

# DEFENDING A CAPITAL CASE



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# Defending a Capital Case

## I. INTRODUCTION

"[T]he penalty of death is different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." Woodson v. North Carolina, 428 U.S. 305, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944.

Because death itself is so different, the prosecution and defense of a death penalty case is different from that of any other criminal case. Important distinctions about death penalty cases include the following:

- ◆ The death penalty is not available if your client is under 18 or is found to have mental retardation/intellectual disability.
- ◆ The jury penalty phase will begin immediately after the verdict comes back if your client is convicted. This phase is a jury trial, and the rules of evidence generally apply.
- ◆ The focus of your case will be saving your client's life. "Winning" a death penalty case most often means obtaining a sentence of LWOP or less through plea negotiations. If the case must go to trial, you must put crucial focus on the penalty phase, at which the life or death decision is made.
- ◆ What might look like a winnable non-death case is much less so once the death penalty request is filed. During voir dire, not only do jurors learn that your client faces the death penalty, but jurors who are conscientiously opposed to the death penalty are removed. "Death-qualified" juries have been found to be much more "conviction-prone" than typical criminal trial juries.
- ◆ None of this is meant to suggest that you need not investigate guilt-innocence phase issues. Since 1973, more than 155 people throughout the nation have been sentenced to death after being wrongfully convicted of murder. Two of them were here in Indiana.
- ◆ In addition to death-qualifying, you must also "life-qualify" your jurors, ensuring that they are able to consider all available sentences as well as all of your tendered mitigation evidence. It is essential that you know and understand both the unique law regarding capital jury selection, and the special techniques that have been developed for effectively life-qualifying your jury.
- ◆ You must begin preparing for the penalty phase from the outset, and work on both guilt-innocence and penalty phases simultaneously. To do this, you will need the help of a mitigation specialist, and should petition the court for funds to hire one.
- ◆ A special criminal rule, CR 24, governs aspects of capital litigation in Indiana, including appointment and compensation of two attorneys, caseloads, and provision of additional resources such as investigators and experts. Ind. Code 33-9-14-5 provides for reimbursement to the county for 50% of its defense expenditures in a death penalty case,

if it complies with CR 24.

- ◆ The ABA has adopted special guidelines for performance of counsel in death penalty cases, as well as supplementary guidelines for the entire defense team's handling of the mitigation investigation. These guidelines have been recognized by the U.S. Supreme Court as a benchmark for reasonable performance, and they are both a guide and a tool in fighting for your client's life.
- ◆ You will be working as part of a multi-disciplinary team, with another attorney, a mitigation specialist, a factual investigator, experts from a variety of mental health and other fields, and perhaps a paralegal and/or law clerk. This kind of teamwork is unfamiliar to most criminal defense attorneys and will require special effort. Regular communication is essential.
- ◆ Your client is an important part of your team. His or her behavior before, during, and after trial can have a serious impact on the outcome. Your client may suffer from mental and emotional problems, which will likely be exacerbated by the stress of facing a life or death trial
- ◆ You must be prepared to stand before the jury at the penalty phase. Your guilt-innocence and penalty-phase theories must be consistent with one another. The jury that just rejected your alibi defense will not listen kindly to your mitigation theory explaining why your client committed the offense.
- ◆ Aggravating circumstances are strictly limited to those set out in Ind. Code 35-50-2-9(b), and must be alleged by the prosecutor and proved beyond a reasonable doubt, while mitigating circumstances include virtually anything that might persuade even one juror to recommend a lesser sentence. Be aware, however, that some of your mitigation evidence may open the door to damaging rebuttal evidence. If you decide to put this evidence on, you must be prepared to mitigate that damage.
- ◆ Juror decision-making in capital cases has been the subject of a massive research project funded by the National Science Foundation and based on interviews with actual capital jurors. The Capital Jury Project has produced research that is invaluable for helping you understand how jurors think so that you can more effectively do everything from questioning prospective jurors in order to identify those who will not consider your mitigation evidence and litigating for voir dire conditions that will let you do so, to identifying the most sympathetic mitigating factors in your case, weaving them together into a compelling case for life, successfully arguing evidentiary issues, and drafting jury instructions that jurors can understand and follow.
- ◆ Indiana's death penalty and life without parole (LWOP) statute, Ind. Code 35-50-2-9, provides at subpart (1) that before a sentence of death or LWOP may be imposed, the jury (or judge in the event of a bench trial or guilty plea) must make the following findings: (1) that at least one aggravating circumstance has been proved beyond a reasonable doubt; and (2), that the aggravating circumstance(s) outweigh any mitigating circumstances.

- ◆ In Ring v. Arizona, 536 U.S. 584 (2002), the U.S. Supreme Court held that when eligibility for the death penalty is contingent upon certain facts, the 6th Amendment right to trial by jury requires that those facts must be found by a unanimous jury beyond a reasonable doubt. Because the second of the fact-findings set out in Ind. Code 35-50-2-9(l) is not required to be found by a unanimous jury beyond a reasonable doubt, there is an argument that Indiana's death penalty statute is unconstitutional on its face. This argument has already been rejected by the Indiana Supreme Court, reasoning that the second finding is not a fact-finding, but rather a weighing process. More recently, however, in Hurst v. Florida, 136 S.Ct. 616 (2016), the U.S. Supreme Court struck down Florida's death penalty statute which allowed the weighing of aggravators and mitigators and determination of sentence by the court rather than the jury, calling Indiana's statute into question. (But see McKinney v. Arizona, 140 S.Ct.702 (2020), where a 5-4 majority of the U.S. Supreme Court *clarified* that in capital sentencing proceedings, a jury (as opposed to a judge) is not constitutionally required to weigh the aggravating and mitigating circumstances or to make the ultimate sentencing decision within the relevant sentencing range. *Id.* At 707. McKinney appears to have been a step back from Hurst or at least should be considered if making a Ring-Hurst argument.
- ◆ One way in which death penalty cases are not different from others is that there are no special safety nets, no special appellate remedies to undo mistakes made at trial. Error must be preserved, both through extensive motions practice before trial, and careful objections made during trial. Rules must be complied with, and deadlines must be met. In answer to the question, "What are they going to do, kill my client?" the Courts have offered a resounding "Yes!" See, e.g., Johnson v. McBride, 381 F.3d 587 (7<sup>th</sup> Cir. 2004) (death row prisoner's habeas petition dismissed as untimely when it arrived one day after statute of limitations had run).

The following outline sections attempt to provide some very basic observations and suggestions regarding these and other aspects of litigation in a death penalty case and contain links to additional materials and sample pleadings that can assist you further. Specialized training is available at IPDC's Death Penalty Defense Seminar in odd-numbered years, as well as a variety of programs around the country. For a list of death penalty defense trainings, follow this [link](#).

## II. APPOINTMENT, CASELOADS, AND MONEY

In 1992, the Indiana Supreme Court adopted Criminal Rule 24, which governs the provision of counsel to indigent defendants facing the death penalty. CR 24 requires appointment of two attorneys and requires that they each be compensated at a rate reviewed and set by the State Court Administrator every two years. The rate for cases filed or appellate appointments made on or after 1/1/20 21 is \$129/hour. You can check [current and past rates](#) on IPDC's website.

The rule also requires that both lead- and co-counsel have completed a 12-hour specialized death penalty defense training program within two years prior to appointment. Because so few death penalty cases are currently filed in Indiana, IPDC now provides such training only in odd-numbered years. For a list of some other trainings across the country, contact the IPDC. The Indiana Supreme Court has granted provisional CR 24 status to an otherwise qualified attorney whose training was completed more than two years prior to the date of appointment, contingent upon his attending IPDC's death penalty seminar later that year, and a copy of this [provisional](#)

[order](#) is available.

See CR 24 itself for information on the experience requirements for appointment as lead- and co-counsel. The rule also sets limits on counsel's caseloads during the pendency of the capital case.

Finally, the rule requires that counsel be provided with "adequate funds for investigative, expert, and other services necessary to prepare and present an adequate defense at every stage of the proceedings, including the sentencing phase," and authorizes *ex parte* application for these funds. CR 24(C) (2). See [Sections VI](#) and [VIII](#) for more information on obtaining funds to hire investigators and experts. Criminal Rule 24(C) calls for periodic billing, at least every thirty days from the date of appointment. Death penalty cases require extensive amounts of time on the part of both the attorneys and others on the defense team, including experts, and consequently, expenditures in these cases are high. The showing required both by CR 24 and case law is that resources requested be reasonably necessary. Even if your trial judge or Chief PD does not require you to make such a showing, keep in mind that wasteful spending may cause them to deny later requests for absolutely necessary resources, and in a larger sense, could provoke a backlash that could result in unreasonable caps on fees and other expenses.

Your county can obtain reimbursement through the Indiana Public Defender Commission for 50% of its defense expenditures in a death penalty case. You can check for current guidelines at the Commission [web site](#). For assistance in seeking reimbursement, contact the staff attorneys for the Commission, at (317) 234-3182. You can also contact the Commission for assistance if you are having difficulty obtaining necessary funds for investigators, experts, and other resources from your trial court. If those efforts are unsuccessful, the Indiana Supreme Court has indicated a willingness to resolve these issues pre-trial. See *Williams v. State*, 669 N.E.2d 1372 (Ind. 1996), f.n. 12.

The 2003 ABA Guidelines for Performance of Defense Counsel in Death Penalty Cases, black letter version or version with commentary, and the [2008 Supplementary Guidelines](#) for the Mitigation Function of the Defense Team in Death Penalty Cases can also provide persuasive authority for your requests for money or time or other resources in order to perform in compliance with them. In *Wiggins v. Smith*, 359 U.S. 510, 524 (2003), the U.S. Supreme Court referred to the Guidelines as "standards to which we have long referred as 'guides to determining what is reasonable.'" (citing *Strickland v. Washington*, 466 U.S. 668, 688 (1984); *Williams v. Taylor*, 529 U.S. 362, 396 (2000)). A case which may be helpful if your court balks at funding for experts is: *McWilliams v. Dunn*, 137 S. Ct. 1790 (2017), citing *Ake v. Oklahoma*, 470 U.S. 68,83 (1985), the trial court failed to meet the standard established in *Ake* that where a defendant's mental health is at issue, the State must provide access to a mental health expert to effectively conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense; death penalty reversed.

You'll find further discussion of this, together with sample motions, in [Section VI](#), Building and Working with Your Defense Team, and [Section VIII](#), Fighting for Life - Investigating and Developing Your Mitigation Case.

### III. ESSENTIAL TOOLS

At the end of this manual, you will find a directory of all of the resource materials and sample



motions linked to the manual. Here, though, are links to a selection of resources and external websites that will be useful to you in learning about death penalty practice and jurisprudence.

#### **A. ABA Guidelines**

[2003 Guidelines](#) for the Appointment and Performance of Defense Counsel in Death Penalty Cases

[2003 Guidelines with commentary](#) includes helpful commentary offering more detailed description of the work and citation to case law and other authority.

[2008 Supplementary Guidelines](#) for the Mitigation Function of Defense Teams in Death Penalty Cases

[1989 Guidelines](#) for the Appointment and Performance of Defense Counsel in Death Penalty Cases, useful for state post-conviction and federal habeas work.

[ABA website](#) section on its Death Penalty Representation Project, where you will find the Guidelines, cites for cases *citing* to the Guidelines, and other useful links.

#### **B. Indiana Timelines and Checklists**

For the 2007 IPDC Death Penalty Defense Seminar, Jodie English compiled [a reverse calendar](#) running from the date of appointment through the beginning of jury selection. This calendar was updated in 2009. Lorinda Youngcourt put together a [checklist](#) for laying the groundwork for a good working relationship with your mitigation specialist, and Jan Dowling prepared an [outline/timeline of responsibilities](#) of a mitigation specialist. Together with the ABA Guidelines, these tools help give you a roadmap for where to begin and how to proceed with all the many things you need to do.

#### **C. Case Law Outlines**

[U.S. Supreme Court capital cases](#) (Check [on-line](#) for most current version.)

[Overview of Constitutional Principles](#) Relevant to Capital Cases, by John Blume and Mark Olive.

[Indiana capital case cites](#). Listing of all Indiana death penalty opinions as well as significant LWOP opinions.

[Indiana capital case outline](#). Outline of issues discussed in Indiana death penalty opinions and significant LWOP opinions.

#### **D. IPDC Website and Lifeforce List-serv**

<http://www.in.gov/ipdc/> IPDC's website where you will find a wide variety of resources, including the following, most of which are in the members only area of the website and require a subscription (for information on how to subscribe to the website, follow this [link](#):

[Death Penalty Facts Links](#) Links to death penalty fact sheets, death penalty training calendar, and other helpful websites. You do not need a username or password to access these links.

[Defending a Capital Case](#) The latest edition of this manual is on-line. You must have a username and password to access this part of the website.

IPDC also sponsors the Lifeforce Listserv, a restricted email group made up of attorneys and other defense team members who are involved in death penalty representation or who are willing to accept appointment in a death penalty case. Follow this [link](#) to subscribe to Lifeforce and other IPDC listservs.

[IPDC Death Penalty Seminar Materials.](#) Death Penalty seminar materials are available from 2006 through the most recent seminars

**E. [Capital Jury Project](#)**

A website dedicated to the Capital Jury Project, including a list of publications based on Project research. See also, [J. Blume, Overview of Findings from the Capital Jury Project](#) and [Other Empirical Studies Relevant to Jury Selection, Presentation of Evidence](#), and [Jury Instructions in Capital Cases](#).

**F. 36 Hofstra L. Rev. Iss. 3 (2008)**

[Special issue on capital litigation](#), taking into account both the 2003 and 2008 ABA Guidelines and the Capital Jury Project research

**G. [Indiana Death Penalty Statutes – 1977 – Present](#)**

**H. Studies of Indiana’s Death Penalty System**

[ABA Assessment:](#) Evaluating Fairness and Accuracy in State Death Penalty Systems: The Indiana Death Penalty Assessment Report, An Analysis of Indiana’s Death Penalty Laws, Procedures, and Practices (2007)

[The Application of Indiana’s Capital Sentencing Law:](#) Findings of the Indiana Criminal Law Study Commission. (2002)

**I. [Indiana Death Penalty Facts](#) [on-line only]**

A regularly updated factsheet on Indiana’s death penalty and its application, available for public distribution at IPDC’s website. You do not need a username or password to access this.

**J. [ALI Death Penalty Report](#)**

A Report on the death penalty’s intractable problems, which led to the American Law Institute (ALI) removing the death penalty from the Model Penal Code.

## **K. Other Death Penalty Defense Web Sites**

[www.capdefnet.org](http://www.capdefnet.org) Joint web site of the Habeas Assistance and Training Counsel and the Federal Death Penalty Resource Counsel. Includes password-protected area.

<http://www.lawschool.cornell.edu/research/death-penalty-project/> Cornell University School of Law death penalty project. Includes scholarly articles, links to other websites, and other helpful resources such as an objection handbook.

## **IV. INDIANA’S STATUTORY SCHEME**

### **A. Introduction**

Indiana Code 35-50-2-3(a) provides that the sentence for murder ranges from 45 to 65 years, with the advisory sentence being 55 years. However, subsection (b) provides that a person who was at least 18 years old at the time of the charged offense may be sentenced to death, pursuant to Ind. Code 35-50-2-9, unless he is found, in a pre-trial hearing pursuant to Ind. Code 35-36-9, to be a person with intellectual disability. Indiana Code 35-50-2-9 governs the procedures that must be followed, from charging through trial and beyond, whenever the state of Indiana seeks a sentence of death for murder.

In order to seek a sentence of death for murder, pursuant to Ind. Code 35-20-2-9, the state must file its request on a separate page from the rest of the charging information or indictment and must allege at least one of the eighteen aggravating circumstances set out in Ind. Code 35-50-2-9(b). Subsection (c) of the statute sets out seven specific mitigating circumstances that may be considered, plus an eighth that includes “any other circumstances appropriate for consideration.” As you will see below, what may be presented to the jury for consideration as mitigating in a death penalty case is virtually wide open and can be anything that might cause even one juror to consider imposing a penalty less than life without parole. You should not let yourself be constrained by the list of mitigating circumstances set out in Ind. Code 35-50-2-9(c) as you investigate and develop mitigation.

### **B. Role of Jury and Judge**

#### **1. Jury Penalty Phase**

Indiana Code 35-50-2-9(d) provides that, in the event your client is convicted, the jury will reconvene for a sentencing hearing. The state will be limited to evidence and argument regarding the charged statutory aggravator(s) or rebutting your tendered mitigation. Bivins v. State, you will be allowed to present evidence relevant to the alleged aggravator(s), as well as evidence relevant to any mitigating circumstances. See Section VIII, below, for more on penalty phase evidence. Subsection (d) also requires the trial court to instruct the jury on the full range of penalties available for each charged offense.

Indiana Code 35-50-2-9(e) gives the jury three sentencing options if the state has asked for a maximum penalty of death. The jury may “recommend” **for** death, **for** life without parole, or may “recommend” **against** both, in which case the trial court would impose a term of years. Indiana capital juries used to make a mere recommendation to the trial court regarding the appropriate sentence. In 2002, the General Assembly amended the statute to provide that if the jury reaches a unanimous “recommendation” regarding the appropriate penalty, the trial court “shall sentence the defendant accordingly.” Ind. Code 35-50-3-9(e).

## 2. 6th Amendment Right to Jury Findings

The 2002 amendment was passed in anticipation of the U.S. Supreme Court’s decision in Ring v. Arizona, 536 U.S. 584 (2002), in which the Court applied to the death penalty its case law holding that, where the state conditions eligibility for a higher penalty upon any fact, that fact is the functional equivalent of an element and the 6<sup>th</sup> Amendment requires it to be submitted to a jury and proved beyond a reasonable doubt.

Ind. Code 35-50-2-9(e) provides that the jury may “recommend” the death penalty or life without parole only if it makes the following findings set out in subsection (l):

(1) that the state has proved beyond a reasonable doubt that at least one of the [alleged] aggravating circumstances ... exists; and

(2) any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances.

Arguably, under the holding in Ring, *supra*, a sentence of death or LWOP is conditioned upon both of the findings set out in Ind. Code 35-50-2-9(l), and so both are facts which must be found by the jury beyond a reasonable doubt. Arguably the statute’s failure to require this is a violation of the 6<sup>th</sup> amendment right to jury trial as set out in Ring. The Indiana Supreme Court has rejected this argument, by a vote of four to one (Rucker, J., dissenting), with the majority writing that the second finding is a weighing process, not a “fact,” per se. *See, e.g., Ritchie v. State*, 809 N.E.2d 258 (2004), *Helsley v. State*, 809 N.E.2d 292 (2004), and *State v. Barker*, 809 N.E.2d 312 (2004). However, in Hurst v. Florida, 136 S. Ct. 616 (2016), the U.S. Supreme Court struck down Florida’s death penalty statute, which allowed the court rather than the jury to weigh aggravators and mitigators and determine the sentence. This once again calls Indiana’s statute into question. A short [sample motion to declare the statute unconstitutional based on this issue](#) is available, as is a [longer sample motion including this and numerous other issues](#).

But, in 2020, the U.S. Supreme Court issued a decision in McKinney v. Arizona, 140 S. Ct. 702 (2020) where a 5-4 majority of the U.S. Supreme Court *clarified* that in capital sentencing proceedings, a jury (as opposed to a judge) is not constitutionally required to weigh the aggravating and mitigating circumstances or to make the ultimate sentencing decision within the relevant sentencing range. *Id.* At 707. McKinney appears to have been a step back from Hurst or at least should be considered if making a Ring-Hurst argument.

### **3. Jury findings regarding the existence of at least one aggravator**

If the jury unanimously finds that no aggravating circumstances have been proved beyond a reasonable doubt, their penalty deliberations are complete, and the trial court must sentence the defendant to a term of years. If the jury hangs on the issue of whether an aggravating circumstance, a new jury penalty phase is required before a sentence of death or LWOP can be imposed. See Bostick v. State, 773 N.E. 2d 266 (Ind. 2002); State v. Barker, 768 N.E.2d 425 (Ind. 2002); Kiplinger v. State, 922 N.E. 2d 1261 (Ind. 2010); Lewis v. State, 2016 Ind. LEXIS 691 (Ind. 2016). If the jury unanimously finds an aggravating circumstance beyond a reasonable doubt, they may proceed to determine whether the aggravating circumstance(s) outweighs any mitigating circumstances.

