

# Switching Juries in Midstream\* : The Perplexities of Penalty-Phase-Only Retrials

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*This article addresses the oft-recurring, but seldom analyzed scenario where a capital conviction is affirmed, but the sentence is reversed, and the prosecutor elects to retry the penalty phase before a new jury. There are not many doctrinal issues raised in these circumstances, but there are a host of practical ones, including: how the jury is to be apprised of the facts underlying the conviction; whether the defense can challenge the underlying facts; how the long delay affects the prospects for each party; how the defendant's behavior in the interim may affect the verdict; and many more. Since these are not mainly doctrinal issues that have generated much case law, the article approaches the topic through a transcript of a panel discussion of capital prosecutors and defense lawyers who have retried penalty-phase-only cases (constructed from individual interviews). These attorneys present a kaleidoscopic set of perspectives that are sometimes consistent, but often in conflict. This reflects the unpredictability of proceedings where such momentous decisions are made so long after the original incident. Yet despite some contradictions, the discussion provides much valuable guidance for lawyers and judges who become involved in penalty-phase-only retrials.*

## I. INTRODUCTION

Death sentences are frequently reversed.<sup>1</sup> Sometimes this is due to an error in the guilt/innocence phase that would necessitate a complete retrial; sometimes the error is in the penalty phase that would necessitate retrial of sentencing only.

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\* This is a take-off on the well-known advice, "Don't switch horses in mid-stream." See A DICTIONARY OF AMERICAN PROVERBS 311 (Wolfgang Mieder et al. eds., 1992) (setting forth seven variations of the proverbial advice against switching/changing/swapping horses in the middle of a stream; the one asserted rationale is that the switcher's pants will get wet).

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<sup>1</sup> The most intensive study of reversals, which attempted to consider every reported capital case during the period 1973 to 1995, concluded that 68% of death sentences were reversed because of error (although some were re-imposed after retrials). See James S. Liebman, Jeffrey Fagan & Valerie West, *A Broken System: Error Rates in Capital Cases, 1973-1995* (June 12, 2000), at <http://www2.law.columbia.edu/instructionalservices/liebman>. Detractors of this study believe the effective reversal rate was closer to 52%. See Barry Latzer & James N. G. Cauthen, *Another Recount: Appeals in Capital Cases*, 35 THE PROSECUTOR 25, 25 (2001) (taking the Liebman study as a baseline and recalculating using different premises). Either way, a large number of capital sentences were reversed on appeal during that period, and there is little reason to believe the situation has changed since 1995.

When a capital conviction is affirmed and the sentence reversed, the prosecution must decide whether to seek a death sentence again. Prosecutors regularly choose to do so, resulting in penalty phases that are tried many years after the crime was committed to juries that did not hear the guilt/innocence phase evidence. Accordingly, strategies for belatedly retrying penalty phases to brand-new juries, and the effects on capital jurors of these long-delayed proceedings, are of great practical importance.

The academic literature, however, is virtually devoid of writing on this topic.<sup>2</sup> Presumably this is because penalty phase retrials raise few interesting doctrinal issues. A potentially interesting *constitutional* issue—whether the Double Jeopardy Clause bars a penalty phase retrial—turns out to be uninteresting because the answer is a clear-cut “No.”<sup>3</sup> Issues of *evidentiary admissibility*, in general, are also cut-and-dried: while states have different rules of admissibility at the penalty phase,<sup>4</sup> in all states the same rules that apply to original sentencings apply equally

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<sup>2</sup> All I have found are Margery B. Koosed, *On Seeking Controlling Law and Re-seeking Death Under Section 2929.06 of the Ohio Revised Code*, 46 CLEV. ST. L. REV. 261 (1998) (examining the Ohio capital resentencing provision), and Janet Marie Walsh, Note, *Coleman v. McCormick, Due Process, and the Dilemma of Capital Resentencing*, 22 ARIZ. ST. L.J. 1003 (1990) (discussing the due process ramifications of resentencing a capital defendant under a statute that has been legislatively or judicially modified since the defendant’s conviction).

<sup>3</sup> *Bullington v. Missouri*, 451 U.S. 430, 446 (1981), held that a prior finding of a non-death sentence by a jury prohibits the prosecution from seeking the death penalty if the case is reversed because the prior non-death sentence constitutes an acquittal of the death penalty. But there has never been any prohibition against the prosecution’s seeking the death penalty again where it was imposed in the first instance, but reversed on appeal. The Supreme Court has referred to it as a “common practice.” See *Franklin v. Lynaugh*, 487 U.S. 164, 173 n.6 (1988) (“Finding a constitutional right to rely on a guilt-phase jury’s ‘residual doubts’ about innocence when the defense presents its mitigating case in the penalty phase is arguably inconsistent with the common practice of allowing penalty-only trials on remand of cases where a death sentence—but not the underlying conviction—is struck down on appeal.”) And as Professor George Thomas, the nation’s leading expert on double jeopardy, see GEORGE C. THOMAS III, *DOUBLE JEOPARDY: THE HISTORY, THE LAW* (1998), wrote to me:

I can’t imagine a plausible Double Jeopardy argument against being re-sentenced to death after a death sentence was reversed *unless*, of course, the appellate court found the evidence insufficient for any rational trier of fact to impose the death sentence. I’m not sure what that would mean in the death context or if it is even possible, but assuming it is a conceivable basis for reversal, the defendant could argue *Burks v. United States*, 437 U.S. 1 [1977]. There a unanimous Court held that a reversal of a conviction on those grounds barred a new trial [of guilt/innocence]. In the absence of that probably really unusual basis for reversal, there is no ground I can imagine for a Double Jeopardy bar to resentencing to death after an earlier death verdict.

E-mail from George C. Thomas III, Professor of Law, Rutgers-Newark Center for Law and Justice (Sept. 8, 2003) (on file with author).

<sup>4</sup> There are two basic variations concerning what the prosecution is permitted to offer in aggravation at the penalty phase. In some states, the prosecution may only present evidence relating to statutory aggravating circumstances. See, e.g., *State v. Nelson*, 803 A.2d 1, 32 (N.J. 2002) (“In a capital sentencing trial, admissible evidence includes that evidence relating to the aggravating and mitigating factors at issue.”); *Hitchcock v. State*, 673 So. 2d 859, 861 (Fla. 1996) (“We have held

to resentencings,<sup>5</sup> supplemented by the common sense principle that the parties must be permitted to introduce evidence from the guilt phase to familiarize the jury with the case.<sup>6</sup> As I will discuss later, however, there are two *specific* doctrinally interesting admissibility issues: 1) to what extent may a defendant offer evidence designed to undermine the new jury's confidence in the prior jury's verdict of guilt; and 2) the same question with regard to the prior jury's finding of an aggravating circumstance.<sup>7</sup>

## II. A DIFFERENT APPROACH

Aside from these two doctrinally intriguing issues, there is not much of doctrinal interest about capital resentencings. Nonetheless, a practically important, yet doctrinally less interesting topic, may simply call for a different kind of research. So, rather than going to books, I went to the lawyers who have litigated such proceedings. It turned out that they had very insightful things to say about this topic, as well as some great "war stories." Thus, the remainder of this Article consists of carefully organized and edited transcripts of my discussions about penalty-phase-only litigation with fourteen experienced capital lawyers—six prosecutors and eight defense counsel<sup>8</sup>—who have dealt with penalty-phase only retrials. (While I sought lawyers with this particular experience, and questioned them mainly about penalty-phase-only issues, many of their insights apply equally to retrials of both phases of a case.)

Here are brief biographical sketches of the lawyers I interviewed:

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that, to be admissible in the penalty phase, the State's direct evidence must relate to any of the aggravating circumstances." In other states, the prosecution may offer any evidence thought to be aggravating; that is, the prosecution is not limited to presenting evidence that relates to legislatively specified aggravating circumstances. *See, e.g.,* *Middleton v. State*, 103 S.W.3d 726, 739 (Mo. 2003) ("In considering capital punishment, the jury is entitled to a wide range of helpful information [citations omitted]. 'The decision to impose the death penalty . . . is the most serious decision society makes about an individual, and the decision-maker is entitled to any evidence that assists in that determination.' *State v. Debler*, 856 S.W.2d 641, 656 (Mo. banc 1993)"); *State v. Carroll*, 573 S.E.2d 899, 913 (N.C. 2002) ("[T]he trial court has discretion to admit any evidence relevant to sentencing [citations omitted]. Accordingly, the State is allowed to admit any evidence that substantially supports the death penalty.").

<sup>5</sup> This is rarely explicitly stated by appellate courts, but is clearly the practice followed in every jurisdiction in which I talked with capital lawyers.

<sup>6</sup> For a rare statement of this principle, see *Hitchcock v. State*, 673 So. 2d 859, 861 (Fla. 1996) ("Evidence necessary to familiarize the [new penalty phase] jury with the underlying facts of the case may also be introduced during the penalty phase.").

<sup>7</sup> *See infra* notes 26–48 and accompanying text.

<sup>8</sup> I tried to interview eight prosecutors also, but came to a point where none of the prosecutors I contacted called me back.

### Prosecutors

**Mike Benito:** Mr. Benito was a prosecutor in Hillsborough County, Florida (Tampa) from 1978 to 1991. He tried more than twenty death penalty cases, including two penalty-phase-only retrials. He is now in private practice in the Tampa area.<sup>9</sup>

**Bill Hawkins:** Mr. Hawkins has been a prosecutor in the Harris County, Texas (Houston) District Attorney's Office for over twenty years. He has argued for the death penalty in thirteen cases. I interviewed him a week after he had finished his first penalty-phase-only retrial.<sup>10</sup>

**Abe Laeser:** Mr. Laeser has been a prosecutor in Dade County, Florida (Miami) for over thirty years. He has handled a large number of death penalty cases, including half a dozen penalty-phase-only retrials.<sup>11</sup>

**Lyn McClellan:** Mr. McClellan is one of three Bureau Chiefs in the Harris County, Texas (Houston) District Attorney's Office, where he has worked for many years. This position puts him only one step below the District Attorney in the office chain of command. From that perspective, he is familiar with many penalty-phase-only retrials handled by his subordinates.<sup>12</sup>

**Chuck Morton:** Mr. Morton has been an attorney in the Homicide Trial Unit of the Broward County, Florida (Ft. Lauderdale) prosecutor's office for eighteen years. He has lost count of the number of capital cases he has litigated. He has tried about five penalty-phase-only retrials.<sup>13</sup>

**Shirley Williams:** Ms. Williams was a prosecutor in Hillsborough County, Florida (Tampa) for fifteen years, until 2002. She litigated over twenty capital cases, including two penalty-phase-only retrials. She is now in private practice in the Tampa area.<sup>14</sup>

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<sup>9</sup> Telephone Interview with Mike Benito, Former Prosecutor, Hillsborough County, Fla., in Tampa, Fla. (Oct. 23, 2003).

<sup>10</sup> Telephone Interview with Bill Hawkins, Prosecutor, Harris County, Tex., in Houston, Tex. (Nov. 19, 2003).

<sup>11</sup> Telephone Interview with Abe Laeser, Prosecutor, Dade County, Fla., in Miami, Fla. (Nov. 5, 2003).

<sup>12</sup> Telephone Interview with Lyn McClellan, Bureau Chief, Harris County, Tex. Dist. Attorney's Office, in Houston, Tex. (Nov. 13, 2003).

<sup>13</sup> Telephone Interview with Chuck Morton, Attorney, Homicide Trial Unit, Broward County, Fla., in Fort Lauderdale, Fla. (Oct. 15, 2003).

<sup>14</sup> Telephone Interview with Shirley Williams, Former Prosecutor, Hillsborough County, Fla., in Tampa, Fla. (Oct. 2, 2003).

### Defense lawyers

**John Britt:** Mr. Britt has been a public defender in North Carolina for twenty-five years, and has handled death penalty cases throughout that time. Four years ago he became one of the two attorneys who started the special capital defender unit for the Public Defenders service. He has litigated four penalty-phase-only retrials, two of them for the same defendant after two sentence-only reversals.<sup>15</sup>

**Jules Epstein:** Mr. Epstein has been a criminal defense lawyer in Philadelphia for twenty-five years, twelve as a public defender, and thirteen in private practice. He has litigated more capital cases than he can count, and has tried two penalty-phase-only cases.<sup>16</sup>

**Norris Gelman:** Mr. Gelman has practiced criminal defense law in Philadelphia for thirty-four years, and has handled death penalty cases throughout that time. He has litigated three penalty-phase-only retrials.<sup>17</sup>

**Johnny Kerns:** Mr. Kerns has been a public defender in Alachua County, Florida (Gainesville) for thirty-one years. He has handled numerous death penalty cases over that period, including two penalty-phase-only retrials.<sup>18</sup>

**Sam Silver:** Mr. Silver has practiced primarily civil litigation with a large Philadelphia firm for fourteen years. But on a pro bono basis, he has retried two penalty-phase-only retrials.<sup>19</sup>

**Neal Walker:** Mr. Walker began his career as a public defender in Louisiana twenty-four years ago, and has litigated numerous death penalty cases. He is currently the Director of the Capital Appeals Project in Louisiana, but continues to try death penalty cases. He has handled two penalty-phase-only cases, in both of which he managed to negotiate life sentence pleas.<sup>20</sup>

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<sup>15</sup> Telephone Interview with John Britt, Public Defender, N.C. Capital Defender Unit, in Durham, N.C. (Oct. 29, 2003).

<sup>16</sup> Telephone Interview with Jules Epstein, Criminal Defense Attorney, in Philadelphia, Pa. (Sept. 18, 2003).

