, 438 U.S. 586 (1978)

(d) Minor participation in the homicide

This may be a statutory mitigator in your state, but if not, it is certainly a non-statutory mitigator which must be considered.

Lockett v. Ohio

(e) The victim's participation in the homicide

Here again, this may be a statutory mitigator. But if not, it must be allowed and considered as a non-statutory mitigating circumstance. As discussed above, under statutory mitigating circumstances, this may include a suicide pact, a mercy killing, or an alleged self-defense that the jury did not accept to find the defendant not guilty, but that the jury/judge must consider because it may tend to mitigate the sentence.

(f) The sentence of a co-defendant to life or a lesser term of imprisonment

This circumstance has been accepted by one state (New Hampshire) as a statutory mitigator. It has been accepted by one state as a non-statutory mitigating circumstance, and rejected by others. It has been accepted by one federal court as a permissible mitigator and rejected by another. The U.S. Supreme Court has yet to speak to this specific issue.

Yes, it is a mitigating factor:

Brookings v. State, 495 So.2d 135 (Fla. 1986)

No, it is not a mitigating factor:

Peoples vs. Belmontes, 755 P.2d 310 (Cal. 1988)

Brogie v. State, 695 P.2d 538 (Okl. Crim. App. 1985)

Coulter v. State, 438 S.2d 336 (Ala. Crim. App. 1982)

State v. Williams, 292 S.E.2D 243 (N.C. 1982)

Yes, it may be a mitigating factor:

Demps v. Dugger, 874 F.2d 1385 (llth Cir. 1989)

No, it is not a mitigating factor:

Broydon v. Butler, 824 F.2d 388 (5th Cir. 1987)

Brogdon v. Blackburn, 790 F.2d 1164 (5th Cir. 1986)

Summary

When a defendant is proposing mitigating evidence that does not exist in your statute, read the lists provided herein of both statutory and non-statutory mitigation accepted by other states. A good rule of thumb is that unless your state or federal court, or the U.S. Supreme Court has specifically rejected the listed proffered evidence as mitigating, let the jury hear it, and if you are a judge- sentencing state, or a judge-sentencing state after a jury recommends the sentence, and accordingly have to prepare a

sentencing memorandum, consider it in your order. Do not refuse to consider mitigating evidence because you don't personally believe it *should* be mitigating evidence. You may give it little weight, but you may not refuse to consider it, or give it no weight at all. *Eddings v. Oklahoma*, 455 U.S. 104 (1982).

L. Circumstances Not Mitigating

The following have been determined not to constitute non-statutory mitigating circumstances:

(1) **Residual or lingering doubt**

Franklin v. Lynaugh, 487 U.S. 164 (1988). See additional discussion under the Defendant's Closing Argument, below.

(2) **Extraneous emotional factors**

California v. Brown, 497 U.S. 538 (1987)

(3) **Descriptions of executions**

Johnson v. Thigpen, 806 F.2d 1243 (5th Cir. 1986)

(4) **Evidence of the church's opposition to the death penalty**

Glass v. Butler, 820 F.2d 112 (5th Cir. 1987)

(5) **Evidence that the death penalty is not a deterrent**

Martin v. Wainwright, 770 F.2d 918 (11th Cir. 1985)

(6) **Testimony of the victim's relatives requesting that the death penalty not be imposed**

Robinson v. Maryland, 829 F.2d 1501 (10th Cir. 1987)

(7) **Testimony that it would cost less to imprison the defendant for life than it would to execute him**

Hitchcock v. State, 578 So.2d 685 (Fla. 1991), *rev'd on other grounds*, 112 S.Ct. 3020 (1992).

(8) The state's offer of life imprisonment in return for a guilty plea

Hitchcock v. State, supra.

Note: (7) and (8) above are state court opinions. Your state court may feel differently. So check your own state law if defendant proffers either or both of these as mitigating factors. If there is no case, you will have to decide how your appellate court might rule in deciding whether or not to allow this evidence to be considered.

(9) The sentence of a co-defendant to life, or a lesser term or imprisonment

See discussion under Non-Statutory Mitigating Circumstances, C (6) *supra.* Some states and at least one federal court accept this as a mitigating circumstance. Some states and at least one federal court do not. If this comes up in your trial, check your state and federal decisions to see if the issue has been decided. If not, read the opinions cited under non-statutory mitigating circumstances, and use your best judgment as to how your appellate court will rule. If you are in doubt, let it be considered. You can't be reversed for allowing a jury to consider it – only for refusing to do so.

M. Proof Problems - Mitigating Circumstances

1. Burden of Proof

Most states require the state to prove aggravating circumstances beyond a reasonable doubt. This author found no state statute that requires the defendant to prove mitigating circumstances beyond a reasonable doubt. Is there a constitutional problem to even requiring the defendant to prove mitigating factors at all? This questions was specifically answered and rejected by the U.S. Supreme Court in *Walton v. Arizona*, 497 U.S. 639 (1990). Arizona requires the defendant to prove, by a *preponderance* of the evidence, the existence of mitigating circumstances sufficiently substantial

to call for leniency. Walton contended that this requirement violated the Eighth and Fourteenth Amendment, and that the Constitution required the defendant be able to claim mitigating circumstances unless the state negated them by a preponderance of the evidence. The Supreme Court found nothing wrong with Arizona's requirement that the burden of proving mitigating circumstances was on the defendant and that the burden of proof was by a preponderance of the evidence.

Some other states (Maryland, New Hampshire, Pennsylvania, and Wyoming, for example) use preponderance of the evidence as their standard which is stated in their statute. Alabama's statute says the defendant has the burden of "interjecting" the issue and once interjected, the state has the burden of disproving by a preponderance of the evidence. Florida's jury instructions say if the jury is "reasonably convinced" of a mitigating circumstance, they may consider it as established. The majority of states do not give the burden of proof regarding mitigating evidence as part of their statute. Therefore, if you are in such a state, you will have to look to your case law (or your Standard Jury Instructions) to determine the burden of proof. If in doubt, remember, the U.S. Supreme Court has approved "preponderance" as an appropriate burden. See *Walton v. Arizona, supra.*

2. Expert Testimony

Since various recognized mitigators – both statutory and non-statutory – may require psychiatric assistance, if a defense counsel properly requests a psychiatrist or psychologist to assist him/her in the sentencing phase, it would probably constitute error not to provide one, even at state or county expense. See *Ake v. Oklahoma*, 470 U.S. 68 (1985).

3. Defendant's Announcement that He/She Will Not Rely on a Mitigating Circumstance

Generally, if a defendant announces he/she will not rely on a particular mitigating circumstance, neither the state nor the defense may present evidence pertinent thereto. But such evidence may become admissible to impeach a witnesses testimony. For example, if your state has as a mitigating factor that the defendant has no significant history of prior criminal activity, and in fact the defendant has been convicted of several crimes, but not crimes of violence (an aggravating factor), he/she will probably announce in advance that he/she will not rely on this mitigating factor. (If defendant did try to rely on it, his/her record would be admissible to rebut the factor and defendant would probably not want the jury to know of his/her record.) But, if the defendant's relatives state he/she is a man/woman who wouldn't violate the law when discussing his/her character, the state may be able to ask the witness about the defendant's prior record to impeach the witness.

4. Weighing state

The sentencer or reviewing court may determine what amount of weight to give to relevant mitigating evidence, but may not, by excluding such evidence from consideration, give it no weight at all. *Eddings v. Oklahoma*, 452 U.S. 104 (1982).

5. Hearsay

Within limits, hearsay is generally allowed by the defense to prove statutory or non-statutory mitigating circumstances. *Green v. Georgia*, 442 U.S. 95 (1979). Other rules of evidence may still have to be complied with before the hearsay is admissible. (Example: Unless your state permits transcripts of previous testimony, depositions, etc., the unavailability of the

witness may have to be established before a transcript of that witness's previous testimony can be admitted.)

N. The Defendant Who Wants the Death Penalty

Generally, the defendant will want to escape the death penalty, but what if the defendant wants to be executed and he/she insists on presenting no mitigating evidence, insists on no closing argument, etc.? If this occurs, perhaps your state court has dealt with the issue and will give you guidance. If not, read David A. Davis, "Capital Cases - When the Defendant Wants to Die," *The Champion*, June, 1992, pp. 45 - 47, for a good discussion of the problem and possible solutions. Mr. Davis points to other articles as well: Linda E. Carter, "Maintaining Systematic Integrity in Capital Cases: The Use of Court Appointed Counsel to Present Mitigating Evidence when the Defendant Advocates Death," 55 *Tennessee Law Review* 95; Richard C. Dieter, "Ethical Choices for Attorneys Whose Clients Elect Execution," 3 *Georgetown Journal of Legal Ethics* 799. For some state court opinions, See *Hamblin v. State*, 527 So.2d 800 (Fla. 1988), ruling the defendant had the right to represent himself and control his own destiny. In *Anderson v. State*, 574 So.2d 87 (Fla. 1991), the defendant had counsel but directed him to present no testimony at the penalty phase. His death penalty was upheld. In *Klokoc v. State*, 589 So.2d 219 (Fla. 1991), the defendant refused to allow his attorney to participate in the penalty phase, indicating he wanted to die. The trial court appointed special counsel to represent the "public interest" in bringing forth mitigating factors to be considered by the court. Even though the trial court sentenced the defendant to die, the Florida Supreme Court, after rejecting defendant's request to dismiss the appeal, reversed the death sentence to life imprisonment based on the mitigation presented by the

special counsel. It is probable that most states have either already encountered this problem or will in the future. There is no easy solution.

O. Closing Arguments

1. In General

All states permit both sides to give closing argument. Some states, by their statute, allow the prosecution to go last, and some the defense to go last. Some state's statutes allow three arguments, with a final rebuttal argument by the prosecution. Some states' statutes allow the defendant or his/her counsel to make the final argument. Many states do not say in their statute the order of closing argument. Presumably, in these states, you can follow the order of argument that exists in the trial, unless your case law has decided another order of argument. You will never be wrong in allowing the defense the final argument if you have nothing else in your state statute or case law to guide you.

2. State's Argument.

Appropriate argument. A proper argument is one that reflects how the evidence tends to prove the existence of aggravating circumstances or how the evidence does not support the existence of statutory or non-statutory mitigating circumstances. Argument dealing with the balancing or weighing of the circumstances, or any other aspect of the law that will be given to the jury to use in their decision is proper.

Inappropriate argument. Much of the case law that condemns a prosecutor's closing argument is the same as that which would be condemned in the closing argument of any trial. (Arguments including personal opinions, inflammatory-type arguments, golden rule arguments, etc.). There is nothing magical about a death penalty closing that obviates the same rules you have always known about improper arguments. However, some arguments that have been condemned specifically relate to

death penalty argument. Those are the ones which will be discussed here. But any type of argument that would be improper in any other closing is *still improper*. It is not being included here because you are quite familiar with the normal prohibitions on improper closings.

a. Denigration of the role of the jury

Read *Caldwell v. Mississippi*, 472 U.S. 320 (1988) if your state is a jury-sentencing state. If you are in a state that allows a judge to sentence the defendant after receiving a non-binding recommendation from the jury, read *Mann v. Dugger,* 844 F.2d 1446 (llth Cir. 1988) and compare *Harich v. Dugger*, 844 F.2d 1464 (llth Cir. 1988). *Caldwell* says a jury's role cannot be minimized by the prosecutor in hisor her closing argument. Specifically, in *Caldwell*, the prosecutor told the jury that if they returned with a death sentence, an appellate court would review it and could overturn it if it was wrong. *Mann* and *Harich* reached different results. But the essence of both cases stands for the proposition that even if the jury recommends the sentence, their role cannot be minimized by either closing argument or jury instructions since they are entitled to know their recommendation must be given great weight by the sentencing judge, who can overturn their recommendation (particularly one of life) in only very limited circumstances. In a nutshell, judges should closely monitor a state attorney's closing to be certain the role of the jury in the sentencing process is in no way minimized by the prosecutor's argument.

b. Arguments regarding aggravation not listed in the statute

In states following the Florida scheme, where aggravating factors are limited by statute, the prosecutor's argument must not speak to issues that the jury might find aggravating, but that are not listed in the

statute. A common example of this is the defendant's lack of remorse. A prosecutor must refrain from arguing the fact that the defendant has shown no remorse for the killing since this is not a listed aggravating circumstance (not found in any of the states' statutes having limited aggravating factors). Of course, if the defendant proffers as a mitigating factor that the defendant has shown remorse, the prosecutor has the right to argue facts in evidence against this as a mitigating factor. The same problem exists if a prosecutor attempts to argue future dangerousness if it is not a listed aggravating factor. Prior violent conduct can be argued in most states because it is a statutory aggravating circumstance; not so future dangerousness *unless* it also is listed as a statutory aggravator or the argument is made in rebuttal to the defendant's attempted showing of a mitigating circumstance of lack of future dangerousness. Another example is an argument regarding the deterrent effect, in general, of the death penalty. This argument should not be allowed if your state limits aggravating circumstances.

c. Personal opinions, expertise, and selective requests of the prosecutor or his/her office as to which cases deserve the death penalty

Read *Brooks v. Kemp*, 762 F.2d 1383 (11th Cir. 1985), *opinion reinstated after remand*, 809 F.2d 700 (11th Cir. 1987). This case devotes many pages to proper versus improper prosecutorial argument. It clearly says the prosecutor's personal belief in the death penalty is improper (at 1408). An argument that the prosecutor or his/her office seeks the death penalty in only a few cases and that that this case, above most of the others, deserves the death penalty is improper argument (at 1410–1413). See also *Johnson v. Wainwright*, 778 F.2d 623 (11th Cir. 1985), which says (at 630–631) that the prosecutor's personal opinion that the death penalty was appropriate to the case at

hand, and the argument that his office seeks the death penalty in only a limited amount of cases, were both improper arguments.

d. Costs of life imprisonment versus death

See Brooks v. Kemp, at 1412:

> It was clearly improper for Whisnant (the prosecutor) to argue that death should be imposed because it is cheaper than life imprisonment. The factual assertion was completely unsupported. More importantly, cost is not accepted as a legitimate justification for the death penalty.... The jury cannot be exhorted to impose death for that reason.

(As an aside, this type of argument, or even suggestion is not only improper, it is probably inaccurate as well. On *Sunday Today*, an NBC News Program, on January 29, 1990, it was reported that the average cost to execute a defendant is $3.2 million, while it costs only $500,000 to keep the defendant alive for the remainder of his/her life.)

It cannot be emphasized enough that you must look to your state law to determine the specific types of arguments that may be proper or improper. For example, the discussion of arguments involving future dangerousness under paragraph 2 above would not be improper if yours is a state that lists future dangerousness as an aggravating circumstance. Further, in a Georgia sentencing scheme state, after one or more aggravating factors is found, there is no limitation of aggravation. Thus, most matters discussed in paragraph 2 would be permitted unless your state appellate court has disallowed them. State appellate courts, even in Georgia-type states will differ on the appropriateness of a deterrent argument – mostly because of the unsettled disagreement regarding the deterrent effect of the death penalty. State law also differs on the propriety of a "send a message

to the community" argument. Some say it is proper; some say it is improper.

In the U.S. Supreme Court case of *Darden v. Wainwright*, 477 U.S. 168 (1986), the prosecutor made many improper closing remarks in his *guilt* phase closing. The U.S. Supreme Court not only reviewed whether the arguments rendered the trial itself fundamentally unfair, but also whether the improper remarks deprived the *sentencing* determination of the reliability required by the Eighth Amendment. This case points out the importance of proper closing arguments by the prosecutor, not only in the sentencing phase of the trial, but in the guilt phase as well.

3. Defendant's Argument

Appropriate argument. Any argument that hows the lack of aggravating circumstance(s) or the existence of a statutory or non-statutory mitigating circumstance(s) is proper. Any argument that deals with the law the jury will be given to make its life/death decision is proper.

Inappropriate argument. As stated under State's Argument, *Inappropriate*, *supra*, the same massive body of case law dealing with inappropriate closing arguments in general applies to death penalty arguments. Defense attorneys cannot inject their personal opinions about the death penalty into their argument any more than the state attorneys can. The same can be said for inflammatory arguments and golden rule arguments. They are improper. The matters below relate specifically to death penalty arguments.

a. Ineffective assistance of counsel arguments

Judges must be ever mindful in listening to defense counsel's closing argument that if the death penalty is imposed, an ineffective

assistance of counsel claim will be raised in some later collateral proceeding. It will be raised both in the state courts and in the federal courts. A fertile field for an ineffective assistance of counsel claim (and the defendant's reward of a new penalty phase trial) is the closing argument of the defense counsel.

Two cases should be studied:

(1) *King v. Strickland*, 714 F.2d 1481 (llth Cir. 1983), *cert. granted and judgment vacated*, 467 U.S. 1211 (1984), *on remand*, 748 F. 2d 1492 (llth Cir. 1984).

(2) *Osborn v. Shillinger*, 861 F.2d 612 (l0th Cir. 1988).

In the 1983 *King* case, the Eleventh Circuit remanded for a new penalty phase based on ineffective assistance of counsel both in failing to present available mitigating evidence and for making a closing argument that may have done "more harm than good" (at 1491). The *defense* counsel called the crime "evil and gross" and "cruel and evil." He implied that, as a Public Defender, he *had* to represent the defendant. The Eleventh Circuit (at 1491) said:

> In effect, counsel separated himself from his client, conveying to the jury that he had reluctantly represented a defendant who had committed a reprehensible crime. Reminding the jury that the undertaking is not by choice, but in service to the public effectively stacks the odds against the accused. (Citation omitted). Rather than attempting to humanize King, counsel in his closing argument stressed the inhumanity of the crime.

In the 1984 *King* case, the Eleventh Circuit said (at 1464):

> Cole's attempt to separate himself from his client in closing argument represents a breach of his duty of loyalty to his client stressed by the Supreme Court in *Washington*.

The Eleventh Circuit had affirmed *King* in part, and reversed in part. The U.S. Supreme Court vacated the judgment and remanded for further consideration in light of *Strickland v. Washington,* 466 U.S. 668 (1984). The Eleventh Circuit still gave King a new penalty phase trial because of defense counsel's inappropriate penalty phase closing argument.

In the *Osborn* case, the Tenth Circuit reversed the defendant's guilty plea and death sentence due to counsel's failure to fulfill his duty of loyalty to his client. The court stated (at 628):

> Counsel's argument at the sentencing hearing stressed the brutality of the crimes and the difficulty his client has presented to him .... In closing, counsel referred to the problems Osborn's behavior had created for counsel throughout the representation. Counsel described the crimes as horrendous. He analogized his client and the co-defendants to "sharks feeding in the ocean in a frenzy; something that's just animal in all aspects."

Both these cases tell you that you will try the case again if the defendant's counsel abandons his/her vigorous representation and loyalty to his/her client in the penalty phase, including the closing argument. What do you do if you see this happening? There are no easy answers. There may come a time when you will have to inject yourself into the proceedings. You can't wait until it's too late to correct the harm. Being aware of the problem will help. But only you can decide when or if you should step in and try to solve this most difficult problem.

b. Residual or lingering doubt

States vary on whether residual or lingering doubt (something between beyond a reasonable doubt and absolute certainty of

defendant's guilt) is a non-statutory mitigating circumstance. The U.S. Supreme Court has held, in a plurality opinion, that there is no Constitutional requirement to have lingering or residual doubt considered in mitigation. *Franklin v. Lynaugh*, 487 U.S. 164 (1988). However, a close reading of the case suggests that the failure to give a requested jury instruction did not impair the defendant's right – if he had one. The Supreme Court stated that the trial court placed "no limitation whatsoever on petitioner's opportunity to press the 'residual doubts' question with the sentencing jury." *Franklin* at 174. What does all this mean as far as closing argument? Presumably, if you are in a state which specifically denies that residual or lingering doubt as to a defendant's guilt is a mitigating circumstance, then defense counsel's closing argument should not include this type of argument. However, in a circumstantial evidence case, it will be very difficult to disallow this type of argument entirely.

c. The aggravating circumstance laundry list argument

If your state lists ten aggravating circumstances (or eight, or six, or fourteen, etc.) and only one or two apply to the case being tried, can the defendant argue his/hers is not a very aggravated case because the legislature has listed ten circumstances and only one (or two, etc.) apply to his/her case? Can the defendant's attorney then proceed to apprise the jury of all the aggravating circumstances that do *not* apply? One state has specifically answered this question against the defendant. *Floyd v. State*, 569 So.2d 1225 (Fla. 1990), held that the trial court can restrict closing argument to the aggravating factors for which evidence has been presented and therefore might apply, and does not need to allow argument apprising the jury of other aggravating factors that do not apply.

P. Jury Instructions

1. *Caldwell* Problems: Denigrating the Role of the Jury.

In a state where the jury recommends the sentence to the judge, it is important that the jury's role in the sentencing scheme not be minimized, not only in closing argument (see above) but also in jury instructions. The U.S. Supreme Court has not dealt specifically with a *Caldwell* problem in a jury/judge hybrid state. They had the opportunity to do so in *Dugger v. Adams,* 489 U.S.401 (1989), but relied on procedural default to deny relief instead of deciding the case on the merits. However, *Mann v. Dugger*, 844 F.2d 1446 (llth Cir. 1988) held that *Caldwell v. Mississippi*, 472 U.S. 320 (1988), applies not only to a jury-sentencing state, but also to a judge-sentencing state where the judge receives a recommendation from the jury. The reason for the holding is that the jury recommendation is to be given great weight in Florida and a recommendation of life can be overturned only in rare circumstances.

Accordingly, the jury instructions should reflect this. This author suggest a jury instruction be given in a jury/judge sentencing state as follows:

> Your advisory sentence as to what sentence should be imposed on this defendant is entitled by law and will be given great weight by this court in determining what sentence to impose in this case. It is only under rare circumstances that this court could impose a sentence other than what you recommend.

If yours is a jury-sentencing state and your Standard Jury Instructions in any way minimize the importance of the jury's decision, you must add (or delete) appropriate language in your instructions.

2. Is Death Mandatory?

There has been a rash of U.S. Supreme Court litigation over states' death penalty schemes that appear to make death mandatory in certain

instances. It is assumed the jury instructions follow the dictates of the statute. For example:

Sumner v. Shuman, 483 U.S. 66 (1987)

Nevada mandated the death sentence for any defendant who murders while serving a life sentence. The Supreme Court said no – you must allow for individualized sentencing – no mandatory death sentence will be approved.

Penry v. Lynaugh, 492 U.S. 302 (1989).

Texas had the jury answer three questions and if all three answers were yes, the defendant would be sentenced to death. Johnny Penry was a mentally retarded defendant who had been badly abused as a child. Penry's lawyer objected to the proposed instructions, suggesting that the jury was not given latitude by the three questions presented to consider the mitigating circumstances presented by Penry. The defense suggested that the jury must be instructed in a way that would allow them to give effect to such mitigation as his retardation and his abused childhood. The Supreme Court agreed and reversed his death sentence. The Texas statute and jury instructions have since been changed to add a fourth question that allows the jury to consider all mitigation and decide whether it is sufficient to warrant a sentence of life imprisonment instead of death. Only if this fourth question is unanimously answered "no" (and the other three questions are also unanimously answered against the defendant), may the death penalty be imposed. For two other cases dealing with the Texas scheme and the problems it presented prior to being amended, see *Graham v. Collins*, 113 S.Ct. 892 (1993), and *Johnson v. Texas*, 113 S.Ct. 2658 (1993).

Blystone v. Pennsylvania, 494 U.S. 299 (1990)

Blystone argued that the jury instructions in Pennsylvania *required* the jury to return a verdict of death if it found at least one aggravating circumstance and no mitigating circumstances, or if it found one or more aggravating circumstances that outweighed any mitigating circumstances. In a 5 to 4 opinion, the U.S. Supreme Court upheld the Pennsylvania scheme and its instructions.

Boyd v. California, 494 U.S. 370 (1990)

Boyd's jury was told that they "shall" impose a sentence of death if the aggravating circumstances outweigh the mitigating circumstances. Although the California instructions have since been changed to eliminate the mandatory language, the U.S. Supreme Court by a 5 to 4 decision held the "shall" instruction did not unconstitutionally prohibit individualized sentencing.

These cases are presented to show the problems jury instructions can generate. If your instructions suggest, for example, that the mitigating circumstances must outweigh aggravating circumstances or else death should be imposed, you have a burden-shifting problem. This has not yet been specifically addressed by the U.S. Supreme Court. This author suggests you take a hard look at your instructions and make adjustments if your instructions have not yet been reviewed by the U.S. Supreme Court and they appear to have Constitutional problems that might cause reversal.

3. Define Vague Terms

Please review the section of this Chapter dealing with the aggravating factor of heinous, atrocious, or cruel. If you have such a factor, or one that includes any of the words vile, horrible, inhuman, depraved, etc., you must define these vague terms for the jury in a manner that has been approved

by the U. S. Supreme Court. If you don't, regardless of what your state supreme court thinks is appropriate, you may get a flood of cases returned for resentencing. See *Espinosa v. Florida*, 112 S.Ct. 2926 (1992). This case struck down Florida's definition of heinous, atrocious, or cruel in its Standard Jury Instruction as unconstitutionally vague. On the same day it remanded *Espinosa*, the Supreme Court summarily remanded five other cases, citing *Espinosa* as authority. It has been suggested this case will affect hundreds of Florida's defendants presently on death row. The effect of using vague terms in your jury instructions should be avoided at all costs, or you may see the floodgates open like Florida is about to see! Look for other vague terms in your instructions and be prepared to define them, especially if requested to do so by the attorneys.

4. Aggravating and Mitigating Circumstances

Allow the jury to consider only those aggravating circumstances for which evidence has been presented and which the law of your state will support. If you allow a jury to consider an aggravating circumstance that is later determined by your supreme court, or by your federal court to be invalid, you may be re-trying the penalty phase, unless your appellate court either re-weighs the aggravating and mitigating circumstances and determines that the death sentence is still appropriate, or unless your appellate court determines your error is harmless. This is not easily done in a death case. See *Clemons v. Mississippi*, 494 U.S. 738 (1990).

See the section of this chapter dealing with doubling up of aggravating circumstances. If this is not allowed in your state, either give only one of the aggravators *(e.g.* give homicide committed in the course of a robbery or homicide committed for pecuniary gain) or give the jury a limiting instruction. In *Castro v. State*, 597 So.2d 259 (Fla. 1992), defense counsel requested the following instruction (at 261):

> The state may not rely upon a single aspect of the offense to establish more than a single aggravating circumstance. Therefore, if you find that two or more of the aggravating circumstances are supported by a single aspect of the offense, you may only consider that as supporting a single aggravating circumstance. For example, the commission of a capital felony during the course of a robbery and done for pecuniary gain relates to the same aspect of the offense and may be considered as being only a single aggravating circumstance.

The trial court refused the instruction. This refusal was found to be error and the case was remanded for a new penalty phase trial. See how California and New Jersey, respectively, solved their "doubling" problem by proper jury instructions in *People v. Harris*, 679 P.2d 433 (Cal. 1984) and *State v. Rose*, 548 A.2d 1058 (N.J. 1988); *State v. Bey*, 548 A.2d 887 (N.J. 1988).

Statutory mitigating circumstances must be read to the jury if *any* evidence regarding them is in the record. Be liberal here. Trust your state attorney to be able to argue in his/her closing against very weak mitigating circumstances. Failure to allow the jury to consider one of these circumstances – no matter how weak – may result in reversal. However, if there is no evidence of a mitigating circumstance, no jury instruction on the circumstance is required. *Delo v. Lashley*, 113 S.Ct. 1222 (1993) .

The *Lockett* instruction must be given in every case (Instruct the jury to consider in mitigation "any other aspect of the defendant's character or record, and any other aspect of the offense."). *Lockett v. Ohio,* 438 U.S. 586 (1978). The word "background" should be added to this catch-all instruction in light of *Penry v. Lynaugh*, 492 U.S. 302 (1989). Failure to do so will result in reversal, unless it is harmless error. *Hitchcock v. Dugger*, 481 U.S. 393 (1987).

Do not allow your jury instructions to even suggest that a mitigating circumstance must be found unanimously by all the jurors before it can be

considered. This is reversible error. *McKoy v. North Carolina*, 494 U.S. 433 (1990); *Mills v. Maryland*, 486 U.S. 367 (1988).

5. Anti-Sympathy Instructions.

Read *California v. Brown*, 479 U.S. 538 (1987), on how problematical anti-sympathy instructions can be. Although the U.S. Supreme Court held that an instruction saying that the jury "must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion, or public feeling" did not violate the Eighth Amendment, the California Supreme Court has mandated that the instruction will not be given. *See also Saffle v. Parks*, 494 U.S. 484 (1990). In *Saffle*, the instruction was that "you must avoid any influence of sympathy, sentiment, passion, prejudice or other arbitrary factor when imposing sentence." The case was decided on procedural grounds, leaving unanswered whether this instruction was constitutionally flawed. Moral: These instructions cause many problems. Many mitigating factors (and some aggravating ones) rest on sympathy. This type of instruction is no good for anyone. This author would not give it.