### **4. If the jury hangs on the penalty determination**

The following is a discussion of Indiana's statute and case law. As mentioned above, Hurst v. Florida, 136 S.Ct.616 (2016), calls both Indiana's statute and case law into question.

Ind. Code 35-50-2-9(f), provides as follows: "if a jury is unable to agree on a sentencing recommendation after reasonable deliberations, the court shall discharge the jury and proceed as if the hearing had been to the court alone." As discussed here, the Indiana Supreme Court has upheld this section, but see the discussion of Hurst v. Florida, 136 S. Ct. 616 (2016), below. In State v. Barker, *supra*, the Court held that subsection (f) was not unconstitutional on its face. Barker did not involve a hung jury but presented a facial challenge to subsection (f) on Ring grounds. The majority opined that subsection (f) was constitutional and that the trial court could make the final sentencing decision so long as the jury had found at least one alleged aggravator beyond a reasonable doubt, using the verdict forms provided for in subsection (d). If the jury had not been able to agree on whether an aggravator existed, the Court wrote that the trial court should follow the procedure set out in Bostick, *supra*, declaring a mistrial and convening a new penalty phase jury. The Court wrote that even if the subsection was unconstitutional, it could be severed from the rest of the statute.

A few years later, in Wilkes v. State, 917 N.E.2d 675 (Ind. 2009), the Court addressed the validity of a death sentence actually imposed by the trial court after the jury failed to agree on the appropriate penalty. Wilkes was convicted of the murders of a woman and her two daughters, ages 8 and 13. At the end of the penalty phase, the jury returned the aggravating circumstance verdict form provided for in subsection (d), unanimously finding the multiple murder aggravator with respect to each victim, as well as the victim younger than 12, aggravator for the murder of the 8-year-old. The jury also returned a verdict form finding that the aggravators outweighed mitigation, although Ind. Code 35-50-2-9 does not provide for this. Despite these two findings, the jury could not agree unanimously on the appropriate penalty, and they were discharged. The trial court later conducting its sentencing, accepting the jury's findings and independently finding each of the alleged aggravators, and sentencing Wilkes to death for each murder.

The Court reiterated its holding in Ritchie that the 6<sup>th</sup> Amendment is satisfied when the jury unanimously finds at least one aggravating circumstance beyond a reasonable doubt. Wilkes challenged the jury's two unanimous verdicts, arguing that they violate the Trial Rule 49 prohibition of "special verdicts," and thus the statutory provision requiring the jury to return a verdict on the aggravating circumstances violates the separation of powers required by Article 3 of the Indiana Constitution. The Court rejected this argument, finding that these verdict forms differ from those contemplated in Trial Rule 49, in that they do not ask the jury preliminary or subsidiary questions, but rather document each of the findings that the jury is required to make to satisfy the death penalty statute and the 6<sup>th</sup> Amendment. It is both statutorily and constitutionally necessary that the jury unanimously find at least one aggravating circumstance beyond a reasonable doubt before it can sentence a defendant to death or to LWOP, and the aggravating circumstance verdict form documents that finding.

Wilkes also challenged the trial court's reliance on the jury's verdicts, arguing that Ind. Code 35-50-2-9(f), which provides that if the jury cannot unanimously agree on the appropriate sentence, the trial court should proceed "as if the hearing had been to the court alone," requires that the trial court take no notice of the jury's verdicts as to the existence or weighing of aggravators. The Court acknowledged that the trial court must make its own findings regarding the existence of at least one aggravator and whether the aggravator(s) outweigh the mitigating circumstances. But *citing* its holding in Bostick, *supra*, the Court finds that the jury's finding of at least one aggravating circumstance is required by the 6<sup>th</sup> Amendment and must be taken into account before there can be any further consideration of whether death is an appropriate penalty. Where, as here, the jury makes this requisite finding but cannot agree on the penalty, subsection (f) provides for the trial court to proceed as if the hearing had been to it alone. Subsection (g) governs hearings before the trial court alone and requires that the trial court make the same subsection (l) findings that a jury must make before it can consider a sentence of death or LWOP. Thus, the Court holds, the trial court properly considered the jury's finding, and then proceeded correctly according to the statute. Wilkes got the benefit of both the 6<sup>th</sup> Amendment requirement of a jury determination regarding the existence of the aggravating circumstances, and the trial court's independent finding of the aggravating circumstance, and independent weighing of aggravation against mitigation. The Court also rejected the argument of *amicus curiae* Marion County Public Defender Agency that the meaning of subsection (f) is that the trial court cannot consider the sentences of death or LWOP, because those sentences require jury determinations unless waived by defendant, as well as its argument that the death penalty statute creates a right to jury sentencing in death penalty and LWOP cases, and that a new jury must be convened if the original jury cannot agree unanimously on penalty.

Finally, the Wilkes Court overruled its holdings in Roche v. State, 596 N.E.2d 896 (Ind. 1992), regarding consideration of the jury's failure to reach a unanimous sentencing decision. In Roche, a majority of the Court held that no meaning should be given to the jury's failure to reach an agreement on sentence, and it should not be considered as a mitigating circumstance. This holding was upheld in Burris v. State, 642 N.E.2d 961 (Ind. 1994), and Holmes v. State, 671 N.E.2d 841 (Ind. 1996).

However, in light of the “increased emphasis” on the role of the jury in light of Ring v. Arizona and the 2002 amendment to the statute, the majority now agrees with the Roche dissenters that the failure of the jury to reach a sentencing recommendation is appropriate for the trial court to consider. The Court acknowledged that the lack of unanimity does not directly bear on recognized mitigating considerations – aspects of the defendant’s character or record or circumstances of the offense that might reduce his moral culpability – but wrote that it was a “relevant consideration.” Wilkes, supra, 917 N.E.2d at 692. On post-conviction review, the trial court considered not only the lack of unanimity, but the jury’s actual vote, which was 11 – 1 against the death penalty. The PCR court vacated Wilkes’ death sentence and imposed a sentence of LWOP.

As mentioned above, however, in Hurst v. Florida, 136 S.Ct.616 (2016), the U.S. Supreme Court struck down Florida’s death penalty statute because it allowed the court, rather than the jury, to weigh aggravation and mitigation and determine sentence. This calls Indiana’s statute and case law into question however, this analysis is still in flux because in McKinney v. Arizona, 140 S. Ct. 702 (2020) a 5-4 majority of the U.S. Supreme Court *clarified* that in capital sentencing proceedings, a jury (as opposed to a judge) is not constitutionally required to weigh the aggravating and mitigating circumstances or to make the ultimate sentencing decision within the relevant sentencing range. Id. At 707. As mentioned above McKinney appears to have been a step back from Hurst and should be considered if making a Ring-Hurst argument.

## **5. After a unanimous jury sentencing “recommendation”**

The language of Ind. Code 35-50-2-9(e), providing that if the jury reaches a unanimous sentencing “recommendation,” the trial court “shall sentence the defendant accordingly,” has also led to confusion as to the trial court’s obligations and possible actions. Prior to the 2002 statutory amendment, the jury’s decision was a recommendation only, with the actual sentencing decision made by the trial court. The Indiana Supreme Court had set out very clearly what trial courts were supposed to do in making their sentencing decision and drafting their sentencing orders. In Harrison v. State, 644 N.E.2d 1243 (1995), the Court wrote that the trial court’s written sentencing findings must (1) identify each mitigating and aggravating circumstance found, (2) include the specific facts and reasons which led the court to find the existence of each such circumstance, (3) articulate that the mitigating and aggravating circumstances have been evaluated and balanced, (4) make clear that the jury’s recommendation has been considered, and (5) set forth the trial court’s personal conclusion that the sentence imposed is appropriate for this offender and this offense. Id., at 1262 - 63. Before the 2002 amendment, the trial court was the final sentencer, and such specific written findings were required for meaningful appellate review. Id.

In the first group of cases reviewing and interpreting the 2002 amendments to the death penalty/life without parole statute, the Indiana Supreme Court reviewed the amendments from a variety of perspectives. Reviewing a claim that the amendment was an *ex post facto* law because it took away from the defendant a second chance at

a lesser sentence in the form of a judge overriding the jury's recommendation, the Court acknowledged that "[u]nder the new statute, however, there is only one sentencing determination, which is made by the jury, and the judge must apply the jury's determination." Stroud v. State, 809 N.E.2d 274, 287 (2004) (*citing* Ind. Code 35-50-2-9(e)). The Stroud Court then went on to say that the effect of the amendment was to "shift the role of determining a defendant's final sentence from the judge to the jury." Id., 809 N.E.2d at 289. The Court vacated Stroud's death sentence because the trial court had initially instructed the jury that its verdict would only be a recommendation.

In Helsley v. State, 809 N.E.2d 292 (2004), handed down the same day as Stroud and other similar cases, a defendant against whom the state had sought a maximum punishment of life without parole began trial before the effective date of the amendment, and was sentenced after the effective date. Just before the judge sentencing hearing was to begin, the defense was informed that the court would treat the jury's determination only as a recommendation, and then was denied a continuance to prepare additional evidence to present to the trial court. The majority wrote that this denial of a continuance did not harm the defendant, because in fact the trial court was required to follow the jury's recommendation regardless of any additional information he might have presented. Justices Boehm and Rucker wrote separately to concur in result, opining that they read "sentence accordingly" to encompass "the need to set aside a recommendation if it is not supported by evidence and the power to decline to impose death if, after consideration of all aggravating and mitigating factors, including those in the sentencing report, and giving due deference to the jury's recommendation, the judge concludes that death is inappropriate." Id., 809 N.E.2d at 307.

In State v. Barker, 809 N.E.2d 312 (2004), reviewing a trial court's pre-trial dismissal of the state's death penalty request on grounds that Ind. Code 35-50-2-9, as amended, violates the 6<sup>th</sup> Amendment right to jury trial as set out in Ring, the Court opined that the amendment prohibited a trial court from imposing a sentence of death or life without parole if the jury unanimously recommended against it. The majority noted that Barker did not challenge the trial court's authority to impose a sentence less than the jury recommended, and thus the Court declined to address that issue. Id., 809 N.E.2d 218, n.5.

Finally, in Pittman v. State, 885 N.E.2d 1246, 1253-54 (2008), reviewing a challenge to the adequacy of a trial court's sentencing order, the Court wrote the following:

If the jury makes a recommendation, the extent to which the judge is bound by that recommendation has not been fully resolved. See Kubsch v. State, 866 N.E.2d 726, 739 (Ind. 2007). We believe that the statutory directive to "sentence the defendant accordingly" is intended to direct the trial court to impose the sentence recommended by the jury except where the traditional allocation of functions between judge and jury authorize or require the judge to set aside the jury's findings. The trial court is obligated to follow the jury's recommendation unless (1) the recommendation is based on a statutory aggravator that is not



supported by sufficient evidence; (2) there is error in the course of the trial that requires grant of a Motion to Correct Error or Motion for New Trial; or (3) the trial court exercises its role as the "thirteenth juror" to set aside the sentence and order a new sentencing phase.

As to the level of detail required in a post-amendment sentencing order, the Court wrote that if the trial court made the sentencing decision without a jury recommendation, as in the case of a guilty plea or a hung jury at the penalty phase, its sentencing order must comply with the requirements set out in Harrison v. State, *supra*, 644 N.E.2d at 1262-63 (1995). When the trial court sentences in accordance with a jury's recommendation, the Court wrote,

. . . [a] Harrison-style sentencing order would be out of place. Juries are traditionally not required to provide reasons for their determinations. Any reasoning provided by a trial court's order would necessarily be that of the trial judge, not the jury. Because the final decision belonged to the jury, this reasoning would be unhelpful on appeal and could undermine confidence in the jury's determination. We think it is enough that by entering the sentence recommended by the jury, the trial court has made an independent determination according to the trial rules that there is sufficient evidence to support the jury's decision.

Pittman, *supra*, 885 N.E.2d at 1254. And when the trial court exercises its "traditional Trial Rule 50 and 59(J) (7) functions" to set aside a jury's recommendation, its order need only comply with those rules. Id.

## **V. REVIEWING THE CHARGES**

### **A. Is Your Client Eligible?**

#### **1. Age**

The first question you should ask is whether your client is eligible for the death penalty. If he is under 18, he is not eligible for the death penalty, and you should move to dismiss the death penalty request pursuant to Ind. Code 35-50-2-3. If he is under 16, he is not eligible for either death or LWOP, and you should move to dismiss both requests.

#### **2. Intellectual Disability (Mental Retardation)**

In Atkins v. Virginia, 122 S. Ct. 2242 (2002), the U.S. Supreme Court held that the 8<sup>th</sup> Amendment prohibits execution of individuals with mental retardation. Under Ind. Code 35-50-2-3, and Ind. Code 35-50-2-9(a), your client is ineligible for both the death penalty and LWOP if the trial court determines, in a pre-trial hearing, that he is an "individual with intellectual disability," as defined at Ind. Code 35-36-9-2.

The Indiana Code defines "individual with intellectual disability" as follows:

“individual with intellectual disability” means an individual who, before becoming twenty-two (22) years of age, manifests:

- (1) significantly subaverage intellectual functioning; and
- (2) substantial impairment of adaptive behavior; that is documented in a court ordered evaluative report.

IC 35-36-9-2. The statutory definition was originally adopted from a definition developed by the American Association on Mental Retardation (AAMR).

The professional terminology has changed over the years, moving from “mental retardation to “intellectual disability,” and the 2015 Indiana General Assembly amended the Indiana statutes to reflect this change. The AAMR has become the American Association on Intellectual and Developmental Disability (AAIDD).

Do not discount intellectual disability out of hand - clients often become very adept at masking their deficits, and our assumptions are often wrong. A short [guide to Indiana cases](#), put together by Tom Hinesley and Kathleen Cleary, is available for your use, as are copies of orders and expert transcripts from Indiana cases in which defendants were found to have intellectual disability. Professors John Blume, Sheri Johnson, and Christopher Seeds have written an excellent article on the clinical definitions of intellectual disability set forth by the American Association on Intellectual and Developmental Disabilities and the American Psychiatric Association, and how some states, including Indiana, deviate from these standards so as to exclude from the protection of Atkins individuals who should be included. See Blume, Johnson, & Seeds, “[Of Atkins and Men](#): Deviations from Clinical Definitions of Mental Retardation in Death Penalty Cases (January 13, 2009). Cornell Journal of Law and Public Policy, 2009; Cornell Legal Studies Research Paper No. 09-001. Also essential reading is a comprehensive [practitioner’s guide](#) to representing individuals with intellectual disability, put together by nationally recognized experts and sponsored by the International Justice Project. You can check for the most current version in the password protected section of the Federal Death Penalty Resource Counsel and the Habeas Assistance and Training Project website at <http://www.capdefnet.org>. You will need to request a password. Information specifically on the [Flynn effect](#), the gradual improvement in scores as a testing instrument ages, is also available.

The Indiana Supreme Court has held that the standard of proof at the pre-trial hearing on intellectual disability should be a preponderance of the evidence, rather than clear and convincing evidence. Pruitt v. State, 834 N.E.2d 90 (Ind. 2005). This is based at least in part on the fact that Atkins creates a constitutional prohibition against execution of individuals with intellectual disability, rather than a mere statutory proscription. There is a Ring v. Arizona, 122 S. Ct. 2428 (2002) based argument that the nonexistence of intellectual disability is a fact upon which death or LWOP are contingent, so that your client has a 6<sup>th</sup> Amendment right to submit this fact to the jury with the burden on the state to prove it beyond a reasonable doubt. This argument was rejected in Pruitt, *supra*, and again in the opinion affirming denial of post-conviction relief for Pruitt but should be raised to preserve it for federal review.

Also, do not forget that even if the trial court does not find your client to be an individual with intellectual disability pursuant to Ind. Code 35-36-9-2, you can still present evidence of intellectual disability to the jury at the penalty phase as mitigation evidence. Also, Ind. Code 35-36-1-1 defines “mentally ill” to include “having an intellectual disability,” making this evidence available at the guilt-innocence phase in support of an insanity defense or a guilty but mentally ill verdict or plea.

## **B. Other Nuts & Bolts of Charging: What Can/Must the Prosecutor Do?**

Under the statute, Ind. Code 35-50-2-9, the prosecutor must request the death penalty by alleging at least one statutory aggravating circumstance on a page separate from the rest of the charging information. Unlike a habitual offender enhancement, there is no time limit on filing a death penalty request, so long as the defendant is afforded an opportunity to prepare a defense. *See, e.g., Daniels v. State*, 453 N.E.2d 160 (1983); *Games v. State*, 535 N.E.2d 530 (1989). However, these cases were decided before the filing deadline for an habitual offender enhancement was added to the statute, and the issue can certainly be revisited. Under current case law, the most likely remedy for late filing of a death penalty request is a continuance. *Games, supra*. However, if a death penalty request is filed in retaliation for the exercise of a constitutional right, *i.e.*, filing a speedy trial motion, you can move to dismiss it on grounds of vindictive prosecution.

Prosecutors often threaten the filing of a death penalty request or otherwise make known their intent to file the request at some future point. There is dicta from the Indiana Supreme Court indicating that the defense cannot preclude the prosecution from its announced intent to file a death penalty request by entering a guilty plea to the existing murder charge. *See Anderson v. State*, 615 N.E.2d 91 (1993).

Prosecutors will sometimes threaten to file a death penalty request if your client does not plead guilty to the murder charge and accept a LWOP or lesser sentence within a limited time-frame and will further insist that there will be no plea negotiation after the death penalty request is filed. All too often, this threat is made shortly after the murder charge is filed, and the timeframe given is too short for you to adequately investigate the case and competently advise your client. The [2003 ABA Guidelines](#) for the Performance of Defense Counsel in Death Penalty Cases, Guideline 10.7 - Investigation, and its commentary, and Guideline 10.9.1(B) - The Duty to Seek an Agreed-Upon Disposition, can give you ammunition for seeking adequate time to investigate and to give your client the sort of detailed advice required by the Guidelines and to build the relationship of trust necessary for your client to be able to consider your advice. These guidelines have been recognized as a guide to determining what reasonable performance for IAC purposes is, and to insist that you advise your client to accept a plea agreement without complying with the guidelines is to subject that plea to being set aside on IAC grounds.

Typically, when the prosecution alleges a 35-50-2-9(b) (1) aggravator, intentional killing while committing or attempting to commit a specified felony, they will also charge the underlying felony at the guilt-innocence phase as well. Double jeopardy does not prevent the state from charging and obtaining a conviction for the underlying felony at the guilt-innocence phase and then using it as the basis for an aggravating circumstance at the penalty phase. *See, e.g., Overstreet v. State*, 783 N.E.2d 1140, 1165 (Ind. 2003); *Laux v.*

State, 821 N.E.2d 816 (Ind. 2005). **However, if your client is acquitted of the felony at the guilt-innocence phase that serves as an acquittal on the (b) (1) aggravator as well, and if only the (b) (1) aggravator is alleged, you should move to dismiss the state’s death penalty and LWOP request.**

Conversely, the state may choose not to charge the underlying felony at the guilt-innocence phase, and it is not necessary that they do so. See Lowery v. State, 640 N.E.2d 1031 (Ind. 1994). Remember, though, that the state bears the burden of proving beyond a reasonable doubt each element of its alleged aggravating circumstance(s) at the penalty phase. In the case of a (b) (1) aggravator, this includes proving each element of the underlying felony, if it has not been charged and proved at the guilt-innocence phase, and the jury should be instructed accordingly.

Finally, regardless of the *mens rea* required by the particular alleged aggravator – intentional murder for the (b) (1) aggravator and knowing or intentional murder for the others – the State need not charge your client with such a murder at the guilt-innocence phase. See Landress v. State, 600 N.E.2d 938, 940 (Ind. 1992). If, however, the state charges only felony murder, a conviction on this charge alone will not support a sentence of death or LWOP; the state will have to prove the requisite *mens rea* and degree of involvement at the penalty phase. See Pittman v. State, 885 N.E.2d 1246, 1258-59 (Ind. 2008); Kiplinger v. State, 922 N.E.2d 1261, 1264-65 (Ind. 2010). **And if the State charges both a felony murder and a knowing or intentional murder at the guilt-innocence phase, and the jury convicts only on the felony murder, their rejection of the knowing or intentional murder serves to preclude the finding of any charged aggravator.** See *discussion of aggravators, below*.