<sup>17</sup> Telephone Interview with Norris Gelman, Criminal Defense Attorney, in Philadelphia, Pa. (Sept. 18, 2003).

<sup>18</sup> Telephone Interview with Johnny Kerns, Public Defender, Alachua County, Fla., in Gainesville, Fla. (Oct. 28, 2003).

<sup>19</sup> Telephone Interview with Sam Silver, Attorney, in Philadelphia, Pa. (Sept. 19, 2003).

<sup>20</sup> Telephone Interview with Neal Walker, Director, La. Capital Appeals Project, in La. (Sept. 24, 2003).

**Bob Wolfrum:** Mr. Wolfrum is a public defender in the Eastern District of Missouri. He has been a defender for twenty-two years, and has handled many death penalty cases. He has litigated one penalty-phase-only retrial.<sup>21</sup>

**John Wright:** Mr. Wright has practiced criminal defense law in Huntsville, Texas, for twenty-seven years. He has handled three penalty-phase-only retrials, two of which were for the same defendant.<sup>22</sup>

The alert reader will have recognized that my interviewees do not hail from across the country, but tend to be clustered in certain areas—four prosecutors from Florida and two from Texas; three defense lawyers from Philadelphia, although the remainder represent the five jurisdictions of Florida, Louisiana, Missouri, North Carolina, and Texas. This pattern is the result of my method for finding persons to interview: the only way I knew to find good lawyers who were familiar with penalty-phase-only retrials was to start “asking around” in the death penalty litigation community. This generated a pool of possible interviewees. I called many of these people—and many did not return my calls or did not have experience with such retrials—and I ended up interviewing the people who had such experience and were willing to talk with me. The persons I interviewed turned out to be a very talented and loquacious group of lawyers, but not representative of a nationwide geographic spectrum. Nonetheless, their insights tended to reinforce each other, which leads me to hypothesize that their experience is more broadly generalizable than their geographic diversity might indicate. I extend my heartfelt gratitude to these lawyers for the time they spent talking to me, and the openness they exhibited.

The reader will also have noticed that none of these very experienced lawyers has handled a large number of penalty-phase-only retrials. This fact indicates that while there is a relatively large volume of these cases nationwide, they tend to be distributed among a large number of lawyers. When I began my quest to interview lawyers familiar with penalty-phase retrials, I suspected that I might find at least one person who specialized in these cases, a lawyer who might be the “dean of penalty-phase-only retrials.” But after soliciting names from people who have a wide perspective on death penalty litigation—including Stephen Bright of the Southern Center for Human Rights, Roger Groot of the Capital Case Clearinghouse at Washington and Lee, and Phil Wischkaemper, the Capital Assistance Counsel of the Texas Criminal Defense Lawyer’s Project—I am convinced that no such specialist exists.

The lawyers I interviewed reported handling a total of thirty-four penalty-phase-only proceedings. Of these, twenty resulted in another death sentence, ten

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<sup>21</sup> Telephone Interview with Bob Wolfrum, Public Defender, E.D. Mo., in Mo. (Sept. 24, 2003).

<sup>22</sup> Telephone Interview with John Wright, Criminal Defense Attorney, in Huntsville, Tex. (Oct. 2, 2003).

resulted in life verdicts, and four resulted in negotiated life sentence pleas. Given that the death sentencing rate was one hundred percent in these cases in the earlier penalty phase proceedings, it is obviously a major coup for a death-sentenced defendant to get a sentence reversed, because it appears that the chance of a life sentence on the second go-around is substantial.

### III. THE INTERVIEWS

I interviewed these lawyers individually by telephone. But to usefully organize the issues, I have taken the liberty of reconstructing the dialogues into a roundtable discussion with myself as moderator. Also, while my conversations with the lawyers involved the use of names of particular defendants, I have deleted those names in the interests of privacy.

**Moderator:** Let us begin by exploring from the prosecutors' standpoint why a death penalty might be sought—or not—when a case has been reversed as to sentence only. Prosecutors, is there a presumption that if the case was deathworthy once, it is still deathworthy after a sentence reversal?

**Prosecutor Morton:** Yes, one does start off with that presumption, but it certainly depends on the facts, and on the state of present law, as well. Most resentencings are older cases; there could be significant changes in the law which could change our mind whether to seek the death penalty again. My analytical process is: first a recognition that a sentence of death by jury means the death penalty presumptively should be sought again; second, the availability of evidence—this is the most determinative element of whether to proceed or not; and third, the present aggravating and mitigating factors.

**Prosecutor Laeser:** There is obviously some presumption based on the fact the case was deemed deserving of the death penalty in the first place. But there are a lot of issues that I consider that do not necessarily deal with the crime in deciding whether to go after the death penalty. For example, if the appellate court decided that certain evidence should not have been admitted, we have to go to square one and decide whether to go after the death penalty again. Also, other circumstances change. For example, the guy who goes into prison at nineteen after committing a mass murder who is now thirty-nine, has been in a few fights while institutionalized, and as a result is brain-damaged; he is obviously a different person now. In a case I tried in 1980, the defendant had shot eight people in a robbery; three died and the other five were seriously injured. His I.Q. had declined after being in a serious fight in prison. After a successful appeal, I would have to ask myself whether the case still warranted the death penalty.

**Prosecutor Hawkins:** But you cannot take such defense claims at face value, either. In one of my cases the defense told us that their client was going to die of

diabetes. However, his medical records showed his glucose was good as mine—I am a type 2 diabetic. Healthwise, he was doing fine.

**Prosecutor McClellan:** The imposition of an earlier death sentence does cause us to lean toward seeking it again. If we got death before, we would have to look at what has changed that would cause a jury not to give death again. We seriously consider whether or not the facts of the case appear to be worthy of death and whether a jury would consider them deathworthy. Twenty years ago crimes that were deathworthy are not deathworthy today. We could get death for a lot of things then that you cannot now. So obviously if the defendant had been given the death penalty on something that is not currently statutorily allowed, we would not seek the death penalty.

**Prosecutor Williams:** Here is an example of a case where, from an evidence standpoint, it was viable to seek death penalty again. The defendant had shot one victim who lived and one who died—the surviving victim was available to testify. There was also a conviction on a prior murder, although the jury could not be informed that he had received the death penalty for it. The sheriff at the time of the murder was available to testify. The photographs were still preserved from the previous trial. It was feasible to put all that information into the trial again.

**Moderator:** Defense lawyers, I assume that you try your best to convince prosecutors not to pursue death sentences again. What techniques do you use?

**Defense Attorney Walker:** In both of my penalty-phase-only reversal cases, I tried to keep the client away from a jury. In a case where there is a reasonable certainty that a client will be convicted of capital murder and that you will be in front a penalty phase jury, your overarching goal is to keep the client away from a penalty phase jury and to settle the case somehow with a plea bargain or negotiated settlement. With a reversal that requires retrial of both phases, you are basically holding the same hand as prior to the original trial, and the same bargaining chips. You can save the state time if your client is willing to plead guilty, and it limits the state's risk that they might not be able to sustain a conviction. But with a penalty-phase-only reversal, the state has the conviction, so you don't have a whole lot of good cards to play. Nevertheless, in both of my cases we were able to negotiate life sentences.

In one of the cases, the Louisiana Supreme Court held that there had been ineffective assistance of counsel at the penalty phase for failure to obtain mental health records showing significant mental illness. This left me with a hand I could work with on remand. I called the district attorney and said, "Look, we can retry sentencing if you want. But read the Louisiana Supreme Court opinion. At some point if he is re-sentenced to death we will be right back here with a post-conviction claim for ineffective assistance of counsel with regards to the insanity defense at the guilt/innocence phase. If you are willing not to oppose a life

sentence we will agree not to file any post conviction motions to undertake to get the conviction reversed.” He agreed. I thought it was a good resolution for my client, because he would never have had much of a chance with the insanity defense even if it had been presented better. The number of insanity defenses that have prevailed for the killing of a white by a black in the Deep South is limited. The victim was a popular, well-known member of the business community. I believe my client was psychotic when the offense occurred, but the offense itself didn’t bespeak a psychotic episode—it looked like a standard robbery/murder. Realistically, he was never going to do any better than a life sentence. I love to try cases, so for any non-capital case I am willing to rock and roll and trust my instincts. But in a Deep South capital case, I am incredibly conservative.

In the other case, the prosecutor ultimately agreed to the same arrangement of a life sentence in return for my client giving up post-conviction remedies. It was a shock to me that the prosecutor was willing to agree, because the victim was a police officer. I am sure the resolution came about, though, because there was something about the prosecutor’s behavior that the prosecutor did not want to come out in public, which I am not going to get into here. Again, I thought it was a great deal for my client, because the evidence against him was overwhelming that he had shot a police officer during a burglary. But still, my client was not thrilled. It was only because of his mother’s urging that he agreed to be re-sentenced to life. Even then, things still almost fell apart in open court. The judge said at the beginning of the sentencing that he was going to ask my client what had happened. I asked for a brief moment with my client. I was not sure what he would do. I was on pins and needles. He only went through with it because his mother was sitting in the first row. I went to see him in jail right after the court proceeding. It was a real tiny parish where you had to go to the jail library to interview prisoners. My client was sitting there crying like a baby. That was about as low as I have ever felt, even though I knew it was the best possible outcome. But I realized what I had taken away from him was hope.

**Defense Attorney Britt:** For a long time in North Carolina, it was a hard argument to make against the prosecution pursuing a new penalty phase. Essentially, the defense had to argue for a reduction of the charge to second-degree murder, because under the statute, if there was evidence of aggravating factors, the prosecution had no discretion to forgo capital punishment. The prosecution could reduce the charges, but if they chose to proceed on first-degree murder, they had no discretion not to pursue the death penalty. Fortunately, that law has recently been changed, so now the prosecution can decide not to seek the death penalty even in a first-degree case.<sup>23</sup>

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<sup>23</sup> See N.C. GEN. STAT. § 15A-2004(a) (2003) (providing that a prosecutor may choose to prosecute a first-degree murder as a non-capital case even if an aggravating circumstance exists, and may accept a life sentence plea in a case that is being prosecuted capitally).

**Defense Attorney Kerns:** It is not uncommon to work out some plea in avoidance of the death penalty by giving up post-conviction rights. But for me it is very difficult to give up post-conviction rights. Anyway, I am not sure how effective those waivers are for the prosecution. If the defendant breaches the agreement by filing a post-conviction petition, isn't the state's remedy to declare the agreement void and go back to retry the penalty phase? And is the state really going to want to do that?

**Defense Attorney Epstein:** For one of my clients, the prosecutor offered that he would get a life sentence in return for giving up all appeals. That was a great deal, because my client had no good issues on appeal—his trial was so clean: he was caught red-handed, he confessed, they had the gun, the ballistics—a child could have tried the case for the prosecution. But I just could not bring my client to the table—he just did not get that he had no appeal issues. So we went through the penalty phase retrial. That was the worst week of my life, knowing that he had given up a non-death resolution by giving up appeal rights of no value, and now stood in danger of a death sentence. Fortunately, after two hours the jury returned a life sentence verdict.

**Defense Attorney Silver:** I had a very similar case. I argued to the prosecutor, “You can't conceivably want to spend tax dollars on this.” But she took a hard line. Finally, on the eve of trial, she offered that the prosecution would accept a penalty of life in prison if we waived all future challenges. But my client rejected it despite my reservations. He said, “I have enough faith in you, Sam.” I advised him, “If we lose, you'll have no ineffective assistance of counsel argument for appeal.” I told him, “If we lose, you *will* be executed.” It was a very difficult situation for me to deal with. Fortunately, the jury returned a life verdict.

**Defense Attorney Gelman:** I was able to convince the prosecutor in one case not to seek the death penalty by suggesting that I could make the trial last a month or so—I had twenty peremptory challenges, for starters. Generally, a prosecutor is a creature of image and publicity of the moment—a prosecutor does not want to be stuck for four-to-five weeks on an old case. All the pizzazz is gone. The prosecutor wants to be in the limelight, not bogged down by what happened years ago. Plus, a case like that really only has a downside for a prosecutor: the case has already been won once, so a loss will look pretty bad.

**Moderator:** I wonder whether the cases where death is sought again are the ones that are highly aggravated, or include some relatively non-aggravated ones. Prosecutors, can you give me some examples of the fact patterns of cases where you have sought the death penalty again after a sentence-only reversal?

**Prosecutor Benito:** In one case an ex-boyfriend broke into his ex-girlfriend's house and found her with her new boyfriend. He cut her head off with a machete

and then jammed the machete into the boyfriend's face. The boyfriend managed to go next door to the neighbor's house with a big hole in his face and get some assistance. Miraculously he lived and was able to testify as to who the attacker was. In another case the guy killed his wife and daughter in the garage with a hammer then set the building on fire.