Q. Jury Pardons

Some states say the jury need not be instructed on a jury pardon if a question is asked by the jury that sounds like a request to ignore the law and facts and render a jury pardon. See *Dougan v. State*, 595 So.2d 1 (Fla. 1992). The Florida Supreme Court has said if you tell the jury they can ignore the facts and law, you will open up sentencing verdicts to arbitrariness and capriciousness in violation of *Gregg v. Georgia*, 428 U.S. 153 (1976). The Florida Supreme Court approved the judge's response to the jury's question: he told the jury to rely on the law and evidence they had heard.

Other states have decided, by case law or by statute, that the jury can exercise a jury pardon. For example, see *Pickens v. State*, 730 S.W.2d 230 (Ark. 1987), which says the jury, regardless of its findings (regarding aggravation outweighing mitigation), can still return a life without parole verdict simply by rejecting the death penalty. In New Hampshire, the statute follows many others in suggesting the jury shall decide if an aggravating factor or factors exist and if so shall then consider if the aggravating factors found to exist sufficiently outweigh any mitigating factors found to exist; or, if there is an absence of any mitigating factors, determining whether the aggravating factors themselves are sufficient to justify a death sentence. If so, then the jury, by unanimous vote, may recommend a sentence of death rather than a sentence of life imprisonment without parole. But here's the kicker – the jury pardon: "The jury, regardless of its findings with respect to aggravating and mitigating factors, is never required to impose a death sentence *and the jury shall be so instructed.*" (emphasis supplied). N.H. Rev. Stat. Ann. §630: 5 IV (1991).

If your state statute or case law tells you how to handle the jury pardon issue, follow it. But if not, it is doubtful you will be reversed if you answer the jury's question by telling them they should follow the law and the evidence in deciding their sentencing verdict. It is certain you will not be reversed if you tell the jury they have the right to exercise a jury pardon.

R. Hung Juries

What if the jury can't agree on a sentence or recommendation? Most of the states require a unanimous vote for death before the jury can return a death sentence. Two states require a vote of ten or more for death. One state requires a simple majority (seven or more) for a death recommendation. In some states, if the jury can't agree unanimously, they automatically return a life recommendation. Some states require a

unanimous decision for a life sentence. In one state (Alabama) it takes a majority for life, but ten or more for death. In the state requiring a majority for death (Florida), a six-six vote is a life recommendation as is a majority for life. What about the states that require unanimity? What if the jury cannot agree?

Some states require the jury to impose a life sentence if they can't agree unanimously on death. Some states require the judge, if the jury is unable to agree, to impose a life sentence. In three states (Alabama, California, Kentucky) if the jury can't agree, the judge cannot sentence the defendant and has no choice but to impanel another jury. In California, if the second jury cannot agree, the judge can then impose a life sentence or impanel another jury. Alabama, however, allows the judge to decide, after one or more mistrials if both sides and the judge agree that the judge can decide the sentence. In one state (Indiana) if the jury can't agree, the judge proceeds as if the hearing had been before the court alone. In Kentucky the judge has no authority to sentence and a new jury must be impaneled. There is no discussion in the Kentucky statute as to how many times a new jury must be impaneled – presumably until the state gives up and agrees to a life sentence. In one state (Nevada) if the jury can't agree, the sentence is decided by a three-judge panel. In Florida where a majority vote authorizes death and six or more votes authorizes life, there is never a hung jury. In the four states where the judge alone decides the sentence (Arizona, Idaho, Montana, and Nebraska), this is not a problem. Review your statute for the answer to a hung jury in your state.

The biggest problem is whether or not the jury can be told what will happen if they cannot agree on the sentence. The states do not agree on this. Some say the jury can and should be told; some say no. You will have to review your statute and case law to know the answer to this problem should it arise.

S. The Judge's Job After Receiving Jury's Sentencing Verdict or Recommendation, After the Jury's Failure to Agree on a Verdict or Recommendation, or When No Jury Verdict is Required

1. Jury-Sentencing States

If you are in the vast majority of states where the jury's sentence is the sentence the judge must impose your job is over after the jury decides on life or death. You simply impose the sentence of the jury and the appellate process begins. The same is true if the jury can't agree, and you are in the majority of states where the judge must impose a life sentence. You do so and the appellate process begins. If you are in a jury-sentencing state and you have no power to sentence if they don't agree, you begin talking about a new penalty phase trial date if your prosecutor won't agree to a life sentence. (You don't expect the defendant to agree to a sentence of death.)

If you are in one of the states (California, Colorado, and Ohio) that requires you to sentence the defendant to life if the jury's verdict is life, but allows you in specific circumstances explained in your statute to overrule a sentence of death, all three states require various findings by the judge. Presumably the findings are required to be in writing. Ohio and Colorado require a writing; California says the court must set forth reasons for its ruling and direct that they be entered in the clerk's minutes.

In Ohio, there is a writing requirement regardless of whether the court imposes life or death. The court must lay out the aggravating and mitigating circumstances and the reasons why the aggravating circumstances outweigh the mitigating circumstances or why the court "cannot so find."

In both California and Colorado, the court must look to the aggravating and mitigating circumstances found and can impose life only if the finding of the jury that the aggravating circumstances found outweigh the mitigating circumstances found are "contrary to the law or evidence"

(California) or "clearly erroneous as contrary to the weight of the evidence" (Colorado).

If you are part of the three-judge panel in Nevada, after a jury deadlock, your findings supporting a sentence of death must be on the record and indicate "the aggravating circumstance(s) found beyond a reasonable doubt and shall state that the mitigating circumstances are not sufficient to outweigh the aggravating circumstances found."

2. Judge-Sentencing State

Four states have decided not to let the jury play a role in the sentencing procedure: Arizona, Idaho, Montana and Nebraska. The U.S. Supreme Court has upheld a judge-only scheme. *Walton v. Arizona*, 497 U. S. 639 (1990).

All four states require written findings supporting the sentence imposed. All four states require specific findings of the aggravating and mitigating factors considered. Two states (Arizona and Montana) require that each aggravating and mitigating factor be discussed, whether found or not found. One state (Nebraska) requires the trial judge to do a proportionality review. (This is difficult enough for a state's supreme court that has the cases from all circuits, districts, etc., to compare. I pity the poor Nebraska judge who practiced civil law and has his/her first death penalty case as a judge!) While each of the four states' writing requirements may differ slightly, this author has included a special verdict form used in Arizona to satisfy its writing requirement. See Appendix A.

3. The Mixed Bag: Jury/Judge States.

Four states (Alabama, Florida, Indiana, and as of November 4, 1991, Delaware) have the worst of both worlds. You have to go through a jury penalty phase trial (with all the chances of error) and then after getting a recommendation from the jury, have to decide the sentence with a written

sentencing order (subject to more error). In these four states, the jury recommendation is not binding. In the new Deleware scheme, the jury's new function is to make findings regarding the existence of aggravating circumstances and whether the aggravating factors outweigh the mitigating factors. The judge then decides the sentence. In those states, if the jury recommends death, the judge can sentence the defendant to life. More drastically, if the jury recommends life, the judge can sentence the defendant to death. This scheme, as applied in Florida has been upheld several times by the U.S. Supreme Court: *Proffitt v. Florida,* 428 U.S. 242 (1976); *Spaziano v. Florida*, 468 U.S. 447 (1984); *Hildwin v. Florida*, 490 U.S. 638 (1989). *Spaziano* dealt specifically with an override from life to death and the constitutionality of that occurrence. The supreme court found the override constitutional. Neither Indiana's, Alabama's, nor Deleware's override provisions have been reviewed by the U.S. Supreme Court.

It should not be assumed that a recommendation of life by the jury can be ignored. Florida, by case law, requires the verdict of the jury to be given "great weight." To override a recommendation of life in Florida, "the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable people could differ." *Tedder v. State,* 322 So.2d 908, 910 (Fla. 1975). Indiana has a standard similar to Florida's *Tedder* standard. In order to override a jury's recommendation of life in Indiana and sentence a defendant to death, "the facts justifying a death sentence should be so clear and convincing that virtually no reasonable person could disagree that death was appropriate in light of the offender and his crime." *Martinez-Chavez v. State*, 534 N.E.2d 731, 735 (Ind. 1989). Alabama has not formulated a standard to allow a judge to override a jury's recommendation of life. The trial court is required only to consider the recommendation of the jury. The law allows the trial judge to independently weigh the aggravating and mitigating circumstances to determine whether the death penalty is appropriate. The appellate court in

Lindsey v. State, 456 So.2d 383 (Ala. Crim. App. 1983) held that the trial judge was free, after considering the jury's recommendation, to disregard it. The Alabama Supreme Court may reverse a death sentence imposed after the jury recommends life where "the principles and standards of 'fundamental fairness' require that the trial court's action be reversed." *Hadley v. State,* 575 So.2d 145, 158-159 (Ala. Crim. App. 1990). There is not yet a reported case in Delaware where the judge sentenced a defendant to death after a jury recommended a life sentence.

All four states require the judge to issue a sentencing order dealing with the aggravating and mitigating circumstances. Alabama requires that each aggravating factor and each mitigating factor be addressed, whether found to exist or not. Florida requires that each aggravating factor found to exist be addressed and that all mitigation proffered by the defense be addressed in the sentencing order. Indiana requires that the judge's findings include identification of each mitigating and aggravating circumstance found to exist. Delaware requires the order to set forth the "findings upon which the sentence of death is based." There are, of course, additional requirements such as weighing the aggravating circumstances found against the mitigating circumstances found to determine the proper sentence.

An attached set of hypothetical facts and a sentencing order following the Florida writing requirements are attached in Appendix B.

T. Helpful Hints for all Judges Required To Issue a Written Sentencing Order

First, request a sentencing memorandum from each side prior to the sentencing date. Of particular importance, require the defense to list all statutory and especially non-statutory mitigating factors it believes have been established by the evidence. This will avoid your having to guess (and possibly miss) the non-statutory mitigating factors the defense wants you to consider.

Do not ask for sentencing orders to be prepared by the attorneys. The writing requirement is the judge's – not the state attorney's nor the defense attorney's.

Findings in aggravation and mitigation should not be mere conclusions. They should state facts supporting the finding or lack of finding of the various aggravating and mitigating circumstances. The facts stated should be supported by the record. Failure to state with unmistakable clarity your reasons for a death sentence will, at best, result in a remand for re-sentencing and might cause your death sentence to bereversed for a life sentence.

If there is a writing requirement, the findings should (or in some states must) be written prior to or contemporaneously with the pronouncement of the sentence. The Florida Supreme Court got so fed up with delayed written findings that it sent a warning and now actually reverses death sentences to life sentences if the writing is not filed when sentence is pronounced. *Christopher v. State*, 583 So.2d 642 (Fla. 1991). If a contemporaneous sentencing order is required in your state, and if there is going to be any presentation of additional evidence or argument before your pronouncement of the sentence, you should hear any additional argument, etc., and then set the actual sentencing later to give appropriate consideration to the additional evidence/argument before pronouncing sentence and filing your sentencing order. (Having been in that situation as a lawyer, I can attest that it is very disconcerting to have a judge ask for legal argument, etc., and immediately at the conclusion of lengthy argument begin reading from a previously prepared script!)

Most Important, do not include reasons for imposing death that are not enumerated as aggravating circumstances in your statute (unless, of course, you are in a Georgia-type state that allows anything relevant to be considered in aggravation if one or more statutory aggravating factors are found). Example: Do not write about the defendant's total lack of remorse as a reason for imposing death. This is not an enumerated aggravating

factor in any statute. *Do* consider in your order *all* statutory and non-statutory mitigation presented by the defense; do not ignore it. You can give it little weight, if you like, but you cannot, by excluding such mitigating evidence from your consideration, give it no weight at all. *Eddings v. Oklahoma*, 455 U.S. 104 (1982). If you fail to consider all relevant mitigation, you are inviting reversal.

U. Conclusion

This Chapter has attempted to point out the various questions you must answer and pitfalls you will encounter when conducting the penalty phase of a capital trial. Remember, this is a benchbook – a starting point. You must be eminently familiar with your state law as well as the applicable federal decisions to even hope that a death sentence you impose can withstand the judicial scrutiny your decision will receive, be continuously affirmed, and actually carried out. It must never be overlooked that only the worst facts in the capital cases you preside over, coupled with the worst defendants, are deserving of the death penalty. A life sentence will be the correct sentence in most capital cases. If you keep this in mind, and reserve the death penalty for the exception, and not the rule, you will be applying the law as the United States Supreme Court has always, and will always, require.

APPENDIX A

CAPITAL CASE - SPECIAL VERDICT - ARIZONA

Defendant was found guilty of Murder in the First Degree by a jury on (Date).

The court conducted a separate sentencing hearing under A.R.S. 13-703 (B) on (Date). Both parties had the opportunity to present evidence and argument concerning the existence or non-existence of the aggravating and mitigating circumstances enumerated in A.R.S. §13-703(F) and (G). Both parties were given the opportunity to present any other relevant mitigation for the court's consideration. All material in the pre-sentence report was disclosed to defendant's counsel and to the prosecutor.

Based upon the evidence introduced at the trial, the evidence received at the sentencing hearing, and the pre-sentence report, the court renders this special verdict:

AGGRAVATION: As to the statutory aggravating circumstance F1, the court finds beyond a reasonable doubt that defendant "has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable." The evidence showed: [Facts].

(If F1 has not been proved beyond a reasonable doubt, or if there was no evidence of it, state: "The court finds that aggravating circumstance F1 has not been proved.") [Repeat for all factors listed in A.R.S.§13-703(F)]

MITIGATION - STATUTORY:[1] As to statutory mitigating circumstance G1, the court finds by a preponderance of the evidence that defendant's "capacity to appreciate the wrongfulness

[1]List in the special verdict all mitigation offered. The Court must explain the reasons for accepting (considering) or rejecting each offered item. *State v. Leslie*, 708 P.2d 719 (Ariz. 1985).

of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution." the evidence showed: [Facts]. (If G1 has not been proved by a preponderance of the evidence, or if there was no evidence of it, state: "The court finds that mitigating circumstance G1 has not been proved.") [Repeat for all factors listed in A.R.S. §13-703(G)].

MITIGATION - NONSTATUTORY: Defendant has proved by a preponderance of the evidence the following nonstatutory mitigating factors:

(1) [i.e.] That he led a deprived childhood. The evidence showed: [Facts]. [List all nonstatutory mitigation offered by the defendant and, for each factor, state a finding that it is:

a) proved by a preponderance of the evidence and is relevant mitigation; or
b) proved by a preponderance of the evidence and is not relevant mitigation; or,
c) not proved by a preponderance of the evidence.]

CONCLUSION: The court concludes that the state has proved beyond a reasonable doubt statutory aggravating factors [F1, F2, F3, F4, F5, and F6]. The state has not proved aggravating factors [F7, F8, F9, and F10]

The court concludes that defendant has proved by a preponderance of the evidence statutory mitigating circumstances [G1, G2, and G3]. Defendant has not proved statutory mitigating factors [G4 and G5].

Defendant has also proved by a preponderance of the evidence the following nonstatutory mitigating circumstances: [Summary list].

DEATH SENTENCE: The court has considered each of the mitigating circumstances offered by defendant and proved to exist and finds that they are not sufficiently substantial to outweigh the aggravating circumstances proved by the state and to call for leniency.

From the evidence at trial and the jury's verdict, the court concludes beyond a reasonable doubt that:[2]

1. Defendant was the one who killed; OR
2. Defendant was not the actual killer, but attempted to kill or intended to kill; OR
3. Defendant was not the actual killer, but was a major participant in the acts that led up to the killing and exhibited a reckless indifference to human life.

Defendant is therefore sentenced to death. Pursuant to Rule 26.15, A.R.Cr.P., the Clerk is thereby Ordered to file a Notice of Appeal from this Judgment and Sentence.

JUDGMENT AND SENTENCE - LIFE: The court has considered each of the mitigating circumstances offered by defendant and proved to exist by a preponderance of the evidence and finds that they are sufficiently substantial to outweigh the aggravating factors proved by the state and to call for leniency.

Defendant is therefore sentenced to life imprisonment without possibility of release on any basis until he/she has served 25 calendar years (35 if the victim was under 15). [Complete the sentence as per prison sentence script.]

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[2]Required by *Enmund v. Florida*, 458 U.S. 782, (1982) and *Tison v. Arizona*, 481 U.S.137 (1987). See also, *State v. McCall*, 770 P.2d 1165 (Ariz. 1989). (*Enmund-Tison* requisites must be found beyond a reasonable doubt. *State v. McDaniel*, 665 P.2d 70 (Ariz. 1983).

APPENDIX B

CAPITAL CASE: SENTENCING ORDER

IN THE CIRCUIT COURT IN AND FOR PINELLAS COUNTY, FLORIDA

CRIMINAL DIVISION

CASE NO. CRC92-12345CFANO

STATE OF FLORIDA

VS.

JOSEPH DOAKS /

FACTS

On April 1, 1991, a neighbor who played Bingo with Mrs. Dorothy Jones was alarmed when Mrs. Jones did not show up for the weekly Bingo game. She went to Mrs. Jones' home and knocked on the door. She received no answer. She summoned the police. The police found a living room window had been pried open. Upon entering the house, they found the naked body of Mrs. Jones. She had been severely beaten and sexually assaulted. They found an electrical cord around her neck. The medical examiner was summoned. An autopsy revealed bruises to the victim's face and body. She had sperm in her torn vagina and rectum. Knitting needles which had been found on the floor of the victim's home had blood on them and the autopsy showed 30 puncture wounds to the victim's breasts which could have been caused by these needles. The autopsy further revealed the victim had died from strangulation. The ligature marks around her neck were consistent with the electrical cord found.

Crime scene technicians found smudges and prints on the window and frame, but none with sufficient points for effective comparison. No one in the neighborhood had heard or seen anything unusual. The police had no leads.

Upon contacting the victim's family, the police learned the victim kept large sums of cash at her home on a regular basis. No cash was found during a search of the victim's residence.

Two days later, the defendant, JOSEPH DOAKS, arrived at the Sheriff's Office. He asked to speak to the detective in charge of the Dorothy Jones' murder. The defendant then told the detective he was the person they were looking for. He was advised of his *Miranda* rights and he told the detective he had worked for Mrs. Jones and knew she kept large sums of money on hand. He owed a lot of money to various drug dealers. He decided to break into Mrs. Jones' home and steal her money. After prying open the living room windows, he searched the house for money but couldn't find any. He woke Mrs. Jones. She told him the money was under the mattress. After he had the money, which he said was over $10,000.00, he said something "snapped" inside of him and he threw the victim to the ground and sexually assaulted her. When she screamed, he found some tape and taped her mouth shut. He found some knitting needles and punctured her breasts. He couldn't believe he was doing this – he said it was like another person was doing it – not him. He remembered telling her would kill her if she didn't perform to his liking. He said after he had anal sex with her, this "other person" got an electrical cord and put it around the victim's throat. She finally stopped struggling. He left through the same window.

The defendant told the detective he paid off his debts and bought more cocaine. He went to a bar and finally passed out somewhere. When he woke up the next day and realized what he had done, he thought about running away or killing himself. He finally decided to turn himself in.

The detective also learned the defendant was an alcoholic and drug addict and had been so for some time. On the day of the homicide, he had begun drinking around noon. He had used cocaine three times that day and had consumed twelve beers and a pint of scotch. The defendant could offer no explanation for his violent sexual assault on the victim or for the murder except the effect of the drugs and alcohol.

Throughout the interview, the defendant expressed extreme remorse for his actions. The detective believed the defendant was truly sorry for his deeds.

The defendant's background shows convictions for armed robbery, possession of cocaine, aggravated assault, and felon in possession of a firearm. He is presently on parole for the armed robbery.

The defendant was charged with and convicted by a jury of First Degree Murder, Involuntary Sexual Battery, and Burglary to a Residence.

In the penalty phase, the state produced evidence regarding the defendant's convictions for prior crimes of violence and evidence that he was currently on parole for Armed Robbery.

Two doctors testified for the defendant, and one testified for the state. They all agreed he was an alcoholic and drug addict and had been for some time. Two of the three felt the defendant's addictions had affected his brain to the extent that he was under some mental or emotional disturbance at the time of the crime. The third doctor disputed this. None felt he was under the influence of "extreme" mental or emotional disturbance at the time of the homicide. Two of the doctors expressed the opinion that at the time of the murder, the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired due to his addiction and due to his alcohol and drug usage on the day of the offense. The third doctor disputed this and indicated that even though the defendant may have been "high" at the time of the crime and this may have "clouded" his ability to conform his conduct to the requirements of the law, he felt the

defendant did appreciate the criminality of his conduct and that was why he murdered the victim – to keep from being caught and prosecuted for his vicious sexual assault.

The defendant's mother, brother, and sister testified. They thought his criminal problems were the result of his abusive alcoholic father. All of them had been physically abused occasionally. However, neither the brother nor sister had ever been arrested. The parents divorced when the defendant was ten years old and the father abandoned the family.

The defendant was thirty-four years old when he committed this crime.

The defendant has recently been a model inmate. However, when he was in prison for the Armed Robbery, he once tried to escape, and had six disciplinary reports. He also had two disciplinary reports in the county jail, had participated in a hunger strike, and once was moved to isolation due to his abusive behavior toward the guards.

The defendant proffered valid testimony that it would cost the taxpayers less money to keep him alive and in prison for the rest of his life than it would to execute him. Although the judge would not allow this testimony before the jury, the defendant has asked the court to consider this in mitigation.

The jury returned a recommendation, by a vote of ten to two, that the defendant be sentenced to death.

You were the judge at trial. Consider the sentencing order you will prepare.

IN THE CIRCUIT COURT IN AND FOR PINELLAS COUNTY, FLORIDA

CRIMINAL DIVISION

CASE NO. CRC92-12345CFANO

STATE OF FLORIDA

VS.

JOSEPH DOAKS

_____/

SENTENCING ORDER

The defendant was tried before this court on February 3, 1992 - February 7, 1992. The jury found the defendant guilty of all three counts of the Information (Count I - Murder in the First Degree; Count II - Involuntary Sexual Battery; Count III - Burglary to a Residence). The same jury re-convened on February 10, 1992, and evidence in support of aggravating factors and mitigating factors was heard. On February 11, 1992, the jury returned a ten to two recommendation that the defendant be sentenced to death in the electric chair. On February 11, 1992, the court requested memoranda from both counsel for the state and counsel for the defendant. The memoranda were received from both sides on March 13, 1992. On March 20, 1992, the court held a further sentencing hearing where both sides made further legal argument. The court set final sentencing for this date, March 27, 1992.

This court, having heard the evidence presented in both the guilt phase and penalty phase, having had the benefit of legal memoranda and further argument both in favor and in opposition of the death penalty finds as follows:

A. AGGRAVATING FACTORS

1. The capital felony was committed by a person under sentence of imprisonment.

The defendant, JOESEPH DOAKS, was sentenced to twenty years in prison for the crime of armed robbery in 1978. He was released on parole in 1985. His parole was due to expire on March 3, 1998. This homicide occurred on April 10, 1991. Since the defendant was on parole when this murder was committed, the defendant was under a sentence of imprisonment when he committed this capital felony. This aggravating circumstance was proved beyond a reasonable doubt.

2. The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

The defendant was convicted in 1978 of the crime of armed robbery. Additionally, in 1989 the defendant was convicted of the crime of aggravated assault. Both of these felonies involve the use or threat of violence to another person. This aggravating circumstance was proved beyond a reasonable doubt.

3. The capital felony was committed while the defendant was engaged in the commission of, or attempt to commit, or escape after committing a sexual battery.

The defendant was charged and convicted of committing a sexual battery on the victim of the homicide. The evidence shows the victim, an 81-year-old woman living alone, had tears to her vagina and rectum. The medical examiner testified these injuries were inconsistent with consensual intercourse. The defendant's own statement admits he raped the victim. The capital felony was committed, therefore, while the defendant was engaged in the commission of a sexual battery. This aggravating circumstance was proved beyond a reasonable doubt.

4. The capital felony was committed for pecuniary gain.

The defendant was charged and convicted of the crime of burglary. The facts of the case show the defendant broke into the victim's house with the intent to steal. His statement to the detectives indicate this was his intent when he broke into the house. He left the house with over $10,000.00 in cash that was hidden under the victim's mattress. Therefore, the capital felony was committed for pecuniary gain. This aggravating circumstance was proved beyond a reasonable doubt.

5. The capital felony was especially heinous, atrocious, or cruel.

The victim in this case had gone to bed for the evening. The defendant, who had worked for the victim in the past, knew the victim kept large sums of money on hand. He decided to break into her house and steal her money, which he needed to support his extensive drug habit. After crawling in through the livingroom window, the defendant proceeded to look through the victim's house for this cash. When he was unable to find it, he woke the victim and demanded her money. She told him it was under her mattress. After retrieving the money, the victim demanded that the defendant leave her house. According to the defendant's own statement to the detectives in this case, he then decided he wanted more than money. He threw the victim to the ground and demanded sex from her. She refused. He ripped her nightgown off and had vaginal intercourse with her. When she begged him to stop, and cried out in pain, he beat her and taped her mouth shut so her cries could not be heard. He then proceeded to take her knitting needles and puncture her breasts. According to the medical examiner, the victim had over thirty such puncture wounds on her breasts. Then he performed anal sex on the victim. Throughout the ordeal, he kept telling the victim if he was not pleased with her performance, he was going to kill her. Finally, the defendant strangled the victim with an electrical cord. This entire ordeal lasted over 1 1/2 hours, and the victim, according to the medical examiner, put up quite a struggle and experienced excruciating pain. She was

conscious throughout and surely knew of her impending doom when the defendant wrapped the cord around her throat and began to choke the life out of her. This murder was indeed a conscienceless, pitiless crime which was unnecessarily torturous to the victim. Since these facts were admitted by the defendant, and the evidence fully supports his admission, the aggravating factor that the capital felony was especially heinous, atrocious, or cruel has been proved beyond a reasonable doubt.

6. The state has asked the court to find two additional aggravating factors – that the capital felony was committed for the purpose of avoiding or preventing a lawful arrest for the crimes of Burglary and Involuntary Sexual Battery and that the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. Part of the defendant's statement was that he never intended to harm the victim, but only to steal her money. He stated that something inside him just "snapped" and he could not explain why he committed the acts of rape and murder. He believed it had to be because he was "strung out" on cocaine and had consumed both alcohol and cocaine prior to these crimes. While the state certainly has an argument that these two aggravating factors apply, it cannot be said that either of them has been proved beyond a reasonable doubt. Therefore, the court neither finds, nor has it considered, either of these aggravating factors.

None of the other aggravating factors enumerated by statute is applicable to this case and none other was considered by this court.

Nothing except as previously indicated in paragraphs 1 - 5 above was considered in aggravation.

B. MITIGATING FACTORS

Statutory Mitigating Factors

In its sentencing memorandum, the defendant requested the court to consider the following statutory mitigating circumstances:

1. The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

   Three doctors testified during the penalty phase of this trial. Two were called by the defendant, and one was called by the state. These doctors differed on the extent, and even the existence of any mental disturbance of the defendant at the time of the murder. However, on one thing they all agreed – the defendant was not under the influence of any *extreme* mental or emotional disturbance at the time of this crime. This court allowed the defendant to argue this circumstance to the jury, but now finds that neither the totality of the facts, nor any expert or non-expert testimony suggests the defendant was under the influence of extreme mental or emotional disturbance when he committed this murder. This mitigating circumstance does not exist.

2. 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.

   Two doctors testified that the defendant had been a cocaine addict and alcoholic for many years. They believed the defendant had ingested these substances prior to this entire episode and that because of his addiction and the use of both cocaine and alcohol during the day and night of this crime, that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. The doctor for the state found the defendant did appreciate the criminality of his conduct which is why he believed the defendant murdered the victim – to avoid being caught and prosecuted for his vicious sexual assault on the victim. He did admit the defendant suffered from alcohol and cocaine abuse, and

acknowledged the defendant may have been "high" at the time of the crime. He believed this may have "clouded" the defendant's ability to conform his conduct to the requirements of law, but did not feel the defendant was so intoxicated or so under the influence of drugs that his capacity was substantially impaired.

The facts of this case, the defendant's statements, and the testimony of two of the three experts, coupled with the lack of any known or suspected sexual abnormality or sexual violence in the defendant's past, cause this court to be "reasonably convinced" – the test for a mitigating factor – that the defendant's capacity to conform his conduct to the requirements of law was substantially impaired. Accordingly, this mitigating circumstance exists.

The court has given this circumstance significant weight since it appears the defendant was acting out of character in committing this homicide.