### C. Reviewing & Challenging the Aggravator(s)

You should review the alleged aggravating circumstance(s) in the state's death penalty request, just as you would look at a charged offense. What are the elements of the alleged aggravator(s)? Many statutory aggravators have been interpreted and narrowly defined in case law, as you will see below in the discussion of potential challenges to each aggravator. And in Pittman v. State, 885 N.E.2d 1246 (Ind. 2008), the Court set out the *mens rea* and degree of involvement required for a defendant to be eligible for death or LWOP.

If a (b) (1) aggravator is alleged – intentional killing while committing or attempting to commit a specified felony – the Court wrote that “the State must prove that the defendant was a major participant in the killing and the killing was intentional.” Pittman, *supra*, 885 N.E.2d at 1257. This should be read in light of Landress v. State, 600 N.E.2d 938 (Ind. 1992), in which the Court held that the intent to kill cannot be imputed from a co-defendant for the purpose of proving this aggravator.

If any of the other seventeen aggravators is alleged, although they do not contain language setting out a particular *mens rea*, the Pittman Court held that the state must prove that the **defendant was either the sole killer or an active participant in the killing**, and that the **killing itself was knowing or intentional**. *Id.*, at 1258-59. The Court reached this holding as a matter of statutory construction, reasoning that when Ind.

Code 35-50-2-9(a) refers to “murder,” it means a “knowing or intentional” killing as defined in Ind. Code 35-42-1-1(1).

Remember, the state must prove the existence of every element of the alleged aggravators beyond a reasonable doubt. This is not a lay-down. Even in multiple aggravator cases, our Supreme Court has reversed death and LWOP sentences because the state has not proved at least one aggravating circumstance. *See, e.g., Ingle v. State*, 746 N.E.2d 927 (Ind. 2001) (kidnaping element of (b) (1) aggravator and lying in wait aggravators not proved); *Nicholson v. State*, 768 N.E.2d 443 (Ind. 2002) (intent element of (b) (1) aggravator and torture aggravator not proved); or because the jury has not made the requisite unanimous finding, *see Kiplinger v. State*, 922 N.E.2d 1261 (Ind. 2010).

In some circumstances, you may want to move to dismiss an alleged aggravator because it cannot, by definition (or interpretation in case law) be applied to your client and/or the acts he is alleged to have committed. In other circumstances, you may present evidence tending to disprove the aggravator, and/or argue to the sentencer that the state has not proved the existence of each element of the aggravating circumstance(s) beyond a reasonable doubt. Finally, you can challenge the sufficiency of the evidence supporting a finding that an aggravator exists, in a TR 50 or 59(J) (7) motion or on appeal. *Pittman, supra*, 885 N.E.2d at 1254.

Below is a list of the current aggravating circumstances set out at IC 35-50-2-9(b), their elements as interpreted by the Indiana Supreme Court, and a non-exhaustive list of suggested challenges to them. Because the aggravating circumstances are the same for both the death penalty and LWOP, case law interpreting these circumstances applies to both death penalty and LWOP cases. *See, e.g., Ajabu, supra*, 693 N.E.2d 921 (Ind. 1998.); *Farber, supra*, 703 N.E.2d 151 (Ind. 1998); *Warlick, supra*, 722 N.E.2d 809 (Ind. 2000).

I encourage you to look at the [Indiana capital case law outline](#) for cases involving your charged aggravator(s) as well.

**1. (b)(1) The defendant committed the murder by intentionally killing the victim while committing or attempting to commit any of the following:**

- (A) Arson (Ind. Code 35-43-1-1).
- (B) Burglary (Ind. Code 35-43-2-1).
- (C) Child molesting (Ind. Code 35-42-4-3).
- (D) Criminal deviate conduct (Ind. Code 35-42-4-2) (before its repeal).
- (E) Kidnapping (Ind. Code 35-42-3-2).
- (F) Rape (Ind. Code 35-42-4-1).
- (G) Robbery (Ind. Code 35-42-5-1).
- (H) Carjacking (Ind. Code 35-42-5-2).
- (I) Criminal gang activity (Ind. Code 35-45-9-3).
- (J) Dealing in cocaine or a narcotic drug (Ind. Code 35-48-4-1).
- (K) Criminal Confinement (Ind. Code 35-42-3-3).

The elements of this aggravator include intent to kill. If your client is charged with intentional murder and felony murder, and is acquitted on the intentional count, that constitutes a finding against the state as to this element, and they cannot proceed to

the penalty phase on this aggravator. You should move to dismiss the death penalty request if the state itself does not do so. If there was no finding on your client's intent to kill at the guilt-innocence phase, *i.e.*, if the state charged only felony murder, and/or if the state has charged a “knowing **or** intentional” killing, the state must prove intent to kill during the penalty phase to establish this aggravating circumstance. *See Harrison v. State*, 659 N.E.2d 480 (Ind. 1995); *Nicholson v. State*, 768 N.E.2d 443 (Ind. 2002); *Pittman*, *supra*, 885 N.E.2d 1246 (Ind. 2008); *Kiplinger v. State*, 922 N.E.2d 1261 (Ind. 2010).

If your client was not the sole actor, “the State must prove that the defendant was a major participant in the killing and the killing was intentional.” *Pittman*, *supra*, 885 N.E.2d, at 1257. A co-defendant's intent to kill cannot be imputed to your client for the purpose of establishing this aggravator. *See Landress v. State*, 600 N.E. 2d 938 (Ind. 1992) (specifically held applicable to LWOP cases in *Ajabu v. State*, 693 N.E.2d 921 (Ind. 1998).

The underlying felony must also be proved to establish this aggravator. If it was not charged at the guilt-innocence phase, raise any challenge to the alleged felony that you would if it were charged at the guilt phase, and put the state to its proof on each element. (See, *e.g.*, *Ingle v. State*, 746 N.E.2d 97 (Ind. 2001) (where abductor merely seeks to get victim, rather than third party, to do or not do something, kidnapping is not established.) Make sure the jury is instructed on each element of the underlying felony, and on the state’s burden of proof. If the state in fact charged the underlying felony at the guilt phase, and the jury acquitted your client, you should move to dismiss this aggravator if the state itself does not do so.

For case law on what constitutes “while committing,” *see e.g.*, *F. Davis v. State*, 477 N.E.2d 889, 884 (Ind. 1985) (“the phrase ‘while committing’ denotes a continuing chain of events under our felony-murder statute. In other words, when there is a close proximity in terms of time and distance between the underlying felony and the homicide and there is no break in the chain of events from the inception of the felony to the time of the homicide, we treat the two events as part of one continuous transaction.”) *See also Krempetz v. State*, 872 N.E.2d 605 (Ind. 2007).

**2. (b)(2) The defendant committed the murder by the unlawful detonation of an explosive with intent to injure a person or damage property.**

On its face, this aggravator merely requires the state to prove intent to injure persons or damage property. However, *see* the note above from *Pittman v. State*, 885 N.E.2d 1246, 1258-59 (Ind. 2008). The language of this section “makes clear the defendant is assumed to be the killer.” *Id.* Further, the defendant be either the sole killer or an active participant in the killing, and the killing must be at least knowing or intentional. *Id.*

*See* the [Leonard Memorandum in Support of a Motion to Dismiss](#) the LWOP request based in part on this aggravator.

Particularly if the specific intent charged was to damage property, you can also argue that the aggravator does not ‘genuinely narrow[] the class of persons eligible for the

death penalty and ... reasonably justif[y] the imposition of a more severe sentence on the defendant compared to others found guilty of murder,' [Zant v. Stephens, 462 U.S. at 877, as required by the U.S. Constitution."

**3. (b)(3) The defendant committed the murder by lying in wait.**

This aggravator includes the elements of "waiting, watching, concealment, and taking the victim by surprise." See F. Davis v. State, 477 N.E.2d 889 (Ind. 1985). The waiting, watching, and concealment must be used as a "direct means to attack or take control of the victim." Id.; Ingle v. State, 746 N.E. 927 (Ind. 2001). This aggravator cannot apply to one who arranged for another to kill and was elsewhere while accomplices lay in wait. Thacker v. State, 556 N.E.2d 1315 (Ind. 1990). Our Court has also determined that the language of this aggravator "makes clear the defendant is assumed to be the killer." Pittman v. State, 885 N.E.2d 1246, 1259 (Ind. 2008), and that it requires that the defendant be either the sole actor or an active participant in the killing. If your client is an accomplice who is not alleged to have been present or to have been involved in the killing, you should file a motion to dismiss. If you go to trial on this aggravator, challenge the sufficiency of each of these elements.

**4. (b)(4) The defendant who committed the murder was hired to kill.**

**(b)(5) The defendant committed the murder by hiring another person to kill.**

These aggravators require proof that the killer was motivated by "pecuniary gain." See Thacker v. State, 556 N.E.2d 1315 (Ind. 1990). You should also put the state to its proof that the killer was actually hired "to kill," and not simply to scare or hurt the victim. As with the aggravator above, our Court has determined that the language of this statute "makes clear the defendant is assumed to be the killer." Pittman v. State, 885 N.E.2d 1246, 1259 (Ind. 2008). Further, the defendant must either be the sole killer or an active participant in the killing, and the killing itself must be at least knowing or intentional. Id.

**5. (b)(6) The victim of the murder was a corrections employee, probation officer, parole officer, community corrections worker, home detention officer, fireman, judge, or law enforcement officer, and either:**

- (A) The victim was acting in the course of duty; or
- (B) The murder was motivated by an act the victim performed while acting in the course of duty.

One of the most important elements of this aggravator, as interpreted by the Indiana Supreme Court, is the requirement that the defendant **knew** of the alleged official status of the victim at the time of the killing. Castor v. State, 587 N.E.2d 1281 (Ind. 1992). Put the state to its proof regarding your client's knowledge that the victim was a law enforcement officer, or other alleged official, at the time of the killing.

Also, of course, you should put the state to its proof on the elements of whether the victim was acting in the course of duty, or if subpart (B) is alleged, whether the killing was motivated by an act of the victim committed while in the course of duty.



Finally, see the note above from Pittman v. State, 885 N.E.1246, 1258-59 (2008), requiring that the defendant be either the sole killer or an active participant in the killing, and that the killing be at least knowing or intentional.

**6. (b)(7) The defendant has been convicted of another murder.**

For purposes of this aggravator, "conviction" means the entry by a trial court of a judgment of conviction. Lockhart v. State, 609 N.E.2d 1093 (Ind. 1993). In dicta, in Thompson v. State, 492 N.E.2d 264 (Ind. 1986), the Indiana Supreme wrote: "it may also be argued that for conviction of another murder to serve as an aggravating circumstance warranting consideration of a death sentence, the prior conviction must have existed at the time of commission of the principle murder charged. Such interpretation would be consistent with our rule that criminal and penal statutes must be strictly construed against the State and in favor of the defendant where construction is necessary." However, in Hough v. State, 560 N.E.2d 511 (Ind. 1990), the Court rejected this argument.

See also the note above from Pittman v. State, 885 N.E.1246 (2008), requiring that the defendant be either the sole killer or an active participant in the killing, and that the killing be at least knowing or intentional.

**7. (b)(8) The defendant has committed another murder, at any time, regardless of whether the defendant has been convicted of that other murder.**

In State v. McCormick, 272 Ind. 272, 397 N.E.2d 276 (Ind. 1979), the Indiana Supreme Court held that where the "other murder" alleged as an element of this circumstance is unrelated to the death-charged murder, application of this aggravator violates due process by exposing the defendant to a trial on that murder charge at the penalty phase before an undeniably prejudiced jury. Other cases have *clarified* that to be related, and to be applicable for charging under this aggravating circumstance, the other murder(s) must be prosecuted in the same action as the instant offense. See, e.g., Williams v. State, 669 N.E.2d 1372 (Ind. 1996); Wrinkles v. State, 690 N.E.2d 1156 (Ind. 1997); Monegan v. State, 721 N.E.2d 243 (Ind. 1999). If the other murder which the state alleges as part of this aggravator is not being prosecuted together with the death-charged murder, move to dismiss this aggravating circumstance.

See the [Leonard memorandum in support of a motion to dismiss the LWOP request](#) based in part on this aggravator.

Finally, see the note above from Pittman v. State, 885 N.E.1246 (2008), requiring that the defendant be either the sole killer or an active participant in the killing, and that the killing must be at least knowing or intentional.

**8. (b)(9) The defendant was:**

- (A) under the custody of the department of correction;
- (B) under the custody of a county sheriff;
- (C) on probation after receiving a sentence for the commission of a felony;  
or
- (D) on parole; at the time the murder was committed.



There is no case law interpreting whether the custody or probation or parole status elements of this aggravating circumstance must be legally valid. If a question exists as to the legality of your client's custody or status, raise it in a motion to dismiss this aggravating circumstance. This aggravating circumstance is also open to a proportionality challenge, raised in a motion to dismiss, and based on the grounds for the custody or probation or parole status. For example, if subpart (C) is alleged, and your client was on probation for an offense which would have been a misdemeanor but for an enhancement (i.e., a DUI offense enhanced to a class D felony pursuant to IC 9-30-5-3), file a motion to dismiss raising a proportionality challenge under Ind. Const. Art. I, Sec. 16. See Clark v. State, 561 N.E.2d 759 (Ind. 1990).

If you go to a penalty phase with this aggravator, you can limit the evidence which the state puts on to prove your client's status. In Old Chief v. U.S., 117 S.Ct.644 (1997), the U.S. Supreme Court held that, where the defendant's legal status as having a prior felony conviction was all that mattered under a statute, the defendant could stipulate to that status and prevent the state from admitting even a record of conviction naming the offense.

See also the above note from Pittman v. State, 885 N.E.1246 (2008), requiring that the defendant be either the sole killer or an active participant in the killing, and that the killing must be at least knowing or intentional.

In his concurrence/dissent in post-conviction appeal in Saylor v. State, 765 N.E.2d 535 (Ind. 1997), Justice Sullivan wrote the following: "I do not think that making a defendant eligible for death on the sole basis of a knowing killing while on probation 'genuinely narrows the class of persons eligible for the death penalty and ... reasonably justifies the imposition of a more severe sentence on the defendant compared to others found guilty of murder,' [Zant v. Stephens, 462 U.S. at 877, as required by the U.S. Constitution." The Indiana Supreme Court has more recently confronted this issue and concluded that not only is this aggravator constitutional, but that a trial court did not abuse its discretion in giving it great weight. Gibson v. State, 51 N.E.3d 204 (Ind. 2016).

**9. (b)(10) The defendant dismembered the victim.**

In a motion to dismiss, this aggravating circumstance can be challenged as facially vague, and can also be challenged in its application to your client's actions. Raise these challenges not only under the 8th Amendment to the U.S. Constitution, but also under Art. I, Sec. 16 of the Indiana Constitution. See, e.g., Maynard v. Cartright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372, for discussion of analysis of vagueness claims, focusing on "whether the challenged aggravating circumstance adequately informs the jury regarding what it must find in order to impose the death penalty, or whether it leaves the jury with unchanneled discretion to make an arbitrary and capricious decision." See also Bivins v. State, 642 N.E.2d 928 (Ind. 1994), regarding higher standard of proportionality in Indiana Constitution.

See also the note above from Pittman v. State, 885 N.E.1246 (2008), requiring that the defendant be either the sole killer or an active participant in the killing, and that the killing must be at least knowing or intentional.

**10. (b)(11) The defendant:**

- (A) burned, mutilated, or tortured the victim; or
- (B) decapitated or attempted to decapitate the victim;  
while the victim was alive.

In Nicholson v. State, 768 N.E.2d 443 (2002), the Indiana Supreme Court defined the torture aggravator as requiring the following: “an appreciable period of pain or punishment intentionally inflicted and designed either to coerce the victim or for the torturer’s sadistic indulgence. Put another way, torture is the gratuitous infliction of substantial pain or suffering in excess of that associated with the commission of the charged crime.” Although the victim experienced extreme suffering as she choked to death due to tissue taped inside her mouth lodging in her throat, it did not constitute torture.

In Leone v. State, 797 N.E.2d 743 (2003), the Court reversed a trial court’s finding of torture, finding that the defendant’s actions did not exceed the scope of murder or child molestation, and were accompanied by statements of remorse. The defendant had bound the victim’s hands and mouth with duct tape, made her walk from her trailer to his camper, cut her clothes off with a box knife, attempted vaginal intercourse and performed oral sex, and placed a dog choker collar around her neck and strangled her with it. “Although Leone’s actions were despicable, they did not exceed the scope of murder or molestation. He did not attempt to coerce [the victim] through torturous acts, nor did he appear to indulge in sadistic acts. In fact, he continually expressed remorse for his actions, and contacted the police to pick him up. We conclude that the evidence was inadequate to support a finding of torture.”

See also the note above from Pittman v. State, 885 N.E.1246 (2008), requiring that the defendant be either the sole killer or an active participant in the killing, and that the killing must be at least knowing or intentional.

See the [Leonard memorandum in support of a motion to dismiss the LWOP request](#) based in part on this aggravator.

But see Leonard v. State, 73 N.E.3d 155 (Ind. 2017), finding the State proved the b(11) aggravator because it did not have to show he intentionally burned a victim.

**11. (b)(12) The victim of the murder was less than twelve (12) years of age.**

When this aggravator is charged, the state need only show beyond a reasonable doubt that victim was less than 12 years old, not that the defendant was aware of the victim’s age. Stevens v. State, 691 N.E.2d 412 (1997).

However, see the above note from Pittman v. State, 885 N.E.1246 (2008), requiring that the defendant be either the sole killer or an active participant in the killing, and that the killing must be at least knowing or intentional.

**12. (b)(13) The victim was a victim of any of the following offenses for which the defendant was convicted:**

- (A) Battery as a Class D felony or as a Class C felony under Ind. Code 35-42-2-1.
- (B) Kidnapping (Ind. Code 35-42-3-2).
- (C) Criminal confinement (Ind. Code 35-42-3-3).
- (D) A sex crime under Ind. Code 35-42-4.

Although this aggravator was adopted together with expansions to (b) (9), largely in response to Alan Matheney's murder of his wife while on a one-day leave from his prison sentence for a prior battery against her and was more than likely intended to apply to domestic situations in which the victim was "previously" the victim of one of the specified offenses, there is no legislative history to document this. The Indiana Supreme Court has held that it can be found where the specified offense and the murder occur in a single episode and has also found that it is not duplicative of the (b)(1) aggravator based on the same specified offense. In so finding, the Court reasoned that one aggravator focuses on the defendant's character, and the other focuses on the victim's suffering. See Overstreet v. State, 783 N.E.2d 1140 (Ind. 2003).

See also the above note from Pittman v. State, 885 N.E.1246 (2008), requiring that the defendant be either the sole killer or an active participant in the killing, and that the killing must be at least knowing or intentional.

**13. (b)(14) The victim of the murder was listed by the state or known by the defendant to be a witness against the defendant and the defendant committed the murder with the intent to prevent the person from testifying.**

Clearly, the state must prove either that the victim was listed as a witness against the defendant, or if not listed, that the defendant knew, at the time of the killing, that the victim would be a witness against the defendant.

Further, the state must show that the defendant was the sole killer or a major participant in the killing, and that the killing must have been at least knowing or intentional. See Pittmann v. State, 885 N.E.1246 (2008).

Finally, the aggravator requires proof of specific intent to prevent the victim from testifying. If the defendant was not the sole actor, argue that this specific intent cannot be imputed to him/her from a co-defendant. See Landress v. State, 600 N.E.2d 938 (Ind. 1992).

**14. (b)(15) The defendant committed the murder by intentionally discharging a firearm (as defined in IC 35-47-1-5):**

- (A) into an inhabited dwelling; or
- (B) from a vehicle.