**Prosecutor Hawkins:** The penalty-phase-only case I just finished retrying last week had the most horrible facts I have ever seen. The defendant had an extensive record, including two aggravated robberies and the attempted murder of a police officer. Then while he was on parole, during a six-week period, he committed four aggravated robberies, and was indicted on five capital murders and was convicted of one. Three of the aggravated robberies were of victims in hotel rooms, at gunpoint. But all of the murders were in addition to those robberies. One murder involved a badly decomposed body that had been stabbed to death during a robbery. The defendant was tied to the scene by his bloody fingerprints above the victim's body and in two places inside the victim's vehicle. The defendant also tried to use the victim's credit card. Another murder was of a traveling salesman. The guy sold T.V. Guides and had a route where he would check on the stock and supply. The defendant confronted him at the back of his apartment complex and started stabbing him in front of a small group of people. The victim fled and then fell. The defendant came up behind him, stabbed him multiple times, and then fled with the victim's Blazer and credit cards. Then another guy was sitting in a truck outside of Wal-Mart waiting for his wife and daughter to come out. The defendant walked up and asked him the time, produced a pistol, and had the man drive him to a Houston ship channel. He had the guy get out of the truck and told him to take off his boots. Then he shot the guy in the face with his .22, took out a knife, and sliced the guy's abdomen from one side to another, and drove away in the truck. Remarkably, the guy survived. Then we finally come to the murder that resulted in the death sentence. A young couple had been married for three months. They had moved to Houston from Louisiana because he got a job on an oil rig. The defendant knocked on their motel room door and said he was with management. When the husband opened the door, he shoved a gun in his face. He tied the couple's hands and feet together on the bed, searched the room, discovered a .44 caliber pistol that belonged to the husband, gathered up other property and started to leave. He came back, gagged them and then left again. He came back again, put a sheet over the guy's head and when the guy woke up the next morning at 7:00 a.m. his wife was dead. The husband had been shot in the head with the .44. He was shot in the temple and the bullet lodged in the base of the skull. It had to be removed with surgery. We recovered the slug from the wall. Amazingly, the husband recovered, and was available to testify at the new penalty phase.

When I started as a prosecutor, I was not a big believer in the death penalty. I have come into contact with lots of cold individuals who have changed my mind. I did not know about antisocial personality disorder then. I do now.

**Prosecutor Morton:** One of mine was a particularly bad case. It was a combination of a bad prior record and horrible circumstances. He was convicted of kidnapping a young lady on New Year's Eve, raping her and burying her in a construction site (her body was never found). He had a horrendous record.

**Prosecutor Williams:** In one of my penalty-phase-only retrials, the defendant was living with a woman and renting an apartment from the victims—an elderly couple in their seventies. He was behind on his rent and they served him with eviction papers. He got an advance from his employer. He took the check to the victims, signed it over, got a receipt, and with whatever money was left, he went out bar-hopping, drinking and used up the remaining money on drugs. He then went back to the victims' house to get the check back, but they would not give it to him. He got a butcher knife from the kitchen. The woman was stabbed over thirty times, and the man over fifty times. There was evidence he pursued them through their own home. She had numerous defensive wounds on her arms and legs. The man ran to the back of the house to get out and he also had numerous defensive wounds. The couple rented the other part of their house to another couple who heard them begging for help.

In my other case, the defendant went on a crime spree. He carjacked a vehicle and killed the driver, drove it around for hours, then set it on fire. Then he was hitchhiking and a girl and her boyfriend who were going home from the beach picked him up. He shot her and left her for dead and then killed the boyfriend and drove around for a while in their vehicle. He then attempted to rob a convenience store and shot the clerk right between the eyes. The clerk actually survived. While escaping from that robbery, he was caught. He was charged with two murders and two attempted murders. This spree was not a one-night thing. It was over a week or ten-day period.

**Moderator:** Well, almost anyone would agree that those are highly aggravated fact patterns. Defense lawyers, have you found it to be true that prosecutors only select highly aggravated cases to seek the death penalty again after a sentence-only reversal?

**Defense Attorney Britt:** In one of my cases, my client and a buddy of his, both in the Army, were into the Dungeons and Dragons game. It was a big deal going on at the time; several people across the nation committed some bad acts inspired by that game. These guys picked a woman at random on the street and followed her home. Then they got all this martial arts gear, ninja costumes, head-to-toe dressed in black—butterfly knives, blow guns. Their idea was they were ninja warriors who would sneak into the castle and get booty of some kind. They entered the home and brutally murdered the woman and her husband. They were captured two hours later with all the stuff in the vehicle. They accidentally drove into a restricted area. Military police saw them and pulled them over.

Now admittedly, that was a bad case. But one of my other penalty-phase-only retrials did not have horrendous facts. My client dabbled in drugs—nothing heavy—marijuana here and there. He gave ten dollars worth of marijuana to a friend of a friend; the guy was going to pay him later. My client mentioned it to the guy, and the guy kept putting him off. One day, my client saw the guy pull up next to the trailer where my client was living. My client picked up his sawed-off shotgun, approached the guy's car, and basically said, "Where's my money?" Then he shot the guy's head off. My client maintained that the gun went off accidentally. But even if my client shot intentionally, the only really horrendous thing about this case is how messy the killing was. The guy he shot was sitting in the passenger seat. Part of the brain splattered on the driver; the whole inside of the car was just a mess. The prosecution put on plenty of gruesome photos of it. But my client in that case had a second-degree offer, which would have meant a sentence of thirty-five to forty years, and he probably would have served less than half that amount, but there was a change in the prosecutor. The new prosecutor took the offer off the table. I think most people on Death Row in North Carolina at one time had an offer they rejected or that was retracted by the prosecution.

My third penalty-phase-only case was not that terrible, either. My client was separated from his wife. He was arrested for assault or some kind of confrontation between them and was locked up over the weekend. On Monday evening after getting out of jail, he was standing in the roadway outside her house. She drove out to where he was in the road and he fired several shots and one killed her. The prosecution contended he was waiting for her to come out so he could kill her. My client's position was that he was not lying in wait, but that he only wanted to talk to her. But I do not think the intent was the crucial issue for the death penalty. Here is what was: the couple's two infants were in the car at the time. I am sure the jury didn't appreciate that—shooting her and putting the kids at risk at the same time.

**Defense Attorney Epstein:** Two of my penalty-phase-only retrials should not have been death cases to begin with. In one of them, my client was involved in a dispute with some guy who was sitting in a car. My client walked up and shot the guy through the window with a shotgun. The prosecution's aggravating factor was the grave risk to the other person sitting in the car. In my other case, my client argued with a guy in a bar, left and returned in a car, and called the guy over to the car and shot him. These are both run-of-the-mill murders—not deathworthy cases. But for a long time Philadelphia had a district attorney who believed in alleging death in almost every case where there was an aggravating factor, and letting juries decide. There was a time when about eighty percent of homicide cases were designated capital, although sometimes during negotiations before the trial, they would back off the death penalty. But the Philadelphia D.A.'s Office has toned it down in the last six months. I think they decided it was just beating the system to a pulp resource-wise to have all these capital cases.

I had a third case that was not a retrial, but raises the same issues because, due to an odd set of circumstances, there was a different jury in the penalty phase at the original trial. This case had worse facts than the other two. My client robbed one person, robbed a second person and shot him when he resisted, and then went around a corner and pistol-whipped a third man—a nice dentist who was staying in the inner city to work out of a sense of obligation. The cops came and my client pointed the gun at the cops and clicked, but the gun had jammed. My client confessed to everything and could have had a life plea at any time, but would not go for it.

**Defense Attorney Walker:** In one of my penalty-phase-only retrials, my client was a parolee from Texas on a robbery conviction and transferred to Natchitoches Parish. He started working for a lumber mill operator. One day he shot and killed his employer. By the way, my client was black and the victim was white. Within about ten minutes the body was discovered and the local police were called. On the way to the scene, the police passed my client driving the victim's truck. My client was apprehended by the police, interrogated, and he confessed in detail to how the events took place and that he robbed his employer and stole his wallet and his truck. Now this sounds plenty bad, but when the police asked why he shot his employer my client responded that "an old man and an old woman told me to." My client had a long history of mental illness, complete with hallucinations.

In my other penalty-phase-only case, it was clear why the prosecution was intent on the death penalty—the victim was a cop. My client, who was a petty thief, was burglarizing an insurance agency. A police officer saw a window sash out of place and saw signs of forced entry. The officer went into the building and when the smoke cleared, the officer was shot and killed with his own service revolver.

**Defense Attorney Gelman:** The penalty-phase-only retrials I have handled have not been really horrendous cases. They have involved a deliberate killing during a robbery.

**Defense Attorney Silver:** Both of the penalty-phase-only retrials I have handled were initially tried in the 1983–1984 period. Both had taken fifteen-to-twenty year journeys through the courts before I retried them. Both involved death sentences in situations where the jury originally found one aggravator and no mitigators.

One of them, on its face, had very bad facts. My client had a pretty awful-looking rap sheet, and then was sentenced to death twice for killing two people in separate incidents. In fact, he has been tried and convicted four separate times for four different murders. This client is notorious in the prosecutor's office—they consider him to be an evil man. He is not at the very top of their list, but is certainly pretty high up there on the list of people they want executed.

My other penalty-phase-only retrial is an amazing case—it is an incredible example of why the death penalty is so flawed. My client shot an individual in an

abandoned drug house. The decedent was killed by a single bullet to the chest. My client never disputed that he fired the shot, but from the day that my client met his original defense attorney, he asserted that he shot the guy in self-defense because he thought the guy was going to stab him. My client even provided names of two witnesses who would testify that they saw the other guy come up to the house with a knife in his hand. So the original defense attorney sent a letter to the prosecutor stating in sum and substance, “My client gave me name of these two witnesses. Please interview them and tell me if they have anything to say.” This was the letter the defense attorney *sent to the prosecutor’s office* asking the prosecutor to talk to these witnesses! The prosecutors replied that these witnesses had nothing to say. This just should *not* have been a death penalty case! You could put this to the Attorney General Ashcroft and he would say, “Nah, not a death penalty case.”<sup>24</sup>

**Moderator:** These penalty-phase-only retrials must seem odd to the new jurors. The judge instructs them that they have to abide by the guilty verdict, yet they have not heard any of the evidence of guilt. Plus, it will soon come out when the date of the offense is revealed that the case is years—sometimes decades old. What help do jurors get in understanding the strange posture of the case?

**Defense Attorney Britt:** I always file a motion to preclude that a death sentence was found at the first trial. That is always granted. But I think the jurors all understand the case has been reversed and sent back, although that is not told to them in any way—they figure it out. So in theory they do not know, but really they do.

**Defense Attorney Kerns:** That is true. The jury is not supposed to know it is coming back for resentencing. However, it is hard for them not to know. For instance if the crime occurred in 1976 and the new jurors are sitting in 1998, they must be asking themselves, “How come I haven’t read about this is the paper?” The jury is not fooled.

**Prosecutor Laeser:** I agree also. The jury has to be told in very gentle terms that another jury has already heard the trial evidence. If the judge says, “I don’t want the jury to know he’s been on Death Row for fifteen years,” you have to fashion your statements around that. But the dates have not been excised, so the jury knows something is up. My assumption is that there are not twelve people stupid enough not to figure out he has been sentenced to death before.

**Defense Attorney Wright:** If you have a guy who has earlier been sentenced to death, it is virtually impossible to keep from the jury that he has been on Death Row this whole time. The earlier death verdict is a major problem for the defense.

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<sup>24</sup> One assumes Mr. Silver is engaging in hyperbole here.

If a jury has already found him deathworthy, that makes it easier for the new jury to say that this guy should die, since twelve other jurors have already said this.

**Defense Attorney Kerns:** Under Florida procedure, even a seven-to-five vote for death results in a death recommendation to the judge.<sup>25</sup> So it is very important for the defense to ascertain in voir dire how much the jury knows about the first sentencing case. Specifically, do they know how the first jury found—that is, a unanimous verdict, as opposed to a split verdict?

**Prosecutor Morton:** I agree that the new jury will figure out that the defendant was previously sentenced to death. But in terms of what the new jury is likely to know about the facts of the case, I think there is a distinction between populous counties and smaller ones. If the case was tried years ago, in a populous county like the one where I work, it is not likely to have jurors who remember the case. So it is not that different than trying the case for the first time. But in smaller counties, people will remember horrific crimes, publicity and all.

**Moderator:** Prosecutors, how do you try to get the jury up to speed on the guilt/innocence facts? Obviously, you want to do more than simply present the prior verdict form showing the conviction. But do you need to re-present all the guilt/innocence phase evidence, to the extent it is still available?

**Prosecutor Laeser:** In Florida when a case is sent back for resentencing, both parties start from square one, except for the fact of conviction. Indeed, the prosecution can even prove additional aggravating circumstance(s) beyond what it presented at the original trial. Under Florida law, we do not labor under the hearsay rule at the penalty phase, so in a penalty-phase-only retrial, I can put on summary witnesses. I can use a lead investigator to summarize parts or all of the investigation—this is important because it limits the cross-examination the defense can do. So I could put up a very bare bones case, but I do not do that. Strategically, I put on as much evidence as possible. To convince a jury that a death sentence is appropriate is a difficult task. I have to put on as many important witnesses as possible. I have to pull emotional heartstrings. This takes a huge amount of pretrial preparation. Usually it is a very old case; witnesses' memories are not all that sharp. You do not like to refresh their recollection in front of a jury. So it takes a lot of witness preparation.

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<sup>25</sup> See FLA. STAT. ANN. § 921.141 (2003) (establishing that the jury renders an advisory sentencing recommendation by majority vote, and the judge makes the findings of aggravating and mitigating circumstances, and decides the sentence). *But see* Bottoson v. Moore, 833 So. 2d 693, 714 n.34 (Fla. 2002) (reiterating the longstanding Florida rule that the judge must accord great weight to the advisory verdict, *citing* Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975)).

**Prosecutor Benito:** One significant difference in the voir dire in a penalty-phase-only trial is that the jurors do not have to be made to understand the difference between direct and circumstantial evidence.

**Prosecutor Hawkins:** In the case I just finished, at the original trial the prosecution presented over a hundred witnesses. At our new penalty-phase, we presented only forty witnesses. The prosecution still needs to put on a full case, but we are able to dispense with a good deal of foundational evidence. For example, we put in the beginning and end of the chain of custody for physical evidence, like a cartridge case, but not the middle. Actually, that feels weird for a trial attorney who is accustomed to laying a complete foundation.