3. The age of the defendant at the time of the crime.

At the time this murder was committed, the defendant was thirty-four years old. All three doctors said the defendant's I.Q. was normal, and he was in no way retarded. Accordingly, the defendant's emotional age is consistent with his actual age. The defendant's age at the time of the crime is not a mitigating factor.

Non-Statutory Mitigating Factors

The defendant has asked the court to consider the following non-statutory mitigating factors.

1) Family background
2) Abuse of the defendant as a child
3) Defendant's remorse
4) Voluntary confession

5) Good conduct in jail

6) Defendant's alcohol and drug abuse

7) The fact that it would cost less to imprison defendant for life than to execute him

1) & 2) The testimony of defendant, as well as of his sister, brother, mother, and the three expert witnesses showed that the defendant and his other family members were abused physically by an alcoholic father. This abuse stopped when the parents divorced when the defendant was ten years old. The abuse was not extreme, nor was the defendant singled out any more than the other siblings. Neither the defendant's brother nor sister has ever been arrested for any crime. Thus, while the court finds the abuse suffered by the defendant at the hand of his father and the fact that the defendant came from a broken home to be mitigating circumstances, the court gave them little weight in the weighing process.

3) & 4) The defendant appears to be truly remorseful for what he has done. This is evident by the fact that he turned himself into the police and gave a voluntary confession. His tape-recorded confession displays much grief. He has written a letter of sincere apology to the victim's family, against his attorney's advice. The police admitted in the penalty phase that the defendant was not a suspect when he turned himself in and agreed to cooperate. Both the defendant's remorse, and his voluntary confession are recognized mitigating circumstances. They have both been proved by the evidence. They were both given substantial weight by this court.

5) There is no doubt that the defendant's good conduct in jail may be a mitigating factor. In this case, however, the defendant has not shown this to exist. During his tenure in prison for his Armed Robbery conviction, he once attempted escape, and had six disciplinary reports prior to his parole. Since being incarcerated for the instant offense, he has participated in a hunger strike, has accumulated two disciplinary reports, and was finally moved to isolation because of abusive behavior toward the guards. Although his recent behavior has improved dramatically, and he

has been moved back to general population with no additional difficulties, the court does not find that it has been reasonably established by the evidence that the defendant's jail conduct is good.

6) It has been established by the evidence that the defendant suffers from both alcoholism and drug addiction. This disease is recognized as a mitigating circumstance. The court has given this factor some weight in her consideration of defendant's sentence.

7) The defendant asked to present evidence to the jury that it would cost the taxpayers of Florida significantly less to imprison the defendant for the alternative sentence of life imprisonment without possibility of parole for twenty-five years than to execute him. The court did not allow the jury to hear this testimony. The defendant proffered the testimony for the record to preserve his appellate rights. He now asks the court to consider the proffered testimony and declare this a non-statutory mitigating factor. The proffered testimony suggests the defendant's assertion is correct. However, the Florida Supreme Court does not recognize this as a non-statutory mitigating factor, and this court has accordingly not considered it as such.

8) The defendant asked the court to find the statutory mitigating factor that he was under the influence of *extreme* mental or emotional disturbance when he committed this murder. For the reasons previously expressed, the court declined to do so. However, there was testimony, while in conflict, that the defendant was suffering from *some* mental or emotional disturbance when this murder was committed. The crux of the testimony was that the defendant's use of alcohol and drugs over a period of time has taken a toll on the defendant's mind and body. The court does consider this as a non-statutory mitigating factor. Since the court has given weight to the defendant's alcohol and drug use and addiction both as a statutory mitigating factor (defendant's capacity was substantially impaired) and as a non-statutory

mitigating factor (See Paragraph 6 above), the court gives it only little weight as an additional non-statutory mitigating factor.

The court has very carefully considered and weighed the aggravating and mitigating circumstances found to exist in this case, being ever mindful that human life is at stake in the balance. The court finds, as did the jury, that the aggravating circumstances present in this case outweigh the mitigating circumstances present.

Accordingly, it is

ORDERED AND ADJUDGED that the defendant, JOSEPH DOAKS, is hereby sentenced to death for the murder of the victim, DOROTHY JONES. The defendant is hereby committed to the custody of the Department of Corrections of the State of Florida for execution of this sentence as provided by law.

May God have mercy on his soul.

DONE AND ORDERED in Clearwater, Pinellas County, Florida this 27th day of March, 1992.

/SUSAN F. SCHAEFFER

SUSAN F. SCHAEFFER
CIRCUIT JUDGE

Copies furnished to:

The Honorable James T. Russell, State Attorney
Mr. Thomas Dean, Counsel for Defendant
Mr. Joseph Doaks, Defendant

Chapter 7

Post-Conviction Remedies

Chapter 7. Post-Conviction Remedies

by The Honorable Philip J. Padovano, Circuit Court, Tallahassee, Florida

A. In General

The term "post-conviction remedy" refers to any procedural device used to raise a collateral challenge to the judgment or sentence in a criminal case. In a capital case, the claims raised in a post-conviction proceeding may attack the validity of the conviction, the validity of the death sentence, or both. The essential nature of all claims in post-conviction proceedings is that they challenge the validity of the judgment or sentence on grounds other than those that could be raised on direct appeal.

1. Habeas Corpus

Many states have now adopted specific post-conviction procedures to be used in place of a petition for writ of habeas corpus. These procedures are typically characterized as civil remedies since they are designed to supplant the civil remedy of habeas corpus. If there is no post-conviction procedure established by rule or statute, or if the procedure does not provide a remedy for the type of claim that is raised, the proper method of seeking post-conviction relief is to file a petition for writ of habeas corpus. Some states continue to use habeas corpus as the principal method of post-conviction relief. In two of the largest death penalty states, California and Texas, post-conviction claims are raised by habeas corpus. *See, e.g., In Re Marquez*, 822 P. 2d 435 (Cal. 1992); *Ex Parte Williams*, 833 S.W. 2d 150 (Ct. Crim. App. Tex. 1992).

Even those states that have adopted a comprehensive rule or statute regarding post-conviction remedies may still use the remedy of habeas corpus. For example, some states use habeas corpus as a post-conviction

remedy to raise a claim of ineffective assistance of appellate counsel. *See, e.g., Correll v. Dugger*, 558 So.2d 422 (Fla. 1990). Depending on the local procedure, it may also be proper to file a petition for writ of habeas corpus to raise a claim of ineffective assistance of counsel in a previous post-conviction motion.

2. Coram Nobis

Absent a more specific post-conviction procedure established by a rule or statute, the proper method for a defendant to bring a factual error to the attention of the court is to file a petition for writ of error coram nobis. Under the common law, a defendant seeking a writ of error coram nobis was required to file the petition in the appellate court alleging that there are facts that were unknown at the time of the trial that would have changed the result of the case. If the appellate court granted the petition, the defendant was given an opportunity to present the newly discovered facts in the trial court and the trial judge would then determine whether the facts merit granting a new trial.

Some states continue to use the writ of coram nobis under modernized versions of the common law procedure. In other states, it is now proper to raise claims of newly discovered evidence in a post-conviction motion. *See, e.g., People v. Steidl*, 568 N.E.2d 837 (Ill. 1991); *Richardson v. State*, 546 So.2d 1037 (Fla. 1989).

3. Post-Conviction Motions

Many post-conviction claims may now be raised by filing a motion in the trial court under procedures established by a rule or a statute. Standard 1.1 of the American Bar Association Standards for Criminal Justice Regarding Post-Conviction Remedies (hereafter ABA Post-Conviction Remedies Standards) provides that "[t]here should be one comprehensive remedy for post-conviction review (i) of the validity of judgments of

conviction or (ii) of the legality of custody or supervision based upon a judgment of conviction. The unitary remedy should encompass all claims whether factual or legal in nature and should take primacy over any existing procedures or process for determination of such claims." The procedures in effect in most states replace the remedies formerly available by habeas corpus, coram nobis, and other extraordinary proceedings.

The state court procedures regarding post-conviction motions are generally found in criminal statutes and rules of criminal procedures. However, courts have often observed that post-conviction motions are civil in nature. *See, e.g., State v. Bostwick*, 443 N.W. 2d 885 (Neb. 1989); *State v. Skjonsby*, 417 N.W. 2d 818 (N.D. 1987); *Ouimette v. Moran*, 541 A. 2d 855 (R.I. 1988); *Peltier v. State*, 808 P. 2d 373 (Idaho 1991). This is so because the extraordinary remedies of habeas corpus and coram nobis, from which post-conviction remedies are derived, were regarded as civil proceedings even when used in conjunction with a criminal case.

A post-conviction motion may only be used to raise a collateral challenge to the validity of the judgment or sentence. For this reason, it is improper to include in a post-conviction motion a claim that was or could have been raised on direct appeal. The courts have consistently held that post-conviction relief is not a substitute for an appeal. *Engberg v. Meyer*, 820 P. 2d 70 (Wyo. 1991); *State v. El-Tabech*, 453 N.W. 2d 91 (Neb. 1990); *Cutbirth v. State*, 751 P. 2d 1257 (Wyo. 1988); *Coplen v. State*, 766 S.W. 2d. 612 (Ark. 1989); *Combs v. State*, 537 N.E. 2d 1177 (Ind. 1989). Post-conviction motions were not designed to provide a second opportunity to argue alleged trial errors. Nor were they intended to provide a forum for reargument of the issue of guilt or innocence. Those matters will have been settled at the time the post-conviction motion is filed. Rather, a post-conviction motion serves the limited purpose of providing the defendant with a remedy in the event there has been a substantive deprivation of

federal or state constitutional rights in the proceeding that produced the judgment or sentence under attack. *People v. Enoch*, 585 N.E. 2d 115 (Ill. 1991).

4. Executive Clemency

Clemency is an exclusive function of the executive branch of government. Therefore, the courts lack jurisdiction to interfere with the proper exercise of discretion to grant a petition for executive clemency. Judicial review of executive clemency is limited to claims that the clemency statute is unconstitutional on its face or that the executive officers failed to apply the statute according to state and federal constitutional requirements. *See, e.g., Andrews v. Utah Board of Pardons*, 836 P. 2d 790 (Utah 1992). If the clemency statute is valid, the defendant's constitutional rights have not been violated in the application of the statute; the final decision to grant or deny clemency is not subject to judicial review.

Unless a particular state procedure allows a judge to make a recommendation regarding clemency, trial judges are not usually directly involved in the clemency process. Trial judges may have some indirect involvement in the process under state laws requiring them to appoint counsel and to resolve potential disputes regarding the compensation of counsel.

B. Motion and Response

1. Pleading Requirements

While each jurisdiction has its own formal requirements for filing a post-conviction motion, some general requirements are almost always imposed. In most jurisdictions, the defendant must sign the post-conviction motion even if it has been prepared by an attorney. Likewise, in most jurisdictions the factual allegations of the motion must be verified either

by the defendant or by some other person. If the applicable rule or statute requires a signature and verification, a post-conviction motion that does not meet these formal requirements is insufficient and may be dismissed. *See, e.g., Kilgore v. State*, 791 S.W. 2d 393 (Mo. 1990), which contains a discussion of the signature and verification requirements for post-conviction motions in capital cases, and *Scott v. State*, 464 So.2d 1171 (Fla. 1985), clarified by *Gorham v. State*, 494 So.2d 211 (Fla. 1986).

2. Contents of Motion

Generally, a post-conviction motion is subject to certain basic pleading requirements that are designed to enable the trial judge to quickly ascertain the proper method of disposition. While the specific requirements vary depending on the provisions of the rule or statute in effect in a particular jurisdiction, the applicable procedures typically require that a post-conviction must contain the following information:

(a) the judgment or sentence under attack and the court that rendered the judgment;

(b) whether there was an appeal from the judgment or sentence and the disposition of the appeal;

(c) whether a previous post-conviction motion has been filed, and if so, how many;

(d) if a previous motion has been filed, the reasons why the claims in the present motion were not raised in the former motion;

(e) the nature of the relief sought; and

(f) a statement of the facts relied on in support of the motion.

Some states have adopted standard forms that must be used in preparing a post-conviction motion. As is the case with federal habeas corpus petitions, the motion must follow the general format of an approved form even if the defendant is represented by a lawyer. A typical form for a post-conviction motion is set out in Appendix A to the ABA Post-

Conviction Remedies Standards. Forms such as this one are widely used because post-conviction motions are often filed as pro se pleadings.

3. Order to Show Cause

Most states have a procedural mechanism by which the court can order a response from the state before deciding whether to grant a hearing on the motion. Depending on the applicable procedure, the court may direct either the state attorney or the attorney general to file a response to the motion. In any event, it would be wise to obtain a response if the post-conviction motion is sufficient on its face, and if the available files and records do not readily show that the defendant's claims are unfounded. Counsel for the state may be able to provide a transcript or some other portion of the record that conclusively refutes the claim. At the very least, the state has a right to be heard on the issue whether the motion can be summarily decided. The state may wish to argue that the court *is* required to grant an evidentiary hearing on certain issues.

4. Response by the State

In most states, the attorney general has the responsibility to respond to a post-conviction motion when the court has issued an order to show cause. The response may contain an argument that the motion is insufficient on its face, or it may alert the court to parts of the record that conclusively show the defendant is not entitled to relief.

5. Checklist

The following matters should be considered in determining whether a post-conviction motion is sufficient:

- Whether the applicable rule or statute requires that a post-conviction motion be signed by the defendant or that the facts be verified;

- Whether the factual allegations are sufficient to establish a prima facie case in support of the motion;
- Whether the allegations of the motion are sufficient to establish a ground upon which relief could be granted;
- Whether a particular form is required, and if so, whether the motion has been submitted on the approved form;
- Whether an appendix is required, and if so, whether the necessary documents are submitted as an appendix; and
- Whether the allegations of the motion are refuted by the files and records in the previous criminal proceedings.

C. Time Limitations

1. General Rules

The passage of time may bar the right to pursue a claim in a post-conviction proceeding. Generally, the state may place a time limit on the filing of a post-conviction motion without violating any constitutional right guaranteed to the defendant. *State v. Rhoades*, 820 P. 2d 665 (Idaho 1991); *State v. Ervin,* 835 S.W. 2d 905 (Mo. 1992). The purpose of placing a time limit on post-conviction relief is to promote fairness and finality, and to avoid piecemeal litigation in post-conviction proceedings. *Johnson v. State*, 536 So.2d 1009 (Fla. 1988).

Some states have set time limits for the filing of post-conviction motions, while other states have applied the equitable doctrine of laches. In recent years, the trend has been toward the adoption of fixed time limits. Statutes or rules imposing time limits on post-conviction motions have been established primarily in response to criticism about the delays in capital cases.

The ABA Post-Conviction Remedies Standards recommend that the right to obtain post-conviction relief should not be subject to a statute of limitations. The rationale for this view is based in part on the fact that

there are no time limits on the comparable remedy afforded by a writ of habeas corpus and in part on the fact that the courts retain the ultimate power to find that a post-conviction motion is an abuse of the process where the defendant has raised a claim that could have been raised at an earlier stage of the proceedings. Standard 2.4. Since the adoption of the ABA Standards, however, many states have placed specific time limits on the filing of post-conviction motions. Among those states with specific time limits are:

a. One year: Nevada (Nev. Stat. §177.315(3));

b. Two years: Alabama (Ala.R.Crim.P. 32.2(c)); Florida (Fla.R. Crim.P. 3.850);

c. Three years: Delaware (Del.Sup.Ct.Crim.R. Rule 61(i)); Illinois (Ill.Code.Crim.P. §122-1); Mississippi (§99-39-5(2) Miss. Code 1972 Ann. (Supp. 1991)); Tennessee (Tenn.Stat. 40-30-102);

d. Five years: Montana (Mont.Stat. 46-21-102); New Jersey (N.J.Rule 3:22-12);

e. Other: Idaho, Idaho Code §19-2719 (42 days from judgment and sentence of death); Oklahoma, Title 22 Okl.Stat. §1089(C) (60 days from the expiration of the time to file certiorari in the United States Supreme Court or 60 days from the denial of certiorari; .

2. Exceptions

Even in the states that impose a time limit on post-conviction motions, there may be exceptions for claims that could not have been discovered within the applicable time period. For example, for claims based on newly discovered facts, Alabama allows a petition to be filed within six months after discovery of the facts (Ala.R.Crim.P. 32.2(c)), and Florida allows an exception for claims based on facts that could not have been discovered in time with the exercise of due diligence (Fla.R.Crim.P. 3.850).

Some states also recognize an exception for claims that are based on a newly recognized principle of law. Under Delaware law, a post-conviction motion may be filed within three years of the recognition by the Delaware Supreme Court or the United States Supreme Court of a right that can be applied retroactively. Del.Crim.R. Rule 61(i). Similarly, Mississippi recognizes an exception for claims based on an intervening decision of the state or United States Supreme Court. Miss.Code Anno. §§99-39-5(2), 99-39-23(6) (Supp. 1991).

Finally, some states allow an exception for any reason if the delay cannot be attributed to the defendant. In Illinois, for example, an untimely claim will be allowed if the delay was not caused by the "culpable negligence" of the defendant. Ill.Code Crim.P. §122-1. *See also* New Jersey Rule 3:22-12, which allows an exception to the five–year time limit if the delay was caused by the defendant's "excusable neglect" and Nevada Statute §177.315(3), which allows an exception to the one–year limit for "good cause."

3. Abbreviated Time Limits

Abbreviated time periods may apply to the filing of a post-conviction motion after a death warrant is signed. For example, in Florida if a death warrant is signed setting the date of execution at least 60 days from the date of the warrant, the defendant must file a post-conviction motion within 30 days of the warrant or the right to file the motion will be waived. Fla.R.Crim.P. 3.851. Rules such as that are designed to prevent the defendant from disrupting the process by filing an unmeritorious post-conviction motion just before the date of the execution.

Generally, if an abbreviated time period applies to the filing of a post-conviction motion after a warrant, the time period will be subject to the same exceptions for newly discovered evidence and newly established constitutional rights. See Fla.R.Crim.P. 3.851. For example, in *Lightbourne*

v. Dugger, 549 So.2d 1364 (Fla. 1989), the Florida Supreme Court reversed the denial of an untimely post-conviction motion because the allegations of the motion demonstrated that the defendant could not have previously discovered the claim by the exercise of due diligence.

4. Checklist

The following matters should be considered in determining whether a post-conviction motion is timely.

- Whether there is a statute or court rule that imposes a time limit for filing a post-conviction motion;
- Whether the statute or rule imposes a different time limit if the defendant has sought review in a state of federal appellate court;
- Whether there is an exception to the time limit for newly discovered evidence or newly recognized principles of law, and if so, whether the exception applies; and
- Whether there is an abbreviated time period that applies to post-conviction motions filed after the issuance of a death warrant.

D. Right to Counsel

There is no absolute constitutional right to counsel in post-conviction proceedings, *Pennsylvania v. Finley*, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987); *Ross v. Moffitt*, 417 U.S. 600, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974). However, that rule is usually qualified with an explanation that the circumstances of a particular case may require the appointment of counsel. *Spalding v. Dugger*, 526 So.2d 71 (Fla. 1988). Moreover, the need for appointed counsel may rise to the level of a constitutional right if there is no statutory provision for the appointment of counsel in such proceedings. See *Murray v. Giarratano*, 492 U.S. 1, 109 S.Ct. 2765, 106 L.Ed.2d 1 (1989) (Kennedy concurring).

Some states provide appointed counsel to all indigent defendants in post-conviction proceedings in capital cases. *See, e.g.*, Ariz. Rules of Crim. Pro. 32.5(c) (the court is required to appoint post-conviction counsel for a defendant sentenced to death); Fla.Stat.Ann. 27.702 (a special state public defender represents only defendants in capital cases in post-conviction proceedings in state and federal courts); N.J.Stat. 3:22-6 (the public defender is appointed on the first post-conviction motion); 22 Okla.Stat. §1089(B) (the public defender must represent all indigent defendants in post-conviction proceedings in capital cases). If there is no specific provision requiring the appointment of counsel, there may be a general rule or statutory provision that permits the appointment of counsel when necessary to protect the rights of the defendant. Finally, if there is no express authority permitting the appointment of counsel in a post-conviction proceeding, a trial judge in any state may have inherent authority to appoint an attorney and to require the state to pay the legal costs.

The need for appointed counsel in post-conviction litigation in a capital case is greater than in any other kind of criminal case. This is so because an error in preparing or presenting a post-conviction claim could easily go uncorrected before the execution of the sentence. Although a defendant has no absolute constitutional right to counsel in a post-conviction proceeding, as the court explained in *Murray v. Giarratano*, *supra*, a good argument could be made in nearly any capital case that the circumstances demand the appointment of counsel (or advisory counsel if the defendant refuses counsel) as a matter of constitutional law. For this reason, it would be wise to provide counsel for every defendant who is seeking post-conviction relief from a judgment and sentence of death.

Trial judges are more likely to encounter lawyers from other states in the post-conviction stage of a capital case than any other stage of the case. Lawyers who specialize in handling such motions are not always confined

to a particular state. Generally, if the attorney is not a member of the state bar association and has filed a motion to appear pro hac vice along with the post-conviction motion, the trial judge must rule on the motion to appear pro hac vice before striking the post-conviction motion on the ground that it was not filed by an attorney authorized to practice in the state. *See, e.g., Huff v. State*, 569 So.2d 1247 (Fla. 1990). The summary denial of the motion for leave to appear deprives the defendant of his right to due process of law.

E. Stay of Execution

1. Authority

In some jurisdictions, the authority to grant a stay of execution pending disposition of a post-conviction motion may be expressly provided by law. *See, e.g.*, Ariz.Rules of Crim. Pro. 32.4(f); Tenn.Stat. 40-30-109(2)(b); Nev.Stat. 177.380(4). Even in the absence of a rule or statute on the subject, however, trial judges have inherent authority to grant a stay of execution pending post-conviction proceedings in the trial court. *Spalding v. Dugger, supra.*

2. Criteria

The prospect of irreparable injury is apparent in death penalty cases. Therefore, whether it is appropriate to grant a stay of execution is an issue that usually deals more with the likelihood of success on the merits of the case. The resolution of this issue is, for the most part, left to the discretion of the trial judge. Given the broad range of circumstances that might exist from case to case, there is no practical way to establish a formula for determining whether a trial judge should exercise discretion to grant or deny a motion for stay. Some factors have a bearing on the decision, however, and these are discussed below.

If a death warrant has been signed, the trial judge should consider the date that a stay was requested in relation to the date the warrant was signed. A motion for stay of execution that is filed near the end of the time, when it could have been filed earlier, is likely to be an abuse of the process. For example, in *Osborn v. Shillinger*, 705 P.2d 1246 (Wyo. 1985), the court denied a motion for stay of execution in part because the defendant had waited more than three months after the warrant had been signed.

The trial judge should consider the sufficiency of the allegations in the motion for stay of execution or in the post-conviction motion. If the claims are based on conclusory assertions that are not supported by specific factual allegations, then there is a greater likelihood the post-conviction motion will be denied without an evidentiary hearing. Ordinarily, the need for a stay of execution in such a case is not as great as it would be in a case requiring an evidentiary hearing. In *Osborn v. Shillinger, supra*, the appellate court affirmed the denial of a stay in part because the motion for stay contained only "patently defective" pleadings.

The trial judge should also consider the relative merit of the allegations in the motion for stay of execution in light of the record. If the motion for stay of execution alleges a facially sufficient ground for relief, but the facts supporting that ground are conclusively refuted by the files and records of the proceeding, the motion may likely be denied without a hearing. Again, in this situation there may not be a need to stay the execution. However, if there is some doubt about the merits of the defendant's claim, the court should grant a stay so that the claim can be resolved in a full and fair hearing. Generally, it is proper to grant a stay of execution if the motion reveals that the defendant "might be" entitled to post-conviction relief (*State ex rel. Russell v. Schaeffer*, 467 So.2d 698 (Fla. 1985)) or if the files and records do not readily establish the lack of merit in the defendant's post-conviction claim (State v. Sireci, 502 So.2d 1221 (Fla. 1987)).

The propriety of granting a stay of execution depends to some extent on whether the motion before the court is the first post-conviction motion or a successive motion. Major collateral challenges, such as ineffective assistance of trial counsel and failure to disclose favorable evidence, are often raised in the first motion. Those claims typically involve disputed issues of fact that must be resolved in an evidentiary hearing. If the post-conviction motion is the first one the defendant has filed and if the motion raises fact-based claims that will require an evidentiary hearing, the court almost always is required to grant the stay. In contrast, if the post-conviction motion before the court is the second or third motion the defendant has filed and if the claims are legal issues that could be quickly decided, there may be no need to grant a stay of execution. Generally, a motion for stay of execution should be denied if the post-conviction motion alleges grounds that were previously presented or could have been presented on direct appeal or in a prior post-conviction motion. *Johnson v. State*, 508 So.2d 1126 (Miss. 1987); *Darden v. State*, 521 So.2d 1103 (Fla. 1988).

a. Federal standards

There is no automatic right to a stay of execution pending the adjudication of a federal habeas corpus petition, but in most cases a stay will be entered to allow review of a first petition. The chances of obtaining a stay of execution pending consideration of a second or successive petition for writ of habeas corpus are much less likely. The United States Supreme Court held in *Barefoot v. Estelle*, 463 U.S. 880, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983), that the district courts have authority to expedite disposition of a second or successive petition and that the granting of a stay in such a case "should reflect the presence of substantial grounds upon which relief might be granted. *Barefoot* at 1105.

Barefoot also addresses the procedures to be followed by a federal appellate court when considering a motion for stay of execution pending an appeal from the denial of habeas corpus. In essence, the Court held that a stay of execution should be granted if the district court has denied a petition for writ of habeas corpus but a determination has been made either by the district court or by the circuit court of appeals that there is "probable cause" for the appeal. "Probable cause" is something more than the "absence of frivolity" and it requires a "substantial showing of a violation of a federal right."

Before the United States Supreme Court will grant a stay of execution there "must be a reasonable probability that four members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari [to review the affirmance of an order denying habeas corpus] or the notation of probable jurisdiction; there must be a significant possibility of reversal of the lower court's decision; and there must be a likelihood that irreparable harm will result if that decision is not stayed." *White v. Florida*, 458 U.S. 1301, 103 S.Ct. 1, 73 L.Ed.2d 1385 (1982). *See also Maggio v. Williams*, 464 U.S. 46, 104 S.Ct. 311, 78 L.Ed.2d 43 (1983) (a stay vacated on ground there was no likelihood that four members would grant certiorari); *Woodard v. Hutchins*, 464 U.S. 377, 104 S.Ct. 752, 78 L.Ed.2d 541 (1984) (stay denied; court found successive petition was an abuse of the writ); and *Autrey v. Estelle*, 464 U.S. 1301, 104 S.Ct. 24, 78 L.Ed.2d 7 (1983) (stay granted on the ground that the Court had accepted review of the issue in another case)

b. Checklist

The following matters should be considered in determining whether to grant a stay of execution.

- Whether there was a delay in filing the stay request and if so whether the delay can be excused;
- Whether the stay request or the post-conviction motion contains allegations that are sufficient to establish a prima facie ground supporting the claim for relief;
- Whether the allegations of the stay request or the post-conviction motion are conclusively refuted by the files and records of the proceedings;
- Whether the post-conviction motion will require an evidentiary hearing, and if so, whether the scheduling needs of the court and counsel will require a stay of execution; and
- Whether the post-conviction motion is the first motion or a successive motion.

F. Grounds for Relief

A post-conviction motion may be based on any legal ground that could not have been raised on direct appeal and on any legal ground that affects the essential validity of the judgment or the sentence. The specific grounds that may be asserted in a post-conviction motion are usually listed in the applicable state rule or statute. Many of the rules and statues were patterned after the ABA Post-Conviction Remedies Standards, which contains a list of the grounds in support of a post-conviction motion. Standard 2.1. These grounds are summarized below.

1. The conviction was obtained or sentence imposed in violation of the Constitution of the United States or the constitution or laws of the state in which the judgment was rendered.

2. The defendant was convicted under a statute that violates the Constitution of the United States or the constitution of the state in which judgment was rendered, or the conduct for which the defendant was

prosecuted is constitutionally protected.

3. The court rendering judgment was without jurisdiction over the defendant or the subject matter of the case.

4. The sentence was in excess of the maximum authorized by law or is not in accordance with the authorized sentence.

5. There are material facts that were not previously known and those facts require the court to vacate the judgment or sentence in the interest of justice.

6. There has been a significant change in the substantive or procedural law and the change in the law is one that applies retroactively

7. The judgment is otherwise subject to collateral attack.

These are the general types of claims that may be raised in a post-conviction motion. Within each category on the list there are numerous specific claims that could be raised. Without attempting to catalog every possible claim, the legal issues that arise most often in post-conviction motions filed in death penalty cases are discussed in more detail below.