Under Pittman v. State, 885 N.E.2d 1246 (Ind. 2008), the state must show that the defendant was a major participant in the killing, and that the killing was at least knowing or intentional. The state must also prove that the defendant had the specific

intent set out in the aggravator, and if the defendant was not the sole actor, argue that it cannot be imputed to him/her from a co-defendant. See Landress v. State, 600 N.E.2d 938 (Ind. 1992).

Particularly if the specific intent charged was discharging a firearm from a vehicle, you can also argue that the aggravator does not ‘genuinely narrow[] the class of persons eligible for the death penalty and ... reasonably justif[y] the imposition of a more severe sentence on the defendant compared to others found guilty of murder,’ [Zant v. Stephens, 462 U.S. at 877, as required by the U.S. Constitution.”

**15. (b)(16) The victim of the murder was pregnant, and the murder resulted in the intentional killing of a fetus that has attained viability (as defined in IC 16-18-2-365).**

The state must prove that the fetus had attained viability, that the defendant was aware that the fetus had attained viability, and that the defendant specifically intended to kill the fetus. Argue that this specific intent cannot be imputed from a co-defendant. See Landress v. State, 600 N.E.2d 938 (1992). You should also argue that the state must show that the defendant was either the sole actor or an active participant in the killing. See Pittman v. State, 885 N.E.2d 1246 (2008).

**16. (b)(17) The defendant knowingly or intentionally:**

- (A) Committed the murder:
  - (i.) In a building primarily used for an educational purpose;
  - (ii.) On school property; and
  - (iii.) When students are present; or
- (B) Committed the murder:
  - (i.) In a building or structure owned or rented by a state educational institution or any other public or private postsecondary educational institution and primarily used for an educational purpose; and
  - (ii.) At a time when classes are in session.

This aggravator is written in a way that leaves room to challenge whether your client committed the murder in a place and at a time described in the statute. Was the building “primarily used for an educational purpose?” Further, you can challenge the vagueness in the language on due process grounds, for not giving your client sufficient notice of the aggravated conduct. See Kolender v. Lawson, 461 U.S. 352 (1983).

Also, the state must show that your client was the sole actor or a major participant in the killing. See Pittman v. State, 885 N.E.2d 1246 (2008).

**17. (b)(18) The murder is committed:**

- (A) in a building that is primarily used for religious worship; and
- (B) at a time when persons are present for religious worship or education.

This aggravator is written in a way that leaves room to challenge whether your client

committed the murder in a place and at a time described in the statute. Was the building “primarily used for a religious purpose?” Further, you can challenge the vagueness in the language on due process grounds, for not giving your client sufficient notice of the aggravated conduct. See Kolender v. Lawson, 461 U.S. 352 (1983).

Also, the state must show that your client was the sole actor or a major participant in the killing, and that the killing itself was at least knowing or intentional. See Pittman v. State, 885 N.E.2d 1246 (2008).

## **VI. BUILDING AND WORKING WITH YOUR DEFENSE TEAM**

Indiana’s Criminal Rule 24(B) requires that at least two qualified attorneys be appointed, and subsection (C) (2) requires that counsel be “provided, upon an **ex parte** showing to the trial court of reasonableness and necessity, with adequate funds for investigative, expert, and other services necessary to prepare and present an adequate defense at every stage of the proceeding, including the sentencing phase.” 2008 ABA Supplemental Guideline 4.1(A) also provides that funds requests be conducted *ex parte*, *in camera*, and under seal.

Here is a [sample motion for funds](#) to hire a mitigation specialist, and an [affidavit from mitigation expert Russell Stetlar](#) on the scope of mitigation investigation required by the prevailing professional norms and the ethical obligations of counsel in a capital case.

The 2003 ABA Guidelines, at Guideline 10.4, provide that lead counsel should assemble a defense team as soon as possible after being appointed. The Guideline describes a team as consisting of lead counsel and one or more associate counsel, at least one mitigation specialist and one fact investigator, “at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments,” and “any other members [such as experts] needed to provide high quality legal representation.” These latter members and experts will be added as your investigation progresses and you discover new areas in which you need assistance and expertise.

If you represent a foreign national, your team should include members familiar with your client’s home country and fluent in the language. These would include someone who can conduct or assist with your mitigation investigation, and at least one of your mental health experts. “[Mitigation Abroad](#),” by Gregory Kuykendall, Alicia Amezcua-Rodriguez, and Mark Warren, is a helpful piece to read, as are other materials on [cultural competence](#) in legal representation and forensic mental health assessments. You will also have additional obligations under Guideline 10.6 of the 2003 ABA Guidelines regarding contacting the consulate from your client’s home country, and they may also offer assistance with your mitigation investigation and search for experts.

Guideline 5.1 of the 2008 Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases sets out at some length and in considerable detail the qualifications required of defense team members, and 2008 Supplementary Guideline 4.1(B) places on Counsel the duty to “investigate the background, training and skills of defense team members to determine that they are competent; and to supervise and direct the work of all team members” to “ensure on an ongoing basis that their work is of high professional quality.” 2008 Supplemental Guideline 10.3 requires each member of the defense team to “limit their caseloads to the level needed to provide each client with high quality legal representation in accordance

with these Supplemental Guidelines and the ABA Guidelines as a whole.”

2008 Supplementary Guideline 4.1(D) provides:

It is counsel’s duty to provide each member of the defense team with the necessary legal knowledge for each individual case, including features unique to the jurisdiction or procedural posture. Counsel must provide mitigation specialists with knowledge of the law affecting their work, including an understanding of the capital charges and available defenses; applicable capital statutes and major state and federal constitutional principles; applicable discovery rules at the various stages of capital litigation; applicable evidentiary rules, procedural bars and “door-opening” doctrines; and rules affecting confidentiality, disclosure, privileges and protections.

2008 Supplementary Guideline 8.1 provides that all team members should successfully complete specialized death penalty defense training at least once a year, and that funding should be provided for this purpose.

2008 Supplementary Guideline 4.1(C) states that “[a]ll members of the defense team are agents of defense counsel,” and that they are bound by the same duties of privilege and confidentiality, diligence, and loyalty to the client through this role as agent. The next subsection, quoted above, gives you the obligation of making sure all team members understand this. 2008 supplementary Guideline 10.11(D) provides that “[t]he manner in which information is provided to counsel is determined on a case-by-case basis, in consultation with counsel, considering jurisdictional practices, discovery rules and policies.” Occasionally, a prosecutor will seek to depose a mitigation specialist or seek to discover their notes. Unless and until they are used as witnesses, your investigator’s notes and mental impressions are protected work-product and are no more discoverable than yours or co-counsel’s. Similarly, when you initially hire an expert, you should treat them as a consultant unless and until you decide that they will have favorable testimony and should be designated as a witness. The 7<sup>th</sup> Circuit recently reiterated this, finding trial counsel ineffective in part because they disclosed the report of an unfavorable expert, and failed to take advantage of the protections for consulting experts in T.R. 26(B)(4)((b). Stevens v. McBride, 849 F.3d 883, 896-97 (7<sup>th</sup> Cir. 2007). For more on discovery issues in capital cases, see Lorinda Youngcourt’s [discovery outline](#).

Working in a team, particularly as part of a multi-disciplinary team with non-lawyers, does not come naturally or easily to most criminal defense attorneys. Effective teamwork will take considerable effort, with clear and open communication a necessity. It is important that all team members understand the team's common goals, that each member understands his own role and the role of others on the team, that they understand your expectations of them, that you meet regularly to share information and hand out and report in on assignments, that all members understand how to report information in the way that you request it and without raising discovery concerns, that all members are able to share their information and ideas, that they understand how decisions will be made, and that decisions **are** made. 2008 Supplementary Guideline 10.4(A) provides in part:

Counsel bears ultimate responsibility for the performance of the defense team and

for decisions affecting the client and the case. It is the duty of counsel to lead the team in conducting an exhaustive investigation into the life history of the client...

2008 Supplementary Guideline 10.4(B) provides:

Counsel guides the defense team and, based on consultation with team members and experts, conducts ongoing reviews of the evidence, assessments of potential witnesses, and analyses of the most effective manner in which to convey the mitigating information. Counsel decides how mitigation evidence will be presented.

For more on laying the groundwork for a good working relationship with your mitigation specialist and other members of your team, see Lorinda Youngcourt's [outline](#) prepared for the 2007 IPDC Death Penalty Defense Seminar. If your mitigation specialist is a social worker, you may both want to read "[Mitigating Death](#)," by Emily Hughes. For more on the mitigation investigation itself, see [Section VIII](#), Fighting for Life, Investigating and Developing Mitigation, below. I would also encourage you to read [Cyndy Short's article](#), "Building Capital Teams and Uncovering the Client's Unique Stories: The DeLong Case," The Warrior, p.5, Spring 2004.

Your mitigation specialist and other team members can help you determine what other experts may be necessary and can help you find and work with them. 2008 Supplementary Guideline 10.11 states that it is the duty of the defense team members to aid counsel in selection and preparation of witnesses who will testify, and 2008 Supplementary Guideline 10.11(E)(1) provides the following as a non-exhaustive list of types of potential testifying expert witnesses:

- A. Medical doctors, psychologists, toxicologists, pharmacologists, social workers and persons with specialized knowledge of medical conditions, mental illnesses and impairments; substance abuse, physical, emotional and sexual maltreatment, traumas and the effects of such factors on the client's development and functioning.
- B. Anthropologists, sociologists and persons with expertise in a particular race, culture, ethnicity, religion.
- C. Persons with specialized knowledge of specific communities or expertise in the effect of environments and neighborhoods upon their inhabitants.
- D. Persons with specialized knowledge of institutional life, either generally or within a specific institution.

Only a thorough understanding of your client's history, resulting from a thorough mitigation investigation, can tell you the many types of experts you will need to assist you in developing and presenting mitigation evidence. You cannot simply hire a single mental health expert to go see your client and "evaluate" him or her, and neither can you wait until shortly before trial to hire experts, leaving no time for them to do their work and leaving you no time to work with them to develop your mitigation case or to prepare them for trial. See [Prowell v. State](#), 741 N.E.2d 704 (Ind. 2001). As you and your defense team begin to determine your need for each type of expert, you should begin to request them, *ex parte*, from your funding source (the trial court or your public defender office), making an individualized and specific showing of reasonable necessity for each one.



Your mitigation specialist and other team members not only can help you identify what experts you need and help select them they may be able to help support your request for funds to hire an expert. Similarly, the experts you have can help support your requests for additional experts in related but more specialized areas.

All of this emphasis on the mitigation investigation and experts is not intended to suggest that you do not need a guilt-innocence investigator or experts who can help you challenge the state's guilt-innocence phase forensic evidence. In the thirty-plus years of the modern death penalty era, at least one-hundred and fifty individuals who have been convicted and sentenced to death have later been exonerated, and this should keep us mindful of the need to thoroughly investigate and challenge the state's guilt-innocence phase case. Many of these wrongful convictions involved shoddy forensic science, and in 2005, Congress authorized the National Academy of Sciences to conduct a study of the forensic sciences. Their 2009 report, "Strengthening Forensic Science in the United States: A Path Forward," identified several problems with "the forensic science enterprise," and particularly called into question the validity of several non-DNA identification or individualization techniques, including already questioned techniques such hair and bite-mark identification, and such long-accepted techniques as tool-mark and firearm identification and fingerprinting. You can purchase the NAS report, download a pdf, or read it for free on-line at [http://www.nap.edu/catalog.php?record\\_id=12589](http://www.nap.edu/catalog.php?record_id=12589). Craig Cooley, of [The Innocence Project](#), has written, "[The National Academy of Sciences Report and the Capital Defense Attorney](#)," which provides an outline of the problems identified by the NAS report, as well as suggestions for using it to challenge the state's experts. One of the factors that the Indiana Supreme Court has identified the degree to which an area of expertise involves precise testing and measurements or instead is subject to debate as a pertinent factor in determining whether defense counsel has established a reasonable need for an independent expert to assist in challenging a state expert. *James v. State*, 613 N.E.2d 15, 21 (Ind. 1993). The NAS report can help establish this factor and help you obtain funds to hire your own expert.

Remember that Criminal Rule 24(C) (2) authorizes *ex parte* requests for funds to hire experts. For a discussion on obtaining funds, including sample funds motions, and a sample order instructing court staff how to maintain the confidentiality of your funds requests, see [Getting Funds for Experts](#). Although it is not required in Indiana, your trial court may ask you to provide a projected budget for your team. A [sample budget](#) from a federal capital case is available.

For a discussion on working with experts to make the most effective use of them at trial, see [Developing the Expert/Attorney Relationship to Help the Client: An 8-Step Process](#), by Edward Monahan and James J. Clark. For more on mental health issues and experts, in particular, see [Section IX](#), Mental Health Issues, below. You can also look for experts on IPDC's [website](#), although your search should not end there.

## **VII. WORKING WITH YOUR CLIENT**

Never forget that your client is also an important part of your team -- after all, it is his life you are all working to save. Your client has been charged with what is probably a very brutal murder. He faces the death penalty, and his best hope may be for a sentence of LWOP. More than likely, you represent him as a public defender, a member of a group he does not hold in high regard. In order to represent him, you and your team will have to inquire into his and his family's darkest secrets, and perhaps expose them before a courtroom full of people. You will be



aggressively pursuing plea negotiations, and if you are successful and your investigation leads you to believe that a guilty plea would be appropriate, you will likely be trying to talk him into accepting a sentence of LWOP or a similarly long term of years. Cellmates and members of the media will all be eager to talk to your client, increasing his opportunities to derail his defense and ensure a conviction and death sentence. To make matters worse, your client may very likely suffer from mental and emotional problems as the result of childhood abuse or neglect, mental illness or disorder, brain damage, and/or substance abuse. All of these things complicate your ability to develop a trusting relationship and to work effectively with your client, and yet your client's cooperation is crucial to a positive outcome, either through plea negotiations or at trial.

Guideline 10.5(A) of the 2003 ABA Guidelines provides that counsel “should make every appropriate effort to establish a relationship of trust with the client and should maintain close contact with the client.” Guideline 10.5(B)(1) provides that “an interview of the client should be conducted within 24 hours of counsel’s entry into the case,” and Guideline 10.5(C) provides that counsel should “engage in a continuing interactive dialogue with the client concerning all matters that might reasonably be expected to have a material impact on the case...” These include the “progress and prospects for the factual investigation,” legal issues, development of a defense theory and presentation of the case; potential plea agreements, case deadlines, and “relevant aspects of the client’s relationship with correctional, parole, or other governmental agents (e.g., prison medical providers or state psychiatrists.)”

Guideline 10.11(B) – (E) of the 2003 ABA Guidelines provide:

- B. Trial counsel should discuss with the client early in the case the sentencing alternatives available, and the relationship between the strategy for the sentencing phase and for the guilt/innocence phase.
- C. Prior to the sentencing phase, trial counsel should discuss with the client the specific sentencing phase procedures of the jurisdiction and advise the client of steps being taken in preparation for sentencing.
- D. Counsel at every stage of the case should discuss with the client the content and purpose of the information concerning penalty that they intend to present to the sentencing or reviewing body or individual, means by which the mitigation presentation might be strengthened, and the strategy for meeting the prosecution's case in aggravation.
- E. Counsel should consider, and discuss with the client, the possible consequences of having the client testify or make a statement to the sentencing or reviewing body or individual.

Guideline 10.11(J) of the 2003 ABA Guidelines provides:

If the prosecution is granted leave at any stage of the case to have the client interviewed by witnesses associated with the government, defense counsel should:

1. carefully consider

**(a) what legal challenges may appropriately be made to the interview or the**

conditions surrounding it, and

**(b) the legal issues and strategic issues implicated by the client's co-operation or noncooperation;**

2. assure that the client understands the significance of any statements made during such an interview; and
3. attend the interview.

For a more thorough discussion about working with your client, see [Working With Your Client](#), by Jodie English. This outline, which was prepared for IPDC's 1996 Death Penalty Seminar, predates the ABA Guidelines, and some of its references are becoming dated, but it still contains sage wisdom about your client's concerns and the barriers between you. For more on working with clients who have mental illness, see Dr. George Savarese's presentation from the 2016 IPDC Death Penalty Seminar, [Working With Mentally Ill Clients](#). For a one-page chart outlining the impact of various factors on your client's behavior, and how they may affect your case and your work with your client, see [Who Is Your Client](#) and What Does It Matter, by Deana Dorman Logan. For an excellent discussion of how to recognize signs of mental impairment from your client's behavior, including behavior that otherwise might frustrate your work with him and increase his chance of being sentenced to death, see [Learning to Observe Signs of Mental Impairment](#), also by Deana Dorman Logan. There are also training materials [on representing clients diagnosed with borderline personality disorder](#).

Finally, psychologist Xavier Amador has developed a four-step process for clients with schizophrenia or bipolar disorder who do not seem to understand or believe that they are sick, or that their delusions are not real. Clinical research over the past fifteen years indicates that this lack of insight is not willful or defensive denial, but an actual symptom called anosognosia. The individual is simply not aware of their symptoms, even though their symptoms are readily apparent to everyone around them. See Amador, [Poor Insight in Schizophrenia: Overview and Impact on Medication Compliance](#), Special Report, CNS Newsonline, September 2006. They cannot be "reasoned out of" this unawareness. Amador calls his four-step process LEAP, with the steps being Listen, Empathize, Agree, and Partner. This process is widely hailed for its effectiveness in working with individuals who lack awareness of their illness. See Amador, *I Am Not Sick: I Don't Need Your Help*, 2d ed. 2007. A [short outline](#) is available.

For more on mental health issues generally, see [Section IX](#), below.

## **VIII. CAPITAL DEFENSE INVESTIGATION**

### **A. Guilt-Innocence Investigation – Putting the State's Case to the Test**

As mentioned above, in the thirty-plus years of the modern death penalty era, [more than 155 individuals](#) have been exonerated after being wrongly convicted and sentenced to death. Many of these cases involved faulty eyewitness identification, coerced confessions, false snitch testimony, shoddy forensic evidence, and inadequate investigation by defense counsel. Accordingly, the 2003 ABA Guidelines, Guideline 10.7(A) provides in part:

Counsel at every stage have an obligation to conduct thorough and

independent investigations relating to the issues of both guilt and penalty.

1. The investigation regarding guilt should be conducted regardless of any admission or statement by the client concerning the facts of the alleged crime, or overwhelming evidence of guilt, or any statements by the client that evidence bearing upon guilt is not to be collected or presented.

The commentary to Guideline 10.7 elaborates further on the elements of an adequate guilt-innocence investigation.

1. Charging Documents:

Copies of all charging documents in the case should be obtained and examined in the context of the applicable law to identify:

- a. the elements of the charged offense(s), including the element(s) alleged to make the death penalty applicable;
- b. the defenses, ordinary and affirmative, that may be available to the substantive charge and to the applicability of the death penalty;
- c. any issues, constitutional or otherwise, (such as statutes of limitations or double jeopardy) that can be raised to attack the charging documents; and
- d. defense counsel's right to obtain information in the possession of the government, and the applicability, extent, and validity of any obligation that might arise to provide reciprocal discovery.

2. Potential Witnesses:

- a. Barring exceptional circumstances, counsel should seek out and interview potential witnesses, including, but not limited to:
  - (1) eyewitnesses or other witnesses having purported knowledge of events surrounding the alleged offense itself;
  - (2) potential alibi witnesses;
  - (3) witnesses familiar with aspects of the client's life history that might affect the likelihood that the client committed the charged offense(s), and the degree of culpability for the offense, including:
    - (a) members of the client's immediate and extended family
    - (b) neighbors, friends and acquaintances who knew the client or his family
    - (c) former teachers, clergy, employers, co-workers, social service providers, and doctors
    - (d) correctional, probation, or parole officers;

(4) members of the victim's family.

- b. Counsel should conduct interviews of potential witnesses in the presence of a third person so that there is someone to call as a defense witness at trial. Alternatively, counsel should have an investigator or mitigation specialist conduct the interviews. Counsel should investigate all sources of possible impeachment of defense and prosecution witnesses.

3. The Police and Prosecution:

Counsel should make efforts to secure information in the possession of the prosecution or law enforcement authorities, including police reports, autopsy reports, photos, video or audio tape recordings, and crime scene and crime lab reports together with the underlying data therefor. Where necessary, counsel should pursue such efforts through formal and informal discovery.