**Prosecutor Morton:** With new juries, we are not limited to just aggravating and mitigating circumstances. We put on as much guilt phase evidence as needed to put the crime in its context. Juries want to be assured that the person they are going to sentence did in fact commit the crime. Live witnesses are my preference. Otherwise we have to use a detective to summarize the evidence, or transcripts of the original trial will be read back. But that just does not have the same emotional impact (often including tears) that you get from live witnesses.

**Prosecutor McClellan:** In Texas, if you have a resentencing on punishment phase only, the state is going to put on evidence as if it was starting from the guilt/innocence phase. Regardless of what phase is reversed we are going to proceed the same as for a jury who had heard the entire case and was deciding the punishment phase as well. All of these issues come out one way or the other either in laying out the aggravating circumstances or when the mitigating factors are presented. You have to present the facts of the crime itself and put on the same evidence as you would in the guilt/innocence phase. The presentation of the evidence does not differ very much at all. In one case the defendant had been on Death Row for seventeen years before he got a retrial. We re-tried the whole enchilada and were able to put on the same case we had previously. Of course, sometimes you are forced to use transcripts of the previous trial, but that still helps a lot in being able to substantially utilize your original strategy.

**Prosecutor Benito:** Certainly there are downsides to not being able to present all the proof from the guilt/innocence phase because some of it has become unavailable, but the upside is that the prosecutor can choose not to present evidence that was not that strong in the first place, and instead present it in summary form through a good detective. And hearsay is admissible in the new penalty phase.

**Moderator:** I must now break the flow of this discussion to put my law professor hat back on and discuss the law with respect to the two doctrinally interesting issues in this area of the law: to what extent may a defendant attempt to challenge

the guilty verdict; and to what extent challenge a prior finding of an aggravating circumstance?

With respect to a defendant's attempting to *undermine the prior guilty verdict*, the straightforward answer under the "law of the case" principle<sup>26</sup> would seem to be that a defendant is not permitted to do it, since the conviction was upheld on appeal and is binding on the new jury. This is indeed the law in most jurisdictions.<sup>27</sup> There are at least two states, though, in which courts have held that

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<sup>26</sup> This doctrine is ubiquitous in both civil and criminal cases. *See, e.g.,* Landowners v. City of Fort Wayne, 622 N.E.2d 548 (Ind. Ct. App. 1993) (citations omitted):

In general, facts established at one stage of a proceeding, which were part of an issue on which judgment was entered and appeal taken, are unalterably and finally established as part of the law of the case and may not be relitigated at a subsequent stage. Even if the judgment is erroneous, it nevertheless becomes the law of the case and thereafter binds the parties unless successfully challenged on appeal. All issues decided directly or by implication in a prior decision are binding in all further portions of the same case.

We note, however, that the law of the case doctrine is a discretionary rule of practice. This doctrine expresses the practice of courts generally to refuse to reopen what has been previously decided. A court has the power to revisit prior decisions of its own or of a coordinate court in any circumstance, although as a rule courts should be loathe to do so in the absence of extraordinary circumstances.

*Id.* at 549.

*Bickers v. State*, No. E2002-02887-CCA-R3-PC, 2004 WL 34509, at \*2 (Tenn. Crim. App. Jan. 7, 2004) (citation omitted):

The "law of the case" refers to a doctrine which generally prohibits reconsideration of issues that have already been decided in a prior appeal of the same case. Under the law of the case doctrine, an appellate court's decision on an issue is binding in later trials and appeals of the same case if the facts on the second trial or appeal are substantially the same as the facts in the first trial or appeal.

*Id.* at \*2.

<sup>27</sup> *See, e.g.,* Wilcher v. State, 863 So. 2d 776 (Miss. 2003):

It appears that Wilcher is under the impression that he had a right to relitigate his guilt of the underlying capital murder in front of the jury during his resentencing. This Court has held that the guilt of a capital murder is res judicata during the sentencing phase and may not be relitigated . . . . During the guilt phase of Wilcher's trial, a jury found beyond a reasonable doubt the existence of aggravating circumstances. The jury impaneled for Wilcher's resentencing was charged with weighing those aggravating circumstances against any mitigating circumstances.

*Id.* at 833.

*Way v. State*, 760 So. 2d 903, 917 (Fla. 2000) ("If Way had been able to put on the testimony of the expert witness to explain the alternate theory of the crime . . . he would have been [impermissibly] relitigating the question of guilt rather than explaining the circumstances of the crime."); *Holland v. State*, 705 So. 2d 307 (Miss. 1997):

California, among other states, prohibits the introduction of this evidence. *People v. Haskett*, 30 Cal. 3d 841, 180 Cal. Rptr. 640, 656, 640 P.2d 776, 792 (1982) (stating "he [defendant] had no right to attack 'the legality of the prior adjudication . . . .' We found 'self-evident' the proposition that attempts to relitigate a prior finding of guilt are prohibited."), *cert. denied*, 502 U.S. 822, 112 S. Ct. 83, 116 L. Ed. 2d 56 (1991); *see* *Kuenzel v. State*, 577 So. 2d 474, 477 (Ala. Crim. App. 1990) (approving statutory

a defendant *does* have the right at resentencing to present evidence challenging the guilty verdict<sup>28</sup> (although if successful, the defendant would not have the verdict overturned, but would avoid a death sentence). Also, as will be discussed shortly, the permissibility of a defendant's challenging the guilty verdict is problematic when that verdict is closely linked with aggravating circumstances that the defendant *is* entitled to contest.

With respect to a defendant's attempting to *undermine a prior finding of an aggravating circumstance*, the generally accepted and logically unimpeachable principle is that a flawed penalty phase is a nullity.<sup>29</sup> But how this principle plays out in practice is dependent on how a state's capital punishment system is structured. On one end of the spectrum are states like Georgia where first-degree murder is defined without reference to capital punishment,<sup>30</sup> with death eligibility

procedure allowing jury to consider aggravator "proved beyond a reasonable doubt" at sentencing, if used at trial to reach conviction), *cert. denied*, 502 U.S. 886, 112 S. Ct. 242, 116 L. Ed. 2d 197 (1991); *State v. Biegenwald*, 106 N.J. 13, 524 A.2d 130, 160 (1987) (stating "retrial of issues relevant only to guilt is not permitted."); *Stockton v. Commonwealth*, 241 Va. 192, 402 S.E.2d 196, 207 (1991) (holding defendant not allowed to present evidence of innocence in penalty phase), *cert. denied*, 502 U.S. 902, 112 S. Ct. 280, 116 L. Ed. 2d 231 (1991).

*Id.* at 323–24.

<sup>28</sup> See, e.g., *Romine v. State*, 350 S.E.2d 446, 453 (Ga. 1986) (disapproving the prohibition of defense attacks on the guilty verdict, particularly in a resentencing); *State v. Stewart*, 341 S.E.2d 789, 790 (S.C. 1986) (holding that since the State's evidence of guilt is admissible at the resentencing, basic fairness requires that the defendant's evidence contesting guilt be admissible as well).

<sup>29</sup> See, e.g., *Morton v. State*, 789 So. 2d 324, 334 (Fla. 2001) ("Where a defendant's death sentence has been vacated and the case is remanded to the trial court to conduct a new penalty phase proceeding before a new jury, '[t]he resentencing should proceed de novo on all issues bearing on the proper sentence which the jury recommends be imposed. A prior sentence, vacated on appeal, is a nullity,'" citing *Teffeteller v. State*, 495 So. 2d 744, 745 (Fla. 1986)); *State v. Copland*, 300 S.E.2d 63, 75 (S.C. 1982) ("It is axiomatic, of course, that a death sentence infected by prejudicial trial error is a nullity . . . .")

<sup>30</sup> See GA. CODE ANN. § 16-5-1 (1998):

Murder

- (a) A person commits the offense of murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being.
- (b) Express malice is that deliberate intention unlawfully to take the life of another human being which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart.
- (c) A person also commits the offense of murder when, in the commission of a felony, he causes the death of another human being irrespective of malice.
- (d) A person convicted of the offense of murder shall be punished by death or by imprisonment for life.

via aggravating circumstances completely determined in the penalty phase.<sup>31</sup> In such states it is clear that the findings of aggravating circumstances from the earlier null sentencing proceeding do not carry over to the new penalty phase, and the defendant is entitled to present evidence to contest the aggravating circumstances being argued by the prosecution. On the other end of the spectrum are states like Texas whose statutes create a special crime of “capital murder,”<sup>32</sup>

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<sup>31</sup> See *id.* at § 17-10-30 (Supp. 2003):

Mitigating and aggravating circumstances; death penalty:

- (1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony;
- (2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree;
- (3) The offender, by his act of murder, armed robbery, or kidnapping, knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person;
- (4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value;
- (5) The murder of a judicial officer, former judicial officer, district attorney or solicitor-general, or former district attorney, solicitor, or solicitor-general was committed during or because of the exercise of his or her official duties;
- (6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person;
- (7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim;
- (8) The offense of murder was committed against any peace officer, corrections employee, or firefighter while engaged in the performance of his official duties;
- (9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement; or
- (10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

<sup>32</sup> See TEX. PENAL CODE ANN. § 19.03 (Supp. 2004), defining capital murder as murder committed with at least one of the following additional circumstances present:

- (a) A person commits an offense if the person commits murder as defined under Section 19.02(b)(1) and:
  - (1) the person murders a peace officer or fireman who is acting in the lawful discharge of an official duty and who the person knows is a peace officer or fireman;

with the determination of death eligibility at the penalty phase hinging on “special circumstances,” primarily future dangerousness.<sup>33</sup> Such statutes encompass the “aggravating” factors within the very definition of capital murder. Thus, while the findings of special circumstances at the flawed penalty phase are a nullity, the findings of aggravating factors inherent in the guilty verdict should be entitled to preclusive effect.

In the middle of the spectrum are states like Mississippi whose schemes specially define a crime of “capital murder,”<sup>34</sup> but then duplicate some of the

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- (2) the person intentionally commits the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, aggravated sexual assault, arson, obstruction or retaliation, or terroristic threat under Section 22.07(a)(1), (3), (4), (5), or (6);
  - (3) the person commits the murder for remuneration or the promise of remuneration or employs another to commit the murder for remuneration or the promise of remuneration;
  - (4) the person commits the murder while escaping or attempting to escape from a penal institution;
  - (5) the person, while incarcerated in a penal institution, murders another:
    - (A) who is employed in the operation of the penal institution; or
    - (B) with the intent to establish, maintain, or participate in a combination or in the profits of a combination;
  - (6) the person:
    - (A) while incarcerated for an offense under this section or Section 19.02, murders another; or
    - (B) while serving a sentence of life imprisonment or a term of 99 years for an offense under Section 20.04, 22.021, or 29.03, murders another;
  - (7) the person murders more than one person:
    - (A) during the same criminal transaction; or
    - (B) during different criminal transactions but the murders are committed pursuant to the same scheme or course of conduct; or
  - (8) the person murders an individual under six years of age.

<sup>33</sup> See TEX. CRIM. PROC. CODE ANN. § 37.071(2)(b) (Supp. 2004):

- (1) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
- (2) in cases in which the jury charge at the guilt or innocence stage permitted the jury to find the defendant guilty as a party under Sections 7.01 and 7.02, Penal Code, whether the defendant actually caused the death of the deceased or did not actually cause the death of the deceased but intended to kill the deceased or another or anticipated that a human life would be taken.

<sup>34</sup> See MISS. CODE ANN. § 97-3-19 (Supp. 2003):

“Murder” and “capital murder” defined

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elements of capital murder in aggravating circumstances.<sup>35</sup> This raises a doctrinally perplexing issue. For example, the following scenario arose in

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(2) The killing of a human being without the authority of law by any means or in any manner shall be capital murder in the following cases:

- (a) Murder which is perpetrated by killing a peace officer or fireman while such officer or fireman is acting in his official capacity or by reason of an act performed in his official capacity, and with knowledge that the victim was a peace officer or fireman. [definitions of "peace officer" omitted];
- (b) Murder which is perpetrated by a person who is under sentence of life imprisonment;
- (c) Murder which is perpetrated by use or detonation of a bomb or explosive device;
- (d) Murder which is perpetrated by any person who has been offered or has received anything of value for committing the murder, and all parties to such a murder, are guilty as principals;
- (e) When done with or without any design to effect death, by any person engaged in the commission of the crime of rape, burglary, kidnapping, arson, robbery, sexual battery, unnatural intercourse with any child under the age of twelve (12), or nonconsensual unnatural intercourse with mankind, or in any attempt to commit such felonies;
- (f) When done with or without any design to effect death, by any person engaged in the commission of the crime of felonious abuse and/or battery of a child in violation of subsection (2) of Section 97-5-39, or in any attempt to commit such felony;
- (g) Murder which is perpetrated on educational property as defined in Section 97-37-17;
- (h) Murder which is perpetrated by the killing of any elected official of a county, municipal, state or federal government with knowledge that the victim was such public official.