1. Incompetency to Proceed

The courts will generally entertain a claim of incompetency to proceed even if the claim is made for the first time in the motion for post-conviction relief. *See, e.g., People v. Eddmonds*, 578 N.E. 2d 952 (Ill. 1991); *Mason v. State*, 489 So.2d 734 (Fla. 1986). In such cases it is difficult for the state to argue that the defendant waived the right to argue the issue of incompetency by failing to raise the issue at trial or on direct appeal.

In *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), the Supreme Court held that a criminal defendant who makes a preliminary showing that his mental condition may be an issue in a death penalty case, either in the guilt phase or the penalty phase, is entitled to

a court-appointed expert to assist in the investigation and presentation of the mental health issues. The *Ake* decision has given rise to a variety of issues regarding to the duty to appoint experts and the extent of the required psychiatric assistance. Many of these issues will be presented as post-conviction claims, just as they are presented in trials and appeals.

2. Ineffective Assistance of Counsel

The claim most frequently raised in a post-conviction proceedings is that the defendant did not receive effective assistance of counsel. Challenges to the effectiveness of counsel are often raised in collateral proceedings because the record of the alleged errors and the effect of those errors is not easily developed until after the trial and the direct appeal.

There are three types of ineffective assistance of counsel claims, and each is governed by a different standard. The first type of claim is one that is based on an allegation that the state prevented the defendant from receiving effective assistance of counsel. In such a case, the argument focuses primarily on the actions of the state and does not involve a claim that the lawyer could have done something differently. For example, if the trial judge appoints a probate lawyer to a capital case one day before the trial, the defendant can argue that the actions of the court deprived him of effective assistance of counsel. For this kind of claim the standard is whether in there has been a breakdown in the adversary process. *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984).

The second kind of ineffective assistance of counsel claim is one that is based entirely on the acts or omissions of the lawyer. Claims such as this are based on an argument that the defendant was deprived of his or her right to counsel as a result of something the lawyer did or failed to do and not that state actions interfered in some way with the right to counsel. The proper standard for resolving this type claim is outlined in *Strickland*

v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). First, the defendant must show that the lawyer's performance was deficient. Second, the defendant must show there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. Trial judges have the option to decide the second issue first; that is, a trial judge need not determine whether counsel's performance was deficient before examining whether the alleged deficiency was prejudicial. *In Re Jackson*, 835 P.2d 371 (Cal. 1992); *In Re Rice*, 828 P.2d 1086 (Wash. 1992); *Leisure v. State*, 828 S.W.2d 872 (Mo. 1992).

The third type of ineffectiveness claim that defendant may raise is based in part on a violation of an ethical duty of the lawyer. For example, if the lawyer representing the defendant had a conflict of interest (*i.e.*, he actively represented conflicting interests) and if the conflict adversely affected the lawyer's performance, the defendant hA a valid claim. If the defendant makes this showing, prejudice is presumed. *Strickland v. Washington*, *supra*; *Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed. 333 (1980); *People v. Enoch*, 585 N.E. 2d 115 (Ill. 1991).

A defendant may claim that his attorney was ineffective at the penalty phase as well as the guilt phase. The same legal standards apply. Generally, to demonstrate prejudice in connection with a death sentence a defendant must show that there was a reasonable probability that, absent the deficient performance, the outcome at sentencing would have been different. *State v. Twenter*, 818 S.W.2d 628 (Mo. 1991); *Bertolotti v. State*, 534 So.2d 386 (Fla. 1988). It is more difficult for the defendant to establish a claim of ineffectiveness at sentencing when the trial judge has rejected a jury recommendation of life. A jury's recommendation of life is a strong indication of counsel's effectiveness. *Francis v. State*, 529 So.2d 670 (Fla. 1988).

To obtain an evidentiary hearing on a claim of ineffective assistance

of trial counsel during the guilt phase or the penalty phase, the defendant must allege specific facts that are not conclusively rebutted by the record and that demonstrate a deficiency in performance that prejudiced the defendant. *Roberts v. State,* 568 So.2d 1255 (Fla. 1990). A mere conclusory allegation that counsel was ineffective is insufficient to require an evidentiary hearing. *Pollard v. State*, 807 S.W.2d 498 (Mo. 1991); *In Re Rice, supra.* Counsel is not constitutionally ineffective simply because he or she fails to raise every conceivable claim, even those of constitutional magnitude. *Engle v. Isaac*, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982).

Matters of strategy and tactics are generally not evidence of ineffectiveness. *State v. Twenter*, 818 S.W.2d 628 (Mo. 1991). For example, a reasonable decision to advise a defendant not to take the witness stand, even if it proves improvident, is a tactical decision within the realm of counsel's professional judgment and may not be regarded as ineffective assistance of counsel. *Wainwright v. State,* 823 S.W.2d 449 (Ark. 1992).

a. Failure to Investigate

"Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Accordingly, a failure to investigate evidence that would be relevant and helpful during the guilt phase or the penalty phase may constitute ineffective assistance of counsel. However, lawyers are not obligated to pursue every possible lead or to interview every possible witness. Trial lawyers have a reasonable degree of discretion to determine what investigation is necessary in a given case. Most of the findings of ineffectiveness of counsel that are based on failure to

investigate involve situations in which there was a total or substantial failure on the part of the lawyer.

Failure to pursue certain discovery procedures does not necessarily require a finding that counsel was ineffective. It must be shown that some relevant and helpful information would have been obtained or that the defendant was otherwise prejudiced by counsel's failure to pursue the discovery in question. For example, in *People v. Titone*, 600 N.E. 2d 1160 (Ill. 1992), the court rejected a claim of ineffective assistance of counsel based on a failure to pursue discovery because there was no reasonable probability the outcome of the case would have been different. Likewise, a defense lawyer does not have a duty to investigate every possible statement that could be used as impeachment. To establish a claim of ineffective assistance of counsel based on a failure to contact a witness, the defendant must show, among other things, that the witness would have been located through reasonable investigation, and that the witness's testimony would have provided a viable defense. *State v. Twenter*, 818 S.W. 2d 628 (Mo. 1991).

b. Failure to Present Mitigating Evidence

Failure to present mitigating evidence during the penalty phase does not invariably require a conclusion that the trial attorney's performance was deficient. *Pollard v. State,* 807 S.W. 2d 498 (Mo. 1991). Such a conclusion depends on whether the decision not to present mitigating evidence was an informed decision based on a reasonable investigation of the available mitigating evidence. Furthermore, a failure to present mitigating evidence cannot support an ineffective assistance claim unless there is a showing of what the evidence would be and how it would have affected the outcome of the sentencing proceeding. *State v. Ervin,* 835 S.W. 2d 905 (Mo. 1992).

If the attorney has made a tactical decision not to present mitigating evidence after a full investigation, the court is not likely to find ineffectiveness. *In Re Jackson,* 835 P.2d 371 (Cal. 1992). Nor is it likely that an ineffective assistance of counsel claim will be sustained if the omitted mitigating evidence is merely cumulative of evidence presented at trial. *Hill v. Dugger*, 556 So.2d 1385 (Fla. 1990). Strategic decisions of counsel should not be "second-guessed" by a reviewing court. *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

In contrast, the court is more likely to find ineffective assistance of counsel in a case in which the lawyer has not conducted any investigation of the potential mitigating evidence. For example, in *In Re Marquez,* 822 P. 2d 435 (Cal. 1992), the court granted relief in a case in which counsel had undertaken "no investigation" of the mitigating circumstances. Quoting the referee appointed to conduct the hearing, the court said that "[u]nless a minimally adequate investigation is undertaken, it is impossible to make a tactical decision about whether to present or withhold mitigating evidence at the penalty phase." *Id.* at 447. Similarly, in *Stevens v. State*, 552 So.2d 1082 (Fla. 1989), the court found that the defendant did not receive effective assistance of counsel and ordered a new sentencing. The court noted that the defense attorney did "virtually nothing" on the defendant's behalf and explained that the defense attorney's failure to investigate or present mitigating evidence was a deficiency that may have affected the outcome of the sentencing hearing.

c. Involuntariness of Guilty Plea

The voluntariness of the defendant's plea of guilty to a capital offense is a matter that can be raised in a post-conviction motion. *See, e.g., Wilson v. State*, 813 S.W.2d 833 (Mo. 1991). There is a critical

difference, however, between a claim that the plea was involuntary and a claim of ineffective assistance of counsel prior to the entry of a plea. The latter claim is governed by the two-part standard set out in *Strickland v. Washington*, 466 U.S. 668 (1984). *See Hill v. Lockhart*, 474 U.S. 52 (1985); *Ware v. State*, 567 N.E. 2d 803 (Ind. 1991). When presenting a claim of ineffective assistance of counsel in connection with the entry of a guilty plea, the defendant must show that "but for counsel's deficient performance, the defendant would not have pled guilty and would have insisted on going to trial." *State v. Langford*, 813 P. 2d 936 (Mont. 1991).

d. Newly Discovered Evidence

Before the widespread use of comprehensive post-conviction rules, claims of newly discovered evidence could be raised only by petition for writ of error coram nobis. At common law, filing a petition for coram nobis involved a cumbersome procedure in which the defendant had to ask the appellate court for permission to present new evidence in the trial court. The defendant also had a heavy burden to show conclusively that the newly discovered evidence would have changed the outcome of the case. A few states continue to rely on coram nobis, in some form, as the principle method of securing relief when the defendant has filed a post-conviction claim based on newly discovered evidence.

In most states, however, the remedy of coram nobis is now included within the relief that can be granted by filing a post-conviction motion. Since a claim of newly discovered evidence is a form of "collateral attack," such a claim is generally treated as a claim that is cognizable in a post-conviction motion. *See, e.g., Richardson v. State*, 546 So.2d 1037 (Fla. 1989); *People v. Steidl*, 568 N.E.2d 837 (Ill. 1991). The remedies afforded by the post-conviction rules were

intended to supplant the remedies previously afforded only by extraordinary writs such as a writ of error coram nobis.

e. Failure to Disclose Exculpatory Evidence

Failure to disclose exculpatory evidence is a ground that may be asserted in a post-conviction motion. Furthermore, such a claim can be raised after the time limit for filing a post-conviction motion if the failure to disclose was not discovered in time. These claims are sometimes referred to as *Brady* claims after the decision in *Brady v. Maryland,* 373 U.S. 83 (1963). In order to establish such a claim, the defendant must show (1) that the state possessed evidence favorable to the defendant; (2) that the defendant did not possess the evidence, nor could he or she obtain it with any reasonable diligence; (3) that the prosecution suppressed the evidence; and (4) that had the evidence been disclosed, a reasonable probability exists that the outcome of the proceedings would have been different. *Routly v. State*, 590 So.2d 397 (Fla. 1991); *Engberg v. Meyer*, 820 P.2d 70 (Wyo. 1991). For example, in *Nelson v. Zant*, 405 S.E.2d 250 (Ga. 1991), the prosecution failed to disclose the existence of an FBI report showing that hair samples were of little value and could not be compared. The court found that the failure to disclose was material because the prosecution had called a state law enforcement officer who used the hair samples to link the defendant to the crime and because the evidence in the case was otherwise circumstantial.

To prevail on a *Brady* claim, it is not necessary for the defendant to show that the prosecution had actual knowledge of the undisclosed favorable evidence. As the court observed in *In Re Jackson*, 835 P.2d 371 (Cal. 1992), the question is whether the state knew or should have known about the testimony. In *Jackson*, the court concluded that the

prosecution should have known from information the police had that the witnesses had been promised of leniency.

Brady claims are most often rejected on the ground that the evidence was not material; *see e.g., Swafford v. Dugger*, 569 So.2d 1264 (Fla. 1990), or on the ground that the error was harmless. The courts have found that a *Brady* violation was harmless error when there is no reasonable probability that the evidence, if disclosed, would have affected the outcome of the case. *In Re Jackson, supra.*

Failure to disclose exculpatory evidence is the kind of claim that will frequently require an evidentiary hearing. *See, e.g., Hoffman v. State,* 571 So.2d 449 (Fla. 1990), in which the court reversed the summary denial of a post-conviction motion. The defendant had alleged that the state suppressed the names of other persons who confessed to the crime, and the state was unable to refute the claim without a hearing. Moreover, claims that the prosecution failed to disclose exculpatory evidence are often allowed after the expiration of the time limit for filing post-conviction motions. In many of these claims the nondisclosure gives the defendant a built-in argument that the factual basis for the claim was not known, and could not have been known, within a certain period of time.

f. Use of False or Misleading Testimony

The deliberate use of false or misleading testimony is a claim that can be raised in a post-conviction motion. *See Lightbourne v. Dugger*, 549 So.2d 1364 (Fla. 1989). Such claims are sometimes referred to as *Giglio* claims after the decision in *Giglio v. United States*, 405 U.S. 150 (1972). In order to establish such a claim, the defendant must show (1) that the testimony was false; (2) that the prosecutor knew the testimony was false; and (3) that the testimony was material. *Routly v. State*, 590 So.2d 397 (Fla. 1991).

As with *Brady* claims, *Giglio* claims often require an evidentiary hearing and they are occasionally presented after the time limit for filing a post-conviction motion. If the prosecution has knowingly used false testimony, the defendant might not learn of that fact within the time period for filing a post-conviction motion.

g. Sentencing Errors.

Since the imposition of an illegal sentence is "fundamental error," a claim that the defendant's sentence of death is illegal is the kind of claim that can be raised for the first time in a post-conviction motion. However, if the sentencing issue presents a substantive or procedural error that does not affect the legality of the sentence itself, then it must be presented on direct appeal and not in a post-conviction motion.

Generally, the trial courts may consider a post-conviction claim that the sentence is in excess of the maximum allowed by law, that the sentence was imposed in violation of the state or federal constitution, or that the sentence is otherwise subject to collateral attack. *Gardner v. State*, 764 S.W.2d 416 (Ark. 1989). Within these general categories there are many specific sentencing issues that can be raised. Among other things, defense lawyers frequently use post-conviction motions to challenge the sufficiency of the jury instructions given during the penalty phase. *See, e.g., Arnold v. State,* 42[illegible] S.E.2d 834 (S.C. 1992); *Ex Parte Williams,* 833 S.W.2d 150 (Ct. Crim. App. Tex. 1992); *Riley v. State*, 585 A.2d 719 (Del. 1990).

Many sentencing issues are presented in post-conviction motions as alleged violations of newly established constitutional principles. For example, the decision of the Supreme Court in *Hitchcock v. Dugger*, 481 U.S. 393 (1987), that the sentencing jury must be informed of its right to consider nonstatutory mitigating factors, required state courts

to consider new post-conviction claims in old cases. Likewise, defense lawyers attempted to use the decision of the court in *Caldwell v. Mississippi,* 472 U.S. 320 (1985), that the trial court cannot minimize the role of the jury in the sentencing process, as a basis for raising new post-conviction claims. Ultimately, the Supreme Court held that *Caldwell* did not announce a new principle of law and that it was not therefore "cause" for excusing a procedural default. *Dugger v. Adams*, 489 U.S. 410 (1989).

G. Grounds for Denial of Relief

1. Res Judicata

An issue that has been presented and decided on direct appeal cannot be litigated again in a post-conviction motion. The decision on appeal operates as a bar to further consideration of the issue under the doctrine of res judicata. *People v. Neal*, 568 N.E. 2d 808 (Ill. 1990). For the same reason, an issue that was decided in a post-conviction motion cannot be considered again in a subsequent post-conviction motion.

A closely related principle of law holds that an issue presented and decided on direct appeal cannot be recast as a claim of ineffective assistance of counsel and raised again, in that form, on a post-conviction motion. *O'Neal v. State*, 766 S.W. 2d 91 (Mo. 1989).

2. Waiver

Issues that could have been raised on direct appeal are waived and may not be considered in a post-conviction motion. *People v. Enoch,* 585 N.E.2d 115 (Ill. 1991); *Engberg v. Meyer*, 820 P.2d 70 (Wyo. 1991); *Johnson v.State*, 593 So.2d 206 (Fla. 1992); *Flamer v. State,* 585 A.2d 736 (Del. 1990). In this context, the waiver resulting from the defendant's failure to present the claim in an earlier proceeding is sometimes referred to as a "procedural default."

An issue is also waived if it could have been presented in a prior post-conviction motion. *People v. Stewart*, 565 N.E.2d 968 (Ill. 1990); *Hendrix v. State*, 557 N.E.2d 1012 (Ind. 1990); *Commonwealth v. Hagood*, 532 A.2d 424 (Pa. 1987); *Adams v. State*, 543 So.2d 1244 (Fla. 1989); *Bolder v. State*, 769 S.W.2d 84 (Mo. 1989); *State v. Otey*, 464 N.W.2d 352 (Neb. 1991). For example, in *Resnover v. State*, 547 N.E.2d 814 (Ind. 1989), the court declined to consider a claim of ineffective assistance of trial counsel because the claim was presented in a second post-conviction motion and available at the time the defendant filed his first motion.

The defendant cannot overcome a procedural default merely by using a different argument to relitigate an issue that has been decided on appeal or in a previous post-conviction motion. *Medina v. State*, 573 So.2d 293 (Fla. 1990); *Quince v. State*, 477 So.2d 535 (Fla. 1985). Nor can the defendant overcome a procedural default by recasting the argument as a claim for ineffective assistance of counsel. *Roberts v. State*, 775 S.W.2d 92 (Mo. 1989); *Kight v. Dugger*, 574 So.2d 1066 (Fla. 1990). If the issue is one that was or could have been made in a direct appeal or a previous post-conviction motion, then it is barred.

A significant change in the law will excuse the failure to raise an issue on direct appeal or in a prior post-conviction motion. *State v. Slemmer*, 823 P.2d 41 (Ariz. 1991). For example, in *Selvage v. Collins*, 816 S.W.2d 390 (Tex.Crim.Ct.App. 1991), the court held that the decision of the Supreme Court in *Penry v. Lynaugh*, 492 U.S. 302 (1989), holding that the Texas death penalty statute, as applied, precludes consideration of mitigating circumstances, was a new point of law. Therefore, the court held that the defendant's failure to raise a claim under the principles enunciated in *Penry* was excused.

As previously mentioned, the Supreme Court enunciated a new principle of law in *Hitchcock v. Dugger*, 481 U.S. 393 (1987), when it decided that the jury must be informed of its right to consider nonstatutory

mitigating factors. Therefore, a claim under *Hitchcock* could be raised in a post-conviction motion even if it had not been raised earlier on direct appeal or in a previous post-conviction motion. However, the right to present a claim based on a new point of law does not exist forever. If there is a time limit on post-conviction relief, then the new claim must be presented within the time allowed by law. The *Hitchock* case is cited here only because it is a good example of the kind of decision that truly announces a new principle of law. Many claims that could have been made under *Hitchcock* are now time-barred under local procedures. The defendant must raise a new constitutional claim at the first opportunity it becomes available. If there is a time limit on post-conviction claims, the time for raising a claim based on a new point of law begins to run when the new point of law is announced. *See, e.g., Hall v. State*, 541 So.2d 1125 (Fla. 1989); *Jackson v. Dugger*, 547 So.2d 1197 (1989).

A modification or interpretation of an existing law does not amount to a "new" principle and, therefore, does not serve as a reason to excuse a procedural default. The natural development of the law through precedents is not necessarily a change in the law. In this regard, the courts have observed that an "evolutionary refinement" of the law will not excuse the failure to raise a claim in a previous direct appeal or post-conviction motion. *See, e.g., Harich v. State*, 542 So.2d 980 (Fla. 1989) in which the court held that a previous decision of the court was merely a refinement of existing law and not a new point of law.

3. Harmless error

A post-conviction motion may also be denied on the ground that the error at trial was harmless; such denial is one instance in which it would be appropriate for a trial judge to apply the harmless error rule. *Engberg v. Meyer*, 820 P.2d 70 (Wyo. 1991). For example, a claim that the prosecution failed to disclose exculpatory information might be resolved

on the ground that the information would not have changed the result. *See* p. 7-23 of this Chapter, *supra*. And a claim of ineffective assistance of counsel might be resolved on the ground that the acts or omissions of the lawyer did not have an effect on the outcome of the proceeding. *See* p. 7-19 of this Chapter, *supra*.

H. Evidentiary Hearings

1. Need for Hearing

There is no absolute right to an evidentiary hearing on a post-conviction motion. *People v. Titone*, 600 N.E.2d 1160 (Ill. 1992). An evidentiary hearing is not required if the post-conviction motion is legally insufficient on its face or if the files and records show that the defendant is not entitled to relief. *State v. Otey*, 464 N.W.2d 352 (Neb. 1991); *State v. Rehin,* 455 N.W.2d 821 (Neb. 1990); *Holland v. State*, 503 So.2d 1250 (Fla. 1987). However, if the post-conviction motion is sufficient on its face to establish a prima facie ground for relief and if the claim raised in the motion is not conclusively refuted by the files and records in the case, the trial judge must grant an evidentiary hearing on the motion.

Claims that will often require a hearing are those that depend on facts not determined at the trial. For example, a defendant who has raised a prima facie case of ineffective assistance of trial counsel is likely to obtain an evidentiary hearing because it will be difficult for the court to resolve the claim in any other way. *See e.g. Neal v. State*, 525 So.2d 1279 (Miss. 1987); *Foster v. State*, 395 N.W. 637 (Iowa 1986). If the motion makes a specific factual allegation and if the allegation is sufficient to establish a claim of ineffective assistance of counsel, it is difficult to resolve the claim without an evidentiary hearing. Likewise, a defendant who has raised a claim that the prosecution failed to disclose favorable evidence is likely to obtain an evidentiary hearing. In most cases the issues relating to

knowledge and materiality of the alleged favorable evidence is not discovered until after the trial, and thus the facts cannot be resolved without a hearing.

Any doubt about the need for an evidentiary hearing should be resolved in favor of granting a hearing. While the denial of a hearing may save some time, it only opens the door to an argument in federal court that the defendant is entitled to an evidentiary hearing on a federal habeas corpus petition because he was denied a full and fair hearing in state court. If the federal court agrees, then the denial of an evidentiary hearing in state court will have served to delay the resolution of the case.

Generally, a successive motion for post-conviction relief is less likely to require an evidentiary hearing. *See, e.g., Bolder v. State*, 769 S.W. 84 (Mo. 1989). This is not to say that every successive motion can be resolved without an evidentiary hearing. A successive motion may involve a factual issue that could not have been raised in an earlier proceeding and, in that event, the court should grant an evidentiary hearing.

2. Presence of the Defendant

Generally, the defendant must be present in court at an evidentiary hearing on a post-conviction motion. ABA Post-Conviction remedies Standard 4.6(a); Clark v. State, 491 So.2d 545 (Fla. 1986). The defendant's presence is not absolutely required if the motion for post-conviction relief is denied without a hearing, or if the defendant is represented by counsel and the hearing is limited to issues of law. For hearings such as an initial hearing to determine which claims will be addressed in an evidentiary hearing, it may not be advisable to have the defendant present. However, it would be wise to have the defendant available for the final hearing even if the hearing does not involve the taking of testimony.

3. Scheduling and Conducting the Hearing

The trial judge should allow a reasonable time for a full and fair evidentiary hearing. Consideration should be given to the scheduling needs of counsel as well as the scheduling needs of the court. If a stay of execution is required to accommodate those interests, then the court should grant a stay. Haste in resolving a post-conviction claim that truly requires an evidentiary hearing will only cause more delay in the long run.

The hearing is similar to any other evidentiary hearing in a criminal case. The defendant is entitled to present evidence on any issue that has not been summarily decided, and the state is entitled to present evidence in response. The trial judge acts as the trier of fact and resolves conflicts in the evidence and all issues of fact including credibility and weight to be given to the testimony of the witnesses. Generally, the trial court's findings of fact will be upheld unless they are clearly erroneous. *State v. El-Tabach*, 453 N.W.2d 91 (Neb. 1990).

4. Practical Considerations

Post-conviction motions in capital cases should take first priority over all other matters pending before the court. Trial judges should be aware that if a warrant has been signed, the state appellate courts and the federal courts will all have to work within the time remaining under the warrant. If the warrant sets the date of execution in three months but the trial judge uses two full months to decide the state post-conviction motions, the other state and federal courts will be left with little time to perform their functions. An excessive delay in the trial court will only increase the likelihood that a higher court will grant a stay of execution. These and other problems of managing time in capital post-conviction proceedings are discussed in *Glock v. State*, 537 So.2d 99 (Fla. 1989).

The need to proceed expeditiously may also require the trial judge to make special arrangements with the clerk and the court reporter. The

available time for preparing a record on appeal from a post-conviction motion when there is a pending warrant is obviously not the same as the time available when the defendant is filing a direct appeal from the judgment and sentence.

I. Summary Disposition

1. General Rule

A post-conviction motion may be summarily denied if the motion is facially insufficient or if the files and records of the proceeding show that the defendant is not entitled to relief. *State v. Otey*, 464 N.W.2d 352 (Neb. 1991). Appellate review of the sufficiency of a post-conviction motion is analogous to the review of a civil defendant's motion to dismiss for failure to state a cause of action. *Billiot v. State*, 515 So.2d 1234 (Miss. 1987). A post-conviction motion is properly dismissed if it fails to establish a prima facie ground upon which relief could be granted.

2. Legal Sufficiency

A post-conviction motion that is legally insufficient may be summarily denied. In this context the term "legal sufficiency" includes several distinct concepts. A post-conviction motion must meet all the procedural requirements of the state rule or statute, that is, it must be timely filed and it must be prepared in the proper form. If the rule or statute requires a defendant to verify the facts alleged in a post-conviction motion, then an unverified motion would be legally insufficient and it would be subject to summary denial. *Kilgore v. State*, 791 S.W.2d 393 (Mo. 1990).

Another concept that is included within the general meaning of "legal sufficiency" is that the motion must allege facts that would establish a right to relief. A timely post-conviction motion that is otherwise procedurally correct may be denied nevertheless because it fails to allege any facts that would give rise to a claim for relief. *See, e.g., Stuart v.*

State, 801 P.2d 1283 (Idaho 1990) (the new evidence was insufficient to warrant an evidentiary hearing because it would not have changed the conviction or sentence in any event); *Pollard v. State*, 807 S.W.2d 498 (Mo. 1991) (the motion contained only conclusory allegations); *In Re Rice*, 828 P.2d 1086 (Wash. 1992) (the allegations must be based on more than speculation, conjecture, or inadmissible hearsay).

If the motion is untimely or procedurally defective in some other respect or if it simply fails to allege a basis for relief, the trial judge may summarily deny the motion without requesting a response from the state. This is so because these are all defects that are apparent from the motion itself. Even if it is possible to deny a post-conviction motion on its face, however, the better practice is to request a response from the state. The state will have to defend the summary denial on appeal and should be given an opportunity to address the court on the motion, even if that is not a matter of right.

3. Unmeritorious Claims

One final kind of post-conviction motion that could be characterized as "legally insufficient" is a claim that is sufficient on its face but refuted by evidence in the record. In some states, a post-conviction motion that raises a facially sufficient yet frivolous claim may be summarily denied as long as the portions of the record that conclusively refute the claim are attached to the order denying the motion. For example, a motion falsely claiming defendant was not informed on entering his or her plea that the death penalty could be imposed can be denied by an order to which the plea transcript is attached.

If the deficiency in the post-conviction motion is that the facts alleged are refuted by the record, it is advisable for the court to request a response from the state before summarily denying the motion. Counsel for the state may believe that the allegation cannot be refuted by the record or that it

could be refuted more effectively by evidence that was not previously presented. As a practical matter, the opportunity to attach parts of the record exists only in the trial court. The state will not be able to provide any evidence to the appellate court, so the decision to grant an evidentiary hearing or to summarily deny the motion by attaching parts of the trial record is one that should be made carefully. As with other issues, a doubt regarding the need for an evidentiary hearing should be resolved in favor of granting the hearing.

J. Findings and Conclusions

The final order resolving a post-conviction motion should state whether the disposition was made summarily or after an evidentiary hearing. Depending on the nature of the disposition, the order should contain findings of fact, conclusions of law, or both. If the motion is summarily denied on the ground that it is not legally sufficient on its face, then the order of denial should contain conclusions of law explaining why the defendant is not entitled to relief. If the motion is summarily denied on the ground that the files and records conclusively show that the defendant is not entitled to relief, the trial judge should attach the portions of the record necessary to support that conclusion. Finally, if the motion is granted or denied after an evidentiary hearing, the order should contain both findings of fact and conclusions of law supporting the decision.

The importance of including specific findings in the final order on a post-conviction motion is that it will avoid the possibility that the case will be reversed by the state appellate court because the court could not ascertain the basis of the ruling. There are other good reasons for making express findings of fact and conclusions of law. As explained below, express findings of fact may preclude relitigation of the facts in federal court. Moreover, as to some issues, express conclusions of law will preclude relitigation of certain issues of law in federal court.

1. Finality of Factual Decisions

The existence of specific findings of fact may preclude the possibility that the defendant will be granted another evidentiary hearing in federal court. Title 28 U.S.C. §2254(d) sets out a list of circumstances under which a United States District Court is required to grant an evidentiary hearing on a federal habeas corpus petition. For the most part, these reasons deal with the adequacy of the state-court hearing procedure, and with the state-court the hearing itself.