4. Physical Evidence:

Counsel should make a prompt request to the relevant government agencies for any physical evidence or expert reports relevant to the offense or sentencing, as well as the underlying materials. With the assistance of appropriate experts, counsel should then aggressively re-examine all of the government's forensic evidence and conduct appropriate analyses of all other available forensic evidence.

5. The Scene:

Counsel should view the scene of the alleged offense as soon as possible. This should be done under circumstances as similar as possible to those existing at the time of the alleged incident (e.g., weather, time of day, and lighting conditions).

## **B. Fighting For Life -- Investigating And Developing Mitigation**

Although mitigating circumstances can be presented for consideration at any sentencing hearing, in a death penalty case, they are presented to the jury as part of the case for sparing your client's life. Ind. Code 35-50-2-9 sets out the jury's decision-making process: the jury will be asked to determine whether the alleged aggravating circumstance or circumstances have been proved beyond a reasonable doubt, and whether they outweigh the mitigating circumstances. The jury cannot recommend death or LWOP, and the judge cannot impose either of those sentences, unless the answer to both of those questions is yes. But even if the jury reaches that point, they are not "required" to impose the death penalty. The jury's decision goes far beyond these formulaic questions - ultimately they are deciding whether your client deserves to die. You must present to them a comprehensive and persuasive case for sparing your client's life.

The ABA's 2008 Supplementary Guidelines for the Mitigation Function of Defense

Teams in Death Penalty Cases, at Guideline 1.1(A), says this about mitigation evidence:

Mitigation evidence includes, but is not limited to, compassionate factors stemming from the diverse frailties of humankind, the ability to make a positive adjustment to incarceration, the realities of incarceration and the actual meaning of a life sentence, capacity for redemption, remorse, execution impact, vulnerabilities related to mental health, explanations of patterns of behavior, negation of aggravating evidence regardless of its designation as an aggravating factor, positive acts or qualities, responsible conduct in other areas of life (e.g. employment, education, military service, as a family member), any evidence bearing on the degree of moral culpability, and any other reason for a sentence less than death.

It is crucial to conduct a full mitigation investigation, looking both for evidence which would rebut the state's alleged aggravating circumstance(s), and for mitigating circumstances which would warrant a sentence less than the maximum penalty sought. Mitigating circumstances include virtually "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a" lesser sentence. Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L.Ed.2d 973 (1978).

The Indiana Supreme Court has recognized the crucial nature of representation at the penalty phase. In Smith v. State, 547 N.E.2d 817, 882 (1989), the Court wrote, "In the absence of any mitigating circumstances, which ... may include virtually anything favorable to the accused, or of evidence to rebut the existence of the charged aggravating factors, a death sentence is a foregone conclusion." Moreover, the Court held that "[a] decision by defense counsel not to present evidence can be deemed reasonable only if it is 'predicated on a proper investigation....'" Id., at 821. The Court found counsel's failure to investigate and prepare for the penalty phase to be ineffective assistance of counsel. See also dissent by Chief Justice Rush in Weisheit v. State, 109 N.E.3d 978 (Ind. 2018), stating the defendant was prejudiced by counsel's cumulative deficiencies, which collectively undermine confidence in the legality of defendant's death sentence. The dissent believes a new penalty phase was warranted because the jury was deprived of enough essential information about [D's] background and mental health to the extent that his death sentence is not as reliable as the constitution requires. Nor did the jury encounter any expert testimony about [D's] past adjustment to imprisonment, which might have served as a basis for a sentence less than death.

*Citing* to the 1989 ABA Guidelines for Performance of Defense counsel in Death Penalty Cases, the U.S. Supreme Court reversed the death sentence of Kevin Wiggins on IAC grounds because his trial counsel had not conducted a reasonable mitigation investigation. Wiggins v. Smith, 539 U.S. 510 (2003). The Court described the Guidelines as:

standards to which we have long referred as 'guides to determining what is reasonable.' Strickland, supra, at 688, 466 U.S. 668; Williams v. Taylor, supra, at 396, 529 U.S. 362. The ABA Guidelines provide that

investigations into mitigating evidence ‘should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.’ ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C), p. 93 (1989) (emphasis added). Despite these well-defined norms, however, counsel abandoned their investigation of petitioner’s background after having acquired only rudimentary knowledge of his history from a narrow set of sources. *Cf. Id.*, 11.8.6, p. 133 (noting that among the topics counsel should consider presenting are medical history, educational history, employment and training history, *family and social history*, prior adult and juvenile correctional experience, and religious and cultural influences) (emphasis added).

Wiggins, at 524.

More recently, in a *per curiam* opinion in Sears v. Upton, 130 S. Ct. 3259 (2010), the Court reiterated that a decision to focus on one particular penalty-phase theory cannot be justified as a “tactical decision” if trial counsel has not first conducted a thorough investigation into the client’s background. *Id.*, (slip op. at 15-16). In both Sears and Porter v. McCollum, 130 S. Ct. 447 (2009), another *per curiam* opinion from the same term, the Court wrote that trial counsel should not be dissuaded by the discovery of seemingly adverse evidence, noting that “competent counsel should have been able to turn some of this adverse evidence into a positive.” Sears, *supra*, (slip op. at 10-11). And the Sears Court also pointed out that the fact that some evidence uncovered in the course of a thorough mitigation investigation might be “‘hearsay’ does not necessarily undermine its value -- or its admissibility -- for penalty phase purposes.” *Id.*, (slip op. at 9-10) (*citing* Green v. Georgia, 442 U.S. 95, 97 (1979)). *See also* Dumas v. State, 803 N.E.2d 1113, 1121 (Ind. 2004), and [Section XIII C](#) below.

The 2003 ABA Guidelines, at Guideline 10.7(A) (2), spells out the necessity of conducting a full penalty phase investigation, providing that “The investigation regarding penalty should be conducted regardless of any statement by the client that evidence bearing upon penalty is not to be collected or presented.” The commentary to this rule elaborates further on the potential scope of mitigation evidence, describing the penalty phase investigation as follows:

Because the sentencer in a capital case must consider in mitigation, “anything in the life of the defendant which might militate against the appropriateness of the death penalty for the defendant,” penalty phase preparation requires extensive and generally unparalleled investigation into personal and family history. In the case of the client, this begins with the moment of conception. Counsel needs to explore:

- (1) Medical history (including hospitalizations, mental and physical illness or injury, alcohol and drug use, pre-natal and birth trauma, malnutrition, developmental delays, and neurological damage);

- (2) Family and social history (including physical, sexual or emotional abuse; family history of mental illness, cognitive impairments, substance abuse, or domestic violence; poverty, familial instability, neighborhood environment and peer influence); other traumatic events such as exposure to criminal violence, the loss of a loved one or a natural disaster; experiences of racism or other social or ethnic bias; cultural or religious influences; failures of government or social intervention (e.g., failure to intervene or provide necessary services, placement in poor quality foster care or juvenile detention facilities);
- (3) Educational history (including achievement, performance, behavior, and activities), special educational needs (including cognitive limitations and learning disabilities) and opportunity or lack thereof, and activities;
- (4) Military service, (including length and type of service, conduct, special training, combat exposure, health and mental health services);
- (5) Employment and training history (including skills and performance, and barriers to employability);
- (6) Prior juvenile and adult correctional experience (including conduct while under supervision, in institutions of education or training, and regarding clinical services);

The 2008 Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases further flesh out the breadth and depth of the mitigation investigation, as well as the roles and working relationships of individual defense team members. 2008 Supplementary Guideline 10.11 (B) - (D) provides as follows:

- (B) The defense team must conduct an ongoing, exhaustive and independent investigation of every aspect of the client's character, history, record and any circumstances of the offense, or other factors, which may provide a basis for a sentence less than death. The investigation into a client's life history must survey a broad set of sources and includes, but is not limited to: medical history; complete prenatal, pediatric and adult health information; exposure to harmful substances in utero and in the environment; substance abuse history; mental health history; history of maltreatment and neglect; trauma history; educational history; employment and training history; military experience; multi-generational family history, genetic disorders and vulnerabilities, as well as multi-generational patterns of behavior; prior adult and juvenile correctional experience; religious, gender, sexual orientation, ethnic, racial, cultural and community influences; socioeconomic, historical, and political factors.

(C) Team members must conduct in-person, face-to-face, one-on-one interviews with the client, the client's family, and other witnesses who are familiar with the client's life, history, or family history or who would support a sentence less than death. Multiple interviews will be necessary to establish trust, elicit sensitive information and conduct a thorough and reliable life-history investigation. Team members must endeavor to establish the rapport with the client and witnesses that will be necessary to provide the client with a defense in accordance with constitutional guarantees relevant to a capital sentencing proceeding.

(D) Team members must provide counsel with documentary evidence of the investigation through the use of such methods as genealogies, social history reports, chronologies and reports on relevant subjects including, but not limited to, cultural, socioeconomic, environmental, racial, and religious issues in the client's life. The manner in which information is provided to counsel is determined on a case by case basis, in consultation with counsel, considering jurisdictional practices, discovery rules and policies.

As these standards indicate, it is important that your mitigation investigation and presentation of evidence be "culturally competent," developing for yourself and your jury a complete picture of your client's essential humanity within his own community and cultural context. This is true whether your client is a foreign national or grew up in the projects of Chicago or a rural southern Indiana community. [Materials on cultural competence](#) are available.

The mitigation investigation, together with your guilt-innocence phase investigation, should begin as early as possible. These ongoing investigations can inform and help expand and guide one another, as you learn more about your client and how he experiences and interacts with the world and learn more about the crime, how it was committed, and your client's involvement in it. They will also inform your pretrial motion practice and your plea negotiations strategy.

The [2003 ABA Guidelines and commentary](#) and the [2008 Supplementary Guidelines](#) serve not only as a guide, but as persuasive authority in getting the time and resources you need to conduct an effective investigation. The typical mitigation investigation involves both gathering records, which may be old and difficult to locate, and interviewing people regarding sensitive and unpleasant experiences. Both are difficult and time-consuming. You should seek funds to hire a mitigation specialist or specialist as soon as possible. You should also be prepared to fight for the time necessary for your team to fully investigate your client's life and to develop your mitigation case. Here is a [sample motion for funds](#) to hire a mitigation specialist, and a [sample motion for continuance](#). Both motions cite to the ABA Guidelines as well as to Wiggins and other cases that rely on them. You can find the most recent listing of cases *citing* the Guidelines at <http://www.abanet.org/deathpenalty/resources/home.shtml>.



You will need to explain to your client and his family why you are beginning to prepare for the penalty phase so soon. Their likely understanding will be that you are simply giving up and writing off any challenge to the murder charge. You must explain to your client and his family that he is on trial for his life, and you are preparing to defend his life in every possible way. Explain that there will be no time to prepare for sentencing after trial; unlike other cases, where sentencing is set 30 days after trial, the penalty phase will begin immediately if your client is convicted. You can explain what you are trying to do and why you need to begin now. See 2003 ABA Guideline 10.11(A) - (E), regarding keeping your client informed about penalty phase investigation and strategy. **It is also important to make sure that both your client and his family understand the importance of mitigation. Your mitigation specialist can help you with this.**

Fairly often, a capitally charged defendant will refuse to allow mitigation to be developed presented, arguing that he would rather be killed than spend the rest of his life in prison, or will forbid the defense team to talk to his family. Regardless, it is necessary to develop mitigation, whether your client wants you to or not. As mentioned above, 2003 ABA Guideline 10.7(A) (2) requires that the penalty phase investigation be conducted regardless of any statements by your client that it should not be done. Without conducting an investigation, you cannot effectively advise your client of potential mitigation or its value. See, e.g., Thompson v. Wainwright, 787 F.2d 1447 (11<sup>th</sup> Cir. 1986); Emerson v. Gramley, 91 F.3d 898 (7<sup>th</sup> Cir. 1996). In a unanimous *per curiam* opinion, Porter v. McCollum, 130 S. Ct. 447 (2009) trial counsel were found ineffective for failing to investigate and develop extensive mitigation evidence regarding Porter's heroic military service and the trauma it inflicted, his struggles upon returning home from the military, his childhood history of physical abuse, and his diminished mental capacities. Trial counsel served as standby counsel until after Porter was convicted, and then represented him at the penalty phase which was held a little over a month later. He ascribed his failure to investigate and develop mitigation to Porter's own behavior, which he described as fatalistic and uncooperative, and to Porter's instructions not to talk with his son. The Court wrote that this combination of circumstances did not relieve counsel of the obligation to conduct a penalty phase investigation.

Clients are often depressed, stressed out or otherwise unwilling or unable to allow you to put on mitigation. A mental health professional can be invaluable in helping your team understand your client's thinking and the barriers that prevent him from allowing you to put on mitigation. In the event that nothing helps persuade your client to allow mitigation to be presented, Professor Jules Epstein has written a [law review article](#) arguing that a court allowing a defendant to waive presentation of mitigation violates the 8<sup>th</sup> Amendment, because it undermines the requirement that the death penalty be reserved for the worst of the worst. The Indiana Supreme Court has rejected this argument, in Smith v. State, 686 N.E.2d 1264, 1275 (Ind. 1997), but you can raise it to preserve it for federal review.

For more information on understanding and working with your client, including those with mental and emotional impairments, see [Section VII](#), Working With Your Client, above, and [Section IX](#), Mental Health Issues, below.

It is important to be broad-minded in your search, and not to limit it to any particular

category of mitigation, such as positive character evidence, evidence intended to evoke sympathy, substance abuse or mental health evidence, or what have you. Your mitigation investigation and presentation of mitigation must be both broad and deep. It is not enough simply to identify broad categories of mitigating circumstances which can be cited to the jury, *i.e.*, your client had a “turbulent childhood” or suffered physical abuse. These circumstances, in the abstract, can be easily dismissed. You must anticipate your jurors' response that, after all, everybody got a few whacks growing up, and we all know people who were abused physically or sexually, or who were poor and often hungry, and none of them grew up to commit murder. If you doubt the impact of childhood environment and experience on later behavior, or you worry that your jurors will, there is research sponsored by the National Institute of Justice demonstrating the link between not just childhood abuse but neglect as well. See Widom and Maxfield, [An Update on the Cycle of Violence](#), National Institute of Justice Research Brief, February 2001, p.1. The Justice Department's [Office of Juvenile Justice and Delinquency Prevention \(OJJDP\)](#) has identified risk factors in childhood that increase the likelihood of future violent behavior, as well as protective factors that help prevent such violent behavior. These factors are broken into four categories, individual, family, peer, and school and community, and form the basis for government-funded efforts to prevent juvenile delinquency. [A collection of OJJDP research](#) is available. The Department of Child Welfare, a branch of the federal department of Health & Human Services, also has a helpful on-line [clearinghouse of information](#) on the effects of child abuse and neglect on development and behavior.

You must investigate and present a compelling case for life, rich in specific, human detail that your jurors can see and feel. For an overview of the mitigation investigation and its stages, see [Mitigation: An Integrative Approach](#), by George Savarese, Ph.D., and [The Phases of Mitigation](#), by Juliet Yackel. And here is a non-exhaustive [list](#) of potential mitigation areas to jog your thinking. Two law review articles will also give you real insight into the wide-open nature of mitigation evidence and the importance of mining it in rich human detail. See Stetler, [“The Mystery of Mitigation: What Jurors Need to Make a Reasoned Moral Response in Capital Sentencing,”](#) 11 J. L. & Soc. Change 237(2007) and Blume, Johnson & Sundby, [“Competent Capital Representation: The Necessity of Knowing and Heeding What Jurors Tell Us about Mitigation,”](#) 36 Hofstra L. Rev. 1035 (2008). Cyndy Short's [article](#), “Building Capital Defense Teams and Uncovering the Client's Unique Stories: The DeLong Case, The Warrior, p.5, Spring 2004, provides a good example of the development of a case for life.

For more information on mitigation investigations, see the full commentary to 2003 ABA Guideline 10.7, and the 2008 Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases, as well as Jan Dowling's brief mitigation specialist [outline](#) and her longer and more detailed outline on the components of a [social history investigation](#). The National Alliance of Sentencing Advocates and Mitigation Specialists has also prepared a [list of interviewing tips](#). For more on how you and your team should work together to conduct this investigation and prepare mitigation evidence for trial, see [Section VI](#), Building and Working with Your Team, above. Finally, for a discussion of discovery issues in capital cases, see Lorinda Youngcourt's discovery [outline](#).

Be sure to read [Section XIV\(B\)](#), Your Battle Plan for the Penalty Phase, for further discussion regarding developing, planning and presenting a compelling case for life, including [Steve](#)

[Bright's article](#) discussing how he made the case for William Brook's life all through his trial, from jury selection through final argument at the penalty phase.

## IX. MENTAL HEALTH ISSUES

Mental disabilities pervade our client's lives, causing suffering we often fail to comprehend in our focused efforts to resolve their capital murder charges. Most suffer from a constellation of recognized mental disorders, brain damage from a variety of causes, and experiences that have left them with what can only be described as tormented psyches. These disabilities and disorders can prevent us from working effectively with our clients and can lead them to behave in ways that are not only maddening but self-destructive. They can cause jurors to turn away in fear or indifference and to decide that our clients should be "put down" like a two-headed calf. But these same disorders can also serve as powerful mitigation if we can develop and present them to jurors so that they can empathically understand the profound and tragic ways that these disorders have impacted our client's lives. Except in the rare instance where these problems rise to the level of establishing a defense of insanity, they should not be presented as an "excuse" for the charged crime, but as information that jurors need in-order to understand this individual defendant and to fairly consider what punishment is appropriate for this defendant and this offense.

For this reason, the 2003 ABA Guidelines require that at least one member of each capital defense team be "qualified to screen for mental or psychological disorders or impairments." See 2003 ABA Guideline 4.1. While mental health evidence will come into play in nearly every capital case, be warned that you should never simply hire a psychologist or psychiatrist to "evaluate" your client before you have gathered significant information from your mitigation investigation. See Stetler, "[Mystery of Mitigation](#)," *supra*, at 254-56. You need information from your mitigation investigation to help you determine the particular area(s) of expertise you want your mental health professional(s) to have, and to support your request for them, and you will also need significant background information to provide to your mental health professional in order to direct her focus and to enable her to perform a competent, informed evaluation. Id., See also, e.g., Prowell v. State, 741 N.E. 2d 704 (Ind. 2001). But Prowell also demonstrates the problems inherent in waiting too late in your investigation and trial preparation to hire the mental health professional(s) that you need, so that they do not have adequate time to perform a competent evaluation. In addition to giving your mental health expert adequate time and information about your client, you will need to be clear about your reason for hiring her and what role she will play on your team. Only a mental health professional that you intend to put on the stand as a witness need be listed as such and disclosed to the prosecution; an expert you merely consult with need not be disclosed. See Stevens v. McBride, 489 F.3d 883, 896-97 (7<sup>th</sup> Cir. 2007) (*citing* T.R. 26(4) (b) (4)).

Mental health experts can play many different roles. They can serve as a consultant for your team, helping you work with your client and helping you identify potential issues and identify other experts who can assist you. Some mental health experts are skillful and insightful interviewers who can elicit sensitive information from your client and his family and friends and can serve as part of your investigative team. And of course, mental health experts can testify at trial, helping tie together and explain the impact of childhood experiences and environment, brain damage, or any of a broad spectrum of mental disabilities. You may need experts from a variety of different specialties, depending on your client's individual problems. And do not

disregard mental health professionals who have examined or treated your client in the past. If they can be properly prepared, their testimony can have special credibility with the jury because their observations were not made in preparation for this case. See Blume, Johnson & Sundby, “[Competent Capital Representation](#),” *supra*, at 1041-42.

For a practical discussion of how to use your mitigation investigation to develop the basis for a sound mental health evaluation, see [Dudley & Leonard](#), “Getting It Right: Life History Investigation as the Foundation for a Reliable Mental Health Assessment,” 36 Hofstra L. Rev. 963 (2008). Psychologist Kathy Wayland has also written an excellent [memorandum](#) describing how people you interview regarding your client might experience and describe symptoms of mental health problems or illness, particularly in different cultural and social contexts. John Blume and Pamela Leonard have also written two excellent articles -- one on the [elements of a competent and reliable mental health evaluation](#), and one [on developing and presenting mental health evidence](#) in capital cases. Douglas Liebert, Ph.D., and David Foster, M.D., have written an article on [standards of practice](#) for mental health evaluations in capital cases.