<sup>35</sup> See *id.* at § 99-19-101:

Jury determination of death penalty

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(5) Aggravating circumstances shall be limited to the following:

- (a) The capital offense was committed by a person under sentence of imprisonment.
- (b) The defendant was previously convicted of another capital offense or of a felony involving the use or threat of violence to the person.
- (c) The defendant knowingly created a great risk of death to many persons.
- (d) The capital offense 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 robbery, rape, arson, burglary, kidnapping,

Mississippi: the defendant was convicted at trial of capital murder on the basis of a definition that included murder committed during the commission of rape, and the jury also found at the penalty phase the aggravating circumstance of rape and sentenced the defendant to death. An appellate court later affirmed the conviction but overturned the death sentence. The prosecution elected to retry the penalty phase, and the defendant sought to present evidence contesting that he committed rape. A logical conundrum is apparent: the finding of rape in the capital murder conviction should have preclusive effect, but at the same time the finding of rape as an aggravating circumstance is a nullity, and thus apparently challengeable by the defendant! The Mississippi Supreme Court, in a split decision, held that the defendant could not challenge the finding that he had committed the rape<sup>36</sup> (although presumably he could have presented evidence that his role in the rape, as an accomplice for example, had been less than fully culpable, because this would have related to the “circumstances of the offense.”) A similar example comes from a Florida case, where a defendant whose convictions of murder and arson were affirmed was held to have been properly barred from presenting evidence at the resentencing showing he was not guilty of the arson, although he would have been permitted to show a relevant mitigating circumstance such as that he had played a relatively minor role in the arson compared to other accomplices.<sup>37</sup>

To make matters more complex, the same analytical conundrum can arise even in a state where the definition of first-degree murder is not duplicated in the aggravating circumstances. For example, imagine that in Georgia a defendant is convicted of two counts of murder at the original trial, and sentenced to death after

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aircraft piracy, sexual battery, unnatural intercourse with any child under the age of twelve (12), or nonconsensual unnatural intercourse with mankind, or felonious abuse and/or battery of a child in violation of subsection (2) of Section 97-5-39, Mississippi Code of 1972, or the unlawful use or detonation of a bomb or explosive device.

- (e) The capital offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.
- (f) The capital offense was committed for pecuniary gain.
- (g) The capital offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.
- (h) The capital offense was especially heinous, atrocious or cruel.

Comparing the Mississippi definition of capital murder, *supra* note 34, with the aggravating circumstances, the substantial overlapping provisions of the murder definitions and the aggravating circumstances are, respectively, 2(b) and 5(a), 2(c) and 5(c), 2(d) and 5(f), 2(e), (f) and 5(d), and 2(h) and 5(g).

<sup>36</sup> *Holland v. State*, 705 So. 2d 307, 324–27 (Miss. 1997). Compare the dissenting opinion in which three judges joined, *id.* at 358–59 (Prather, J., dissenting).

<sup>37</sup> *See Way v. State*, 760 So. 2d 903, 917 (Fla. 2000).

the jury finds the aggravating circumstance of multiple murders.<sup>38</sup> The convictions are then affirmed on appeal, but the sentence reversed. The conundrum is again apparent: in the new penalty phase, the two murder convictions would be entitled to preclusive effect, but the finding of the aggravating circumstance of multiple murders would be a nullity. So, should the defendant be permitted to introduce evidence at the resentencing that he did not commit one of the murders?<sup>39</sup> The same conundrum would arise if the defendant had been convicted in the earlier proceeding of first-degree murder plus another felony arising out of the same course of criminal conduct that provided the finding of an aggravating circumstance<sup>40</sup>—at a resentencing, is the defendant entitled to present evidence to contest his commission of the other felony as an aggravating circumstance, even though the guilty verdict of that felony is entitled to preclusive effect?

Yet another complexity is that the aggravating factor of prior serious felony convictions of a defendant may be entitled to special treatment. The Supreme Court has held in the non-capital context that the fact of a prior conviction is an issue to which a defendant is not entitled to a jury determination,<sup>41</sup> and at least one state supreme court has held that this principle carries over to capital sentencing.<sup>42</sup> If this is true, then probably a jury at a resentencing could be instructed that a prior conviction aggravator found by an earlier jury is entitled to preclusive effect. Even this wrinkle has another wrinkle, though, because if the prosecution goes beyond trying to prove the *fact* that the defendant was convicted, and seeks to prove the *underlying details* of the conviction, then one can be certain defendants would often try to fight preclusive effect by contesting that the underlying facts are really as damning as the prosecution claims.

To the extent a defendant at a resentencing attempts to present evidence to undermine a guilty verdict, or an aggravating circumstance inherent in a guilty verdict, the governing law from a *constitutional* standpoint is that relating to “residual doubt,” a.k.a. “lingering doubt” or, more pejoratively, “whimsical doubt,”<sup>43</sup> “Residual doubt” is a term to describe the phenomenon that a juror who

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<sup>38</sup> See GA. CODE ANN. § 17-10-30(2), *supra* note 31.

<sup>39</sup> See *supra* notes 30–31 and accompanying text for authority that Georgia would permit the defendant to attack the existence of the multiple murder aggravator.

<sup>40</sup> See *supra* note 31.

<sup>41</sup> See *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (exempting fact of prior conviction from the requirement of a jury trial).

<sup>42</sup> See *Stallworth v. State*, 868 So. 2d 1128 (Ala. 2001). See generally *State v. Ring*, 76 P.3d 421, 425 (Ariz. 2003) (analyzing in the aftermath of *Ring v. Arizona*, 536 U.S. 584 (2002), the preclusive effect of various aggravating circumstances in consolidated cases involving numerous defendants whose death sentences were overturned because a judge rather than a jury had found aggravating circumstances).

<sup>43</sup> See *Holland v. State*, 705 So. 2d 307, 325 (Miss. 1997) (“Holland argues that our caselaw requires the trial court to permit his presentation of evidence on whimsical or residual doubt. Our caselaw has prohibited counsel from doing more than asserting whimsical doubt at closing argument.”).

has found the defendant guilty beyond a doubt still may be unwilling to sentence the defendant to death if there is the slightest doubt in the juror's mind about the defendant's guilt.<sup>44</sup> While the defendant is entitled to present penalty phase evidence concerning "the circumstances of the offense,"<sup>45</sup> and doubt about the defendant's guilt is arguably relevant to the circumstances of the offense, the Supreme Court long ago rejected this argument. In *Franklin v. Lynaugh*<sup>46</sup> the Court held that "residual doubt" does *not* relate to the "circumstances of the offense," and thus a defendant has no constitutional right to a jury instruction that the sentencer can consider residual doubt in determining the sentence.<sup>47</sup> Most states have followed the Court's lead on this issue, and refuse to permit the defendant to introduce evidence at the penalty phase to suggest a doubt about the defendant's guilt, or to require an instruction that the jury may consider residual doubt in determining the sentence, although somewhat paradoxically, a fair number of states do nonetheless permit defense counsel to *argue* residual doubt in summation at the penalty phase, even though the defense is not entitled to present any additional evidence to show lack of guilt, and is not entitled to a jury instruction.<sup>48</sup>

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<sup>44</sup> See William S. Geimer & Jonathan Amsterdam, *Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases*, 15 AM. J. CRIM. L. 1, 27 (1987–88) (defining "residual" or "lingering doubt" as "(1) actual, reasonable doubt about guilt of any crime; (2) actual, reasonable doubt that defendant was guilty of a capital offense, as opposed to other offenses; (3) a small degree of doubt about (1) or (2), sufficient to cause the juror not to want to foreclose (by execution) the possibility that new evidence might appear in the future."). For academic discussions of residual doubt, all arguing that it should be accorded constitutional weight, see Margery Malkin Koosed, *Averting Mistaken Executions by Adopting the Model Penal Code's Exclusion of Death in the Presence of Lingering Doubt*, 21 N. ILL. U. L. REV. 41 (2001); Christina S. Pignatelli, Note, *Residual Doubt: It's a Life Saver*, 13 CAP. DEF. J. 307 (2001); Jennifer R. Treadway, Note, "Residual Doubt" in Capital Sentencing: No Doubt It Is an Appropriate Mitigating Factor, 43 CASE W. RES. L. REV. 215 (1992).

<sup>45</sup> See *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (reiterating that the triumvirate of "character," "record," and "circumstances of the offense" are matters about which the defendant has a constitutional right to present mitigating evidence); see also *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (establishing this triumvirate).

<sup>46</sup> 487 U.S. 164, 171 (1988).

<sup>47</sup> *Id.* at 174:

Our edict that, in a capital case, "the sentencer . . . [may] not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense," *Eddings v. Oklahoma*, 455 U.S. 104, 110, 102 S. Ct. 869, 874, 71 L.Ed.2d 1 (1982) (quoting *Lockett*, 438 U.S., at 604, 98 S. Ct., at 2964), in no way mandates reconsideration by capital juries, in the sentencing phase, of their "residual doubts" over a defendant's guilt. Such lingering doubts are not over any aspect of petitioner's "character," "record," or a "circumstance of the offense." This Court's prior decisions, as we understand them, fail to recognize a constitutional right to have such doubts considered as a mitigating factor.

*Id.* at 174.

<sup>48</sup> See Koosed, *supra* note 44, at 86–87 (footnote omitted):

The concept of residual doubt is normally associated with an original trial where the same jury determines both guilt and sentence. But for the sort of cases that are the subject of this article—resentencings years later before a new jury that is instructed that the guilt finding is binding—perhaps we should coin a new term, like “belated residual doubt.” Even this may be a misnomer, because how can there be “residual” doubt when the new jury does not have any “residue” in its memory? In this matter, as in so many others, capital defenders feel put upon. Even though residual doubt has no constitutional status even at an original trial, there are still ways a good lawyer may *sub silencio* seek to invoke its benefits. But if there is no residue of doubt to draw upon, and no constitutional right to try to create a residue of doubt, even good defense lawyers may founder. But there is a practical consideration that cuts at least somewhat the other way: prosecutors generally have an incentive to present guilt/innocence phase evidence at the resentencing to familiarize the jurors with the case—and to energize their outrage so as to induce a death verdict. And once the prosecutor presents evidence relating to guilt, the defense may be able to undermine it by deft lawyering.

Now, getting back to our panel discussion, I am sure you all agree that the issues of law of the case and residual doubt loom large with respect to resentencings. From a practical standpoint, death penalty litigators know residual doubt is a real and important phenomenon.<sup>49</sup> The peculiar thing about the new jury

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In the wake of frequent apparent misinterpretations of *Franklin* as holding that residual doubts never matter, residual doubt seems to have become a largely unavailable protection in the lower courts. Courts rarely reverse for failure to give the instruction, perhaps leading some trial judges to be less forthcoming in giving them. The Illinois Supreme Court and many other state courts sometimes approve of defense argument about residual doubt but generally refuse to require jury instructions.

*Id.*

Professor Koosed argues that the “misinterpretation” of *Franklin* consists of first, failing to recognize that the Court’s pronouncement is arguably dictum; and second, failing to recognize that while a majority of the Court may have held that no evidence of residual doubt about the defendant’s *identity* as the culprit relates to the circumstances of the offense, a majority also seems to have believed that residual doubt evidence directed at the defendant’s *mental state* or *causal role* does relate to the circumstances of the offense. *Id.* at 76–77.

<sup>49</sup> See William J. Bowers, Marla Sandys & Benjamin D. Steiner, *Foreclosed Impartiality in Capital Sentencing: Jurors’ Predispositions, Guilt-Trial Experience, and Premature Decision Making*, 83 CORNELL L. REV. 1476 (1998). In an ongoing project of interviewing capital jurors after their service, the jurors were presented with a list of fifteen possible mitigating factors, including residual doubt, and asked about their importance. The researchers summarized their findings as follows:

By far, the strongest mitigating factor was lingering doubt, the one that read, “Although the evidence was sufficient for a capital murder conviction, you had some lingering doubt that (the defendant) was the actual killer. Some 13.4% of the jurors indicated that this was a factor present in their case; of these, 62.9% said it was very important in their punishment decision, 69.2% said it made them “less” likely, and 48.7% said “much less” likely, to vote for death. In fact, of the 116 jurors who said that this was a factor in their case, 69.5% cast their final vote for life in comparison to 41.7% of the 756 jurors who said this was not a factor in their case. Lingering doubt outstrips its nearest rival, as a

in a penalty-phase-only retrial is that they have no basis for having a residual doubt, since they have not heard the guilt/innocence phase evidence. I am guessing, though, that prosecutors still have to worry about the defense attempting to inject doubt about the conviction, and any inherent aggravating circumstances. Am I right about that?

**Prosecutor Benito:** The residual doubt phenomenon is very real. If one jury hears both phases of a capital trial the jury wants to make sure that justice is handed out and a guilty verdict is handed down. If it was a close case of guilt or innocence, the jury is not going to then recommend the death penalty. They may have lingering doubts about guilt or innocence and they can feel like they have served justice by handing down a guilty verdict but helped the defense by not recommending a death sentence. But that dynamic just does not exist for the new jury. And if the defense tries to inject it, and the prosecutor objects, the judge may reel the defense in and admonish the jury that they are not dealing with guilt or innocence regarding this phase.

**Prosecutor Laeser:** Even though the jurors are told they have to assume guilt, some jurors are very hesitant to accept someone else's finding. Some feel they have to be absolutely certain of guilt before assessing a death sentence. As a practical matter, we usually do present enough evidence to persuade them, but we do not take anything for granted.

**Prosecutor Hawkins:** We are quick to shut the door on any residual doubt theory with an objection. Plus, defense lawyers have to be wary of losing their credibility. If they have a mountain of evidence coming against them showing the defendant's guilt, they lose credibility if they nitpick the details. Also, if a jury feels that a lawyer is wasting their time, the lawyer is going to lose credibility with the jury.

**Prosecutor Laeser:** Actually, I love when defense lawyers try to cast doubt on the defendant's guilt. I tell the jurors that the defense attorneys are asking them to disregard the law the judge has given them. Trying to inject doubt is counter-productive because it is extraordinarily difficult to argue that the defendant is not guilty.

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“very important” sentencing consideration, the “defendant had a history of mental illness,” by 18.6 percentage points; it outstrips its nearest rival that made jurors much less likely to vote for death, “the defendant was mentally retarded,” by 12.3 percentage points. These data reveal that doubt about the defendant's guilt is both a fundamental and abiding moral concern of jurors in deciding the appropriate punishment. The haunting possibility of an erroneous capital murder conviction, and even more so, the prospect of condemning and even executing an innocent person, is more formidable in jurors' decision making than any of the other mitigating considerations.