In the adjudication of federal habeas corpus petitions, the federal courts are required to presume that factual findings made by state courts are correct. *Wainwright v. Witt*, 469 U.S. 412 (1985); *Sumner v. Mata*, 449 U.S. 539 (1981). In contrast, a conclusion of law with respect to a federal constitutional issue is not entitled to any deference in a subsequent post-conviction proceeding in federal court. Federal courts are not entitled to defer to nonfactual findings or conclusions of law in the state courts. *Miller v. Fenton*, 474 U.S. 104 (1985).

2. Issue Preclusion

If a federal constitutional claim is denied on the ground that is was barred by a state procedural default, then that ground and only that ground should be assigned as reason for denying the claim. The rule in federal court is that if a state court disposes of an issue on the basis of a procedural default, that fact must plainly appear from the ruling of the state court. *Harris v. Reed*, 109 S.Ct. 1038 (1989). Otherwise, the federal court may assume that the state court addressed the issue on the merits and that assumption in turn will be cause for the federal court to assume that because the issue has been exhausted in state court it is subject to review on the merits in the federal habeas corpus proceeding. The rule plainly shows the danger in assigning alternative reasons for the denial of a post-conviction claim. If the trial judge holds that a federal constitutional claim

is barred by a state procedural default, and then for good measure adds that the claim was without merit in any event, the issue will be reviewable in federal court. In contrast, the federal court will have no authority to review the issue if the trial judge has plainly denied the claim on the basis of a state procedural default.

3. Checklist

The following matters should be considered in drafting a final order on a post-conviction motion in a capital case.

- If the motion is summarily denied on the ground that it is facially insufficient, the order should contain a legal conclusion regarding the insufficiency of the allegations.
- If the motion is summarily denied on the ground that the files and records conclusively show the defendant is not entitled to relief, the order should specifically identify the parts of the record that refute the defendant's claim. Depending on the applicable procedure, the order should also include an appendix containing copies of the files and records that refute the defendant's claim.
- If the order was entered after an evidentiary hearing, it should contain findings of fact and conclusions of law.
- If the decision can be based either on a state procedural ground or on the merits of the defendant's claim, the trial judge should consider whether it is necessary to discuss the merits at all. A decision on the merits may undercut the effect of the decision on state procedural grounds.

K. Successive Motions

1. General Rule

A second or successive motion for post-conviction relief can be summarily denied if there is no reason for failing to raise the issues in the

previous motion. *Bolder v. State,* 769 S.W.2d 84 (Mo. 1989); *State v. Otey,* 464 N.W.2d 352 (Neb. 1991). Likewise, the court is not required to entertain a post-conviction claim that could have been raised in a previous petition for writ of habeas corpus. *Hurst v. Cook,* 777 P.2d 1029 (Utah 1989). A claim that was not asserted in a previous collateral challenge to the conviction is waived. *People v. Stewart,* 565 N.E.2d 968 (Ill. 1990); *Hendrix v. State,* 557 N.E.2d 1012 (Ind. 1990); *Commonwealth v. Hagood,* 532 A.2d 424 (Pa. 1987). Presentation of a new claim in a successive motion is sometimes referred to as an "abuse of process," *(Eutzy v. State,* 541 So.2d 1143 (Fla. 1989)), or an "abuse of the writ" *(In Re Rice,* 828 P.2d 1086 (Wash. 1992)).

There are some circumstances that justify a failure to present a claim in an earlier post-conviction motion. When a successive motion is filed, however, the defendant has the burden of establishing a justification for the failure to present the claim in an earlier proceeding. One reason that is often given for presenting a new claim in a successive post-conviction motion is that the facts were not known, and could not have been known, at the time the original post-conviction motion was filed. Another is that the claim is based on a principle of constitutional law that was not announced until after the disposition of the first motion. *See, e.g., Stuart v. State,* 801 P.2d 1283 (Idaho 1990).

The state may claim an "abuse of process" not only as to those issues that could have been raised in a prior post-conviction motion but also as to those issues that were actually presented and decided. If the court has adjudicated a claim on the merits, then the decision is binding on the parties and the claim cannot be raised again in a subsequent petition. Of course, if the motion was summarily denied on the ground that it failed to allege a basis for relief, then the defendant would not be precluded from raising the issues once again in a subsequent post-conviction motion. In

this situation, the denial is not a decision on the merits and has no binding effect on the parties.

2. Federal Standard

The issues that arise in the presentation of a successive post-conviction motion are similar to those that arise in federal court in connection with a successive petition for writ of habeas corpus. The U. S. Supreme Court has held that a second federal habeas corpus petition can be dismissed on the ground that it is an "abuse of the writ" if the issue was, or could have been, raised in a previous petition for writ of habeas corpus. *McKleskey v. Zant*, 113 L.Ed.2d 517 (1991). The test to be applied in such cases is the "cause and prejudice" test set out in *Wainwright v. Sykes*, 433 U.S. 72 (1977). The petitioner must show cause for the failure to raise the issue in an earlier petition, and that the failure to consider the claim will result in prejudice to petitioner's rights. Under this standard, a claim negligently omitted from a habeas corpus petition cannot be raised in a subsequent petition.

3. Checklist

The following matters should be considered in ruling on a successive post-conviction motion.

- Whether the claim is barred by the time limits governing the filing of post-conviction motions;
- Whether the claim was actually raised in a prior appeal or post-conviction motion and if so, whether it was decided on the merits;
- Whether the claim is one that could have been raised in a prior appeal or post-conviction motion,
- Whether the claim is based on a newly announced principle of constitutional law, and if so, whether the principle is one that is applied retroactively;

- Whether the claim is based on evidence that was not known or could not have been known within the time period for filing the motion; and
- Whether a failure to consider the claim would prejudice the defendant's rights.

L. Appeals

Post-conviction remedies are generally characterized as civil remedies even though they are often made part of the state criminal procedure by a rule or statute. *State v. Bostwisck*, 443 N.W.2d 885 (Neb. 1989); *State v. Skjonsby*, 417 N.W.2d 818 (N.D. 1987); *Ouimette v. Moran*, 541 A.2d 855 (R.I. 1988); *Peltier v. State*, 808 P.2d 373 (Idaho 1991). For this reason, the state has a right to appeal an order granting a post-conviction motion in the same way that the defendant has a right to appeal an order denying such a motion. *State v. Thomas*, 599 A.2d 1171 (Md. 1992); *Commonwealth v. Francis*, 583 N.E.2d 849 (Mass. 1991); *State v. Twenter*, 818 S.W.2d 628 (Mo. 1991); *State v. Sireci*, 502 So.2d 1221 (Fla. 1987).

Ordinarily, the proper court to hear an appeal from an order on a post-conviction motion is the court that has jurisdiction over the case on direct appeal. If a sentence of death is appealable directly to the state supreme court, and not to an intermediate appellate court, then an order on a post-conviction motion in which the defendant has been sentenced to death would be appealable to the state supreme court. If the defendant may file a direct appeal to the supreme court from an order denying a post-conviction motion, then the state may file a direct appeal to the supreme court from an order granting such a motion. *Commonwealth v. Francis, supra; State v. Sireci,* 502 So.2d 1221 (Fla. 1987).

The standard of review on appeal depends on the nature of the decision made in the trial court and the applicable state law. Generally, if a decision

on a post-conviction claim is based on a finding of fact, the decision will not be reversed on appeal unless the appellate court finds that it is clearly erroneous. As the court said in *Wilson v. State*, 813 S.W.2d 833, at 835 (Mo. 1991), a factual decision on a post-conviction motion is clearly erroneous only if after reviewing the entire record the appellate court is left with "the definite impression a mistake has been made."

Chapter 8

The Impact of Federal Habeas Death Penalty Cases on State Post-Conviction Proceedings*

*The Editorial Committee has decided to include the following article submitted for the Benchbook by the Honorable Marvin E. Aspen, United States District Judge, Northern District of Illinois. While individual committee members may not agree with all the views expressed therein, it is the consensus of the majority of the Committee that this thoughtful, scholarly article raises questions that state trial judges should consider when they are assigned a capital case.

Chapter 8. The Impact of Federal Habeas Death Penalty Cases on State Post-Conviction Proceedings

by the Honorable Marvin E. Aspen, District Court, Chicago, Illinois

A. Introduction

Led by Chief Justice Rehnquist, the United States Supreme Court has been in the forefront of legislative efforts to reform the federal habeas corpus process.[1] In June of 1988, the Chief Justice appointed the Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, chaired by retired Justice Lewis F. Powell, Jr., "to inquire into `the necessity and desirability of legislation directed toward avoiding delay and the lack of finality' in capital cases in which the prisoner had or had been offered counsel."[2] The

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[1]The epic 13-year legal battle over Robert Alton Harris, executed by the State of California on april 21, 1992, has come to epitomize the current debate over capital punishment within the federal courts: Is federal habeas corpus review nothing more than a "mockery of our criminal justice system"? Coleman v. Balkcom, 451 U.S. 949, 958, 101 S.Ct. 2031, 2995 - 68 L.Ed. 2d 334 (1981) (Rehnquist, J., dissenting from denial of certiorari) (accusing the Court of "surround[ing] capital defendants with numerous procedural protections unheard of for other crimes and . . . pristinely den[ying] . . . petition[s] for certiorari" in order to "prevent [] the States from imposing a death sentence on a defendant who has been fairly tried by a jury of his peers."). Harris, who was sentenced to death for the 1978 murders of two 16-year old boys from San Diego, California, has appealed his conviction and sentence in the United states courts in three separate petitions. For a detailed account of the procedural history of the *Harris* case, *see infra* notes 81–85 and accompanying test. Noting the push for habeas reform in the United states Supreme court, many commentators label the *Harris* case as the last of the "lengthy appeals." See, e.g., *Harriet Chiang, Harris Case May Be Last Lengthy Appeal: State Death Row Inmates to Have Fewer Chances of Delay*, S.F. Chron., Apr. 13, 1992, at A1; Jorge Casuso, *Does Death Row Hold a Victim?: California Convict Gets Final Appeal*, Chi. Trib., Apr. 12, 1992, at 1-21.

[2]Ad Hoc Comm. on Federal Habeas Corpus in Capital Cases, Comm. Report, *reprinted in* 135 Cong. Rec. S13,481 (daily ed. Oct. 16, 1989). After the naming of the Powell Committee, the American Bar Association likewise formed a task force to study the habeas problem. At least one commentator has suggested that the ABA "did so to counterbalance the seemingly conservative cast of the [Powell Committee]." Vivian Berger, *Justice Delayed or Justice Denied?— A Comment on Recent Proposals to Reform Death Penalty Habeas Corpus*, 90 Colum. L. Rev. 1665, 1667 n.11 (1990). The ABA issued its "more liberal" recommendations in August of 1990. American Bar Association,

Committee composed a report advocating what some have called the "one-bite-at-the-apple rule."[3] This report recommends voluntary legislation limiting state prisoners sentenced to death to one full opportunity for state and federal review of their claims. In addition to this bar on successive petitions, the Powell Committee would impose a statute of limitations on habeas filings. As a quid pro quo for these restrictions, states must opt to offer a capital defendant competent counsel in state post-conviction proceedings.[4] The Powell Committee Report was endorsed by Chief Justice Rehnquist, who forwarded a copy to Senate Judiciary Chairman Joseph Biden (D-Del.).[5] Congress, in fact, came close, but failed, to enact anti-crime legislation that would have "limited most prisoners to one habeas corpus appeal in the federal courts, provided it was filed within one year of their conviction."[6]

Nonetheless, since the reinstatement of the death penalty in 1976,[7] the

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Toward a More Just and Effective System of Review in State Death Penalty Cases, A Report Containing the American Bar Association's Recommendations Concerning Death Penalty Habeas Corpus and Related Materials from the American Bar Association Criminal Justice Section's Project on Death Penalty Habeas Corpus (1990) [hereinafter ABA Recommendations]. For an outstanding comparison of the Powell Committee Report, on the one hand, and the ABA Recommendations on the other, see Berger, *supra*, at 1674–1704.

[3]135 Cong. Rec. S13,473 (daily ed. Oct. 16, 1989) (statement of Sen Biden).

[4]The Supreme Court has recently held that given the right to counsel at trial and on direct appeal, the United States Constitution does not require appointment of counsel for indigent death-row inmates seeking state post-conviction relief. *Murray v. Giarratano*, 492 U.S. 1, 109 S. Ct. 2765, 106 L. Ed. 2d 1 (1989).

[5]*See Chief Justice Endorses Powell Committee Report on Habeas Reform in Capital Cases*, Crim. L. Rep. (BNA) No. 47, at 1159 (May 23, 1990).

[6]Mark Hansen, *Limiting Death Row Appeals: Final Justice*, 78 A.B.A. J. 64, 65 (1992).

[7]The five major death penalty cases of 1976 are *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976); *Proffitt v. Florida*, 428 U.S. 242, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976); *Jurek v. Texas*, 428 U.S. 262, 96 S. Ct. 2950, 49 L. Ed. 2d 929 (1976); *Woodson v. North Carolina*, 428 U.S. 280, 96 S. Ct. 2978, 49 L. Ed. 2d 944

Supreme Court has erected formidable procedural barriers to federal review of an inmate's constitutional claims. Section I of this chapter examines the most significant of these obstacles, including the procedural default doctrine, the exhaustion requirement, and the related doctrines concerning successive petitions and abuse of the writ. Section II explores the tradeoff between the comity and finality interests fostering these procedural doctrines and the possibility that a prisoner will be executed without substantive review of nonfrivolous constitutional claims by any court, federal or state. Finally, Section III concludes that, within the context of capital cases, state courts should consider taking action to ensure that each substantive claim raised is adjudicated on its merits.

B. Legal Barriers to Federal Habeas Review

1. The Procedural Default Doctrine

The procedural default doctrine was established by the federal courts to address the following issue: "In what instances will an adequate and independent state [procedural] ground bar consideration of otherwise cognizable federal issues on federal habeas review?"[8] State courts, in both capital and noncapital cases, typically invoke procedural bars at various stages throughout the totality of the state proceedings. For instance, in states that maintain a contemporaneous objection rule, failure to object at trial to the disputed error will ordinarily prevent review on direct appeal.[9]

(1976); *Roberts v. Louisiana*, 428 U.S. 325, 96 S. Ct. 3001, 49 L. Ed. 2d 974 (1976).

[8]*Wainwright v. Sykes*, 433 U.S. 72, 78–79, 97 S. Ct. 2497, 2502, 53 L. Ed. 2d 594 (1977).

[9]*See, e.g., Johnson v. State*, 308 Ark. 7, 1992 Ark. LEXIS 30, at *24 (1992) (although it was error for trial judge to amend the information orally, it is not grounds for reversal because capital defendant did not object at trial); *People v. Johnson*, 47 Cal. 3d 1194, 1235, 767 P.2d 1047 (1989) (failure of capital defendant to object to alleged prosecutorial misconduct at trial precludes review on direct appeal), *cert. denied*, 494 U.S. 1038, 110 S. Ct. 1501, 108 L. Ed. 2d 636 (1990); *Bedford v. Florida*, 589 So. 2d 245, 1991 Fla.

Likewise, a prisoner generally forfeits the right to raise an issue that he or she failed to raise on direct appeal in a petition for state post-conviction relief, provided the issue was known or should have been known at the time the appeal was filed.[10] Finally, if the prisoner neglects to raise a claim in a post-conviction petition, which was known or should have been known at the time, state courts of appeals typically will invoke a procedural bar rather than address the claim on the merits.[11]

The issue of what treatment to afford these state procedural bars, as well as instances where prisoners altogether fail to raise the claim in the state courts, has been extensively litigated in the federal courts. In *Fay v. Noia*,[12] respondent Noia claimed that his state-court conviction had resulted from a coerced confession in violation of the Fifth Amendment.[13] Unfortunately for Noia, he brought this issue in a coram nobis proceeding, having failed to take a direct appeal; as such, the New York courts ruled

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LEXIS 1743, at *22 (1991) (capital defendant's challenge to the trial court's failure to instruct the jury on the definition of "terrorize" as used in standard jury instruction on kidnapping not preserved for appeal as no such instruction was requested at trial), *petition for cert. filed*, (Mar. 9, 1992); *Spencer v. State*, 260 Ga. 640, 646, 398 S.E.2d 179 (1990) (prosecutorial misconduct not objected to at trial by capital defendant will not warrant reversal on appeal), *cert. denied*, 111 S. Ct. 2276, 114 L. Ed. 2d 727 (1991).

[10]*See, e.g., Magwood v. State*, 449 So. 2d 1267, 1268 (Ala. Crim. App.) (capital defendant's claim of prejudice due to pretrial publicity waived for consideration in post-conviction proceeding as it could have been raised on direct appeal), *appeal denied*, 453 So. 2d 1349 (Ala. 1984); *Flamer v. State*, 585 A.2d 736, 747 (Del. 1990) (capital defendant's claim under *Edwards v. Arizona*, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981) is waived for failure to present it on direct appeal); *Spenkelink v. State*, 350 So. 2d 85, 86 (Fla. 1977) (issue of systematic exclusion of jurors is waived because capital defendant failed to raise the issue on direct appeal), *cert. denied*, 434 U.S. 960, 98 S. Ct. 492, 54 L. Ed. 2d 320 (1977).

[11]*See, e.g., People v. Owens*, 129 Ill. 2d 303, 320, 544 N.E.2d 276, 281 (1989) (capital defendant's challenge to allegedly erroneous jury instructions was first brought in appeal after denial of petition for post-conviction relief and, as such, is deemed waived), *cert. denied*, 110 S. Ct. 3294, 111 L. Ed. 2d 802 (1990).

[12]372 U.S. 391, 83 S. Ct. 822, 9 L. Ed. 2d 837 (1963).

[13]*Id.* at 394, 83 S. Ct. at 825.

that his subsequent coram nobis action was procedurally barred.[14] Against this procedural background, the United States Supreme Court announced what has been called the "deliberate bypass test":

> [T]he doctrine under which state procedural defaults are held to constitute an adequate and independent state law ground barring direct Supreme Court review is not to be extended to limit the power granted the federal courts under the habeas statute. . . . [However, we recognize] a limited discretion in the federal judge to deny relief . . . to an applicant who had deliberately by-passed the orderly procedure of the state court remedies.[15]

In creating this exception to federal review, the Court stated that the waiver must be knowing and actual—"'an intentional relinquishment or abandonment of a known right or privilege.'"[16] Recognizing that Noia was faced with "the grisly choice whether to sit content with life imprisonment or to travel the uncertain avenue of appeal which, if successful, might well have led to a retrial and death," the Court concluded that his choice not to appeal was not a deliberate circumvention of state procedures.[17]

The presumption behind the deliberate bypass test adopted in *Noia* is federal review of federal claims. The availability of a federal forum for the enforcement of federal rights after *Noia*, however, came at the expense of sovereignty interests such as the reinforcement of state procedural rules. As such, many commentators expressed dissatisfaction with the broadened scope of federal habeas review, and in particular the Court's methodology

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[14] *Id.*

[15] *Id.* at 399, 483, 83 S. Ct. at 827, 848.

[16] *Id.* at 439, 83 S. Ct. at 849 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 1023, 82 L. Ed. 1461 (1938)).

[17] *Id.* at 440, 83 S. Ct. at 849.

in *Noia*.[18] A decade after the *Noia* decision, the Court began to reassess the deliberate bypass rule.

In *Davis v. United States*,[19] a federal prisoner brought a habeas petition pursuant to 28 U.S.C. §2255, challenging for the first time the composition of the grand jury that indicted him. Relying on the language of Rule 12(b)(2) of the Federal Rules of Criminal Procedure, which requires that such claims be raised "by motion before trial," the court held that the claim was barred from habeas review in the absence of a showing of cause for the noncompliance and a showing of actual prejudice resulting from the alleged constitutional violation.[20] In *Francis v. Henderson*,[21] The Court applied the rule of *Davis* to the analogous case of a state procedural requirement that challenges to grand jury composition be raised prior to trial. Although noting that the federal courts possessed the power to entertain the claim despite the state procedural default, the Court applied the *Davis* cause and prejudice standard to preclude review, concluding that "considerations of comity and concerns for the orderly administration of criminal justice"[22] mandate that the Court give no "'greater preclusive effect to procedural defaults by federal defendants than to similar defaults by state defendants.'"[23] *Francis* marks a dramatic departure from the *Noia*

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[18]Indeed, the *Noia* Court's historical analysis received much criticism. *See, e.g.*, Lewis Mayers, *The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian*, 33 U. Chi. L. Rev. 31 (1965); Dallin H. Oaks, *Legal History in the High Court—Habeas Corpus*, 64 Mich. L. Rev. 451 (1966).

[19]411 U.S. 233, 93 S. Ct. 1577, 36 L. Ed. 2d 216 (1973).

[20]*Id.* at 243-45, 93 S. Ct. at 1583-84. Note that the cause standard is explicitly embodied in Rule 12(f): "the court for cause shown may grant relief from the waiver." The prejudice requirement represents an implied standard.

[21]425 U.S. 536, 96 S. Ct. 1708, 48 L. Ed. 2d 149 (1976).

[22]*Id.* at 538–39, 96 S. Ct. at 1710.

[23]*Id.* at 542, 96 S. Ct. at 1711 (quoting *Kaufman v. United States*, 394 U.S. 217, 228, 89 S. Ct. 1068, 1069, 22 L. Ed. 2d 227 (1969)).

deliberate bypass standard. The balance struck in *Noia* between state comity concerns and federal review of federal claims was rejected in *Francis*.[24]

The death knell to *Noia*'s deliberate bypass standard came in *Wainwright v. Sykes*.[25] In *Sykes*, the issue facing the Court was "the availability of federal habeas corpus to review a state convict's claim that testimony was admitted at his trial in violation of his rights under *Miranda v. Arizona*, . . . a claim which the Florida courts have previously refused to consider on the merits because of noncompliance with a state contemporaneous-objection rule."[26] Finding that the *Noia* deliberate bypass test accords too little respect to the state's procedural rule—a rule that deserves respect "both for the fact that it is employed by a coordinate jurisdiction within the federal system and for the many intrests which it serves in its own right"—the Court extended its application of the *Davis* cause and prejudice standard to state contemporaneous objection rules.[27]

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[24]For an excellent discussion of *Noia*, *Davis*, and *Francis* and the policies underlying each decision, see Stephanie Dest, *Federal Habeas Corpus and State Procedural Default: An Abstention-Based Interest Analysis*, 56 U. Chi. L. Rev. 263, 266–74 (1989).

[25]433 U.S. 72, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977). The question of whether *Sykes* specifically overruled *Noia* has generated considerable debate. The Court in *Sykes* explicitly rejected "the sweeping language of *Fay v. Noia*, going far beyond the facts of the case eliciting it." *Id.* at 87–88, 97 S. Ct. at 2507. However, the Court noted that "[w]e have no occasion today to consider the [*Noia*] rule as applied to the facts there confronting the Court." *Id.* at 88 n.12, 97 S. Ct. at 2507 n.12. Recently, however, the Court put that issue to rest. *See Coleman v. Thompson*, 111 S. Ct. 2546, 2565, 115 L. Ed. 2d 640 (1991) (explicitly stating that *Noia* no longer applies in any factual circumstance).

[26]*Sykes*, 433 U.S. at 74, 97 S. Ct. at 2499.

[27]*Id.* at 88–91, 97 S. Ct. at 2507–08. Of the "many interests which [the state procedural rule] serves in its own right," the Court was particularly concerned with the avoidance of "sandbagging":

> We think that the rule of [*Noia*], broadly stated, may encourage sandbagging on the part of defense lawyers, who may take their chances on a verdict of not guilty in a state trial court with the intent to raise constitutional claims in a federal habeas court if their initial gamble does not pay off.

Significantly, the court explicitly declined to provide definitions for the terms "cause" and "prejudice," noting only that "it is narrower than the standard set forth . . . in [*Noia*]."[28]

Since its decision in *Sykes*, the Court has had relatively few opportunities to refine the cause and prejudice standard.[29] Toward that end, the most important declaration came in *Murray v. Carrier*.[30] In *Carrier*, the Court faced the issue of "whether a federal habeas petitioner can show cause for a procedural default by establishing that competent defense counsel inadvertently failed to raise the substantive claim of error [on direct appeal after objecting to it at trial] rather than deliberately withholding it for tactical reasons."[31] Holding that attorney inadvertence falling short of ineffective assistance of counsel does not constitute "cause," the Court opined that "cause for a procedural default on appeal ordinarily requires a showing of some external impediment preventing counsel from constructing or raising the claim."[32] In light of the definition

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Id. at 89, 97 S. Ct. at 2508.

[28]*Id.* at 87, 97 S. Ct. at 2507.

[29]*See Engle v. Isaac*, 456 U.S.107, 130, 102 S. Ct. 1558, 1573, 71 L. Ed. 2d 783 (1982) ("[F]utility of presenting an objection to the state courts cannot alone constitute cause for a failure to object at trial."); *United States v. Frady*, 456 U.S. 152, 170, 102 S. Ct. 1584, 1596, 71 L. Ed. 2d 816 (1982) ("prejudice" prong requires a "showing, not merely that the errors at trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.") (emphasis in original); *Reed v. Ross*, 468 U.S. 1, 13–16, 104 S. Ct. 2901, 2909–10, 82 L. Ed. 2d 1 (1984) ("cause" requirement is met in those exceptional circumstances where a constitutional issue is not properly raised because it was "reasonably unknown" at the time.)

[30]477 U.S. 478, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986).

[31]*Id.* at 481–82, 106 S. Ct. at 2642.

[32]*Id.* at 492, 106 S. Ct. at 2648. The Court also stated that "'[i]n appropriate cases' the principles of comity and finality that inform the concepts of cause and prejudice 'must yield to the imperative of correcting a fundamentally unjust incarceration.'" *Id.* at 495, 106 S. Ct. 2649 (quoting *Isaac*, 456 U.S. at 135, 102 S. Ct. at 1576.). The Court continues to describe this "extraordinary" case as one in which "a constitutional violation has probably

expounded in *Carrier*, the Supreme Court has applied the *Sykes* cause and prejudice standard stringently,[33] as have the lower courts.[34]

Some commentators have argued that, within the context of capital cases, the stringent cause and prejudice test is inequitable for the following reasons: (1) capital case reversal rates range between 33% and 77% and, as such, the error rate in state courts is high; (2) substantive review of constitutional claims is preferable to time-consuming litigation over threshold questions such as whether the procedural default doctrine should apply; and (3) the impact of the doctrine is more severe in a death penalty context.[35] However, the Supreme Court has rejected the notion that a

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resulted in the conviction of any one who is actually innocent." *Id.* at 496, 106 S. Ct. at 2649. The Court has yet to apply this exception to the cause and prejudice standard.

[33]*See, e.g., Coleman v. Thompson*, 111 S. Ct. 2546, 2566-68, 115 L. Ed. 2d 640 (1991) ("Attorney ignorance or inadvertence is not 'cause' because the attorney is the petitioner's agent when acting, or failing to act, in furtherance of the litigation, and the petitioner must 'bear the risk of attorney error.'"). The Court's offer of support for this life-and-death conclusion, *i.e.*, the "well-settled principles of agency law" as embodied in the Restatement (Second) of Agency § 242 (1958), has drawn considerable criticism. *See, e.g.*, Monroe Freedman, *Pale Horse, Pale Justice*, Legal Times, Mar. 23, 1992; Hansen, *supra* note 6, at 61.

[34]*See, e.g., Kennedy v. Delo*, No. 91-1075, 1992 U.S. App. LEXIS 4752, at *6-10 (8th Cir. Mar. 19, 1992) (no cause articulated for default of (1) challenge to first degree murder instruction, (2) due process claim, or (3) claim of ineffective assistance of counsel); *Barksdale v. Lane*, No. 89-3705, 1992 U.S. App. LEXIS 2763, at *21 (7th Cir. Feb. 27, 1992) (no cause articulated for default of ineffective assistance of counsel claim); *Caswell v. Ryan*, 953 F.2d 853, 862 (3d Cir. 1992) (pro se status does not constitute cause for default of all four of petitioner's ineffective assistance of counsel claims), *petition for cert. filed* (Mar. 19, 1992); *Morrison v. Duckworth*, 898 F.2d 1298, 1301 (7th Cir. 1990) (petitioner could not show cause by claiming ineffective assistance of counsel during state habeas proceeding); *Thompson v. Lynaugh*, 821 F.2d 1080, 1081–82 (5th Cir.) (claim that introduction of victim impact statement violated Eighth Amendment not so novel as to excuse default even when Supreme Court did not decide the issue until after the default because the Court ruling merely particularized existing constitutional doctrine), *cert. denied*, 483 U.S. 1035, 108 S. Ct. 5, 97 L. Ed. 2d 794 (1987).