One nearly universal but often overlooked aspect of capital clients’ lives is a history of severe and chronic psychological trauma. These traumatic experiences are often overlooked in the rush to find symptoms of mental illness and obtain a diagnosis. Yet these experiences have a profound impact on our clients’ psychological health and behavior, and it is the failure to investigate, develop and present precisely this type of mitigation evidence that the U.S. Supreme Court found to constitute ineffective assistance of counsel in cases like Williams v. Taylor, 529 U.S. 362, 396 (2000) and Wiggins v. Smith, 539 U.S. 510 (2003), and more recently in Porter v. McCollum, 130 S. Ct. 447 (2009) and Sears v. Upton, 130 S. Ct. 3259 (2010). In Porter, *supra*, a unanimous *per curiam* opinion, the Court wrote that it was unreasonable for the state court to “discount to irrelevance the evidence of Porter’s abusive childhood” because he was 54 years old at the time of the crime. Dr. Wayland’s law review article, “[The Importance of Recognizing Trauma throughout Capital Mitigation Investigations and Presentations](#),” 26 Hofstra L. Rev. 923 (2008), is extremely helpful. It is part of a [collection of resources](#) on trauma that is available – both PTSD and complex trauma resulting from the sort of recurring lesser incidents that our clients experience throughout their lives. Although there are two statutory mitigating circumstances in Indiana that relate to your client’s mental state, (see Ind. Code 35-50-2-9(c) (2) and (6)) your mental health mitigation need not rise to the level of satisfying one of these statutory mitigators. See Evans v. State, 598 N.E.2d 516 (Ind. 1992). It is part of the “diverse frailties of humankind” that the U.S. Supreme Court recognized give rise to “the possibility of compassionate and mitigating factors,” “and that should be considered in determining the appropriate punishment for your client. Woodson v. North Carolina, 428 U.S. 280, 304 (1976). It’s important to remember that mental health evidence may also be helpful in challenging the *mens rea* element of an aggravator or the underlying offense, and to pursue those challenges where they are available. But again, your mental health evidence need not rise to that level in order to be relevant. It may simply help paint for your jurors a truly compelling picture of your client as a sympathetic human being, rather than a cold-blooded monster.

You should also consider the relevance of your client’s mental state to other issues in your case. Is your client presently competent to stand trial? What was his mental state at the time of the crime, or when he was interrogated by police or when he confessed to other parties? Your client’s mental state may provide a basis for challenging the voluntariness and reliability of his confession or the voluntariness of his consent to search. It may also provide the basis of your

guilt-innocence phase defense, either through an insanity defense, or challenging the *mens rea* element of the charged offense(s). See [Section XV](#), Preparing for Battle, below. One benefit of incorporating mental health evidence into your guilt-innocence phase in some way is that research conducted as part of the Capital Jury Project indicates that approximately half of all capital jurors make their decision about the appropriate penalty during the guilt-innocence phase, before you have had a chance to put on any of your mitigation case. Bowers, Sandys, and Steiner, “[Foreclosed Impartiality in Capital Sentencing: Jurors’ Predispositions, Guilt-Trial Experience, and Premature Decision Making](#),” 83 Cornell L. Rev. 1476, 1488. Evidence put on in support of defense positions at the guilt-innocence phase has a better chance of reaching and influencing jurors before their minds are made up as to the appropriate penalty.

If the state is granted the opportunity to have their own mental health professional(s) interview your client, do not forget the guidance of [Guideline 10.11\(J\)](#) of the 2003 ABA Guidelines, to carefully consider legal challenges to the interview and its conditions and the legal and strategic issues concerning whether your client should cooperate or not, to make sure that your client understands the importance and implications of any statements he makes during the interview, and to attend the interview yourself.

The [Dudley & Leonard article](#), *supra*, 36 Hofstra L. Rev. 963, provides a good overview of the role of mental health issues, and mental health experts, in capital cases, and how to develop evidence, select and work with experts, and develop your case for life. For a comprehensive and absolutely essential guide to mental health issues for capital defense teams, see [A Practitioner’s Guide to Defending Capital Clients Who Have Mental Disorders and Impairments](#), put together by national experts on these issues and sponsored by the International Justice Project. You can check for the most current version in the password protected section of the Federal Death Penalty Resource Counsel and the Habeas Assistance and Training Project website at <http://www.capdefnet.org>. You will need to request a password.

Finally, there is a developing 8<sup>th</sup> Amendment challenge to execution of the severely mentally ill, following along the lines of the successful 8<sup>th</sup> amendment challenges to execution of defendants with mental retardation and juveniles in [Atkins v. Virginia](#), 536 U.S. 304 (2002), and [Roper v. Simmons](#), 543 U.S. 551 (2005). The majority in these cases looked at objective factors such as legislative trends, the number of death sentences imposed on these groups to see if a consensus had emerged against the practice. The Court then turned its own judgment to the question of whether imposing the death penalty on these groups served the penological purposes of retribution and deterrence and determined that it did not. The court found that defendants with serious mental illness have reduced moral culpability and capacity for deterrence. Professor Scott Sundby, of the University of Miami School of Law, suggests that there is also an unreliability principle in the Court’s reasoning in [Atkins](#) and [Roper](#), that jurors would not be capable of giving a defendant’s youth or intellectual disability adequate weight, and that these defendants lack the ability to assist their attorneys and make sound decisions regarding their case. Sundby, [The True Legacy of Atkins and Roper: The Unreliability Principle, Mentally Ill Defendants, and the Death Penalty’s Unraveling](#), University of Miami Legal Studies Research Paper No. 15-5; 23 William & Mary Bill of Rights J. 1 (2014). Sundby and others argue that the reasoning of the majority in [Atkins](#) and [Roper](#) applies equally to defendants with severe mental illness. See, also, Winick, [The Supreme Court’s Emerging Death Penalty Jurisprudence: Severe Mental Illness as the Next Frontier](#) (October 29, 2008). University of Miami Legal Studies Research Paper No. 2008-31; 1 Boston College L. Rev. 3 (2009).



In 2006, the ABA House of Delegates has adopted a [resolution](#) calling for states to exempt defendants with serious mental illness from the death penalty. For more on the ABA resolution and the research and reasoning underlying it, see the Summer 2005 special issue of the [Catholic University Law Review](#). In 2006 a bill patterned on this resolution was introduced in the Indiana General Assembly and heard in the Senate Committee on Courts, Civil and Criminal Matters. A legislative interim study commission, called the Bowser Commission, conducted hearings later in 2006 and recommended an amended version of the bill that had been introduced the previous year, narrowing the exemption to include only five specific disorders. With or without a statutory exemption, the 8<sup>th</sup> Amendment argument is available and can be raised in a motion to dismiss the death penalty request. However, the recent decision in Bucklew v. Precythe, 139 S. Ct. 1112 (2019), states that a death-row inmate alleging that the State's method of execution constitutes cruel and unusual punishment in violation of the Eighth Amendment, either on its face or applied to that inmate, must show: (1) a feasible and readily implemented alternative method that would significantly reduce a substantial risk of severe pain and (2) that the State refused to adopt the method without a legitimate penological reason. And in Madison v. Alabama, 139 S. Ct. 718 (2019), the Court held that the Eighth Amendment does not prohibit a state from executing a prisoner who due to mental disability cannot remember committing his crime, but it does prohibit executing a prisoner who cannot rationally understand the reasons for his execution, whether that inability is due to psychosis or dementia.

## **X. PLEA NEGOTIATIONS**

Capital cases are hard to "win" in the courtroom. The state's case is usually quite strong and will be pursued with all of the resources the state can bring to bear. To make things worse, death-qualified juries are particularly conviction-prone – even if they weren't naturally so predisposed, the focus on penalty in voir dire cannot help but affect them. Add to this the facts, which are usually bad, and the pictures, which are usually ugly, and prosecutors have little trouble inflaming juror's emotions against our clients. Long-time capital litigator Millard Farmer used to say, "If you're picking a jury in a capital case, you've already lost." Only three of the seventeen capital cases that have gone to trial in Indiana between January 2000 and December 2016 have resulted in a sentence less than death. Given those odds and the stakes if you lose, "rolling the dice" at trial is riskier than playing Russian roulette with bullets in five chambers. The ABA Guidelines have a great deal to say about your obligations with respect to seeking a plea agreement, as well as communicating with your client about the possibility of an agreed resolution, and the pertinent guidelines are set out below.

None of the above is meant to suggest that a plea agreement easy to negotiate, with your prosecutor or with your client. Your client may be insistent that he will not accept a plea offer of any kind, but you should not let these initial refusals dissuade you from working to get an offer from the prosecutor. Your client may have many barriers that prevent him from considering or accepting a plea offer, including the fear of admitting guilt to his family, stress, depression, and other mental health issues. Some clients are very clear that they would rather die than spend the rest of their lives in prison. A mental health expert may be able to help you discover what barriers are at play with your client and may be able to help you help your client overcome them.

There are many factors you can use to persuade your prosecutor to accept a plea bargain. Use of

the death penalty is declining throughout the nation, and Indiana is no different. Fewer cases are being filed, and those that are filed are most often resolved by agreement. Between January 2008 and March 2013, there were no death penalty trials in Indiana. Between March 2013 and December 2016, three men have gone to trial and been sentenced to death in Indiana, two of them having rejected plea offers. Five additional cases were resolved by plea agreements during that time.

The availability of LWOP is one factor driving down use of the death penalty – a sentence of LWOP is coming to be recognized as harsh enough to satisfy the desire for retribution and deterrence and sufficient to protect the public, while avoiding the risks of executing an innocent person. Equally important if not more so, it has been documented again and again that an LWOP prosecution is much less expensive than a death penalty prosecution, and in this economy, taxpayers look with disfavor on anything they perceive as wasteful spending. Whereas prosecutors used to fear negative fall-out if they did not ask for the death penalty for a particularly heinous murder, today a prosecutor who chooses not to seek death or who accepts a plea to LWOP or a similarly lengthy sentence often receives favorable press coverage for fiscal responsibility.

As you work to persuade your prosecutor that your case does not require a death sentence, you can share with him or her [information about the comparative costs](#) of death and LWOP prosecutions, as well as information about ugly cases which did not result in a death sentence. A [list of multiple murders](#) that did not result in a death sentence is available.

You can also share [positive media coverage](#) of very serious cases in which the prosecutor chose to spare her taxpayers the cost of a capital prosecution, as well as media coverage simply calling into question whether the death penalty is [worth the cost](#). Other materials can help make clear that the financial costs are minimal compared to the emotional toll a capital case can take on everyone involved, including [jurors](#). Even victims' survivors, on whose behalf prosecutors often claim, and perhaps even believe, they are acting, are [victimized](#) by the death penalty. Cases drag on for years, erupting into new hearings from time to time and drawing fresh attention from the news media, causing victims' survivors to relive the horror of the murder of their loved one over and over.

You may be able to find a prosecutor who can talk with your prosecutor about the reasons he or she decided not to seek the death penalty, or to accept a plea agreement. Lifeforce, the IPDC death penalty listserv, and Defendnet, our general criminal defense listserv, can be helpful in this regard. If you are not a member of these listservs, you can fill out a [subscription form](#) on our website. If you are not a website subscriber, you can fill out and return this [subscription form](#). You can also contact me to discuss what additional information I may have that can help you in your efforts to resolve your case without a death penalty.

There is also the possibility of resolving a case through mediation, something we never would have thought about a few years ago. Both parties need to agree to this process, and prosecutors are rarely willing even to think about it. But victims' family members often have needs and concerns that are more easily and effectively addressed through mediation than a traumatic death penalty trial. After Christopher Stevens' conviction and death sentence for the murder of 10-year-old Zachary Snider was reversed and remanded by the 7<sup>th</sup> Circuit, attorneys Jessie Cook and Joe Cleary were able to resolve the case through mediation, resulting in a plea agreement for life

without parole. If you are interested in mediation, they can talk with you about procedural issues. An [article on mediation](#) in death penalty cases is also available.

The 2003 ABA Guidelines deal at length with counsel's duty to seek a plea agreement, in Guideline 10.9.1. 2003 Guideline 10.9.1(A) provides that:

Counsel at every stage of the case have an obligation to take all steps that may be appropriate in the exercise of professional judgment in accordance with these Guidelines to achieve an agreed-upon disposition.

Both 2003 Guideline 10.9.1 and 2003 Guideline 10.5 make clear that it is crucial to discuss with the client the possibility of an agreed resolution: 2003 Guideline 10.5(C)(5) lists it as one of the subjects about which Counsel should "engage in a continuing interactive dialogue with the client." 2003 Guideline 10.9.1, subsections (B) through (G) provide:

- B. Counsel at every stage of the case should explore with the client the possibility and desirability of an agreed-upon disposition. In so doing, counsel should fully explain the rights that would be waived, the possible collateral consequences, and the legal, factual, and contextual considerations that bear upon the decision. Specifically, counsel should know and fully explain to the client:
1. the maximum penalty that may be imposed for the charged offense(s) and any possible lesser included or alternative offenses;
  2. any collateral consequences of potential penalties less than death, such as forfeiture of assets, deportation, civil liabilities, and the use of the disposition adversely to the client in penalty phase proceedings of other prosecutions of him as well as any direct consequences of potential penalties less than death, such as the possibility and likelihood of parole, place of confinement and good-time credits;
  3. the general range of sentences for similar offenses committed by defendants with similar backgrounds, and the impact of any applicable sentencing guidelines or mandatory sentencing requirements;
  4. the governing legal regime, including but not limited to whatever choices the client may have as to the fact finder and/or sentencer;
  5. the types of pleas that may be agreed to, such as a plea of guilty, a conditional plea of guilty, or a plea of nolo contendere or other plea which does not require the client to personally acknowledge guilt, along with the advantages and disadvantages of each;
  6. whether any agreement negotiated can be made binding on the court, on penal/parole authorities, and any others who may be involved;
  7. the practices, policies and concerns of the particular jurisdiction, the judge and prosecuting authority, the family of the victim and any other persons or entities which may affect the content and likely results of plea negotiations;



8. concessions that the client might offer, such as:
  - a. an agreement to waive trial and to plead guilty to particular charges;
  - b. an agreement to permit a judge to perform functions relative to guilt or sentence that would otherwise be performed by a jury or vice versa;
  - c. an agreement regarding future custodial status, such as one to be confined in a more onerous category of institution than would otherwise be the case;
  - d. an agreement to forego in whole or part legal remedies such as appeals, motions for post-conviction relief, and/or parole or clemency applications;
  - e. an agreement to provide the prosecution with assistance in investigating or prosecuting the present case or other alleged criminal activity;
  - f. an agreement to engage in or refrain from any particular conduct, as appropriate to the case;
  - g. an agreement with the victim's family, which may include matters such as: a meeting between the victim's family and the client, a promise not to publicize or profit from the offense, the issuance or delivery of a public statement of remorse by the client, or restitution;
  - h. agreements such as those described in Subsections 8 (a)-(g) respecting actual or potential charges in another jurisdiction;
9. benefits the client might obtain from a negotiated settlement, including:
  - a. a guarantee that the death penalty will not be imposed;
  - b. an agreement that the defendant will receive a specified sentence;
  - c. an agreement that the prosecutor will not advocate a certain sentence, will not present certain information to the court, or will engage in or refrain from engaging in other actions with regard to sentencing;
  - d. an agreement that one or more of multiple charges will be reduced or dismissed;
  - e. an agreement that the client will not be subject to further investigation or prosecution for uncharged alleged or suspected criminal conduct;
  - f. an agreement that the client may enter a conditional plea to preserve the right to further contest certain legal issues;
  - g. an agreement that the court or prosecutor will make specific recommendations to correctional or parole authorities regarding the terms of the client's confinement;

- h. agreements such as those described in Subsections 9 (a)-(g) respecting actual or potential charges in another jurisdiction.
- C. Counsel should keep the client fully informed of any negotiations for a disposition, convey to the client any offers made by the prosecution, and discuss with the client possible negotiation strategies.
- D. Counsel should inform the client of any tentative negotiated agreement reached with the prosecution and explain to the client the full content of the agreement along with the advantages, disadvantages and potential consequences of the agreement.
- E. If a negotiated disposition would be in the best interest of the client, initial refusals by the prosecutor to negotiate should not prevent counsel from making further efforts to negotiate. Similarly, a client's initial opposition should not prevent counsel from engaging in an ongoing effort to persuade the client to accept an offer of resolution that is in the client's best interest.
- F. Counsel should not accept any agreed-upon disposition without the client's express authorization.
- G. The existence of ongoing negotiations with the prosecution does not in any way diminish the obligations of defense counsel respecting litigation.

## **XI. DEALING WITH VICTIMS' FAMILIES**

When we first hear about a murder, we may not feel shock, but like everyone else we feel sadness and empathy for the people who loved the victim. We wonder how we could cope with such a loss. We wonder how someone could do such a thing, but unlike most people, we have come to understand that there are far too many forces that can combine to turn an innocent child into someone capable of committing even the cruelest act, and we think about what trauma and what harm the killer must have suffered. If we are appointed to defend the alleged killer, we focus our attention completely on these latter thoughts, and we begin to suppress our initial empathy and feelings. In doing so, we separate ourselves from the very powerful emotions that energize the prosecution of our clients, as well as from the compassion and the humane response that we seek for our client.

Simply put, dealing with the families of the victims our clients are charged with murdering is both one of the most frightening and one of the most important things we must do as capital litigators. Over the years, capital defenders have realized that the wishes of the victim's family play an important role in a prosecutor's willingness to negotiate a case, and so they have sent a member of the defense team - most often the mitigation specialist, to make contact with the family, and ultimately to broach the subject of a plea agreement. Sometimes this worked, but equally often the family was suspicious and even angry. Even in those cases in which a relationship was forged with the victim's family, it was uncomfortable for the mitigation specialist, who might be asked questions whose answers were confidential and privileged.

Nearly twenty years ago, the team defending Timothy McVeigh for the Oklahoma City bombing tried a new approach, borrowing from practices of conflict resolution and restorative justice.

They called this approach Defense Initiated Victim Outreach (DIVO). The team petitioned the Court for funds to hire a victim outreach liaison, who was not a part of the defense team and who was not privy to any information about the defendant or the case that was not available to the public. The liaison simply made herself known to the victims' families, and offered to listen to whatever questions or concerns, to whatever they wanted to say to the defense team and the defendant, and offered to carry those questions and messages to the defense team. In a word, she offered to serve as a liaison between the victims' families and the defense team -- carrying communications back and forth.

In the years since that early experiment, a DIVO protocol has been developed and a number of individuals have received special training to do this work. The protocol suggests that no contact be made with the victim's family for at least six months to a year, depending on the circumstances. The DIVO liaison should be introduced by a letter from defense counsel, and then by a letter from the liaison him or herself. If the family does not respond, the liaison does not pursue them. If the family does respond, the liaison simply carries their questions and messages to the defense team and carries responses back. The subject of plea negotiations comes up only if raised by the family. The DIVO liaison's agenda is to respond to the victim's needs and questions, nothing more.

Although the DIVO liaison asks the family for nothing, including consideration of a plea agreement, the experience has been that attending to the needs and concerns and emotions of the victim's family can create an atmosphere of compassion and humanity that is helpful to the defense, whether through plea negotiations or in the courtroom.

For much more on the concept and protocol for DIVO, see [Branham and Burr](#), "Understanding Defense-Initiated Victim Outreach and Why It is Essential in Defending a Capital Client," 36 Hofstra L. Rev. 1019 (2008). IPDC's [on-line expert database](#) lists a few victim outreach specialists, and I may also be able to assist you in finding one.