*Id.* at 1534.

**Prosecutor Morton:** The defense will particularly try to create residual doubt in cases involving multiple defendants. They try to make the defendant seem less accountable by attempting to shift the blame to the other accomplices. I generally will not try to stop that unless it becomes out-of-hand or egregious. In fact, it lets me focus the jury even more on facts that establish the defendant's guilt. Also, I try to avoid appealable issues because our supreme court is very strict on how we can argue aggravating circumstances.

**Prosecutor Williams:** Of course, the defense is not supposed to be able to make a residual doubt argument—but they do. For example, they cross-examine witnesses to point out weaknesses, bias—all the things they would try to do in the guilt stage of the trial. It all depends on the judge how much of this is permitted. For example, in one of my penalty-phase-only retrials, the judge permitted the defense to make basically the same guilt/innocence argument it had lost at the original trial, that is, the defendant's contention that a guy named Bobby (surname unknown) did the crime while the defendant only watched. It was very difficult for the jury to reconcile this argument with the instructions given that they were to accept the guilty verdict as a given. I had to argue that the defendant had presented the same theory to the first jury, and they had rejected it. Of course, the claim was really weak to begin with. There were neither fingerprints on the knife nor any other evidence of there being another person. The people next door said they only heard one person and other people saw him walking in the area alone. Another key point was that the case detective had gone down and interviewed the defendant right after the crime, who said, "Bobby did it." The case detective said, "I don't believe you," and the defendant finally admitted that he had committed the murders. The jury at the retrial was convinced the defendant was making it up.

Anyway, the judge in that case—and I think most judges in these cases—bend over backwards to be lenient in letting the defense make its case. The judges do not want to commit error in the resentencing that will result in the case getting reversed again.

**Moderator:** Defense lawyers, the prosecutors all believe that you try to inject residual doubt. Are they right?

**Defense Attorney Wolfrum:** If there are problems with the state's proof at the guilt phase, those are still worth pointing out to a jury in the penalty phase. Juries sometimes want more than proof beyond a reasonable doubt in order to give someone the death penalty. If there is any doubt about guilt, the jury is not going to sentence to death. I have seen instances where jurors said that the doubt was a factor in their mind during the second stage proceeding.

**Defense Attorney Britt:** I have not tried to inject uncertainty about conviction. As far as "whodunit," there was no question in any of the cases I have dealt with. I

have found that if there is a significant question about who did it, the prosecution will negotiate a plea bargain.

**Defense Attorney Wright:** I think defense lawyers should always thoroughly investigate the state's case to try to find holes in the guilt/innocence phase and attempt to introduce evidence of those at the penalty phase. The law says the jury can look at the "circumstances of the offense."<sup>50</sup> The state sure harps on them. So I contend that I can argue, "Oh, he's not even guilty of it"—although I recognize that argument may not be available after *Franklin v. Lynaugh*.<sup>51</sup> In one of my penalty-phase-only retrials, we fought hard that my client did not commit the burglary. It was a love triangle: my client goes to the apartment and finds his girlfriend in bed with another guy so he pours gasoline on them and lights it up. The man survived. If my client is to be believed, he says he lived with her and says she let him in—so that would make it no longer capital offense because the murder was not during the course of a burglary.

In my other penalty-phase-only case, there really was no doubt at all that my client was the culprit. The crime was a horrible rape/murder, and we just told the jury they were not going to hear much from us about the crime. He had been found guilty, and we were not there to dispute that. Still, the State put on quite a bit of evidence to show the offense. They went to a lot of trouble to make him sound smarter and more horrible than he was by trying to emphasize the thought processes that would be necessary to commit the crime.

**Defense Attorney Gelman:** You cannot challenge a finding of guilt, although you can subtly try to inject some doubt. But it is usually better not to because the prosecutor can really slam you on that. Plus, I do not think it is likely to be effective to try to get this jury to say the first jury made a mistake—that is just not going to happen. So you proceed with the assumption that they have been convicted and try to show more mitigating circumstances than aggravating.

**Defense Attorney Silver:** I think trying the penalty phase to a new jury may give the defense a slight advantage in contesting the aggravators, over the original trial. It would be very hard to attack the aggravators right after you had just tried and lost the guilt/innocence phase of a trial that included the aggravating evidence. If you started trying to water down what they heard, I think the jury will resent you. But before a new jury, it is possible for the defense to present evidence concerning why the crime is not as bad as it seems. You are telling the jury, "I'm not asking you to say he's not guilty, just that there is something about the crime that is not that horrible." It is a difficult balancing act. In one of my retrials, the judge did

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<sup>50</sup> See *supra* note 45 and authorities cited therein.

<sup>51</sup> 487 U.S. at 174. In light of the holding of *Franklin*, this assertion seems incorrect as a matter of constitutional law, although perhaps a judge who is particularly reversal-averse might let a defense lawyer get away with the argument.

not follow the distinction between challenging the conviction and challenging the aggravators, and got frustrated with us.

In a sense, the prosecutor's desire to present as much of the evidence as possible from the original trial is not all bad for the defense—it can open some possibilities for counterattack because the more prosecution evidence there is, the more there is to possibly undermine. For example, in one of my retrials the prosecutor's case attempted to bring in smidgeons of evidence from all four of my client's murder convictions and how horrible they were. We challenged the details. The prosecution brought in the rifle used to kill one of the victims—literally held up for the jury—but my client had not shot the gun. On cross I asked, "I'm sorry, did you say my client shot that?" and the witness had to answer that my client had not. In fact, by putting on that evidence, the prosecutors enabled us to expand upon a common theme, which was our client was the dumb guy who was always dragged along as the extra stooge. He would do anything to be part of the crowd. I will point out that this was a tactic the original defense lawyer could have used. The difference is that we were better prepared. We obtained original trial transcripts and examined them closely so that when evidence came up we were prepared to ask questions like, "He didn't shoot the gun, did he?"

**Defense Attorney Britt:** I agree. Even if you are not contesting the conviction, you should not just sit there and listen to the prosecution present their case. You cross-examine and try to put your own slant on the facts. Perhaps there are some facts that might weigh on mitigation. You want to emphasize those and de-emphasize the aggravating aspects.

**Defense Attorney Silver:** But I will add that there is a way in which prosecutors have a big advantage when the penalty trial is being handled by a defense attorney who did not handle the original sentencing. The prosecutor's office has all the files on the case. The new defense lawyer gets the files of the earlier defense counsel. In one of my retrials, the prosecutor was able to ambush us with evidence we did not know about.

**Moderator:** Another singular issue about these penalty-phase-only retrials is that they always involve a crime that is many years old, because of the time involved in the appellate process that resulted in the reversal. Prosecutors, do you find that it is difficult to get jurors fired up enough to impose a death sentence in a case that is years old, and where the passions of the moment may have cooled?

**Prosecutor Hawkins:** First, it is important to point out that this is an incredibly emotional task we ask these jurors to do. Just last week I finished a penalty phase retrial where the facts were some of the most horrendous I have ever dealt with, both in terms of the defendant's crimes and his record—he was a "poster boy" for the death penalty. The jury did vote unanimously for death, but the foreman was so distraught he could barely pronounce the verdict. I think every juror was in

tears. I always try to talk with jurors in death cases after they have reached their verdict, but often it just is not possible without intruding too much when they are in an emotional state.

**Prosecutor Benito:** I do think death penalty cases catch jurors off-guard. Here you have twelve people who likely thought they were going to be in a trial for drunk driving, car theft, or domestic abuse. Then you sit them down and tell them they have to consider whether this man should live or die. They sit up and take notice! I do not think it matters whether the crime occurred ten years ago. When they are thrust in the middle of deciding whether someone should live or die, it all becomes very immediate to them.

**Prosecutor Laeser:** I agree that the time lapse does not make much difference. My death penalty cases do not come to trial the *first* time for three to five years. That is because, first, most of these defendants do not want a trial at all, let alone a speedy one; and second, Florida law allows full criminal deposition rights in all cases. Sometimes a case like this will have well over a hundred witnesses. It is hard to get everyone together to do even one deposition, especially if there are multiple defendants. So it takes years to get all the pre-trial preparation done. So even in original penalty phase proceedings, several years will have elapsed since the crime.

**Prosecutor Morton:** I disagree that the time lapse is mostly insignificant for the prosecution. I think the time lapse is a large factor in the defense's favor. Since the crime is not current, the community does not feel as affected by it. My county is urban and fast-growing, so a crime that may have affected psyche of community ten or fifteen years ago will not have the same effect today. Sometimes the prosecution has to present the evidence at the penalty phase in summary fashion, and that just does not have same impact on juries. And on the defense side, they can add new mitigating circumstances. They usually put on by live witnesses, and juries can relate to people rather than cold transcripts. The bottom line is, of the several cases where I have sought the death penalty again, combined with a half-dozen cases of my colleagues of the same kind, I can only think of one where the jury for the second time recommended the death penalty.

**Prosecutor Williams:** I have not noticed that reluctance by jurors, but perhaps that is because all the penalty-phase-only cases I have done have been multiple murders. When the defendant has killed more than one person, I think the jurors tend to be more secure in imposing the death penalty. They do not think, "Hey, I'm putting someone in the electric chair who maybe shouldn't be there." Instead, they think, "Hey, he's got other murders, he's a really bad guy . . . ."

**Moderator:** Regarding the evidence available to the prosecution, are there usually still victim impact witnesses<sup>52</sup> available?

**Prosecutor McClellan:** Victim impact evidence is almost always still available. Sometimes we put on such evidence, but personally, I am not a big believer in it. I think it has zero affect on a jury's decision. Certain things are going to be obvious to a jury. If a mother with small children is killed, then obviously a jury is going to recognize the impact that will have on her family. It would not bother me at all if it were never allowable to put into evidence a victim impact statement. Victim impact statements are pretty limited as to what they can include, anyway. The trauma of any murder is very obvious to any jury.

**Prosecutor Laeser:** I do not believe in victim impact evidence, either. If I present it at all, it will be in front of a judge, and I usually just read a statement they have given. I do not think it should matter if you have fifteen family members who have clout or fifteen who do not. It just is not right that somebody who has a wealthy or large or respected family and somebody else has a family that is unwilling to come to court, or not as wealthy, or whatever. I realize that to many people it seems imbalanced that the defense can present all this heartrending evidence for the defendant and the prosecution really cannot. But victim impact evidence is not fair, so as a matter of personal policy I do not use it. And by the way, remember there is always another set of victims: the truth is for most of my cases, the killer also "killed" his own family. Really deep down, the family hoped this was the nephew who would make it okay, and then found out he has gone out and become a serial killer or something.

**Prosecutor Hawkins:** For me, it is a strategic call whether victim impact testimony will really help. For example, in the case I just finished, we did not use any victim impact statement evidence. It was already 7:30 p.m. and my cross of the defendant's psychologist painted an ugly picture of the defendant. I did not think we needed victim impact evidence at that point. Plus, we already had put in a form of victim impact evidence from the crime itself: the victim's husband, who had also been shot and left for dead by the defendant survived, and testified about the event. Obviously, his testimony was very powerful—he could barely keep it together on the stand, even though it was years later and he was remarried.

**Prosecutor Williams:** I take a middle-of-the-road position on victim impact evidence. I do not believe it makes a lot of difference to the jury, but it is good for the victims' families to have that input. And if you have a defense strategy that puts on a lot of evidence about the defendant's bad childhood, remorse, that kind of stuff—victim impact evidence balances it out a bit.

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<sup>52</sup> See *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (permitting the prosecution to present victim impact evidence without violating the Eighth Amendment).

**Moderator:** Defense lawyers, what about the “heartrending” evidence of the defendant’s bad life that often is presented at the penalty phase. Is that harder or easier to come by and present years later? And does it seem to be effective?

**Defense Attorney Britt:** For one of my penalty-phase-only clients we presented mitigation evidence of his horrible life story. He was raised in the midst of terrible abuse. He witnessed his mother being abused and was raised in that atmosphere of fear. The father was a crazy, mean drunk. He would beat on the mom and fire guns throughout the house. To me it was very compelling. But the jury returned a death sentence anyway. Our investigator talked to some of the jurors afterwards and they said that they didn’t believe the family situation was as bad as we portrayed it. They figured that if it had been that bad, someone would have stepped in and stopped it! And this was before social services, or at least before they were as active as they are now. This was a rural county—what went on in the home stayed in the home. For those jurors to have the reaction they did, I just could not believe it. I was just stunned that they could think that!

My other penalty-phase-only client, the guy who was influenced by Dungeons and Dragons, also had one of the most horrendous histories. His mother was schizophrenic, or at least seriously mentally ill. She was a horrible mother; exposed her children to her engaging in sex, they witnessed knifings, and they witnessed one homicide, I believe. She taught my client and his brother to steal. They hardly ever went to school, and she was constantly running and hiding. She raised these boys in the most horrible fashion, with whatever man she could hook up with. At times, they lived in cars. The boys had quite a social services history. I even called the dad to testify. He was stable, and had remarried. He had gone through a nightmare of a process with the courts to get custody of the boys and could not. But all that fell on deaf ears with the jury. They returned a death sentence anyway. I suppose they just could not get past the horribleness of the crime.