[35]*See* ABA Recommendations, *supra* note 2, at 89–102 (advocating use of *Noia* deliberate bypass rule in capital context).

different standard applies to the procedural default analysis in capital cases.[36] Accordingly, claims procedurally defaulted by capital defendants, like those of non-capital defendants, are governed by the *Sykes* test.

2. Exhaustion of State Remedies

First enunciated in *Ex parte Royall*,[37] the exhaustion doctrine "is grounded in principles of comity and reflects a desire to 'protect the state courts' role in the enforcement of federal law."[38] It is not, however, a jurisdictional requirement.[39] Nonetheless, the requirement creates a "strong presumption in favor of requiring the prisoner to pursue available state remedies."[40] Indeed, as codified in 1948, the exhaustion rule looms as an uncompromising obstacle to state prisoners seeking federal habeas relief:

> (b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.
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> (c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of

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[36]*Smith v. Murray*, 477 U.S. 527, 538, 106 S. Ct. 2661, 2668, 91 L. Ed. 2d 434 (1986).

[37]117 U.S. 241, 6 S. Ct. 734, 29 L. Ed. 868 (1886).

[38]*Castille v. Peoples*, 489 U.S. 346, 349, 109 S. Ct. 1056, 1059, 103 L. Ed. 2d 380 (1989) (quoting *Rose v. Lundy*, 455 U.S. 509, 102 S. Ct. 1198, 71 L. Ed. 2d 379 (1982)).

[39]*Id.; Granberry v. Greer*, 481 U.S. 129, 131, 107 S. Ct. 1671, 1673–74, 95 L. Ed. 2d 119 (1987); *Strickland v. Washington*, 466 U.S. 668, 684, 104 S. Ct. 2052, 2063, 80 L. Ed. 2d 674 (1984); *see also Bowen v. Johnston*, 306 U.S. 19, 27, 59 S. Ct. 442, 446, 83 L. Ed. 455 (1939) (the doctrine "is not one defining power but one which relates to the appropriate exercise of power").

[40]*Granberry*, 481 U.S. at 131, 107 S. Ct. at 1674.

this section, if he has a right under the law of the State to raise, by any available procedure, the question presented.[41]

In general, proper exhaustion requires the petitioner to "fairly present" the issue to the highest court of the state that possesses the power to review the question.[42] "Fair presentation" requires the petitioner to submit to the state court both the factual and theoretical substance of the claim in question.[43] While the exhaustion requirement does not necessitate a written opinion on the part of state courts, raising a claim for the first time in a discretionary appeal to the state's highest court, where the court declines to hear the case, does not constitute "fair presentation."[44] Respecting the substance of a claim, lower courts have adopted differing approaches when a petitioner has submitted the claim to the state courts framed as an issue of state law rather than of federal constitutional law.[45] If, however, a

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[41]28 U.S.C. §2254(b)-(c) (1988).

[42]*Smith v. Digmon*, 434 U.S. 332, 98 S. Ct. 597, 54 L. Ed. 2d 582 (1978); *Brown v. Allen*, 344 U.S. 443, 73 S. Ct. 397, 97 L. Ed. 469 (1953) (overruled in part, not relevant here, by *Wainwright v. Sykes*, 433 U.S. 72, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977)); *see also Justices of Boston Mun. Court v. Lydon*, 466 U.S. 294, 302-03, 104 S. Ct. 1805, 1810, 80 L. Ed. 2d 311 (1984) (exhaustion satisfied by presentation of petitioner's claim to Supreme Judicial Court of Massachusetts).

[43]*Anderson v. Harless*, 459 U.S. 4, 6, 103 S. Ct. 276, 277, 74 L. Ed. 2d 3 (1982) (per curiam) ("It is not enough that all the facts necessary to support the federal claim were before the state court . . . . [T]he habeas petitioner must have 'fairly presented' to the state courts the 'substance' of his federal habeas corpus claim.").

[44]*Castille*, 489 U.S. at 351, 109 S. Ct. at 1060.

[45]*Compare Franklin v. Rose*, 811 F.2d 322, 325–26 (6th Cir. 1987) (exhaustion requirement not satisfied for claim that exclusion of medical records violated due process when it was presented to the state courts exclusively as a violation of state evidentiary law) *and Tyler v. Wyrick*, 730 F.2d 1209, 1210 (8th Cir.) (per curiam) (exhaustion requirement not satisfied for claim brought on federal constitutional grounds in federal habeas proceeding when brought in state courts exclusively under Missouri statutory law), *cert. denied*, 469 U.S. 838, 105 S. Ct. 138, 83 L. Ed. 2d 78 (1984) *with Falconer v. Lane*, 905 F.2d 1129, 1134 (7th Cir. 1990) (exhaustion requirement satisfied for challenge to Illinois murder and voluntary manslaughter instructions despite being brought in the state courts under the state constitution); *Nadworny v. Fair*, 872 F.2d 1093, 1102-03 (1st Cir. 1989) (exhaustion requirement satisfied when facts and legal theories behind the claims

petitioner who has raised properly the relevant claim before the highest court of the state on direct appeal, will not be required to raise the issue on any other avenue of relief, *i.e.*, on state post-conviction review.[46]

Under limited circumstances federal courts may excuse the exhaustion requirement. First, federal courts generally will not require a petitioner to present his or her claim to the state courts when such litigation would be futile or ineffective.[47] Often, however, futility is established because the petitioner procedurally defaulted the claim in state court, leaving him no available remedy in the state's high court.[48] In such a case, excusal of the exhaustion doctrine is a hollow victory as the petitioner must meet the *Sykes* cause and prejudice standard.[49] Second, in extremely rare instances, a federal court will excuse the exhaustion requirement based on excessive delay in the state processes.[50] Finally, if the state fails to assert in the

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brought in federal court were substantially the same as those brought in state court, although not explicitly framed in federal constitutional terms).

[46]*Castille*, 489 U.S. at 350, 109 S. Ct. at 1059; *Brown*, 344 U.S. at 448-49 n.3, 73 S. Ct. at 403 n.3; *see also United States ex. rel Falconer v. Lane*, 708 F. Supp. 202, 204 (N.D. Ill. 1989).

[47]*See Castille*, 489 U.S. at 351, 109 S. Ct. at 1060 ("the requisite exhaustion may nonetheless exist . . . if it is clear that respondent's claims are now procedurally barred under Pennsylvania law"); *Thompson v. Reivitz*, 746 F.2d 397, 401 (7th Cir. 1984) (exhaustion requirement excused when issue is settled by adverse supreme court ruling), *cert. denied*, 471 U.S. 1103, 105 S. Ct. 2332, 85 L. Ed. 2d 849 (1985); *Gray v. Greer*, 707 F.2d 965, 967 (7th Cir. 1983) (Illinois post-conviction statute is an ineffective remedy "in circumstances where the Illinois courts strictly apply the doctrine of res judicata or waiver in post-conviction matters).

[48]As a general matter, if a claim could not be brought in state court because no remedies remain available at the time the federal petition is filed, exhaustion is excused. *Engle v. Isaac*, 456 U.S. 107, 125–26, n.28, 102 S. Ct. 1558, 1570–71 n.28, 71 L. Ed. 2d 783 (1982); *Farrell v. Lane*, 939 F.2d 409, 410 (7th Cir.), *cert. denied*, 112 S. Ct. 387, 116 L. Ed. 2d 337 (1991).

[49]*See supra* notes 25–34 and accompanying text.

[50]*See Brooks v. Jones*, 875 F.2d 30, 32 (2d Cir. 1989) (eight-year delay in state appeal warranting federal consideration of unexhausted claims); *Burkett v. Cunningham*, 826 F.2d 1208, 1218 (3d Cir. 1987) (exhaustion requirement excused when state court appellate

district court that petitioner has failed to exhaust state remedies, the exhaustion requirement may be waived for purposes of appeal, such waiver being dependent on the considerations of comity, judicial efficiency, and fairness.[51]

The rigidity of the exhaustion requirement is exemplified in the circumstance of a "mixed petition"—*i.e.*, a habeas petition containing both exhausted and unexhausted claims. In *Rose v. Lundy*,[52] the Supreme Court held that, in a federal habeas petition that raises multiple claims, a petitioner must exhaust state remedies as to all issues before the court may consider the petition.[53] If, in fact, any of the claims are unexhausted, the petition will be dismissed unless the prisoner opts to sever all unexhausted claims therefrom.[54] The opportunity to amend the petition, however, depends on the prisoner's awareness of the existence of that alternative—an eventuality not to be taken for granted given the vast number of prisoners who proceed pro se.[55] More significant, the Court has refused to recognize

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proceedings were not resolved after one year and nine months following a three and one-half year delay between conviction and sentencing).

[51]*See Granberry*, 481 U.S. at 135–36, 107 S. Ct. at 1675–76 ("[a]lthough there is a strong presumption in favor of requiring the prisoner to pursue his available state remedies, his failure to do so is not an absolute bar to [federal] appellate consideration of his claims"); *Obremski v. Maass*, 915 F.2d 418, 421 (9th Cir. 1990) (state waived exhaustion defense by failing to object in the district court because no unresolved questions of fact existed on appeal, and petitioner's claim is not colorable), *cert. denied*, 111 S. Ct. 986, 112 L. Ed. 2d 1070 (1991). Note that Rule 5 of the Rules Governing Section 2254 Cases in the United States District Courts, 28 U.S.C. foll. § 2254, places the onus of stating whether petitioner's claims have been exhausted on the state.

[52]455 U.S. 509, 102 S. Ct. 1198, 71 L. Ed. 2d 379 (1982).

[53]*Id.* at 522, 102 S. Ct. at 1205.

[54]*Id.* at 510, 102 S. Ct. at 1199.

[55]*Id.* at 530, 102 S. Ct. at 1210 (Blackmun, J., concurring).

an exception to the exhaustion rule for "clear violations" of rights.[56] Accordingly, prisoners who have set forth an exhausted claim involving clear violations of rights coupled with at least one unexhausted claim have been denied relief in federal court under the holding of *Rose*.[57] The problem facing capital defendants is even more pronounced:

> In some capital cases, a peculiar situation arises in which the state courts refuse to stay an execution date and the defendant is forced to request a stay from the federal courts by filing a petition for habeas corpus, even if federal procedural rules prevent the defendant from bringing all valid claims into federal court in the first habeas petition. In this situation, the defendant is faced with the choice of not requesting a stay (and thus being executed) or requesting a stay based on some, but not all, of the claims raised in state court (and thus having either to forgo the remaining claims or to raise them in a successive petition). . . . Any non-capital defendant has the option to wait until crucial second claims catch up before entering federal court. The capital defendant, however, cannot afford to wait; he is forced into federal court early to avoid execution.[58]

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[56]*Duckworth v. Serrano*, 454 U.S. 1, 4, 102 S. Ct. 18, 19, 70 L. Ed. 2d 1 (1981) (per curiam).

[57]*See, e.g., United States ex rel. Pisciotti v. Cooper*, No. 91-3680, 1992 U.S. Dist. LEXIS 1966, at *8-11 (N.D. Ill. Feb. 20, 1992) (noting that the jury instructions given at petitioner's trial violated his due process rights, yet dismissing entire petition because at least one of his additional claims was unexhausted).

[58]ABA Recommendations, *supra* note 2, at 113 (quoting Note, *The Rush to Execution: Successive Habeas Corpus Petitions in Capital Cases*, 95 Yale L.J. 371, 379–81 (1985)). The current restrictions on successive petitions are discussed *infra* at subsection I-C.

3. Successive Petitions and Abuse of Writ[59]

A "successive petition" is one that "raises grounds identical to those raised and rejected on the merits on a prior petition."[60] The circumstances under which federal courts should properly entertain such a petition are governed by 28 U.S.C. §2244[61] and Rule 9(b) of the Rules Governing Section 2254 Cases in the United States District Courts, 28 U.S.C. foll. §2254.[62] These provisions effectively codify the criteria established in *Sanders v. United States*:[63]

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[59]As a related matter, Rule 9(a) of the Rules Governing Section 2254 Cases in the United States District Courts, 28 U.S.C. foll. §2254, based on the equitable doctrine of laches, authorizes a district court to dismiss a petition if it appears that the delay in its filing has prejudiced the state's ability to respond:

> (a) Delayed petitions. A petition may be dismissed if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition by delay in its filing unless the petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred.

This discretionary rule, however, rarely, if ever, comes into play in the death penalty context. The rationale behind the federal courts' reluctance to dismiss a capital case for prejudicial delay is that it is often the state's scheduling of the execution that makes the petitioner's delay unreasonable and prejudices the state in its ability to respond. *See Davis v. Dugger*, 829 F.2d 1513, 1518 (11th Cir. 1987) (district court may not dismiss capital defendant's first habeas petition under Rule 9(a) solely because it was filed on the eve of the petitioner's scheduled execution).

[60]*Kuhlmann v. Wilson*, 477 U.S. 436, 444 n.6, 106 S. Ct. 2616, 2622 n.6, 91 L. Ed. 2d 364 (1986) (plurality) (citing *Sanders v. United States*, 373 U.S. 1, 15–17, 83 S. Ct. 1068, 1077–78, 10 L. Ed. 2d 148 (1963)).

[61]28 U.S.C. § 2244(b) (1988) provides in relevant part: "[A] subsequent application for a writ of habeas corpus . . . need not be entertained by a [federal court] unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ."

[62]Rule 9(b) provides in pertinent part: "A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits."

[63]373 U.S. 1, 83 S. Ct. 1068, 10 L. Ed. 2d 148 (1963).

> Controlling weight may be given to denial of a prior application for federal habeas corpus or §2255 relief only if (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application.[64]

As with the previously discussed barriers to federal review, courts have applied the *Sanders* test in a rigid manner. For instance, courts have held that newly discovered evidence supporting a ground previously presented in generic terms is insufficient to transform the claim into a new or different ground for relief.[65] Moreover, the dismissal of a federal habeas petition on the ground of a state procedural default has been considered a determination "on the merits" for the purposes of the successive petitions doctrine.[66] Additionally, a plurality of the Supreme Court has determined that the "ends of justice" require federal courts to entertain successive petitions "only where the prisoner supplements his constitutional claim with a colorable showing of factual innocence."[67] Finally, prisoners attacking death sentences ordinarily do not receive special treatment under the successive petitions doctrine.[68]

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[64]*Id.* at 15, 83 S. Ct. at 1077.

[65]*See, e.g., Harris v. Vasquez*, 949 F.2d 1497, 1510 (9th Cir. 1991) (despite newly discovered evidence of organic brain damage and other mitigating disorders, Harris' *Ake* claim considered same ground as earlier ineffective assistance of counsel and due process claims based on failure of both his counsel and the state to obtain additional medical assessments regarding possible brain damage), *cert. denied*, 117 L. Ed. 2d 501, 60 U.S.L.W. 3598 (1992).

[66]*Howard v. Lewis*, 905 F.2d 1318, 1322–23 (9th Cir. 1990).

[67]*Kuhlmann*, 477 U.S. at 454, 106 S. Ct. at 2627.

[68]*Richardson v. Thigpen*, 883 F.2d 895, 899 (11th Cir.) (per curiam) (ends of justice do not "necessarily" require federal court to address merits of alleged constitutional violation although claim directly involves death sentence), *cert. denied*, 492 U.S. 934, 110 S. Ct. 17, 106 L. Ed. 2d 631 (1989); *Moore v. Blackburn*, 806 F.2d 560, 564 (5th Cir. 1986) (barring capital defendant's ineffective assistance of counsel claim and *McCleskey* discrimination claim under Rule 9(b)), *cert. denied*, 481 U.S. 1042, 107 S. Ct. 1988, 95

The "abuse of the writ" doctrine, likewise embodied in Rule 9(b) of the Rules Governing Section 2254 Cases in the United States District Courts, 28 U.S.C. foll. §2254, "defines the circumstances in which federal courts decline to entertain a claim presented for the first time in a second or subsequent petition for a writ of habeas corpus."[69] Once the government has properly pled abuse of the writ, the petitioner bears the burden of showing that he or she has not abused the writ in seeking habeas relief.[70] The standard for determining when a petitioner abuses the writ was recently defined in *McCleskey v. Zant*.[71] In a second petition for federal habeas relief, McCleskey presented a claim under *Massiah v. United States*,[72] which he failed to include in his first federal petition.[73] In determining whether McCleskey's claim constituted an abuse of the writ, the Court stated: "Abuse of the writ is not confined to instances of deliberate abandonment. . . . [Rather,] the principle of inexcusable neglect . . . governs in the abuse of the writ context."[74] The Court continued to define "inexcusable neglect" as encompassing the same standard used to determine whether to excuse state procedural defaults—*i.e.*, the *Sykes* cause and prejudice standard.[75] According to death-penalty litigators, this

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L. Ed. 2d 827 (1987).

[69]*McCleskey v. Zant*, 111 S. Ct. 1454, 1457, 113 L. Ed. 2d 517 (1991); *see also Kuhlmann*, 477 U.S. at 444 n.6, 106 S. Ct. at 2622 n.6 (citing *Sanders*, 373 U.S. at 17-19, 83 S. Ct. at 1078-79).

[70]*McCleskey*, 111 S. Ct. at 1461; *Sanders*, 373 U.S. at 10–11, 83 S. Ct. at 1074–75.

[71]111 S. Ct. 1454, 113 L. Ed. 2d 517 (1991).

[72]377 U.S. 201, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964).

[73]*McCleskey*, 111 S. Ct. at 1457.

[74]*Id.* at 1465–66 (citations omitted).

[75]*Id.* at 1468.

standard is virtually insurmountable.[76] Although most capital defendants would have no trouble showing prejudice, the possibility of establishing "cause" is remote in light of the restrictive definition adhered to by the Court: "[C]ause . . . ordinarily requires a showing of some external impediment preventing counsel from constructing or raising the claim."[77] Indeed, in McCleskey's case, the Court held that, despite the fact that the majority of the evidence supporting his *Massiah* claim was discovered after the denial of his first petition, McCleskey should have discovered the evidence sooner and, accordingly, had not established cause for failing to raise the claim at the outset.[78] Noting the risk of sanctions had McCleskey raised the *Massiah* claim in the first petition without the subsequently discovered evidence in support of the claim, many commentators have been very critical of the *McCleskey* holding.[79]

C. The Price of Comity, Federalism, and Finality

The foregoing procedural obstacles to federal habeas review raise the significant possibility that potentially tenable constitutional claims will not be considered on the merits by any court, federal or state. The death

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[76]*See* Hansen, *supra* note 6, at 67. Abuse of the writ has been of particular concern to the Court in the death penalty context:

> A pattern seems to be developing in capital cases of multiple review in which claims that could have been presented years ago are brought forward—often in a piecemeal fashion—only after the execution date is set or becomes imminent. Federal courts should not continue to tolerate—even in capital cases—this type of abuse in the writ of habeas corpus.

Woodard v. Hutchins, 464 U.S. 377, 380, 104 S. Ct. 752, 753, 78 L. Ed. 2d 541 (1984) (Powell, J., joined by Burger, C.J., and Blackmun, Rehnquist & O'Connor, JJ., concurring).

[77]*See supra* note 32 and accompanying text.

[78]*McCleskey,* 111 S. Ct. at 1472–74.

[79]*See, e.g.*, Hansen, *supra* note 6, at 67 (quoting Vivian Berger).

penalty, like all criminal sanctions, must be applied with strict conformance to the dictates of procedural fairness. Given the uniquely irreversible nature of death, however, procedural fairness in the context of capital cases may require greater scrutiny of all potentially meritorious claims.[80]

Consider the case of Robert Alton Harris. In his third and final petition for federal habeas relief, filed on March 26, 1990, Harris contended that (1) the State had denied him competent psychiatric assistance at trial, (2) the prosecution had presented false psychiatric testimony, (3) he had been subjected to an unlawful interrogation, (4) he had been denied effective assistance of counsel, and (5) newly discovered evidence showed he had organic brain damage resulting from fetal alcohol syndrome, as well as other mitigating mental disorders. As in the case of his prior petitions,[81] the district court denied the petition without an evidentiary hearing.

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[80]*See Spaziano v. Florida*, 468 U.S. 447, 459–60, 104 S. Ct. 3154, 3161–62, 82 L. Ed. 2d 340 (1984) (severity and permanence of capital punishment require a greater scrutiny of the merits of capital appeals than is afforded in other cases).

[81]In his first petition for writ of habeas corpus, filed in the United States District Court for the Southern District of California on March 5, 1982, Harris argued that the California death penalty statute was unconstitutional and that he was subjected to prejudicial pretrial publicity. On March 12, 1982, the district court denied Harris' petition without an evidentiary hearing. *Harris v. Pulley*, No. 82-0249 (S.D. Cal. Mar. 12, 1982). The Court of Appeals for the Ninth Circuit, however, vacated the decision on the grounds that the California Supreme Court did not undertake a proportionality review. *Harris v. Pulley*, 692 F.2d 1189, 1196–97 (9th Cir. 1982). The United States Supreme Court reversed, holding that the California death penalty scheme is not rendered unconstitutional by the absence of provision for proportionality review. *Pulley v. Harris*, 465 U.S. 37, 54, 104 S. Ct. 871, 881, 79 L. Ed. 2d 29 (1984).

On August 13, 1982, Harris filed a second petition for habeas relief, presenting federal constitutional issues regarding (1) "death qualification" of the jury, (2) presentation to the jury of nonstatutory aggravating factors, (3) ineffective assistance of counsel at the penalty phase, and (4) denial of due process for failure of the state to grant his post-conviction request for a neurological examination. The district court consolidated these claims with those remanded from his first petition and denied Harris a writ of habeas corpus. *Harris v. Pulley*, No. 82-1005 (S.D. Cal. July 26, 1984). The Ninth Circuit affirmed the district order, and the Supreme Court denied certiorari. *Harris v. Pulley*, 885 F.2d 1354, 1384 (9th Cir. 1988), *cert. denied*, 493 U.S. 1051, 110 S. Ct. 854, 107 L. Ed. 2d 848 (1990).

Holding that his claims were barred by both the abuse of the writ doctrine and the prohibition against successive petitions, discussed *supra*, the Ninth Circuit affirmed.[82] The most harrowing aspect of the rejection of Harris' claims in the federal courts—indeed, the focus of the vast majority of media coverage respecting the impending execution[83]—is that extensive evidence indicating that Harris was borderline mentally retarded and suffered from fetal alcohol syndrome and schizophrenia was not, and never will be, considered in substance by any court. In light of the absence of objective consideration on the merits, the possibility looms large that Harris was executed in contravention of the Eighth Amendment's prohibition of cruel and unusual punishment.[84] Indeed, former California Supreme Court Justice Frank Newman, who previously voted to uphold Harris' conviction and sentence, stated that the evidence of fetal alcohol syndrome alone warranted overturning Harris' sentence.[85]

The integrity and credibility of our criminal justice system rests with our commitment to ensure compliance with the fundamental precepts embodied in the United States Constitution. As stated by Judge Donald Lay:

> [A] nation willing to admit its criminal process can never achieve perfect justice, that human judgment under law will never be

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[82]*Harris v. Vasquez*, 949 F.2d 1497, 1510 (9th Cir. 1991), *cert. denied*, 117 L. Ed. 2d 501, 60 U.S.L.W. 3598 (1992).

[83]*See, e.g.*, Casuso, *supra* note 1, at 21 ("The evidence [of Harris' mental state] was never heard by the judge and jury who sentenced Harris or by the state Supreme Court that reviewed his trial. Efforts to present it in state and federal courts were rejected on procedural grounds.").

[84]*See Ford v. Wainwright*, 477 U.S. 399, 406–08, 106 S. Ct. 2595, 2600–01, 91 L. Ed. 2d 335 (1986) (detailing common-law bar in England and the United States against executing a prisoner who has become insane). Moreover, California maintains a statute explicitly requiring suspension of the execution of a prisoner who meets the legal test for incompetence. Cal. Penal Code Ann. §3703 (West 1982).

[85]*Nightline*, ABC television broadcast (Apr. 15, 1992).

> infallible, should be a proud nation. Continued alertness and review of constitutional process of all courts, although making [the work of the federal courts] more tedious, more complex and perhaps less efficient, seems to me . . . a small price to pay as reassurance to test such fallibility.[86]

In light of the high rate of constitutional error in capital cases, ranging from 33% to 77%,[87] the execution of prisoners without federal substantive review of each nonfrivolous constitutional claim underscores the necessity of enhanced state vigilance in the review of capital proceedings.

D. Substantive Review As a State Obligation

The current abatement of substantive review in federal habeas corpus proceedings rests on ideals of state sovereignty and trust. Indeed, in erecting the procedural barriers discussed above, the Court has articulated its position that state proceedings "on the merits [should constitute] the 'main event,' so to speak, rather than a 'tryout on the road' for what will later be the determinative federal habeas hearing."[88] Implicit in this federal abstention is the notion of a "full and fair" opportunity for substantive review in the state courts. Thus it can be argued that the obligation of state courts will be to address each claim on its merits, rather than invoke procedural bars to summarily dismiss such challenges.[89]

That states are obligated to review each claim on its merits, as opposed to invoking procedural bars, has been expressed by many state court judges. Particularly noteworthy is the dissenting opinion of Justice

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[86]Donald P. Lay, *Problems of Federal Habeas Corpus involving State Prisoners*, 45 F.R.D. 45, 67 (1968).

[87]*See supra* note 35 and accompanying text.

[88]*Wainright v. Sykes*, 433 U.S. 72, 90, 97 S. Ct. 2497, 2508, 53 L.Ed. 2d 594 (1977).

[89]*See supra* notes 10-11 and accompanying text.

Robertson in *Evans v. State*.[90] In addressing the injustice rendered by the majority's invocation of a procedural bar, Justice Robertson began by highlighting the crucial role of state post-conviction proceedings:

> For at least two decades the writ of error coram nobis has been a post-conviction form of action through which prisoners of the state have filed constitutional challenges to their convictions and sentences. We have venerated this writ, for it fulfills our felt obligation to assure that no person experiences the sting of the state's penal sanctions inconsistent with the constitution.[91]

Noting the increasing barriers to federal review, Justice Robertson stated that "[a]s a responsible partner in our federal system we would be remiss if we did not afford state prisoners such a remedy."[92] As such, Justice Robertson concluded that the majority's decision has rendered the writ "an ambassador without portfolio":

> After today we have no plain, adequate and speedy post-conviction remedy for adjudicating constitutional issues. Today's decision makes clear that, if such issues *are* presented at trial and on direct appeal, they are barred on error coram nobis as res judicata. If such issues *are not* presented at trial and on direct appeal, they are deemed waived. *All constitutional claims are thus precluded from post-conviction review.* Today's decision unmistakably holds that the writ of error coram nobis is no longer a viable form of post-conviction action for the litigation of a prisoner's constitutional claims *no matter how meritorious those claims may be*. . . .
>
> . . . The majority would have Evans die, not because the proceedings at trial and on direct appeal were fundamentally fair or constitutionally adequate, but because his lawyer goofed. We have here no suggestion that defense counsel chose deliberately to bypass the trial and appellate process. . . . The majority holds that

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[90]441 So. 2d 520 (Miss. 1983) (invoking procedural bar to avoid consideration of capital defendant's constitutional claims), *cert. denied*, 467 U.S. 1264, 104 S. Ct. 3558, 82 L. Ed. 2d 860 (1984).

[91]*Id.* at 524 (Robertson, J., dissenting, joined by Hawkins and Prather, JJ.).

[92]*Id.*

> Evans must die, *his sixteen federal constitutional claims never having been considered by anyone.*[93]

Justice Robertson continued to define the role of the court in reviewing petitions for post-conviction relief from capital defendants as follows:

> We sit as the highest court of the State of Mississippi, the court of last resort on all questions of state law. . . . By virtue of the Supremacy Clause, we are obligated faithfully to enforce, not to subvert, the Constitution of the United States as the supreme law of the land. . . . The best way to insulate our decisions from federal "tampering" is to get the case right here. If this means reading the decisions of the Supreme Court of the United States and of the United States Court of Appeals for the Fifth Circuit as they are, rather than as we wish they were, so be it.
>
> This State has an important interest in the enforcement of its capital murder statute, specifically including the death penalty portion thereof. That interest is not served by the Attorney General's continued insistence that we blink at federal constitutional rights vested in those accused of capital crimes. Death penalty litigation is in a new era. It is still evolving. Because human life is at stake, this evolution is necessarily a tortuous process. As a major participant in that process, we should serve best the legitimate interests of this State and its people by washing our own linen, rather than pretending that it's not dirty and then reacting with a fit of pique when the federal courts hold to the contrary. . . .
>
> In every case that comes before this Court, and certainly the ones in which a man's life is on the line, our duty is clear. We must decide the case on the law and the facts, fearlessly and without looking over our shoulders at some other court. Our solemn responsibility is to decide each case as though there were no other court. To the extent that we act out of interest in what some other courts may do in the future, we demean ourselves. We are judges, not advocates.
>
> That seven out of the first eight of our cases to be reviewed in the federal courts resulted in the sentence of death being vacated ought to tell us that we have not been doing something right . . .