Another issue that arises with regard to victims and their families is the admissibility of "victim impact" evidence and argument -- information about the victim and the impact of her murder on her family and community. Although the 8<sup>th</sup> Amendment to the federal constitution does not prohibit a state from allowing victim impact testimony at the penalty phase of a capital trial (see [Payne v. Tennessee](#), 501 U.S. 808 (1991)) such evidence is not admissible under Indiana law. In [Bivins v. State](#), 642 N.E.2d 928, 956-57 (1994), the Indiana Supreme Court held that Art. I, Sec. 16 of Indiana's Constitution, which requires that all punishments be proportionate to the nature of the offense, provides greater protection than the federal constitution's 8<sup>th</sup> Amendment. To allow consideration of victim impact evidence, the [Bivins](#) Court reasoned, would create an impermissible risk of a disproportionate sentence, in violation of Art. I, Sec. 16. The Court held that victim impact evidence may be admitted at a capital penalty phase in Indiana **only** if it is relevant to a charged statutory aggravating circumstance or to rebut **tendered** mitigation.

In [Wrinkles v. State](#), 690 N.E.2d 1156, 1169-1171 (Ind. 1997), the Court held that where the defense had called one of the victim's mother at the penalty phase to testify that she opposed the death penalty for religious reasons, the trial court properly allowed the state to cross-examine the witness regarding the impact of witnessing his parents' murder on her grandson, whom she was raising as a result of the murders.

In Allen v. State, 686 N.E.2d 760, 786-87 (Ind. 1997), the Court held that where the defendant claimed that the victim had sworn at him, drawn a knife, and used a racial epithet after allowing him into her home, the victim's daughter was properly allowed to testify that the victim was very religious, taught Sunday School, never swore, and was not violent.

Prosecutors often try to put victim impact before the jury indirectly by using photographs of the victim(s) with their family and loved ones for purposes of identification or to "show that the victim was alive before the murders." In Pittman v. State, 885 N.E.2d 1246 (Ind. 2008), an LWOP case, the Indiana Supreme Court wrote that the use of such photographs "smacks of victim impact evidence and is to be discouraged due to its possible emotional impact on the jury." Id., at 1256 (quoting Humphrey v. State, 680 N.E.2d 836, 842 (Ind. 1997)). This can be addressed pre-trial in a motion in limine.

Even if some form of victim impact evidence should be ruled admissible in your case, keep in mind that the federal constitution places **some** restrictions on this evidence. The majority in Payne v. Tennessee, *supra*, wrote that, "[i]n the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the due process clause of the Fourteenth Amendment provides a mechanism for relief." Payne, 111 S. Ct. at 2608. Also, Payne did not alter the earlier holdings of Booth v. Maryland, 482 U.S. 496 (1987), and South Carolina v. Gathers, 490 U.S. 805 (1989), that admission of "a victim's family member's characterizations and opinions about the crime, the defendant and the appropriate sentence violates the Eighth Amendment." Payne, *supra*, at 2611, n.2. See also Bosse v. Oklahoma, 137 S. Ct. 1 (2016), a per curiam opinion where the Court held that the decision in Payne did not affect the Booth Court's prohibition against victim impact testimony relating to the crime, the defendant, and the sentence.

Finally, Indiana's death penalty statute provides for "a representative of the victim's family and friends to make a statement regarding the impact of the crime on family and friends" **after** the trial court pronounces sentence on the defendant. See Ind. Code 35-50-2-9(e).

## **XII. PRE-TRIAL MOTIONS PRACTICE**

Aggressive pre-trial motions practice is absolutely essential in a capital case, in large part because the case will never be "closed" until your client either gets relief or is executed. Capital jurisprudence is constantly changing and evolving, but your client will be denied the benefits of those changes if you do not raise and preserve legal claims for him now. This means that every conceivable state and federal claim should be raised and preserved by means of pre-trial motions, trial objections, and any further necessary steps such as moving for a curative instruction or a mistrial.

That is not to suggest that counsel should simply file a flurry of frivolous motions with no particular objective. The 2003 ABA Guidelines, at Guideline 10.8, provide that counsel should consider and thoroughly investigate the basis for every potential claim, and evaluate each claim in light of the unique characteristics of capital litigation, the "near certainty that all available avenues of post-conviction relief will be pursued..." and the need to protect against procedural default. If a claim is asserted, the Guideline provides that counsel "should present [it] as forcefully as possible, tailoring the presentation to the particular facts and circumstances of the client's case...."

There are a myriad of strategic objectives you can further through pre-trial motions. We've talked about motions to declare Indiana's death penalty statute unconstitutional and dismiss the death penalty request, which raise and preserve state and federal constitutional claims, educate your judge about problems with the death penalty and capital trial procedures in light of the Capital Jury Project, and can include challenges to a specific aggravating circumstance as applied to your client and his alleged actions. Sample [motions and memoranda of law](#) in support are available.

We have also discussed seeking funds for experts to assist you in preparing your case or seeking additional time so that you and your team can complete necessary work. There are motions that can impact your client's welfare and improve your relationship with him as well as his pre-trial behavior, such as motions to address intolerable jail conditions, or to seek medical or mental health treatment for him. Motions that help enhance the fairness of your client's trial, such as a motion to sever counts or defendants, motions for change of venue or judge or to limit pre-trial publicity, or motions to address courtroom conditions during trial, such as to limit the number of uniformed police officers in the courtroom or to address buttons worn by spectators. And of course there are suppression and other evidentiary motions, including motions to keep out excessive gruesome and gory photographs, or photographs of the victim with family and loved ones, or to keep out a particular type of forensic evidence that may be offered by the state. You can find many sample motions listed at the end of this document.

If you have one of the rare cases where the state's evidence of guilt is weak, you may want to seek true bifurcation of the guilt-innocence and penalty phases, with separate juries for each. This is one you're not likely to win, but if the law evolves on this issue, you will have preserved the claim. Research has long indicated that death-qualified juries are naturally more conviction-prone, both because jurors who are willing to consider imposing death are generally more inclined to believe that an accused is guilty and because of what is called the "process effect" – talking with jurors about the appropriate sentence tends to suggest that your client is guilty. Capital Jury Project research has continued to confirm that death-qualification tilts juries toward convicting. Separate juries are one way of mitigating this tendency; the guilt-innocence phase jury would not be death-qualified. In the event of conviction, a new venire would be convened and death-qualified for the penalty phase. When Mitt Romney was Governor of Massachusetts, his Blue-Ribbon panel tasked with creating a fool-proof death penalty (and co-chaired by IU-Bloomington Law Professor Joe Hoffman) recommended allowing the defense to choose whether to use the same or separate juries for the two trial phases. REPORT OF THE GOVERNOR'S COUNCIL ON CAPITAL PUNISHMENT, *reprinted in* [80 Ind. L. J. 1 \(2005\)](#). In New Mexico, where the death penalty statute was repealed as to crimes committed after July 7, 2009, the state supreme court has ruled that for cases involving crimes committed before that date, the single-jury requirement contained in the statute no longer controls. [In the Matter of Death Penalty Sentencing Jury Rules](#), No. 09-8300-042, 222 P.3d 674 (N.M. 2009). Indiana's death penalty statute likewise contains a requirement that the same jury hear both phases, but our supreme court does not interpret that provision to apply where it is impracticable, such as following a penalty-phase remand. *Burris v. State*, 642 N.E.2d 961 (Ind. 1994). Your client's right to a fair trial by an impartial jury is arguably another reason for trumping the provision. A [sample motion to sever the guilt-innocence and penalty phases](#) and use a jury which has not been death-qualified for the guilt-innocence phase, filed on behalf of Ronald Davis in Marion County, is available. For more, see Rozelle, [The Principled Executioner: Capital Juries' Bias and the Benefits of True Bifurcation](#), 38 Ariz. St. L. J. 769 (2006).

If your client is Black, you will have yet another reason for seeking to sever the guilt-innocence phase from the penalty-phase. Recent research into implicit racial bias suggests that jurors are more likely to convict Black defendants when death is a possible penalty. [Glaser, Martin & Kahn, \*Possibility of Death Sentence Has Divergent Effect on Verdicts for Black and White Defendants\*](#). This can also support your motion to dismiss the state's request for the death penalty. In other implicit bias research, Stanford Professor Jennifer Eberhardt studied a group of 600 capital defendants charged in Philadelphia from 1979 – 1999. She found that newspaper articles about Black defendants contained on average nearly four times as many animal references than newspaper articles about White defendants. She also found a direct and strong correlation between the number of animal references regarding a defendant and the likelihood of his being sentenced to death. [This research is available](#). Ben Cohen, Director of the Capital Appellate Project in Louisiana has drafted a [sample motion](#) to preclude the prosecutor from using animal terminology to reference the defendant, not only in jury argument at trial, but in pretrial statements to the press as well. To give his motion some teeth, he seeks a ruling in advance that each such reference by the prosecutor would render her in contempt of court and subject her to a \$10,000 fine.

In addition to supporting a motion to preclude the prosecutor from making such references to the press, this research can also support your motion for change of venue due to pre-trial publicity. For much more on the subject of implicit racial bias research, how it can affect juror decision making in capital cases, and how to try to limit its effects in your case, [see Section XV\(B\)](#), below, and [research collected here](#). For more on litigating race issues in a death penalty case, [see \*Andrea Lyon, Naming the Dragon: Litigating Race Issues During a Death Penalty Trial\*](#), 1543 DePaul L. Rev. 1647 (2004).

There are also special evidentiary concerns in death penalty trial penalty phase, as will be discussed in the next section of this outline. In *Bivins v. State*, 642 N.E.2d 928 (1994), the Indiana Supreme Court held that only the charged statutory aggravator(s) can be considered in deciding whether to sentence a defendant to death, and that to allow exposure to and consideration of other potential aggravation creates an impermissible risk of a disproportionate sentence in violation of Art. I, Sec. 16 of the Indiana Constitution. If you litigate to keep out prior bad acts at the guilt-innocence phase, you should argue that the risk that the jury might consider these prior bad acts in making its sentencing recommendation should be weighed in as prejudice against any probative value they might have.

*Bivins* clearly gives you grounds to keep out non-statutory aggravation at the penalty phase (and also at judge sentencing, if your jury does not unanimously agree on the sentence). Taking a broader perspective, it can be helpful to file a **pre-trial motion to exclude any mention of non-statutory aggravation** from voir dire through final argument to jury and/or judge, a [sample of which](#) is available. Prosecutors often cannot help pointing out what they consider your client's bad character traits, which are not proper factors for the jury to consider in making their sentencing decision. *Cooper v. State*, 854 N.E.2d 831 (Ind. 2006); *Castillo v. State*, 974 N.E.2d 458 (Ind. 2012).

Even if your motions are not successful, they can help you with other strategic objectives, such as to put the prosecutor on notice that her road to a death sentence will not be easy or to expose weaknesses in her case, and to educate both prosecutor and judge about the requirements of the

law and the ABA guidelines and the real-world findings of research such as the Capital Jury Project. Asking for evidentiary hearings and using live witnesses is also an opportunity to make your issues real. For example, researchers from the Capital Jury Project can testify about the real life experiences of capital jurors, or about their confusion about instructions they were given. A law professor can testify about arbitrariness in charging the death penalty, describing actual cases, or about other topics. Professor Joel Schumm, of the Indiana University McKinney School of Law in Indianapolis has done this and remains willing to do so.

Pre-trial motions also give you an opportunity to learn ahead of time how your judge will preside over and conduct your trial, in terms of voir dire and trial conditions, evidentiary rulings, etc., so that you can thoughtfully plan for trial and can be sure to preserve any legal claims.

Please read “[Litigating Motions and Preserving Issues](#),” originally prepared by Monica Foster and Skip Gant, for thought-provoking suggestions regarding potential subjects for pre-trial litigation, a helpful discussion of strategic considerations, and tips to ensure record preservation. On the latter subject, you may also want to read Andrea Lyon’s [article on preserving error](#) in light of amendments to federal habeas corpus law.

You will find a collection of sample motions at the end of the directory of links at the end of this document. Always remember to Shepardize cases cited in these motions, and to bring them up to date and tailor them to your client and your case before you file them.

### **XIII. A SHORT PRIMER ON PENALTY PHASE EVIDENTIARY ISSUES**

#### **A. Introduction**

Indiana’s statute governing procedure at death penalty and LWOP trials, Ind. Code 35-50-2-9(d) provides that, if the defendant has been convicted at a jury trial, “the jury shall reconvene for the sentencing hearing.” The jury may consider “all the evidence introduced at the trial stage of the proceedings, together with new evidence presented at the sentencing hearing.”

The statute does not specify what new evidence may be presented by the state at the jury penalty hearing, but the Indiana Supreme Court has made clear that, as a matter of Indiana constitutional law, only evidence relevant to the alleged aggravating circumstance(s), or to rebut any tendered mitigating evidence, may be presented by the state or be considered by the jury or judge in determining the sentence. Bivins v. State, 642 N.E.2d 928, 955 (1992). Indiana Pattern Jury Instructions -- Criminal, Preliminary Instruction No. 2 instructs jurors that they may consider all evidence introduced at both the first and second phases of trial, while Preliminary Instruction No. 3 instructs them that they may not consider any circumstances weighing in favor of death or LWOP other than those specifically charged by the state in the Charging Information.

Ind. Code 35-50-2-9(d) goes on to provide that “[t]he defendant may present any additional evidence relevant to: (1) the aggravating circumstance alleged; or (2) any of the mitigating circumstances listed in subsection (c),” and case law indicates that the scope of mitigation evidence is quite broad. See [discussion below](#).



Although the statute does not specify whether the rules of evidence apply at the jury penalty phase, the Indiana Supreme Court has held that they do, with some exceptions that will be [discussed below](#). See Dumas v. State, 803 N.E.2d 1113, 1121 (Ind. 2004).

## **B. The State's Case in Chief**

Guideline 10.11(I) of the 2003 ABA Guidelines provides that:

Counsel at all stages of the case should carefully consider whether all of part of the aggravating evidence may appropriately be challenged as improper, inaccurate, misleading or not legally admissible.

In Bivins v. State, 642 N.E.2d 928 (1994), the Indiana Supreme Court announced that only aggravating circumstances set out in Ind. Code 35-50-2-9(b) and alleged by the state in its death penalty request can be considered in making a capital sentencing determination. Consequently, the state is severely restricted as to the evidence which it can put in during its case-in-chief at the penalty phase. This includes victim impact evidence (Bivins was specifically about victim impact evidence).

Prior to Bivins, the Indiana Supreme Court had held that, as long as one statutory aggravating circumstance from Ind. Code 35-50-2-9(b) was proved, the sentencer could consider other aggravating circumstances from the general felony sentencing statute at Ind. Code 35-38-1-7.1. Minnick v. State, 544 N.E.2d 471 (Ind. 1989). In Bellmore v. State, 602 N.E.2d 111 (Ind. 1992), the Court refused to extend this consideration beyond aggravating circumstances specifically enunciated in Ind. Code 35-38-1-7.1.

In Bivins, however, the Court ruled that, "[w]hen the death sentence is sought, courts must henceforth limit the aggravating circumstances eligible for consideration to those specified in the death penalty statute, Indiana Code Section 35-50-2-9(b)." Id., at 955. The Court based its ruling on Art. I, Sec. 16 of the Indiana Constitution, which provides protections similar to but more extensive than the Eighth Amendment to the United States Constitution. Article I, Sec. 16 provides, in part:

Cruel and unusual punishments shall not be inflicted. All penalties shall be proportioned to the nature of the offense.

The Bivins majority wrote:

The consideration and weighing of aggravating circumstances to select which persons shall receive the death sentence essentially constitutes a determination of whether the death penalty is proportionate to the nature of the offense, including the character of the offender. Because of the ultimate gravity of the punishment, Indiana's death sentence procedure must be cautiously restrained to assure maximum compliance with the proportionality concerns of Article I, Section 16 of our state constitution. When a trial court in death sentencing evaluation considers the more general statutory criteria that authorize



enhancing non-capital sentences [footnote omitted], we perceive a serious risk that the resulting aggravating circumstances, when weighed against mitigating circumstances, will present a significant possibility of disproportionate sentencing not sufficiently related to the specific aggravating circumstances designated by our legislature as appropriate for the death sentence.

Id., at 955.

The Bivins majority contrasted the restrictions imposed upon consideration of aggravating circumstances with the "open-ended" statutory (and constitutional) authorization for consideration of virtually any mitigating circumstances. Applying its newly announced rule, the Bivins majority held that victim impact evidence had been erroneously, though harmlessly, admitted against Mr. Bivins:

With our determination today that Indiana's statutory death penalty aggravators are the only aggravating circumstances available, the admissibility of the victim impact evidence in the present case hinges upon its relevance to the death penalty statute's aggravating and mitigating circumstances.

Id., at 957

The Court thus made clear that any evidence presented by the state in its penalty-phase case-in-chief would have to be relevant to a charged statutory aggravating circumstance. Beware, however, that the state may offer additional evidence to rebut mitigation evidence tendered by the defense. See the discussion of the state's rebuttal evidence, below. And keep in mind that even evidence which is relevant to the charged aggravator(s) may be subject to challenge under IRE 403, because its prejudicial impact outweighs any probative value. When you are thinking about the state's possible evidence and its potential prejudicial impact, be sure to consider the impact in both phases -- guilt/innocence and penalty. For instance, facts which support an alleged aggravating circumstance, such as prior convictions or probationary or parole status, are clearly admissible in the penalty phase, but you should be able to keep them out of the jury's hearing before that point, due to their likely prejudicial impact at the guilt-innocence phase. See Thompson v. State, 690 N.E.2d 224, 228 - 29 (Ind. 1997). Conversely, if you are litigating to keep out prior bad acts evidence in the guilt/innocence phase, consider whether they might later create the kind of risk of disproportionate sentencing the Bivins Court was concerned about in the penalty phase. If so, you should include that in your argument regarding the potential prejudicial impact. A sample [Motion to Exclude](#) Any Reference to Non-statutory Aggravators during Voir Dire, Argument or Trial is available, and can be helpful in shutting down the State's portrayal of your client, through evidence and argument, as a bad character who needs to be killed.

### **C. Defense Evidence at the Penalty Phase**

While the state is limited in its penalty phase case-in-chief to presenting evidence that is relevant to charged aggravating circumstances set out by statute at Ind. Code 35-50-2-

9(b), the range of mitigating circumstances that the defense can present is wide open. Ind. Code 35-50-2-9(c) sets out seven specific mitigating circumstances, and then adds a catch-all category, “any other circumstances appropriate for consideration.” Ind. Code 35-50-2-9(c) (8). The Indiana Supreme Court has described this catch-all category as including “virtually anything favorable to the accused.” Smith v. State, 547 N.E.2d 817, 822 (Ind. 1989).

In Lockett v. Ohio, 438 U.S. 586, 604, 98 S. Ct. 2954, 2964, 57 L.Ed.2d 973 (1978), Chief Justice Burger, writing for a plurality of the Court, wrote that, under the Eighth and Fourteenth Amendments, “the sentencer cannot be precluded from considering, as a mitigating factor, any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death” In Eddings v. Oklahoma, 455 U.S. 104,110 (1982), the majority adopted this aspect of Lockett. Later cases have further developed this reasoning. Smith, *supra*, quotes the following passage from Penry v. Lynaugh, 492 U.S. 302, 327-28 (1989):

The Constitution limits a State's ability to narrow a sentencer's discretion to consider relevant evidence that might cause it to *decline to impose* the death sentence.' [Citation omitted.] (Emphasis in original.) Indeed, it is precisely because the punishment should be directly related to the personal culpability of the defendant that the jury must be allowed to consider and give effect to mitigating evidence relevant to a defendant's character or record or the circumstances of the offense. Rather than creating the risk of an unguided emotional response, full consideration of evidence that mitigates against the death penalty is essential if the jury is to give a 'reasoned moral response to the defendant's background, character, and crime.' [Citations omitted.] In order to ensure 'reliability in the determination that death is the appropriate punishment in a specific case,' [citation omitted,] the jury must be able to consider and give effect to any mitigating evidence relevant to a defendant's background, character, or the circumstances of the crime." Penry v. Lynaugh 492 U.S. 302, 327-28 (1989).

Smith v. State, 547 N.E.2d 817, 822 (1989).