**Defense Attorney Wright:** In one of my cases we proved horrible child abuse and mental retardation. The two play off of each other. Mental retardation can be caused by a significant amount of abuse—my client had significant head injuries. It shows up in medical tests and early diagnoses. Despite this, we have lost this penalty phase each of the three times we had tried it. Once the jury has seen these nice parents, nice pictures of the girl and then they bring on the autopsy/murder pictures, we knew we were not going to win anything without a hearing procedure where retardation was the sole issue—a hearing we asked for, but did not get. So our prospects were bleak even though we put on about three times the quantity and quality of evidence as we had before, especially in regards to experts. But the state was also putting on a better case than they ever had; much greater detail about the mental process that a person would go through to commit the crime—“If the guy can think this well, he’s not retarded.” Still, there is no doubt in my mind, based on twenty-five years of death penalty experience, that my client is retarded. But I

made a big mistake of putting him on the stand in 1990 for his competence trial. What he said was used against him later in federal habeas and in the media, too. If you were there and you heard him testify, you would understand his retardation, but just by looking at what he said in black and white on paper he does not sound retarded.

**Defense Attorney Kerns:** In one of my cases we established a dramatic mitigation case on his behalf. He had a horrible, deplorable childhood. We assembled quite a bit of information and convinced the state attorney not to go after the death penalty on him and agree to a life sentence.

For one of my clients I was able to present some unusual mitigation: he had received some notoriety as a writer while in on Death Row. We brought in writers and editors to testify he had social value as a writer. In fact, in that case the victim's closest relative actually testified for the defense in the retrial. My client had killed this person's great aunt. The niece originally corresponded with my client and then met him because she was trying to understand how someone could do what he had done to a wonderful person like her aunt. She found him to be a human being, and became interested in his writing—she was also a writer. A relationship developed between the two. The niece testified how he helped and assisted her. I have seen victims and defendants reconcile on a number of cases. But the jury apparently did not receive any of that well—they returned a death sentence.

For one of my clients, the most mitigating factor was his relatively old age. In fact, his prison nickname was “Pops.” He was in his mid-fifties for the first homicide case, for which he got the death penalty. And while that case was getting reversed for a new penalty phase, he was indicted on another murder charge. By then he was in his mid-sixties and in pretty poor health. The lawyer who was handling the second homicide and I managed to get life sentences on both cases from the state.

**Defense Attorney Epstein:** The defense can also try to accentuate the positive. For one of my clients the basic thrust of his mitigation was that he had helped a lot of people in his family.

You cannot always show a horrible childhood. One of my clients came from a lovely family and everybody but him was quite accomplished. But in jail, he helped others; he even talked another inmate into going to drug rehabilitation.

**Defense Attorney Walker:** The context the jury comes from is very important. For one of my clients, we could present evidence from the local welfare department showing he was removed from home due to child neglect and had lived a typical sort of childhood full of abuse and neglect. It is the type of poverty and malnutrition that you see in most of these cases. But where his family lived, which is also where the jurors lived, poverty is widespread. I do not know that the

evidence would have had a great effect on that jury. Fortunately, we worked out a deal so he did not have to face a jury verdict.

**Defense Attorney Gelman:** I want to point out that there is a rarely mentioned downside to the rubric that the defense can present evidence regarding the defendant's "character, record, and circumstances of the offense."<sup>53</sup> On the plus side, this does permit evidence of rotten childhood and so forth. But the downside is that before that formulation, a defense attorney had much greater latitude in arguing to the jury. In essence, the parameters of argument have changed from essay to short-answer. Formerly, a defense lawyer could refer to his own life experiences. A lawyer could also ask the jurors to consider the larger policy questions, like whether the death penalty is a deterrent, and whether it is administered evenly. Also, a defense lawyer used to be able to say things like, "Jesus loves my client; you kill him at your own peril." Today, a judge would hold you in for contempt for that—there is a *per se* rule against quoting the Bible in Pennsylvania in death penalty cases.<sup>54</sup> Today, your whole argument and approach are different. But a defense lawyer can still draw on Biblical themes. I can still argue about the virtue of mercy and forgiveness, and how if a person practices those principles that person might later get some for themselves. And I still argue that it does not make sense to have in-kind punishment only for some murder cases.

By the way, I think the "danger of death to more than one person" is a relatively weak aggravator. In one of my cases, the murder victim and a female passenger were in a car. My client put the gun past the woman in the car and shot the victim, and then tried to shoot the woman. But she ended up only with a minor wrist wound. In argument I asked the jury, "Are you going to kill my guy when you have a living victim? You don't kill someone for an attempted murder." The jury returned a life verdict. And of course, you always point out that your client is not getting away with anything—he is still going to have to spend his life in prison.

**Defense Attorney Silver:** For one of my clients, we were able to present proof that his I.Q. was in the mid-fifties—well below the seventy that is considered as the upper boundary of mentally retardation.<sup>55</sup> I think he is a guy who is a paradigm example of someone who was the product of a horrible environment, severely lacking in mental capacities and doing whatever his brother and their crowd

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<sup>53</sup> Lockett v. Ohio, 438 U.S. 586, 604 (1978).

<sup>54</sup> See Commonwealth v. Chambers, 599 A.2d 630, 644 (Pa. 1991) ("We now admonish all prosecutors that reliance in any manner on the Bible or any other religious writing in support of the imposition of a penalty of death is reversible error *per se* and may subject violators to disciplinary action."). Presumably, disciplinary action would equally lie against a defense attorney who made such arguments against a death sentence.

<sup>55</sup> See Atkins v. Virginia, 536 U.S. 304, 309 n.3 (2003) ("Mild mental retardation is typically used to describe people with an IQ level of 50–55 to approximately 70.").

wanted him to do. Although we were only trying one sentence, the other cases were brought in by the prosecution. We found he was not the ringleader, but always the follower and in all instances, he did not inflict the mortal wound. It matters when determining ultimate culpability. If I read his story in the paper about this guy killing four people in four different situations, and I was on the fence for the death penalty, I would think, "Gee, here's a case for the death penalty." I thought there was a very strong possibility that he would be sentenced to death again. I had always known the case as being a very horrible one. Upon looking further, I realized it was winnable.

My theory of mitigation is to try every way possible, because you never know what might work with one juror. We spent the money for an expensive PET scan, and found visual evidence of organic brain dysfunction. We showed the jury that he was mentally retarded, and I think it was very persuasive. I framed the first question to the jury: "Are you prepared to execute someone who is mentally retarded? Is that how you want to start the millennium?" We got a life verdict.

I also think it is very important at a resentencing for the jury to know your client, and if possible, like your client. You need to put your client on the stand to show remorse. I could not do that with my mentally-impaired client because there would have been no way for me to control what he would say. But I put my other client on the stand. The risk of that, though, is that your client is then on record as saying he killed the victim, which might be detrimental in some later proceeding.

**Moderator:** Prosecutors, how do you attempt to counter this kind of defense evidence?

**Prosecutor Laeser:** My experience is for the defense attorney in the penalty phase to throw everything against the wall. Each juror the defense can pick off is to its benefit, because in Florida, if they get six, they win. And even if they do not get enough to avoid the death sentence, for the Florida Supreme Court I think it makes a difference whether the vote was twelve-to-zero or eleven-to-one for the prosecution, or only eight-to-four or seven-to-five. The appellate court may be more inclined to find error if there were a significant number of jurors voting against death.

My response to all the defense evidence about what a bad life the defendant has had is to say to the jury, "Of course I feel bad that society has created a monster, but should the bad background in the past disable us from imposing an appropriate punishment now?" I had one death penalty case where the guy was raised as a trained guerilla killer from childhood in Central America. He made it to the U.S. and killed here. But does that mean society should not be able to impose a fitting punishment?

**Prosecutor Hawkins:** I think mitigation has to really stand out for juries to take note. I tried a mildly retarded man and that was not enough mitigation for that jury.

It can be great for the prosecution when the defendant testifies at the resentencing. In the case I just finished, the defendant testified, even though the defense lawyers did not want him to. I think he was trying to personalize himself. But he minimized the crimes and did not even want to admit them. He claimed that he “lost time” like the defendant in the movie “Primal Fear.” He said he did not remember the offenses at all. A prosecutor does not get many chances to cross-examine a defendant in a death penalty case. It was a lot of fun. He was not a good witness. Our psychologists diagnosed him as an anti-social personality. We put the psychologist on after the defendant testified and that basically destroyed anything the defendant said.

The defense presented testimony that he had a major cocaine problem and was a dope fiend. They also presented evidence that his father never lived with his mother. Both his brother and sister testified for him, but they also hurt him—his sister is an associate pastor and his brother is a barber; they both turned out fine. Actually, his background did not provide a lot of mitigation.

**Moderator:** Another aspect of the lapse of years is that the defendant will have built up quite a record of behavior in prison—either good or bad. Does the defense often offer evidence of good prison behavior,<sup>56</sup> and do you think it is effective?

**Prosecutor Williams:** That is pretty standard defense strategy—get the prison records—virtually all inmates have had some infractions after that length of time, but usually they are pretty minor. But then, there is not much opportunity for Death Row inmates to get into trouble; they are kept in individual cells and only let out one hour a day.

**Prosecutor Laeser:** I agree. When the defense puts on testimony that he has been a model prisoner, that is pretty easy to counter: if he is locked in a small room twenty-three hours a day, there is not much of an opportunity to be a bad prisoner.

**Prosecutor McClellan:** One of my cases went back seventeen years. You have to acknowledge to the jury in such a case that at the original trial the state was trying a different person than one who is sitting in the courtroom on the re-trial. The person does not look or act the same or have the same demeanor. I think the big issue is convincing the jury of the dangerous and continuing acts of violence that the defendant is likely to commit. I do think jurors will examine the prior conduct and behavior and will not put much stock in the fact that the person has been on good behavior for the past seventeen years for the one hour a day he was allowed out of his cell.

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<sup>56</sup> See *Skipper v. South Carolina*, 476 U.S. 1, 5 (1986) (holding that a capital defendant has a constitutional right to present evidence of good behavior in prison as mitigation relating to the defendant’s character and record).

**Prosecutor Hawkins:** Ironically, in the penalty-phase-only trial I just finished where the defendant was a poster boy for the death penalty in terms of his prior record and his numerous robberies and murders, the defense was able to present his good prison record. The guy can do time.

**Defense Attorney Silver:** Perhaps prosecutors underestimate the power of a long, good record of behavior in prison. We want jurors to think: “Why should I take this person who has been serving a life sentence without causing problems, and say now that we have to execute him? If the prison doesn’t think he’s a problem, why should I?” It is really useful if the defense can get a prison employee to testify for the defendant. In one of my penalty-phase-only retrials, we actually called the warden of the prison to testify that my client had a perfectly clean record in his seventeen years on Death Row, in addition to calling prison counselors. The jury came back with a life sentence.

**Defense Attorney Gelman:** It certainly helps if the defense can call personnel from the prison. For one of my clients, I subpoenaed two prison guards and paid for their trip. They testified that my client was a great inmate and that he was one of only two prisoners on Death Row who had a job. I then argued that my client was doing all this when the government was trying to kill him. I told the jury, “You not only need a reason to kill him, you need a *compelling* reason to kill him.” We got a life sentence.

**Defense Attorney Britt:** My client who had murdered in the Dungeons and Dragons-inspired spree was a stellar inmate—he was taking college courses and had a great disciplinary record. But he got another death sentence, anyway. In hindsight, I worried and wondered whether we made it look too good—that the life sentence he was serving was not all that uncomfortable for him.

**Defense Attorney Wright:** My mentally retarded client has not helped himself with his prison record. He gets written up a lot for masturbating in front of the female guards. He gets assault infractions, too. He does other stuff, too—he is a pain to the prison officials because he just does not learn.

**Defense Attorney Kerns:** One of my clients had set a prison guard on fire. That sure does not help.

**Defense Attorney Epstein:** Certainly a client can make things much harder at a retrial due to their prison behavior. One of my penalty-phase-only clients definitely made his situation worse with his behavior during his five years in jail; there were detrimental disciplinary actions against him. That really knocked one of the legs out from under our mitigation case, although we still managed to get a life verdict.

But for one of my other clients we presented evidence that he had been a good inmate. He was black, as is most of Pennsylvania's prison population, and we were able to get a white prison guard to come in and say that my client watched the guards' backs and was a good inmate. We got a life verdict in that one, too.

**Moderator:** Another interesting aspect of the lapse of time from the crime to the new penalty phase trial is that perhaps the state of the art of mitigation practice by capital defense lawyers has improved. At least, some of my research leads me to believe that it has. What do you think: have defense lawyers generally gotten better at the mitigation phase than they were twenty, fifteen, or even ten years ago?

**Prosecutor Laeser:** There has been substantial improvement. A lot has to do with the format set up in Florida. For instance, nowadays there is always a second chair appointed on every death penalty case. That means one lawyer can focus on mitigation. For example, defense lawyers now know about certain expert witnesses. In almost all my death penalty cases now, the defense presents the same expert witness who testifies about how it is proven that death-sentenced inmates are not violent after getting on Death Row, and never commit a violent act again.

**Prosecutor Benito:** Most of our death penalty cases are handled by court appointed lawyers or by the Public Defender's Office. They have a mitigation specialist who deals with capital crimes. If there is a conflict they have a list of attorneys who are pretty well qualified. They appoint two attorneys, one to handle the first phase and the other to handle the second phase to handle the mitigation component. It is too much a burden to have the same lawyer doing both. It helps the public defender's office to have one lawyer arguing the guilt or innocence. If the guy is convicted, the second attorney is a fresh face and can be believable when he wants to present why the jury should not recommend the death penalty.

**Prosecutor Hawkins:** There is no question that defense counsel have gotten better at mitigation. In Harris County there are a high number of investigative people who only do mitigation. I think that in a lot of cases the defense realizes that mitigation is all they have.