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[93] *Id.* at 524, 526–27 (emphasis in original).

> . Our obligation on our oaths is to decide carefully the merits of each constitutional claim tendered by each person sentenced to die. Our eye must be affixed to justice, not slanted toward *Wainwright v. Sykes* . . . .[94]

In sum, as recognized by Justice Robertson, the question of whether to reach the merits of a capital defendant's constitutional claims notwithstanding some procedural irregularities is a question that can be addressed only within the context of federalism.[95] In light of the limited review afforded state prisoners in federal court, "responsible federalism" may mandate state consideration on the merits of all nonfrivolous constitutional issues.[96]

E. Conclusion

Recent United States Supreme Court opinions have changed habeas corpus, requiring stringent procedural rules such as the procedural default doctrine, the exhaustion requirement, and the related doctrines concerning successive petitions and abuse of the writ. No longer are state defendants facing execution assured of federal review of the merits of nonfrivolous constitutional challenges to their conviction and sentence. To the extent that the federal courts have removed themselves from conducting substantive review of these constitutional claims, the obligation falls on the states. The state's obligation to assure that the death penalty defendant is afforded procedural fairness in accordance with the mandates of the United States Constitution cuts to the very essence of the criminal justice system.

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[94] *Id.* at 532–33.

[95] *Id.* at 524.

[96] *Id.* at 534.

Appendix

A. Criminal Pretrial Checklist

1. Find out estimated length of trial (including priors).

2. Inform counsel of trial schedule.

   A. Days of the week on which trial will be held.
   B. Time when trial will begin and end each day.
   C. Recess timing and duration, etc.

3. Decide jury selection issues.

   A. Number of jurors and alternates.[1]
   B. Number of peremptory strikes per side.[2]
   C. Procedure for selecting the jury; how jurors will be seated, how many will be called for questioning.
   D. Procedure for designating alternates.[3]
   E. Status of law re: *Batson* issues.[4]

4. Review with counsel.

   A. Full names of defendant(s), and counsel.
   B. Charges at issue in the trial.
   C. List of witnesses.
   D. List of exhibits, procedure for handling disputes.
   E. Deadline for submitting instructions and verdicts.
   F. Order of trial, if multiple defendants.

---

[1]12 jurors in a capital case or case in which sentence of more than 30 years is possible; 8 jurors in all other criminal cases. Ariz. Const. Art. II §23; A.R.S. §21-102.

[2]Ten strikes in a capital case, six in all other cases tried in Superior Court, two in all cases tried in non-record courts. A.R.Cr.P. 18.4.

[3]By lot. A.R.Cr.P. 18.5 (h).

[4]Major cases on this issue at time of publication are: *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); *Hernandez v. New York*, ___ U.S. ___, 111 S.Ct. 1859, 114 L.Ed. 2d 395 (1991); *Powers v. Ohio*, 499 U.S.___, 111 S.Ct. 1364, 113 L.Ed. 2d 411 (1991); *State v. Superior Court*, 156 Ariz. 512, 753 P.2d 1168 (App. 1987), *approved as supplemented*, 157 Ariz. 541, 760 P.2d 541 (1988); *State v. Hernandez*, 93 Ariz. Adv. Rep 39, ___ P.2d ___, (1991); *State v. Batista*, 106 Ariz. Adv. Rep 52, ___ P.2d ___, (1992).

5. Review Voir Dire procedures.

   A. Preliminary voir dire by the Court.[5]
   B. Content of statement to jury re: nature of the case.
   C. Additional Court voir dire requested by counsel.
   D. Is voir dire by counsel allowed?[6]
   E. Does defense counsel want the jury to be advised during voir dire of defendant's right to not testify?[7]
   F. If defense counsel is a Deputy Public Defender, does counsel prefer to be introduced as such, or without mention of that office.

6. Motions and Preliminary Instructions.

   A. Hear and resolve pending Motions.
   B. Find out about any other issues that might require a hearing, including Motions in Limine.[8]
   C. Settle preliminary instructions, if given instructions in addition to those in the Benchbook.

7. Advise counsel of courtroom protocol re.

   A. Marking exhibits.
   B. Bench conferences.
   C. Mid-trial motions.
   D. Offers of proof.
   E. Examination (Re-cross?)
   F. Making objections
   G. Juror questions.
   H. Using easels, blow-ups, etc.
   I. Approaching witnesses.
   J. Handling exhibits.
   K. Using lectern.
   L. Other matters.

---

[5]Find out whether any of the voir dire at Sections 15-18, Page 54, are relevant, and whether there are other issues the Court might specifically address in voir dire.

[6]"If good cause appears, the court may permit counsel to examine an individual juror." Rule 18.5(d), A.R.Cr.P..

[7]Section 21 of the Script, page 56.

[8]"The primary purpose of a motion in limine is to avoid disclosing to the jury prejudicial matters which may compel a mistrial. It should not, except upon a clear showing of non-admissibility, be used to reject evidence." *State v. Superior Court*, 108 Ariz. 396, 397, 499 P.2d 152, 153 (1972).

8. Any special equipment needs?

   A. Tape recorder, overhead projector, etc.

9. Any special problems anticipated?

   A. Security, prisoner dress, method of bringing prisoner into court, interpreter issues, media coverage[9], etc.

10. Is there an alleged victim?

   A. Has the State complied with the Victims' Rights Act[10] regarding notification?
   B. Is the victim likely to be in attendance during trial?[11]
   C. Are there any issues pertaining to victims' rights requiring special attention by court or counsel, i.e., presence of support person, security issues, interpreter issues, etc?

11. Find out estimated length of Opening Statements. Establish reasonable limits, if necessary.

12. Is the Rule of Exclusion of Witnesses[12] invoked?

   A. If so, tell counsel what it means, and advise counsel of the provisions of the Notice that will be posted.
   B. Have staff post a Notice re: Exclusion of Witnesses.[13]

---

[9]For Order re: Camera Coverage, see Page 85.

[10]A.R.Cr.P.39; A.R.S. §13-4401 et seq.

[11]A.R.S. §13-4420: "The victim has the right to be present throughout all criminal proceedings in which the defendant has the right to be present."

[12]Rule 615, Arizona Rules of Evidence; Rule 39, A.R.Cr.P. (Note: The Rule of Exclusion does not apply to victims. A.R.S. §13-4420.)

[13]For Notice, see Page 84. For Script, see Page 83.

B. Order re: Cameras In Court

SUPERIOR COURT OF ARIZONA
_____ COUNTY

State of _____)
)
v.)
_____)

_____
Case Number

ORDER re: CAMERAS IN COURT*

[* "Cameras" includes any kind of electronic or still photographic equipment.]

The matter of cameras having been considered, the following Orders (as indicated by a mark in the box) are entered for all Superior Court proceedings regarding this case or matter:

☐ 1 Camera coverage is permitted in the courtroom in which a proceeding is being held regarding this case or matter. All persons with cameras shall comply with all provisions of Rule 81, Rules of the Supreme Court of Arizona, (Canon 3(A)(7), Code of Judicial Conduct), whether court is in session or not.

2 Cameras are permitted in the areas of the courthouse specified in Paragraphs A, B, or C, below. There shall be no use of flash bulbs, strobe lights or other artificial lights anywhere in the courthouse. There shall be no use of cameras in any stairwell, elevator, cafeteria, or other public or private area of the courthouse, except that cameras are permitted:

☐ A In the public hallway on the floor where the proceeding is being held.

☐ B In public hallways <u>other</u> than on the floor where the proceeding is being held.

☐ C In a media interview room or other area, as designated by court staff.

☐ 3 Cameras are <u>not</u> permitted in the courtroom or in the courthouse in connection with any proceeding in this case or matter.

Dated this ____ day of _____, 1992. _____

C. Jury Questionnaire

IN THE SUPERIOR COURT OF THE STATE
IN AND FOR THE COUNTY

STATE, Plaintiff, vs. John Vo, Ricard Paradez, Defendants.	Cause No. CR 91-00000 JURY QUESTIONNAIRE

Dear Prospective Juror:

You have been placed under oath. Please answer all questions truthfully and completely, as though the questions were being asked of you in open court. You may be asked additional questions in open court during the jury selection process. Some of the questions asked in court will be similar to questions included in this questionnaire. Every effort will be made to keep duplication of questions to a minimum.

All questions asked, either by way of this questionnaire or by way of oral examination, are intended to facilitate the selection of a fair and impartial jury to hear this case. The answers provided in response to the written questions will be made available to counsel for both the state and the defense.

To assist the court and counsel in evaluating any knowledge you may have concerning this case, please read the brief synopsis provided below. Please bear in mind that this is a summary of the allegations made by the state, and constitutes neither (1) an indication of the court's view of the case, nor (2) evidence against either defendant.

> On May 14, 1991, Jennifer Lynn Montgomery was riding south on the freeway near Dunlap in a pickup truck being driven by her husband, Ricky Lee Montgomery, when she was allegedly shot and killed by Nghia Hugh Vo, who is alleged to have been a passenger in a stolen car allegedly being driven by Richard Paradez. An investigation ensued and eventually Mr. Vo and Mr. Paradez were arrested in Blythe, California and extradited to Arizona. Mr. Vo and Mr. Paradez were subsequently charged with Aggravated Assault, First Degree Murder and Theft.

1. Please PRINT your full name:

   _____

2. Juror Identification Number (found in upper right corner of summons):

   _____

3. If you have ever been known by any other name, please so indicate:
_____

4. Marital status: _____

5. In terms of political outlook, do you usually think of yourself as
___ Very conservative ___ Somewhat liberal
___ Somewhat conservative ___ Very liberal
___ Middle of the road

6. Are you currently registered to vote: ___ Yes ___ No

7. Have you ever seen, read, or heard anything about this case before coming to court today?
___ Yes ___ No

8. Nghia Hugh Vo and Richard Paradez have entered pleas of not guilty to the charges of First Degree Murder, Aggravated Assault and Theft. Have you already formed an opinion as to whether Nghia Hugh Vo and Richard Paradez are guilty or not guilty?
___ Yes ___ No

If your answer is YES, your opinion may be qualified or unqualified. It is an unqualified opinion if it is fixed and settled, that is, if you have made up your mind that either defendant is guilty or not guilty and nothing will change it. It is a qualified opinion if you can set aside that opinion and render a verdict based solely on the evidence presented in court.

9. If your answer to the above question is yes, that you have already formed an opinion as to whether Nghia Hugh Vo and Richard Paradez are guilty or not guilty, is it:
___ Qualified ___ Unqualified

10. Criminal cases are started in the Superior Court of the State of Arizona by filing what is known as an information or indictment. In this case, an indictment was filed. The mere fact that an indictment has been filed is not evidence nor is it proof of guilt and you may not consider it as such. Do you agree with this statement?
___ Yes ___ No If no, please explain:
_____
_____
_____

11. Do you attend religious services? ___ Yes ___ No
If yes, how often? _____

12. Are you active in church activities of any kind?
___ Yes ___ No

13. Does your religious faith prohibit you from ___ dancing?
___ playing cards? ___ smoking cigarettes? ___ drinking?
___ does it prohibit women from wearing makeup or certain kinds of clothing?

14. Do you volunteer your time in any activities?
___ Yes ___ No If yes, briefly describe the type of volunteer work and amount of time you spend. _____
_____

15. What are your hobbies, special interests, recreational activities and major interests?
_____
_____
_____
_____
_____

16. Do you now or have you ever belonged to, or donated money to, any organization whose major purpose is crime prevention or influencing political bodies? ___ Yes ___ No

If yes, please explain briefly: _____

_____

Name of organization: _____

17. Have you or any of your family members ever belonged to, or donated money to, any victims' rights organizations?

___ Yes ___ No

18. Is there a crime prevention group in your neighborhood?

___ Yes ___ No If yes, do you participate in it?

___ Yes ___ No

19. Do you own any weapons? ___Yes ___No If yes, what type(s)?

_____

19(a) If you have ever used a weapon for any purpose other than target or skeetshooting, please explain.

_____

20. How serious a problem do you think violent crime is today?

_____

_____

21. Have you, any member of your family, or a close friend ever been arrested?

___ Yes ___ No If yes, explain.

_____

_____

22. Have you, any member of your family, or a close friend ever been charged with a crime?

___ Yes ___ No

If yes, please explain. _____

_____

_____

23. Have you, any member of your family, or a close friend ever been convicted of a crime?

___ Yes ___ No

If yes, please explain. _____

_____

24. Have you or any member of your family ever had, or been treated for, mental illness?

___ Yes ___ No If yes, please indicate who had the problem and state the type of problem. _____

_____

25. Have you or any member of your family ever had a drug or alcohol problem?

___ Yes ___ No ___ I don't know

If you cannot answer the above question with a simple yes or no, please explain.

_____

_____

_____

26. Do you believe in the saying "an eye for an eye"?

___ Yes ___ No If yes, please explain your philosophy.

_____

_____

27. Do you believe too many people escape conviction/punishment because of technicalities?
___ Yes ___ No

28. What are your feelings about the effectiveness of our criminal justice system?
_____
_____

29. Do you believe offenders sometimes do not receive harsh enough sentences?
___ Yes ___ No
Briefly explain your answer. _____
_____

30. Have you ever felt that judges are too soft on crime?
___ Yes ___ No ___ I don't know
Briefly explain your answer. _____
_____

31. If you had your choice, would you give the police more or less power than they have now? ___ Yes ___ No
Why? _____
_____

32. When a defendant is charged with a crime, do you think he should have to prove his innocence? ___ Yes ___ No
If yes, please explain. _____
_____
_____
_____

33. Have you, any member of your family or anyone you know ever been the victim of a violent crime (assault, robbery, battery, rape, murder, etc.)?
___ Yes ___ No
If yes, please explain. _____
_____
_____
_____

33a Was anyone arrested or prosecuted? ____Yes ___No
33b What was the outcome? _____
33c Do you feel that justice was served? ___ Yes ___ No

34. Do you belong to the NRA? ___ Yes ___ No
35. Are you in favor of gun control? ___ Yes ___ No
36. Do you have any strong feelings about the Vietnam war?
___ Yes ___ No If yes, please explain. _____
_____
_____
_____

37. Did you serve in the United States Military in Vietnam?
___ Yes ___ No If yes, briefly describe your experiences.
_____
_____
_____
_____

38. Do you have any strong feelings concerning the politics of that war?
___ Yes ___ No If yes, please explain.

_____

_____

_____

39. Do you have any strong feelings concerning the Vietnamese people?
___Yes ___No If yes, please explain._____

_____

_____

40. Do you have any strong feelings concerning Nghia Hugh Vo and/or this case because he is one-half Vietnamese and one-half American?
___ Yes ___ No If yes, please explain.

_____

_____

_____

41. Do you have any strong feelings towards Hispanic people?
___ Yes ___ No If yes, please explain. _____

_____

42. Do you believe that individuals of any particular racial or ethnic background are more truthful or less truthful than other people? If so, please comment.

_____

_____

43. What is your main source of news?
____ Radio
____ Television
____ Newspaper

44. Have you, any member of your family, or a close friend ever worked with an organization that counsels victims of crime? ___ Yes ___ No
If the answer is yes, please indicate whether it is you or another person who has been involved with this organization(s). _____

_____

45. Have you or anyone in your family or anyone close to you been involved in a shooting?
___ Yes ___ No If so, please explain. _____

_____

46. Have you ever served as a juror in Superior Court or Federal Court? ___ Yes ___ No
If yes, when did you serve? Was it a memorable experience?

_____

_____

_____

47. If you are selected to sit on this case, you will be instructed that you should not discuss or even consider the possible penalty or sentence that may be imposed in determining whether the defendants are guilty or not guilty. If the defendants are found guilty of Murder in the First Degree by the jury, the Court may impose either life imprisonment or the death penalty as a sentence. The jury does not determine the sentence. The decision is solely the Court's.

(a) Do you have any beliefs that would prevent you from convicting either defendant of First Degree Murder based on the potential imposition of a death sentence?
___ Yes ___ No

Please explain. _____

_____

_____

(b) Punishment is not a concern of the jury. Do you understand that you must not consider the possible penalty during your deliberations on the issue of the defendants' guilt?

___ Yes ___ No Please explain. _____

_____

_____

(c) Do you think the potential imposition of a death sentence upon either defendant, if convicted, would substantially influence your decision in this case?

___ Yes ___ No Please explain. _____

_____

_____

(d) Would you prefer not to sit on this jury because of the possibility that the defendants may be convicted of First Degree Murder and because the death penalty may be imposed?

___ Yes ___ No Please explain. _____

_____

_____

48. Counsel have estimated this trial will take between four and six weeks. It may be more or less. This estimation takes into consideration the Thanksgiving holiday period (see calendar attached). Generally, court will be in session Monday through Thursday, 10:45 a.m. to 4:45 p.m. with at least one hour for lunch. Trials are not held on Fridays.

If you are selected as a juror, do you have any important personal, business or health-related reasons that would prevent you from serving as a juror?

_____

_____

_____

Please understand that the law provides that a juror can be excused only if his or her absence from work would "tend materially and adversely to affect the public safety, health, welfare or interest", or if service as a juror would impose an undue hardship on the juror.

49. Is there anything else you would like to tell the court and counsel that would help them determine if you could be a fair and impartial juror?

_____

_____

_____

I swear or affirm that the responses given are true and accurate to the best of my knowledge and belief.

_____ _____

Signature Date

You are instructed not to discuss this questionnaire or any aspect of this case with anyone, including other prospective jurors. You are further instructed not to view, read, or listen to any media account of these proceedings.

David R. Cole
Judge of the Superior Court

PLEASE PRINT YOUR NAME:

Phone numbers are for the Court's use only. They will not be disclosed to either party.

Home phone

Work phone

Social Security Number
(Necessary for payment)

D. Change of Plea Outline

True Name - Aliases - Age - School - English - Drugs

Going to plead (Guilty) (No Contest) to a charge of _____?

Penalty Provisions:

Death or life	
Prison	Release eligibility
Probation	Jail
Restitution	Fines, Assessments

Now on probation or parole - record will show a conviction

Plea Agreement: Read it - understand it - sign it?
Discussed case and rights with lawyer?

Rights:
1) Keep not guilty plea on original charges
2) Trial by jury, be represented by counsel
3) Presumption of innocence; proof beyond reasonable doubt
4) Confront and cross-examine witnesses presented by state
5) Compel attendance of witnesses and present evidence in defense
6) Testify, refuse to, silence can't be used

Understand these rights, want to give them up?

Take plea - any promises, agreements, threats, force - factual basis

The Court Finds:

A. Plea is knowing, intelligent, voluntary.
B. There is a factual basis for the plea.
C. (IF NOLO: "DUE CONSIDERATION OF THE VIEWS OF THE PARTIES AND THE INTEREST OF THE PUBLIC . . .")

Plea is accepted/deferred - sentencing set for (date).
Presentence report ordered - report to APO ASAP
Release conditions revoked - trial date vacated

E. Guilty (or No Contest) Plea

1. Is your true name _____?

2. What is your date of birth?

3. Do you read and understand English?

4. Have you had any drugs, alcohol or medication in the last 24 hours?

5. Is it your intention today to plead Guilty (No Contest) to _____?

Let me explain the sentencing possibilities and consequences of this plea:

_____.

Special Conditions: [Advise of conditions imposed by statute or plea agreement; i.e., loss of licenses under A.R.S. §13-603(F) or A.R.S. §28-444 and 445; etc.]

Do you have any questions about anything?

Probation or parole: Are you now on probation or parole anywhere? *[If applicable]* Your guilty plea in this case is an admission that you violated your (probation) (parole). You could go to prison on that other case, and the sentence here could be in addition to any sentence there. Do you understand?

Plea Agreement: Have you read the entire plea agreement? Have you discussed it with your lawyer? Is there anything you do not understand? You initialed each paragraph? You signed the plea agreement?

Waiver of Rights: By pleading Guilty (No Contest) you give up certain constitutional rights. Let me explain them to you:

A. You have the right to keep your plea of not guilty to the original charges, to have a trial by jury on those charges, and to be represented by counsel at trial;

B. You are presumed innocent; you could not be found guilty at trial unless the state proved beyond a reasonable doubt that you are guilty;

C. Your trial rights include the right to confront and cross-examine the witnesses called by the State, and the right to present evidence and to subpoena witnesses to testify in your defense.

D. You have the the right to testify at trial if you wish; you also have the right to remain silent and refuse to testify. Your silence could not be used against you.

6. Do you understand these rights? Do you want to give up these rights and plead Guilty (No Contest)?

7. Plea: The charge is: [Read Charge].
Do you plead Guilty (No Contest) or Not Guilty?

8. Promises or Agreements: Were any promises or agreements of any kind made to you other than those contained in this written plea agreement?

9. Threats or Force: Were any threats made or was any force used to get you to enter this plea?

10. Factual Basis; GUILTY PLEA:
[No Contest - see 15; Alford - see 15b.]
What did you do? *[Or ask leading questions.]*

11. Counsel, any additions or corrections to anything?

12. VOLUNTARINESS; FACTUAL BASIS:
The Court finds that Defendant's plea is knowingly, intelligently, and voluntarily made and that there is a factual basis for it.

13. (The plea is ACCEPTED and entered of record.)
or
(Acceptance of the plea is DEFERRED until sentence.)

14. Sentencing is [Day and Date] at [Hour] in [Division].
A presentence report is ordered. Trial date is vacated.
or
Defendant is remanded pending sentence. Any bond is exonerated.

15. [Factual Basis; NO CONTEST PLEA:]

[To Prosecutor:] Would you briefly state what the evidence would be at trial? Why is a No Contest plea in the public interest here?

[To Defense counsel:] Why is it in defendant's interest to plead No Contest?

[To Defendant:] There is no legal difference between a No Contest plea and Guilty plea; the result of each is a (felony) conviction.

If you plead No Contest, you will be sentenced just as though you had pled Guilty. Do you understand?

Do you believe that it is in your best interest to enter this No Contest plea? Why? [Or ask leading questions.]

16. Counsel, any additions or corrections to anything?

17. VOLUNTARINESS; FACTUAL BASIS:
The Court finds that Defendant's No Contest plea is knowingly, intelligently, and voluntarily made and that there is a factual basis for it.

18. On consideration of the views of the parties and the interest of the public in the effective administration of justice[14], I ACCEPT the No Contest Plea.
[or]
(Acceptance of the plea is DEFERRED until sentence.)

19. Sentencing is [Day and Date] at [Hour] in [Division].
A presentence report is ordered. Trial date is vacated.

Defendant is remanded pending sentence. Any bond is exonerated.

15b. [Factual Basis; *ALFORD* PLEA:][15]

[To Prosecutor:] Would you briefly state what the evidence would be at trial?

[To Defense counsel:] Why is this an *Alford* plea?

In view of the evidence and the possible sentence, do you believe it to be advisable for your client to accept the plea offered by the State?

[To Defendant:] There is no difference in the law between an *Alford* Guilty plea and a regular Guilty plea. You will be sentenced for this offense as though you were guilty because, by the plea, you will in fact be convicted of it. Do you understand?

Do you believe it to be in your best interest to enter an *Alford* Guilty plea? Why? *[Or ask leading questions.]*

16. Counsel, any additions or corrections to anything?

---

[14]This finding is required by Rule 17.3(C), A.R.Cr.P.

[15]*North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

17. VOLUNTARINESS; FACTUAL BASIS:
The Court finds that Defendant's *Alford* Guilty plea is knowingly, intelligently, and voluntarily made and that there is a factual basis for it.

18. (The plea is ACCEPTED and entered of record.)
[or]
(Acceptance of the plea is DEFERRED until sentence.)

19. Sentencing is [Day and Date] at [Hour] in [Division].
A presentence report is ordered. Trial date is vacated.

Prior release conditions are affirmed. Report to the Probation Office today.
[or]
Defendant is remanded pending sentence. Any bond is exonerated.

F. Capital Case Special Verdict (Arizona)

Defendant was found guilty of Murder in the First Degree by a jury on (Date).

The court conducted a separate sentencing hearing under A.R.S. 13-703 (B) on (Date). Both parties had the opportunity to present evidence and argument concerning the existence or non-existence of the aggravating and mitigating circumstances enumerated in A.R.S. §13-703(F) and (G). Both parties were given the opportunity to present any other relevant mitigation for the court's consideration. All material in the pre-sentence report was disclosed to defendant's counsel and to the prosecutor.

Based upon the evidence introduced at the trial, the evidence received at the sentencing hearing, and the pre-sentence report, the court renders this special verdict:

AGGRAVATION: As to the statutory aggravating circumstance F1, the court finds beyond a reasonable doubt that defendant "has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable." The evidence showed: [Facts].

(If F1 has not been proved beyond a reasonable doubt, or if there was no evidence of it, state: "The court finds that aggravating circumstance F1 has not been proved.") [Repeat for all factors listed in A.R.S.§13-703(F).]

MITIGATION - STATUTORY:[16] As to statutory mitigating circumstance G1, the court finds by a preponderance of the evidence that defendant's "capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution." The evidence showed: [Facts].

(If G1 has not been proved by a preponderance of the evidence, or if there was no evidence of it, state: "The court finds that mitigating circumstance G1 has not been proved.") [Repeat for all factors listed in A.R.S. §13-703(G).]

MITIGATION - NONSTATUTORY: Defendant has proved by a preponderance of the evidence the following nonstatutory mitigating factors:

(1) [e.g.] That he led a deprived childhood. The evidence showed: [Facts]. [List all nonstatutory mitigation offered by the defendant and, for each factor, state a finding that it is:

---

[16]List in the special verdict all mitigation offered. The Court must explain the reasons for accepting (considering) or rejecting each offered item. *State v. Leslie*, 708 P.2d 719 (Ariz. 1985).

a) proved by a preponderance of the evidence and is relevant mitigation; or
b) proved by a preponderance of the evidence and is not relevant mitigation; or,
c) not proved by a preponderance of the evidence.]

CONCLUSION: The court concludes that the state has proved beyond a reasonable doubt statutory aggravating factors [F1, F2, F3, F4, F5, and F6]. The state has not proved aggravating factors [F7, F8, F9, and F10].

The court concludes that defendant has proved by a preponderance of the evidence statutory mitigating circumstances [G1, G2, and G3]. Defendant has not proved statutory mitigating factors [G4 and G5].

Defendant has also proved by a preponderance of the evidence the following nonstatutory mitigating circumstances: [Summary list].

DEATH SENTENCE: The court has considered each of the mitigating circumstances offered by defendant and proved to exist and finds that they are not sufficiently substantial to outweigh the aggravating circumstances proved by the state and to call for leniency.

From the evidence at trial and the jury's verdict, the court concludes beyond a reasonable doubt that:[17]

1. Defendant was the one who killed; OR
2. Defendant was not the actual killer, but attempted to kill or intended to kill; OR
3. Defendant was not the actual killer, but was a major participant in the acts that led up to the killing and exhibited a reckless indifference to human life.

Defendant is therefore sentenced to death. Pursuant to Rule 26.15, A.R.Cr.P., the Clerk is thereby Ordered to file a Notice of Appeal from this Judgment and Sentence.

JUDGMENT AND SENTENCE - LIFE: The court has considered each of the mitigating circumstances offered by defendant and proved to exist by a preponderance of the evidence and finds that they are sufficiently substantial to outweigh the aggravating factors proved by the state and to call for leniency.

Defendant is therefore sentenced to life imprisonment without possibility of release on any basis until he/she has served 25 calendar years (35 if the victim was under 15). [Complete the sentence as per prison sentence script.]

---

[17]Required by *Enmund v. Florida*, 458 U.S. 782, (1982) and *Tison v. Arizona*, 481 U.S. 137 (1987). See also, *State v. McCall*, 770 P.2d 1165 (Ariz. 1989). (*Enmund-Tison* requisites must be found beyond a reasonable doubt. *State v. McDaniel*, 665 P.2d 70 (Ariz. 1983).)

G. U.S. Supreme Court Death Penalty Opinions

UNITED STATES DEATH PENALTY CASES SINCE 1972
Arranged Alphabetically By Name

Adams v. Texas, 448 US 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980)
Exclusion of prospective jurors who were unwilling to take an oath that the mandatory penalty of life or death would not affect their deliberations on issues of fact violated the 6th and 14th Amendments.

Ake v. Oklahoma, 470 US 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985)
An indigent capital defendant is entitled to the assistance of a court appointed psychiatrist at trial and at the sentencing hearing when the defendant's sanity will be a significant factor at both proceedings.

Arave v. Creech, ___ U.S. ___, 113 S.Ct. 1534, ___ L.Ed.2d ___ (1993)
Idaho's "utter disregard for human life" aggravating circumstance is not unconstitutionally vague.