**Prosecutor Morton:** In my county, defense lawyers have definitely improved. Now they all investigate mitigating evidence and employ experts, particularly mental health experts. The Florida Bar now requires those handling death penalty cases to have completed a certain number of CLE classes, or tried a significant number of cases themselves or with someone else who has had extensive experience. There is also a yearly seminar that the Florida Criminal Defense Attorneys Association sponsors dealing exclusively with defending death penalty cases.

**Prosecutor Williams:** I am in private practice now, and my partner has just gone to that seminar. They share motions and all sorts of things. He came back with a notebook two inches thick. Originally, there was hardly any mitigating on behalf of a defendant. Now, they go into it in depth. It can go for days and days—all about learning disabilities, bad childhood, etc. They put more effort into humanizing the defendant and to explaining why the defendant did the things he did. And you do not want to object to it because if you do and the judge excludes it, you might have yet another resentencing down the road.

**Prosecutor McClellan:** For a period of time here in Harris County defense lawyers did not present much mitigation evidence. Nowadays, Harris County has a lot of high caliber lawyers that are more prepared and have access to more resources than previously.

**Defense Attorney Wolfrum:** Missouri has a good system within Capital Division Districts. The State tries to ensure that every capital defendant is assigned an experienced attorney. But I think experienced people make mistakes, even if you do these cases all the time. The goal of the system is that people learn how to do them and be better than someone who is handling traffic tickets. Competence comes with experience and I do not know that everybody is better at it now than ten years ago. I just do not think there are hard and fast rules you have to do every case. I feel like the people I am working with have gotten individually better, and have a sense of, “That works,” or “That’s a road that doesn’t provide a return.”

**Defense Attorney Britt:** Some defense lawyers have certainly improved. But I do not think you can say that is true across-the-board. Some people work at it more. Some have gotten much better at it. Generally, we have developed better techniques and strategies. Here in North Carolina there are over thirty judicial districts. In many areas, there are not public defenders. And the Capital Defenders are relatively new; our office was started about four years ago with two of us here. Within the last year, we have opened up three branch offices with a couple of attorneys in each, and now there are three of us here. So in total, there are only nine or ten of us specialized capital defense trial lawyers across the state. The vast majority of death penalty defense is done by the private bar.

**Defense Attorney Kerns:** Back in 1970 when I started, we had no clue about mitigation, believe me. We got more sophisticated and in response, the state got more sophisticated. The whole mitigation in phase two has evolved for both sides. The state now gets help from the Legislature. For example, in the late seventies we began to use mental health mitigation. In Florida, recent legislation has been passed to help the state counter mental health mitigation.<sup>57</sup> If the state gives notice

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<sup>57</sup> See FLA. R. CRIM. P. 3.202 (1999) (providing that a capital defendant who intends to present the testimony of a mental health professional at the penalty phase must give written notice

of seeking the death penalty, we have to tell them what mental health experts we will be calling and what statutory and non-statutory mitigations the mental health expert will be discussing. And if we put on medical experts, then we have to turn our client over to a state expert.

**Defense Attorney Epstein:** We still have many lawyers who do not get it when it comes to mitigation. A lot of lawyers treat the penalty phase as an afterthought or delegate it out. But now in Philadelphia each death penalty defendant is assigned two attorneys. There have been a lot of positive developments over the last several years. There have been half a dozen mitigation trainings. The defense bar is teaching lawyers what they can do, and lawyers are trying to do it better.

**Defense Attorney Walker:** I have to cast doubt on the rosy picture that is being painted. Frankly, the state of capital defense in the Deep South is that defendants are given a lick and promise when it comes to the Sixth Amendment's guarantee of effective legal assistance. For example, right now I am looking at a file box in my office that contains an eight-volume record of a fairly recent capital trial from Shreveport. The defense attorney called one witness during both phases—the client's sister. There is less than a page of the record devoted to mitigation.

This lack of effective representation has long been true. For example, in the original trial of my client who killed the sawmill operator and told the police it was because, "an old man and old woman told him to," there was a long history of mental illness. To its credit, the defense in the original case did raise the issue of the client's competence and sanity. However, the court-appointed psychiatrists diagnosed him as a schizophrenic, but competent to stand trial—the competency bar is very low in Louisiana, unless the defendant is a hothouse cabbage. At trial the defense put on a barebones insanity defense, but the client was nevertheless convicted. And then at the penalty phase, the only defense witness was the client's mother.

I was appointed to handle the case on appeal. I learned that the client had been on parole and under the care of a local mental health center provider. Any reference or evidence that he was under psychiatric treatment would have been of great importance to an insanity defense, but it was not presented at trial. I obtained a release from the client and the local mental health center faxed back records. There were six-to-eight months between when he was paroled in Texas and the homicide in Louisiana. During that time he had *voluntarily* begun outpatient mental health treatments. The doctor there had diagnosed the client psychotic and delusional, and had endeavored to put him on a regime of anti-psychotic medications. But the records showed that the doctor was unable to stabilize him

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of that intent not less than twenty days before trial; that the notice must state the particular mental mitigating circumstances the defendant hopes to prove through the expert; and that if the defendant is convicted of capital murder, the court must then appoint an expert for the state to examine the defendant with respect to the mental mitigating circumstances noticed by the defense).

on an effective medication regime. As a consequence, his psychosis got more and more out of control, and he stopped reporting to his parole officer. These medications tend to remain in the system for a month or so, and then the patient is predictably going to become psychotic. It was at that point the client became psychotic and killed his employer. Of course, all this was of surpassing importance, because the clinic records showed that the specific complaint/delusion the client reported was of voices of an old man and woman who were telling him to do bad things—which would have given meaning to the otherwise cryptic confession where he had told the police that he had killed his employer “because an old man and an old woman told me to!” These records had not been requested by the defense lawyer at the original trial. The representation in this case was so bad I think it was actually embarrassing for the Louisiana Supreme Court, which reversed the penalty phase.

**Defense Attorney Silver:** Well certainly the cases I have handled show that lawyers twenty years ago were not looking for mitigating factors at all. In one of my cases, absolutely no mitigating evidence was presented at the original trial. There was no mental health workup at all, despite the fact that the client obviously had some problems with mental function. No defense witnesses were called at the penalty phase. And that was not rare, frankly.

In one of my other cases the defendant’s mother was called and examined for what amounted to one page of testimony. Then the defense put on the client and asked if he wanted to die, and he said he did not. The pathetic closing argument was about how the lawyer had not been able to sleep at night while handling the case. The lawyer really made it a personal appeal, “Don’t put this on me that my guy is going to get killed.” The lawyer did not discuss his client—he only discussed himself. That was it for mitigation. And this was as to my client who shot the guy in the abandoned drug house, who actually had a viable claim of self-defense! Only a completely horrible job of lawyering at original trial, and a complete punting on the sentencing phase, could have resulted in the jury’s returning a guilty verdict and death sentence in just one hour. It is easy to see the differences that lawyering made. It did not have to be me—but lawyering made a huge difference. A man who should not have been executed was hours away. My client was set to be executed during the first week of January 1995. We got the case at Christmas and were able to get a stay on the eve of his execution. In fact, he had been transported to the Death House. Now, he is in general population. We are hoping for a chance to retry the guilt/innocence phase, and if we get that opportunity, I think there is a good chance he will be completely acquitted.

In another case I worked on in Virginia that was an original sentencing, no evidence was put on by either side in the penalty phase. The defendant’s lawyer basically said, “You know what you convicted him on, look in your heart.” That was one of the worst I have ever seen. But it is not unlike a lot of others I have seen. I do not know what the thought process was back then.

I think things are getting better in Pennsylvania now, in large part, because the Federal Defender's Office has been involved in changing people's thought processes by really doing a lot of training, at least for those defendants who get a second shot at sentencing. But I do not know if that training has necessarily filtered out to all the attorneys who are trying these cases tried in the first instance.

**Defense Attorney Gelman:** I do not think death penalty defense here in Pennsylvania is generally getting better. Most lawyers shortchange the mitigation phase. If they are court-appointed, they do not have the resources to do the job right. In one of my penalty-phase-only cases, the defendant's family paid me, but that is very unusual.

**Moderator:** Defense lawyers, I would like to talk about funding, both for attorneys and other personnel, like investigators and experts. Is the funding sufficient?

**Defense Attorney Wolfrum:** The State Public Defender system here in Missouri has funding for hiring of experts. I have not had the experience that I could not get something that I really needed. Of course, state budgets are a problem. The Public Defenders in Missouri took a budget hit when funding was decreased, and as a result we lost some attorneys. But I have not been forced to go to trial in cases where I felt like I need to hire a blood expert or a forensic psychologist and I could not.

**Defense Attorney Wright:** Compensation used to be terrible, but now it is a lot better! As of 2001, the Texas Legislature raised compensation levels, and instituted a requirement of two defense lawyers in every capital case.<sup>58</sup>

It used to be so unbalanced in favor of the prosecution. Back in 1990 in one of my cases that got reversed for a new trial of both phases, I remember going to the preliminary hearing. There were district attorneys from three counties at the hearing working against me. During the hearing, they had set up a fax machine down the hall. If they had a legal question, they would run down and fax it in and a little while later, they would get an answer back. It was overwhelming. So I contacted the Texas capital defense resource center, and they put me in contact with a big firm in New York City<sup>59</sup> that was willing to provide pro bono support for me. That firm has now spent well over a million dollars on the case. That evens things up a bit, but it is also just by luck.

Now with the Internet, it is much easier to find people for mitigation than it used to be. For the last penalty phase retrial, we were able to find family, neighbors, people who knew my client from his childhood and who remembered his abuse and his retardation and could testify to it. On cross-examination, the

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<sup>58</sup> See TEX. CRIM. PROC. CODE ANN. § 26.052(e) (Supp. 2004) (directing the judge to appoint two defense attorneys in a capital case).

<sup>59</sup> A tip of the cap to Paul, Weiss, Rifkind, Wharton & Garrison, of New York City.

prosecution accused us of manufacturing evidence. They were asking, “Why didn’t you make that case back in 1990?” Well, we did not have the resources then that we do now.

**Defense Attorney Silver:** My big firm here in Philadelphia<sup>60</sup> is one of those that is committed to this work. It is the burden and responsibility of large firms to take on these cases. My firm absorbs my time on these cases. The firm also pays for extras, like a \$10,000 PET scan that we needed for one of my clients.

**Defense Attorney Epstein:** In Pennsylvania, compensation varies from county to county. In Philadelphia, a defense lawyer gets \$2000 for all pretrial representation and \$400 a day during trial. Of course, this is a drop in the bucket of what a defense really costs. I am in a small firm with three very supportive and tolerant partners who think good death penalty representation is important. Basically, we subsidize death penalty cases out of our better-paying cases.

**Moderator:** Mr. McClellan, since I have been lucky enough to get to talk to you as a prosecutor who is high up in the chain of command in Harris County (Houston), I am going to ask you a question that is off-point, but that will be of great interest to people who are concerned about the death penalty. I am sure you realize that Harris County is demonized by anti-death-penalty forces as the most bloodthirsty county in the country, because of your high volume of death penalty prosecutions. I wonder if you could comment about that perception?

**Prosecutor McClellan:** If you took just the population of Harris County it would be the twenty-fifth largest state in the nation. Prior to 1999, about thirty-to-forty percent of death-eligible cases in Harris County were prosecuted as death penalty cases. Since 1999, it has been closer to ten percent, but that is still higher than most other counties in Texas. That raises the question of why are the other counties in Texas not seeking the death penalty as often? It is likely economic reasons. Smaller counties have to make decisions based on their budgets. We do not have to make those decisions based on economics in Harris County. That is probably why we have more capital sentencings than any other county in the nation.

We pride ourselves on having a very thorough and objective review process for capital cases. There are twenty-two separate court divisions in Harris County. For each division, we have three prosecutors, the most experienced of whom is called the Chief of Court. Then there are three Bureau Chiefs, of which I am one—my only superior is the District Attorney. Initially, when a case meets the criteria for being a capital case, a Chief of Court will analyze the evidence. A Chief prepares a Capital Murder Summary Report that includes all the aggravating facts and circumstances as well as any known mitigating circumstances, and

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<sup>60</sup> Similar kudos to Schnader, Harrison, Segal & Lewis LLP of Philadelphia.

recommends whether to seek the death penalty. Then the District Attorney examines the Report, solicits other opinions, including those of the Bureau Chiefs. The District Attorney then makes the determination whether to seek the death penalty.

**Moderator:** Well, I am going to conclude the discussion now. Thank you all very much for participating. While we have covered a lot of ground that is difficult to summarize, one overarching point does stand out to me: this discussion has highlighted the fact that despite (or perhaps because of) thirty years of constitutional regulation of capital punishment by the Supreme Court, death penalty law and practice is still a remarkably patchwork affair. The cases that are prosecuted as deathworthy, both originally and at resentencings, are usually—but not *always*—the worst cases; some counties have the funds to have a coherent policy of selecting deathworthy cases, and some do not; the quality of capital defense lawyering has been and continues to be spotty, although perhaps improving overall and particularly in large urban areas; some defendants luck-out in the appeal process and end up being represented by high-powered law firms that are willing to put over a million dollars of pro bono work into the defense, but most defendants do not; some smaller-firm practitioners are willing to work at a loss to do great work on death penalty cases, but many are not—and this list of imbalances is far from complete. While there are ways to ameliorate some of these imbalances,<sup>61</sup> the Court, and legislatures, have been in no to hurry impose/implement them.

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<sup>61</sup> For my own suggestions for improvement of the capital punishment system, see David McCord, *An Open Letter to Governor George Ryan Concerning How to Fix the Death Penalty System*, 32 LOY. U. CHI. L.J. 451 (2001).