Arizona v. Rumsey, 467 US 203, 104 S.Ct. 2305, 81 L.Ed.2d 164 (1984)
Once a sentence of life is imposed, a resentence to death violates the double jeopardy clause.

Baldwin v. Alabama, 472 US 372, 105 S.Ct. 2727, 86 L.Ed.2d 300 (1985)
Alabama's statutory procedure requiring a jury to "fix the penalty at death" when it found guilt and an aggravating circumstance did not violate the Constitution.

Barclay v. Florida, 463 US 939, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983)
Even though the state trial judge considered aggravation not permitted by state law, there were other properly found aggravating circumstances, and the death sentence did not violate the Constitution.

Barefoot v. Estelle, 463 US 880, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983)
It did not violate the 8th and 14th Amendments to allow two psychiatrists to give their opinions at the penalty hearing that Barefoot would commit future acts of violence and that he represented a continuing threat to society (questions the sentencing jury had to answer before imposing a death sentence).

Beck v. Alabama, 447 US 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980)
Alabama's death penalty statute which would not allow the sentencer to consider an offense less than the capital crime violated the 14th Amendment.

Bell v. Ohio, 438 US 637, 98 S.Ct. 2977, 57 L.Ed.2d 1010 (1978)

Blystone v. Pennsylvania, 494 US 299, 110 S.Ct. 1078, 108 L.Ed.2d 255 (1990)
A statute requiring a death sentence when the jury finds at least one aggravating circumstance and no mitigation or finds that aggravation outweighs mitigation does not violate the Constitution.

Booth v. Maryland, 482 US 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987)

Introducing a presentence report containing a VIS (victim impact statement) at the capital sentencing hearing violated the 8th Amendment.

Boyde v. California, 494 US 370, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990)

A jury instruction telling the jury "you shall impose a sentence of death" if the aggravating circumstances outweigh the mitigating circumstances did not violate the Constitution; and an instruction which allowed the jury to consider "any other circumstance which extenuates the gravity of the crime" did not prevent them from considering relevant mitigation.

Branch v. Texas, 408 US 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972)

Texas's death penalty scheme violates the 8th and 14th Amendments.

Bullington v. Missouri, 451 US 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981)

Because Missouri's death penalty sentencing procedure was like a trial on the issue of guilt, the double jeopardy clause prevented the state from seeking a death sentence after the jury at the first trial imposed a life sentence.

Burger v. Kemp, 483 US 776, 107 S.Ct. 3114, 97 L.Ed.2d 638 (1987)

The fact that codefendants were represented by attorneys in the same law firm and each attorney assisted the other in his preparation of the case did not render either constitutionally ineffective and the fact that one attorney's preparation for the sentencing hearing consisted of speaking with his defendant's mother and others about the defendant's troubled childhood and consulting with psychiatrists, but did no further investigation because he thought it would not be fruitful and was afraid that raising the issue of the defendant's character would lead to a counsel.

Cabana v. Bullock, 474 US 376, 106 S.Ct. 689, 88 L.Ed.2d 704 (1986)

A trial court, a state appeals court, or even a federal court may make *Enmund v. Florida* findings.

Caldwell v. Mississippi, 472 US 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985)

The prosecutor's argument to the jury that the jury's decision would be reviewed by higher courts violated the 8th Amendment.

California v. Brown, 479 US 538, 107 S.Ct. 837, 93 L.Ed.2d 934 (1987)

Instruction that jury "must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion, or public feeling" did not violate 8th and 14th Amendments.

California v. Ramos, 463 US 992, 103 S.Ct.3446, 77 L.Ed.2d 1171 (1983)

A jury instruction at the penalty phase informing the jury of the governor's powers to reprieve, pardon and commute did not violate the Constitution.

Clemons v. Mississippi, 494 US 738, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990)

The USSCt. held: "the Federal Constitution does not prevent a state appellate court from upholding a death sentence that is based in part on an invalid or improperly defined aggravating harmless error review."

Coker v. Georgia, 433 US 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977)

Death is an excessive punishment for rape and violates the 8th Amendment.

Darden v. Wainwright, 477 US 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986)

Although the prosecutor's argument to the jury at the guilty phase was improper (he blamed the corrections department for the murder, implied that death was the only guarantee against future murders, and called the defendant an animal) it did not violate the 8th Amendment.

Davis v. Georgia, 429 US 122, 97 S.Ct. 399, 50 L.Ed.2d 339 (1976)

The improper exclusion of one juror under *Witherspoon v. Illinois*, 391 US 510 (1968), required reversal of the conviction and the sentence of death.

Dawson v. Delaware, 503 US ___, 112 S.Ct. ___, 117 L.Ed.2d 309 (1992)

A stipulation (Dawson agreed to the wording but not its introduction) that the Aryan Brotherhood was a white racist group that existed in Delaware and evidence that Dawson had "Aryan Brotherhood" tattoed on his hand (and used the name "Abaddon") at the sentencing hearing violated the 1st and 14th Amendments because it did not relate to any issue (the Court did not decide whether the admission was harmless).

Delo v. Lashley, 507 U.S. ___, 113 S.Ct. 1222, 122 L.Ed.2d 620 (1993)

The trial court properly refused to give the sentencing jury a "no significant history of prior criminal activity " instruction where no evidence was offered to support it. The defendant was not entitled to a sentencing instruction that he was "presumed innocent" of other crimes.

Dobbert v. Florida, 432 US 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977)

A death sentence imposed under a statute that had gone through changes between the murders and the imposition of the sentence did not violate the ex post facto clause; the changes were procedural and ameliorative.

Dobbs v. Zant, 506 U.S. ___, 113 S.Ct. 835, 122 L.Ed.2d 103 (1993)

The federal appeals court erred in refusing to consider a newly discovered transcript that supported the defendant's claim that his attorney was ineffective at sentencing.

Eddings v. Oklahoma, 455 US 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982)

Refusing to consider as mitigation the defendant's age (here 16) violated the 8th Amendment.

Enmund v. Florida, 458 US 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982)

A death sentence for one who drove robbers to the scene and waited in the car while they robbed and murdered violated the 8th and 14th Amendments.

Estelle v. Smith, 451 US 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981)

The admission of the psychiatrist's testimony at the sentencing phase violated Estelle's 5th Amendment rights against self-incrimination and his 6th Amendment right to counsel because his lawyer was not told that the court-ordered psychiatric examination would focus on Estelle's dangerousness (a necessity for a death sentence) and Estelle was not warned that he had a right to remain silent, that anything he said could later be used against him, and that he had a right to an attorney.

Ford v. Wainwright, 477 US 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986)

The 8th Amendment prohibits a state from executing a person who is insane (here a mental disease resembling paranoid schizophrenia).

Franklin v. Lynaugh, 487 US 164, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988)

There was no violation of the 8th Amendment when the trial court refused to instruct the jury any mitigation they found was sufficient to allow a negative answer to either of two interrogatories they had to answer before imposing a death sentence — 1) whether the actions that caused the death were deliberate and done with the expectation that death would result, and 2) whether Franklin would probably commit future acts of violence constituting a continuing threat to society.

Furman v. Georgia, 408 US 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972)

Georgia's death penalty scheme violated the 8th and 14th Amendments.

Gardner v. Florida, 430 US 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977)

Gardner was denied due process when the trial judge, over the recommendation of the trial jury, sentenced him to death based, at least in part, on a presentence report neither Gardner nor his lawyer saw.

Godfrey v. Georgia, 446 US 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980)

Georgia's aggravating circumstance of "outrageously wanton or vile," as interpreted by the Georgia courts, was too vague to support a constitutional death sentence.

Graham v. Collins, 506 U.S. ___, 113 S.Ct. 892, 122 L.Ed.2d 260 (1993)

The "new rule" doctrine of *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), barred a claim that Texas' three special sentencing issues prevented the jury from adequately considering mitigation evidence.

Gray v. Mississippi, 481 US 648, 107 S.Ct. 2045, 95 L.Ed.2d 622 (1987)

The improper excusal of one juror for cause (Witherspoon) is reversible error and is not subject to a harmless-error analysis.

Green v. Georgia, 442 US 95, 99 S.Ct. 2150, 60 L.Ed.2d 738 (1979)

Rejecting a defendant's offered hearsay testimony at a penalty hearing violates the 14th Amendment when it is relevant to a critical issue and there are reasons to believe it is reliable.

Gregg v. Georgia, 428 US 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976)

Georgia's death penalty statutes do not violate the Constitution.

Herrera v. Collins, 506 U.S. ___, S.Ct. 853, 122 L.Ed.2d 203 (1993)

A claim of actual innocence based on newly discovered evidence is not a ground for federal habeas corpus relief under 28 U.S.C. 2254.

Hildwin v. Florida, 490 US 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989)

The 6th Amendment does not require that a jury find aggravation; aggravation may be found by the trial judge.

Hitchcock v. Dugger, 481 US 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987)

Dugger's death sentence was invalid because the state trial judge barred evidence of nonstatutory mitigation at the sentencing hearing.

Hopper v. Evans, 456 US 605, 102 S.Ct. 2049, 72 L.Ed.2d 367 (1982)

Beck v. Alabama does not require a jury instruction on a lesser-included crime when there is no evidence of the lesser crime.

Jackson v. Georgia, 408 US 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972)
Georgia's death penalty scheme violated the 8th and 14th Amendments.

Johnson v. Mississippi, 486 US 578, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988)
Johnson's death sentence, which was based in part on an aggravating circumstance that he had been found guilty of a felony involving violence 20 years before, had to be reexamined when, after the death sentence was imposed, the 20-year old conviction was reversed.

Johnson v. Texas, 509 US ___, 113 S.Ct. ___, 125 L.Ed.2d 290 (1993)
Texas's death penalty sentencing procedures are constitutional against an argument that because the procedure requires the jury to answer to special issues before imposing death, neither of which involves the defendant's youth, the jury cannot consider youth as mitigation.

Jurek v. Texas, 428 US 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976)
The Texas death penalty statutes do not violate the Constitution.

Lankford v. Idaho, 500 US___, 111 S.Ct. 1723, 114 L.Ed.2d 173
The imposition of a death sentence after the state notified the defense that it would not recommend death, violated the 14th Amendment's due process clause.

Lewis v. Jeffers, 497 US___, 110 S.Ct. 3092, 111 L.Ed.2d 606 (1990)
A federal court may not review de novo the evidence before the state court that gave rise to an aggravating circumstance. Once a state has adopted a constitutional construction of a facially vague aggravating circumstance and has applied that construction to a particular case, a federal court's review of that application is limited to determining whether the state court's finding was so arbitrary and capricious as to constitute an independent due process or 8th Amendment violation.

Lockhart v. Fretwell, 506 U.S. ___, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993)
The "prejudice" component of the test for ineffective assistance of counsel is not determined under the law existing at the time of trial. Counsel failed to object at sentencing to the use of an aggravating factor. Such an objection would have been successful, but since it would have relied on an appellate decision that was later overruled, defendant was not prejudiced.

Lockhart v. McCree, 476 US 162, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986)
The removal of prospective jurors at the guilt phase who could not under any circumstances vote to impose a death sentence is not unconstitutional. A "death qualified jury" does not violate the 6th Amendment right to a jury.

Lockett v. Ohio, 438 US 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978)
The Ohio statute, which limited mitigation to three specified factors, violated the 8th and 14th Amendments—the sentencer must not be precluded from considering any aspect of the defendant's character or record or the circumstances of the offense. A court may constitutionally, however, exclude irrelevant evidence not bearing on the defendant's character, record or the circumstances of the offense.

Lowenfield v. Phelps, 484 US 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988)
The fact that one of the aggravating circumstances support the death sentence is identical to one of the elements of the crime the defendant was convicted of does not render the death sentence unconstitutional.

Maynard v. Cartwright, 486 US 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988)

Oklahoma's "especially heinous, atrocious, or cruel" aggravating circumstance is unconstitutionally vague and thus violated the 8th Amendment.

McCleskey v. Kemp, 481 US 279, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987)

The statistical evidence (indicating systemic race bias) presented by McCleskey was not sufficient to show that any of the decision-makers in the death penalty process in McCleskey's case acted with discriminatory purpose and thus there was no violation of the equal protection clause of the 14th Amendment.

McKoy v. North Carolina, 494 US 433, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990)

North Carolina's statute which required a jury to find unanimously that mitigation existed before they could consider it in imposing sentence violated the 8th Amendment.

Mills v. Maryland, 486 US 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988)

Conviction and sentence reversed because it was probable that the jury imposed the death sentence under the impression that the state statutory scheme prevented them from considering any mitigation they did not find unanimously to exist.

Murray v. Giarratano, 492 US 1, 109 S.Ct. 2765, 106 L.Ed.2d 1 (1989)

Neither the 8th nor the 14th Amendment requires states to appoint counsel for indigent death row inmates seeking state post-conviction relief.

Parker v. Dugger, 498 US___, 111 S.Ct. 731, 112 L.Ed.2d 812 (1991)

An affirmance of a death sentence by the Florida Supreme Court based upon "findings" that the trial judge did not actually make was arbitrary and had to be vacated.

Payne v. Tennessee, 501 US___, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991)

Overruling *Booth v. Maryland*, the Court held that the 8th Amendment does not bar the sentencer from considering victim impact evidence.

Penry v. Lynaugh, 492 US 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989)

The Constitution does not prohibit categorically the execution of someone who is mentally retarded. Texas's statutory scheme (jury must answer three specific questions) did not allow the jury a vehicle to express its response to Penry's evidence of retardation and thus the sentence had to be reversed.

Poland v. Arizona, 476 US 147, 106 S.Ct. 1749, 90 L.Ed.2d 123 (1986)

The double jeopardy clause was not violated when the defendants were sentenced to death, and after reversal on appeal, were resentenced to death when the resentencer found an aggravating circumstance it had refused to find at the first trial.

Powell v. Texas, 492 US 680, 109 S.Ct. 3146, 106 L.Ed.2d 551 (1989)

Although Powell waived any error in his lawyer not receiving notice of a mental examination ordered by the state court when he introduced psychiatric testimony in support of his insanity defense, he did not waive his 6th Amendment right to counsel by introducing such testimony.

Presnell v. Georgia, 439 US 14, 99 S.Ct. 235, 58 L.Ed.2d 207 (1978)

Presnell's death penalty for murder, which was based upon the aggravating circumstance of bodily injury during a kidnapping, violated Presnell's due process rights because the jury never actually made such a finding.

Proffitt v. Florida, 428 US 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976)

Florida's death penalty statutes do not violate the Constitution.

Pulley v. Harris, 465 US 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984)

The 8th Amendment does not require state courts to perfom comparative proportionality reviews.

Richmond v. Lewis, 506 U.S. ___, 113 S.Ct. 528, 121 L.Ed.2d 411 (1992)

A death sentence imposed after the sentencer weighed an improper aggravating factor and affirmed by the state supreme court was vacated because the two justices who concurred in affirming the sentence did not reweigh the remaining aggravating and mitigating circumstances.

Ricketts v. Adamson, 483 US 1, 107 S.Ct. 2860, 97 L.Ed.2d 1 (1987)

The 5th Amendment double jeopardy clause did not bar a state from prosecuting for first degree murder (and a death sentence) after Adamson, pursuant to a plea agreement with the state, had pled guilty to second degree murder, began serving his agreed-upon sentence and then breached the plea agreement.

Roberts v. Louisiana, 428 US 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976)

Louisiana's death penalty scheme, which required the jury to impose the death sentence when they found the defendant guilty of first-degree murder violated the 8th and 14th Amendments.

Roberts v. Louisiana, 431 US 633, 97 S.Ct. 1993, 52 L.Ed.2d 637 (1977)

Louisiana's death statute, which mandated death for the killing of a peace officer, violated the 8th and 14th Amendments.

Rose v. Hodges, 423 US 19, 96 S.Ct. 175, 46 L.Ed.2d 162 (1975)

Whether a death sentence is commutable is a question of state law and Hodges' 6th and 14th Amendment rights to a jury trial were not infringed when the governor, after a reversal by the Tennessee Supreme Court, commuted his death sentence and set the sentence at 99 years.

Ross v. Oklahoma, 487 US 81, 108 S.Ct. 2273, 101 L.Ed.2d 80 (1988)

Refusal to remove a juror who should have been removed under *Witherspoon*, and who was then removed by a defense peremptory strike, was harmless error.

Satterwhite v. Texas, 486 US 249, 108 S.Ct. 1792, 100 L.Ed.2d 284 (1988)

Although the harmless error rule applies to *Estelle v. Smith* error (psychiatrist testifying that defendant was a continuing threat to society), the error was not harmless here.

Schad v. Arizona, 501 US___, 111 S.Ct. 2491, 115 L.Ed.2d 555 (1991)

Although the jury verdict has to be unanimous on the question of guilt it does not have to be unanimous on the theory of guilt (here, premeditation or murder-felony).

Shell v. Mississippi, 498 US___, 111 S.Ct. 313, 112 L.Ed.2d 1 (1990)

Although the state court used a limiting instruction when it defined "heinous, atrocious or cruel" it was not sufficient. Remanded for reconsideration under *Clemens v. Mississippi*.

Schiro v. Farley, 510 US ___, 114 S.Ct. ___, 127 L.Ed.2d 47 (1994)

The double jeopardy clause did not prevent the imposition of a death sentence based upon an aggravating circumstance of intentional murder when the jury found the defendant guilty of murder in the course of committing a rape.

Skipper v. South Carolina, 476 US 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986)

Skipper's death sentence violated the Constitution when the sentencer was not permitted to consider as mitigation his good conduct while in jail before trial.

South Carolina v. Gathers, 490 US 805, 109 S.Ct. 2207, 104 L.Ed.2d 876 (1989)

The prosecutor's argment at the sentencing phase which included reading of a poem the victim wrote and telling the jury the victim was a registered voter violated *Booth v. Maryland* and was constitutionally improper.

Spaziano v. Florida, 468 US 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984)

The Constitution does not prohibit a state court judge from overruling a jury's recommendation of life and imposing a death sentence. The Constitution does not require a death sentence to be imposed by a jury. A jury need not be instructed on a lesser-included offense that is barred by the statute of limitations.

Stanford v. Kentucky, 492 US 361, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989)

Imposing capital punishment on those 16 and 17 years old does not violate the 8th Amendment.

Strickland v. Washington, 466 US 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)

Defense counsel is constitutionally effective when he has perfomed reasonably and there is no reasonable probability that, but for counsel's perfomance, the results would have been different.

Sumner v. Shuman, 483 US 66, 107 S.Ct. 2716, 97 L.Ed.2d 56 (1987)

A mandatory death penalty for murder committed by one serving a life sentence violated the 8th and 14th Amendments.

Thompson v. Oklahoma, 487 US 815, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988)

Applying Oklahoma's death penalty statute to a 15-year-old defendant violated the 8th Amendment.

Tison v. Arizona, 481 US 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987)

The imposition of a sentence of death on one who did not kill or intend to kill but who was a major participant in the felonies which led to the killing and who displayed a reckless indifference to the taking of human life, did not violate the 8th Amendment.

Turner v. Murray, 476 US 28, 106 S.Ct. 1683, 90 L.Ed.2d 27 (1986)

Turner, a black man charged with a capital crime, was entitled to have the prospective jurors informed during voir dire that the victim was white and to question the jurors about racial prejudice.

Wainwright v. Goode, 464 US 78, 104 S.Ct. 378, 78 L.Ed.2d 187 (1983)

Although the state trial judge improperly considered dangerousness as aggravation, there were other properly found aggravating circumstances, and the resulting death sentence did not violate the Constitution.

Wainwright v. Witt, 469 US 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985)

A juror who because of his or her views on the death penalty cannot perfom the duties of a juror is properly excused. The state court's determination to excuse is entitled to a presumption of correctness under 28 USC 2254.

Walton v. Arizona, 497 US___, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990)

The Constitution does not require that aggravating circumstances be found by a jury and it does not prohibit a state from placing upon the defendant the burden of establishing mitigation. Arizona's death penalty scheme which requires the sentencer to impose a death sentence when it finds an aggravating circumstance but no mitigation is not unconstitutional. Arizona's "heinous, cruel or depraved" aggravating circumstance is not unconstitutionally vague.

Whitmore v. Arkansas, 495___, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990)

A fellow prisoner had no standing to challenge Whitmore's death sentence.

Woodson v. North Carolina, 428 US 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976)

The North Carolina statutory death penalty scheme, which required a death sentence when the jury found a defendant guilty of first-degree murder, violated the 8th and 14th Amendments.

Yates v. Evatt, 500 US___, 111 S.Ct. 1884, 114 L.Ed.2d 432 (1991)

An unconstitutional instruction that malice may be presumed from a voluntary act was not harmless error—the test being "whether it appears beyond a reasonable doubt that the error did not contribute to the verdict obtained, that is, whether it appears beyond a reasonable doubt that the error was unimportant in relation to everything else the jury considered on the issue in question."

Zant v. Stephens, 462 US 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983)

The Constitution does not require a state appeals court to reverse a death sentence because it finds one aggravating circumstance invalid.

H. Death Penalty Statutes

Death Penalty Statutes

(The statute number shown is normally the first in a series)

Alabama	Ala. Code, sec. 13A-5-45 (1975)
Arizona	Ariz. Rev. Stat. Ann., sec. 13-703 (1989)
Arkansas	Ark. Code Ann., sec. 5-4-602 (Michie 1987)
California	Cal. (Penal) Code, sec. 190.1 (West 1988)
Colorado	Colo. Rev. Stat. Ann., sec. 16-11-103 (West 1990)
Connecticut	Conn. Gen. Stat. Ann., sec. 53a-46a (West 1985)
Delaware	Del. Code Ann., tit. 11, sec. 4209 (Michie 1974)
Florida	Fla. Stat. Ann., sec. 921.141 (West 1985)
Georgia	Ga. Code Ann., sec. 17-10-30 (Michie 1990)
Idaho	Idaho Code, sec. 19-2515 (Michie 1987)
Illinois	Ill. Rev. Stat., ch. 38, para. 9-1 (Smith-Hurd 1979)
Indiana	Ind. Code, sec. 35-50-2-9 (Michie, Bobbs-Merrill 1985)
Kentucky	Ky. Rev. Stat. Ann, sec. 532.025 (Michie 1990)
Louisiana	La. Code Crim. Pro. Ann, art. 905.3 (West 1984)
Maryland	Md. Code Ann. (Crim.Law), art. 27, sec. 413 (Michie 1992)
Mississippi	Miss. Code Ann., sec. 99-19-101 (1972)
Missouri	Mo. Ann. Stat., sec. 565.030 (Vernon's 1979)
Montana	Mont. Code Ann., sec. 46-18-301 (Leg.Council 1991)
Nebraska	Neb. Rev. Stat., sec. 29-2520 (1943)
Nevada	Nev. Rev. Stat., sec. 175.552
New Hampshire	N.H. Rev. Stat. Ann., sec. 630:5 (1987)
New Jersey	N.J. Stat. Ann., sec. 2C:11-3 (West 1987)
New Mexico	N.M. Stat. Ann., sec. 31-20A-1 (Michie 1978)
New York	N.Y. (Penal) Law, sec. 125.27 (McKinney 1987) (ruled unconstitutional)
North Carolina	N.C. Gen. Stat., sec. 15A-2000 (Michie 1991)
Ohio	Ohio Rev. Code Ann., sec. 2929.04 (Anderson 1987)
Oklahoma	Okla. Stat. Ann., tit. 21, sec. 701.10 (West 1983)
Oregon	Or. Rev. Stat., sec. 163.150 (Butterworths 1990)
Pennsylvania	Pa. Stat. Ann., tit. 42, sec. 9711 (Purdon's 1987)
South Carolina	S.C. Code Ann., sec. 16-3-20 (Law.Co-op 1976)
South Dakota	S.D. Codified Laws Ann., sec. 23A-27A-1 (1987)
Tennessee	Tenn. Code Ann., sec. 39-13-204 (Michie 1987)
Texas	Tex. (Penal) Code Ann., sec. 37.071 (Vernon's 1989)
Utah	Utah Code Ann., sec. 76-3-207 (Michie 1953)
Vermont	Vt. Stat. Ann., tit. 13, sec. 2303 (1973)
Virginia	Va. Code, Ann., sec. 53.1-232 (Michie 1950)
Washington	Wash. Rev. Code Ann., sec. 10.95.050 (West 1990)
Wyoming	Wyo. Stat., 6-2-102 (Michie 1977)

I. Denial of Waiver of Counsel

FINDING OF NO WAIVER[18]

The Court finds, based upon the totality of the circumstances, that Defendant desires to forego representation by an attorney and to represent himself/herself in further trial court proceedings.

The Court further finds that Defendant is not able to make a knowing, intelligent, and voluntary waiver of the right to representation by counsel because: *[State specific reasons; i.e., Defendant is too emotionally unstable to make a knowing waiver, etc.]*

IT IS ORDERED that Defendant's waiver of counsel is not accepted. FURTHER ORDERED that Defendant (is) (continues) to be represented by (Attorney) for all proceedings in this case.

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[18]*See, State v. Mott*, 162 Ariz. 452, 784 P.2d 278 (App. 1990); *State v. Fayle*, 134 Ariz. 565, 573, 658 P.2d 218, 226 (App. 1982), rev. denied.

J. Waiver of Counsel Script

WAIVER OF RIGHT TO COUNSEL

1. Is your true name _____ ?
2. What is your date of birth?
3. What grade did you finish in school?
4. Do you read and understand English?
5. Have you had any drugs, alcohol or medication in the last 24 hours?
6. Have you had any current or past mental problems?[19]
7. Do you want to give up your right to counsel and represent yourself in this case?
8. Have you ever represented yourself before?[20]
9. WAIVER FORM: Have you read the Waiver Form?[21]

   [If "No", recess while he or she does so.]
10. There are distinct, serious dangers and disadvantages to representing yourself. It has been proven over and over that "a person who represents himself has a fool for a client"? Why do you want to represent yourself?
11. You have the right to an attorney. If you cannot afford an attorney, I will appoint one to represent you. The attorney would represent you at all critical stages of the case, including before trial, at trial and, if you are found guilty, at sentencing. Do you understand?
12. Do you understand that the services of an attorney, who has spent several years in legal education and training, can be of great value and assistance, especially in a criminal case?

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[19]*State v. Hartford*, 130 Ariz. 422, 636 P.2d 1204 (Ariz. 1982), *cert. denied* 456 U.S. 933.

[20]*State v. Mott*, 162 Ariz. 452, 784 P.2d 278 (Ariz.App. 1990).

[21]The approved form is Appendix Form VIII, A.R.Cr.P. Rule 6.1(c) A.R.Cr.P. requires that the Waiver of Right to Counsel be in writing.

13. Let me make sure you understand the charges, and the possible penalties if you are convicted. you are charged with _____.

    The punishment is: _____.

14. Do you have any questions? Do you understand that if you are convicted, no matter what the sentence is, you will have a felony conviction?

15. Self Representation — Responsibilities

    Do you understand that if you represent yourself, you will have sole responsibility for, among other things:

    * asserting legal defenses;
    * interviewing witnesses;
    * conducting independent investigation;
    * doing legal research;
    * filing and arguing motions;
    * examining and cross examining witnesses;
    * giving opening statement and final argument to the jury.

16. If representing yourself, you will be held to the same standard as a licensed attorney regarding the presentation of your case to the jury and the court. This standard includes knowledge of:

    * courtroom strategy and dynamics;
    * courtroom procedure;
    * applicable case law;
    * Arizona Rules of Evidence[22];
    * Arizona Rules of Criminal Procedure.

17. [Complex case inquiry] Do you understand that your particular case may be especially complicated in that there appear to be: [if applicable]

    * numerous witnesses;
    * numerous potential exhibits;
    * unusual legal issues;
    * (other applicable "complexity" factors).

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[22]Guidelines for District Judges from 1 *Bench Book for United States District Judges* 1.02-2 to 5 (3rd Ed. 1986).

18. [If a firm trial date is soon:] Do you understand that I will very likely not grant a continuance of the present trial setting?[23]

19. WAIVER: Do you still wish to give up your right to counsel and represent yourself?

20. Very well. You can change your mind about this at any time. If at any time you want to be represented by a lawyer, let me know and I will appoint one for you. But if you later ask for a lawyer, you most likely will not be allowed to repeat any part of the case already held or waived without a lawyer.[24]

21. Do you have any questions about anything?

22. FINDING OF WAIVER: The court finds, based upon the totality of the circumstances, that defendant KNOWINGLY, INTELLIGENTLY, and VOLUNTARILY desires to waive the right to representation by an attorney and to represent himself/herself.

    Accordingly, IT IS ORDERED, pursuant to Rule 6.1(c) A.R.Cr.P. that defendant's waiver of right to counsel is accepted.

    [If the Waiver Form has not yet been signed, defendant signs it. The Court then signs it and files it.]

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[23]*State v. DeNistor*, 143 Ariz. 407, 694 P.2d 237 (Ariz. 1985).

[24]Rule 6.1(e), A.R.Cr.P.