## **1. Application of the Rules of Evidence**

As noted above, the rules of evidence apply to jury penalty phases in capital and LWOP cases in Indiana. Dumas v. State, 803 N.E.2d 1113, 1121 (Ind. 2004). However, the Dumas Court acknowledged that the rules are subject to limitations imposed by the *state and federal constitution*, citing as an example Green v. Georgia, 442 U.S. 95, 99 S. Ct. 2150, 60 L.Ed.2d 738 (1979). Id. Green and his co-defendant were charged with kidnapping, raping, and killing a single victim, and the two were tried separately. At his penalty phase, Green tried to introduce testimony from a witness who had testified for the state at the co-Defendant’s trial that the co-Defendant had confided to him that he had killed the victim after sending Green away on an errand. The trial court kept this testimony out on hearsay grounds. The U.S. Supreme Court, in a *per curiam* opinion, wrote:

Regardless of whether the proffered testimony comes within Georgia's

hearsay rule, under the facts of this case its exclusion constituted a violation of the Due Process Clause of the Fourteenth Amendment. The excluded testimony was highly relevant to a critical issue in the punishment phase of the trial, see Lockett v. Ohio, 438 U.S. 586, 604-605 (1978) (plurality opinion); Id., at 613-616 (opinion of BLACKMUN, J.), and substantial reasons existed to assume its reliability.

Id., 442 U.S. at 98, 99 S. Ct. at 2151.

The lesson of Green, read together with Lockett and its progeny, seems to be that, while the rules of evidence apply at a jury penalty phase in a capital or LWOP trial, a Defendant has a due process right to present **reliable** evidence that is **highly relevant** to a **critical issue** at sentencing. This could be to rebut the state's aggravating circumstance(s), or to support a mitigating circumstance that you are offering. Mitigation can be virtually any aspect of the Defendant's character or history or any circumstance of the offense. Your mitigation specialist and experts can help you in framing an argument as to the relevance and importance of a particular item of evidence. Capital Jury Project research can also be helpful in demonstrating the importance of different types of aggravating and mitigating circumstances to capital jurors.

## **2. Scope of Mitigation Evidence**

### **a. Evidence Regarding Defendant's Character and Record**

As discussed above, the scope of mitigation evidence regarding a Defendant and his character or history is completely wide open -- virtually any fact about the Defendant's good character, such as work history, military record, family involvement, parenting, artistic abilities, lack of criminal record, teaching cell-mates to read while awaiting trial, etc.; Defendant's background and formative experiences, such as childhood abuse or neglect or other difficulties and their impact on Defendant's cognitive and emotional development; mental health issues; drug and alcohol abuse issues, etc. Evidence of this type will generally be considered relevant mitigation. (But if your evidence is excluded by hearsay or another rule of evidence, you will have to establish its reliability and admissibility as discussed above.)

### **b. Evidence Regarding Circumstances of the Offense**

Mitigation evidence regarding the circumstances of the crime is more problematic. Obviously, evidence about the crime itself would generally be admissible during the guilt-innocence phase of a capital or LWOP trial. However, issues of admissibility arise when the defendant proffers additional reliable evidence about the circumstances of the crime that was not admissible during the guilt-innocence phase due to hearsay or other prohibitions, and the defendant must prove that it is highly relevant as mitigation evidence. The other likely scenario in which admissibility of this evidence arises is after an appellate ruling in which the conviction is affirmed, and the penalty is reversed, and the case is remanded for a new penalty phase only.

In Oregon v. Guzek, 546 U.S. 517 (2006), the U.S. Supreme Court examined the admissibility of circumstances of the offense evidence at a new penalty phase after appellate remand. The Court divided evidence regarding the offense into two categories: (1) evidence concerning **how** the Defendant committed the crime, and (2) evidence concerning **whether** the Defendant committed the crime, often referred to as residual or lingering doubt evidence. This is an important distinction to remember, because the Court treated the two types of evidence very differently.

**(1) Evidence Regarding *How* Defendant Committed the Crime**

The Guzek Court wrote that evidence regarding **how** Defendant committed the crime, which includes Defendant's mental state at the time of the crime and Defendant's degree of involvement in the killing relative to other participants, was traditional sentence-related evidence, and that these sorts of circumstances of the offense have been recognized as mitigating circumstances that the sentencer must be allowed to consider. In Lockett v. Ohio, *supra*, for example, the Court reversed Sandra Lockett's death sentence because Ohio's sentencing scheme prevented the judge from taking into account the fact that she played a minor role in the crime and remained outside the store where the murder took place. In Green v. Georgia, *supra*, the Court held that hearsay rules could not be used to exclude evidence that the co-Defendant committed the murder after sending the Defendant away. (See also, e.g., Rupe v. Woods, 93 F.3d 1434 (9th Cir. 1996), the 9th Circuit Federal Court of Appeals reversed a death sentence because reliable results of a polygraph taken by a testifying co-Defendant were excluded from Rupe's penalty phase. The polygraph results indicated that the co-Defendant was untruthful when he claimed minimal, after-the-fact only involvement in the bank robbery in which two clerks were killed.) In Indiana, evidence of this type may be relevant not only in mitigation, but to challenge the *mens rea* element of an alleged aggravating circumstance.

**(2) Evidence Regarding *Whether* Defendant Committed the Crime**

The Guzek Court did not look as favorably on evidence regarding **whether** the Defendant committed the murder, which it characterized as pure "residual doubt" evidence. The Court stopped short of finding that the 8th Amendment does not require that Defendant be allowed to present residual doubt evidence, holding instead that even if there is such a right, it would not require admission of the evidence that Guzek sought to introduce.

Guzek involved a new penalty phase after two appellate remands. During the guilt phase of Guzek's original trial, he had put on alibi testimony from his mother and grandfather. At his new penalty phase, a state statute provided for Guzek to present transcripts of evidence from the original trial, as well as "additional relevant evidence." Ore. Rev. Stat. Sec. 138.012(2) (b). Guzek sought to put his mother on the stand to provide additional alibi evidence. The trial court excluded this testimony, finding that it was not relevant to any mitigating circumstance. The Oregon Supreme Court reversed this ruling,

holding that the 8<sup>th</sup> Amendment created a right to offer residual doubt evidence. State v. Guzek, 86 P.3d 1106 (Ore. 2004). The U.S. Supreme Court reversed the Oregon Supreme Court, holding that even if the 8<sup>th</sup> Amendment creates a right to present residual doubt evidence at a capital penalty phase, it would not prohibit a state from limiting that evidence to transcripts and exhibits from the previous trial. Because Guzek had a right to present any transcripts and exhibits he chose from the original trial, and because he had not shown that the additional evidence, he wanted to put on had been unavailable at the original trial, the Court found that the 8<sup>th</sup> Amendment did not create a right to present the additional live testimony that he sought to introduce. It stopped short of finding that the 8<sup>th</sup> Amendment does not create a right to present residual doubt evidence of any sort.

Even had the Guzek Court explicitly held that the 8<sup>th</sup> Amendment does not require admission of any additional residual doubt evidence at a capital penalty phase, the states are free to allow its admission. Courts in a few states have held that pure residual doubt evidence – evidence going to **whether** the defendant committed the crime, is admissible penalty phase mitigation evidence. In State v. Stewart, 288 S. Ct. 232, 341 S.E.2d 789 (1986), the South Carolina Supreme Court wrote:

The jury in the first trial was able to hear all the evidence which was admitted in the guilt phase, including the testimony of appellant's alibi witnesses. During the penalty phases, the jury was able to consider the alibi testimony along with the other evidence in determining the appropriate sentence. **It is unjust to exclude appellant's alibi evidence as a matter of law from the consideration of the resentencing jury merely because the appellant did not receive a proper sentencing hearing in the first trial.**

Id., 341 S.E.2d at 190-91 (emphasis added). See also State v. Teague, 897 S.W.2d 248 (Tenn. 1995); State v. Hartmann, 42 S.W.3d 44, 57-58 (Tenn. 2001); People v. Gay, 42 Cal. 4<sup>th</sup> 1195, 178 P.3d 422 (2008).

Research from the Capital Jury Project, a comprehensive study of capital juries funded by the National Science Foundation, suggests that jurors' residual doubt concerning the Defendant's guilt is highly important to their decision about whether the death penalty is appropriate, and may in fact be the most powerful factor weighing against imposing a death sentence. See Garvey, *Aggravation and Mitigation in Capital Cases: What do Jurors Think?* 98 Colum. L. Rev. 1538, 1563 (1998). See also Geiner & Amsterdam, *Why Jurors Vote for Life or Death: Operative Factors in Ten Florida Death Penalty Cases*, 15 Am. J. Crim. L. 1, 28 (1988); Bowers, Sandys & Steiner, *Foreclosed Impartiality in Capital Sentencing: Jurors Predispositions, Guilt-trial Experience, and Premature Decision Making*, 83 Cornell L. Rev. 1476, 1536 (1998).

However, it is important to note that the way that lingering or residual doubt was presented to jurors in Capital Jury Project interviews was, “‘although the evidence was sufficient for a capital murder conviction, you had some lingering doubt that the defendant was the actual killer.’ Thus, it may be that the lingering doubt experienced by these jurors concerns the extent of the defendant’s involvement in the crime, rather than his complete lack of involvement in the offense.” Sandys, Pruss & Walsh, [\*Aggravation and Mitigation: Findings and Implications\*](#), 37 J. Psychiatry & L. 189, 202 (2009).

The Indiana Supreme Court has not decided this issue. The statute makes no provision for what evidence may be presented by **either party**, or how, in the event of an appellate remand for a new penalty phase. Although the plain language of the statute appears to require that the jury that convicted the defendant “shall reconvene for the sentencing hearing,” the Indiana Supreme Court has ruled, not surprisingly, that this is not necessary in the event of a remand for a new penalty phase. Burris v. State, 642 N.E.2d 961 (Ind. 1994). Burris had argued that it was necessary to find and reconvene his original jury because capital (or lwop) juries at the penalty phase “continue to be concerned with [the defendant’s] guilt or innocence and the manner in which the crime was committed and those facts play a major role in their determination....” Id., 642 N.E.2d at 964. The Burris Court did not discuss what evidence should be provided to the jury at a “penalty-phase-only” remand, nor has the Court done so in any other case.

### 3. Other Residual Doubt Issues

#### a. Residual Doubt Argument

The Indiana Supreme Court has implicitly recognized residual doubt as a proper subject for jury argument at a capital or lwop penalty phase. In Harrison v. State, 659 N.E.2d 480 (Ind. 1995), the Court cited, without comment, the weakness of the state’s evidence against Harrison as one of four mitigating circumstances which Harrison argued to his jury. In Miller, *supra*, 702 N.E. 2d at 1069-70, the Court held that failure to present argument regarding residual doubt was not ineffective assistance of counsel but did not suggest that defense counsel could not have argued residual doubt. In contrast, the Court wrote that there could be circumstances in which counsel would be ineffective for failing to argue “the degree of a defendant’s participation or the defendant’s *mens rea*,” traditional “how defendant committed the crime” circumstances recognized in Guzek, 702 N.E.2d at 1069. Of course, the right to argue residual doubt to the jury would hardly be adequate at a post-remand penalty phase before a jury that has not heard the Defendant’s evidence of innocence.

#### b. Residual Doubt Jury Instruction

In Overstreet v. State, 783 N.E.2d 1130 (Ind. 2003), the Indiana Supreme Court held that the trial court’s rejection of the Defendant’s tendered residual doubt instruction did not violate the 8<sup>th</sup> Amendment or the state constitution, where “nothing the trial court did [impaired] Defendant’s ability to **argue** residual doubt to the jury, and nothing in Defendant’s penalty phase argument ... directed it to

consider residual doubt.” *Id.*, 783 N.E.2d at 1163 (emphasis added). The Court noted that Overstreet did not offer separate state constitutional analysis. In reaching its conclusion, the Court quoted from *Franklin v. Lynaugh*, 487 U.S. 164 (1988), in which the U.S. Supreme Court found that a Defendant’s 8<sup>th</sup> Amendment rights had not been violated under similar circumstances. (As it would do more recently in *Guzek*, the Court in *Franklin* expressed doubts about the existence of an 8<sup>th</sup> Amendment right to have a capital jury consider residual doubts but stopped short of holding that the 8<sup>th</sup> Amendment would never entitle a Defendant to a jury instruction on residual doubt, instead finding merely that even if such a right existed, it was not violated under the circumstances before it.)

Still, in light of the number of Defendants who have been wrongfully convicted and sentenced to death, more than 135 nationally in the post-*Furman* era, two of them in Indiana, a number of reviewing bodies have recommended that juries be instructed on residual doubt. A blue-ribbon commission appointed by Massachusetts governor Mitt Romney, and co-Chaired by Indiana University – Bloomington Law School Professor and death penalty supporter Joseph Hoffman, recommended instructing juries that they could impose a death sentence only if they had “no doubts” about the Defendant’s guilt. [\*Report of the Governor’s Council on Capital Punishment\*](#), reprinted in 80 Ind. L. J. 1, 20-21 (2005). Similarly, the Constitution Project’s Death Penalty Committee recommends instructing jurors to consider any lingering doubts they have about the Defendant’s guilt. *Mandatory Justice: Eighteen Reforms for the Death Penalty*, 40-41 (2001). The bi-partisan committee is made up of former judges, prosecutors, defense attorneys, victim advocates and other public officials, and included both death penalty supporters and opponents. The Committee reaffirmed this recommendation in July 2005, in [\*Mandatory Justice Revisited\*](#).

#### **4. Other Limitations on Mitigation Evidence**

The Indiana Supreme Court has placed **some** limits on the nature of relevant mitigation evidence. In *Wisehart v. State*, 484 N.E.2d 949 (Ind. 1985), the Court upheld a trial courts exclusion of testimony from two penalty phase witnesses regarding the morality and appropriateness of the death penalty in general. The Court wrote, “The issue to be decided by a trial jury is whether the sentence is appropriate for the particular offense and the particular offender.” *Id.*, 484 N.E.2d at 957. Mitigation evidence must be directly related to the particular Defendant and the particular offense and may not merely concern larger issues concerning the death penalty and its application. See also *Spranger v. State*, 498 N.E.2d 931 (Ind. 1986); *Underwood v. State*, 535 N.E.2d 507 (Ind. 1989).

#### **D. State’s Rebuttal Evidence**

The Indiana Supreme Court has held that the state can offer evidence to rebut evidence tendered by the defense in mitigation, see, e.g., *Woods v. State*, 547 N.E.2d 772 (Ind. 1989), and *Bivins* did not close the door to the state tendering penalty phase evidence in rebuttal that it could not offer in its case-in-chief.

The scope of rebuttal is within the discretion of the trial court but is generally limited to evidence which tends to explain, contradict, or disprove evidence offered by the adverse party. See, e.g., Stewart v. State, 531 N.E.2d 1146 (Ind. 1988); Steele v. State, 475 N.E.2d 1149 (Ind. 1985).

It would be a mistake simply to severely restrict the presentation of mitigation evidence in order to keep out damaging rebuttal evidence.

Guideline 10.11(G) of the 2003 ABA Guidelines provides:

In determining what presentation to make concerning penalty, counsel should consider whether any portion of the defense case will open the door to the prosecution's presentation of otherwise inadmissible aggravating evidence. Counsel should pursue all appropriate means (e.g., motions *in limine*) to ensure that the defense case concerning penalty is constricted as little as possible by this consideration and should make a full record in order to support any subsequent challenges.

The most important way to limit damage from rebuttal evidence of prior crimes or bad acts is to conduct a thorough investigation so that counsel is aware of potential rebuttal, and also to seek discovery of intended rebuttal with prior bad acts or other evidence that the state anticipates using. The defense is entitled to discovery of rebuttal witnesses who are known before trial. Reid v. State, 267 Ind. 555, 372 N.E.2d 1149 (Ind. 1978); Mauricio v. Duckworth, 840 F.2d 454 (7<sup>th</sup> Cir. 1988). Under Ind. Evidence Rule 405, the defense can discover specific bad acts with which the state intends to cross-examine defense character witnesses.

Rather than forego putting on a compelling mitigation case, the defense team can seek to develop evidence that will mitigate these prior bad acts, as well, and that will take away some of the sting of evidence put on in rebuttal. Pre-trial motions in limine can provide information about what will and will not come in at trial, so that informed decisions can be made. Bear in mind, however, that a ruling on a pre-trial motion in limine does not preserve the issue for appeal. Azania v. State, 730 N.E.2d 646 (Ind. 2000)

Below is a discussion case law regarding the scope of the state's penalty phase rebuttal evidence.

### **1. Defendant's Character – Prior Bad Acts**

Some prosecutors have argued that any mitigation evidence is essentially “character” evidence which opens the door to anything the state cares to present to show Defendant's bad character. The Indiana Supreme Court has rejected so broad a definition of penalty phase evidence and its consequent rebuttal.

In Thompson v. State, 462 N.E.2d 264 (Ind. 1986), the Defendant presented penalty phase lay witnesses who testified to his good reputation as a worker. The state cross-examined these witnesses regarding the Defendant's firing three years earlier for stealing from his then-employer. The Court held that because the Defendant had put his character trait as a worker in issue, the state had a right to cross-examine his



witnesses regarding their knowledge of specific acts of bad character with regard to that trait.

In Brown v. State, 577 N.E.2d 221 (Ind. 1991), the Defendant offered the testimony of psychologists that she was not aggressive, that she was dominated by her co-Defendant, and that she had low intelligence. The state cross-examined one of these psychologists regarding the usefulness of a videotape of the Defendant's prior testimony to demonstrate her level of intelligence. The state then played this videotape, which contained evidence of other specific bad acts committed by the Defendant. The Court held that because the Defendant offered evidence regarding her own character, she opened the door to the subject of her character for the trait in issue, so that the state could introduce evidence of specific bad acts. The scope of rebuttal is within the discretion of the trial court, the Supreme Court wrote, and evidence of past crimes may properly be used to refute testimony regarding the Defendant's mental condition and behavioral deficiencies.

In Rouster v. State, 600 N.E.2d 1342, 1348-49 (Ind. 1992), the Court held that evidence of an unrelated, uncharged robbery was properly admitted to, rebut the claimed statutory "lack of significant criminal history" mitigator set out at Ind. Code 35-50-2-9(c)(1). In Lambert v. State, 743 N.E.2d 719, 713 (Ind. 2001), this mitigating circumstance was held to open the door to evidence of Lambert's juvenile history. In Wilkes v. State, 917 N.E.2d 675, 692 (Ind. 2009), the Defendant was convicted of murdering a woman and her two daughters, and the Court held that his claim of lack of significant criminal history opened the door to evidence of uncharged sexual misconduct with one of the daughter/victims.

The testimony of a psychologist that there was no indication of profound psychological disturbance or of sadistic tendencies in the Defendant's psychological profile opened the door to the testimony of two women that the Defendant had brutally raped them, in Miller v. State, 623 N.E.2d 403 (Ind. 1993).

In Fleenor v. State, 622 N.E.2d 140, 149 (Ind. 1993), the Defendant interposed an insanity plea at the guilt-innocence phase, and a court-appointed psychiatrist testified at length on the Defendant's behalf. On cross-examination during this guilt-innocence phase testimony, the state elicited the psychiatrist's opinion that "given the opportunity, [the defendant] will continue to involve himself in similar behavior in the future." In the penalty phase, this testimony was referred to during cross-examination of defense mitigation witnesses who testified that there was a low probability that the Defendant would be dangerous in the future. The Supreme Court held this to be proper rebuttal.

In Allen v. State, 749 N.E.2d 1158 (Ind. 2000), the Court reviewed the reasonableness of trial counsels' decision not to put on certain types of evidence in order to keep out evidence of a prior conviction for voluntary manslaughter, the facts of which were similar to the charged murder. Consequently, the Court was not defining the actual parameters of penalty-phase rebuttal, but the reasonableness of trial counsel's concerns about opening the door. The Court reached the following conclusions:

- (1) Evidence of Allen's difficult childhood and family history, because it

“contained numerous positive references to Allen’s role as a protector of the younger children in his neighborhood and family, his role as ‘man of the house,’ his tendency to take blame for others, and his practice of stealing to feed his family ... [was] a form of character evidence that could open the door to Allen’s criminal history.” Note that it is the positive character evidence, not simply the evidence of Allen’s difficult childhood, that the Court reasons might open the door.

(2) Evidence about abuses Allen suffered at the Boy’s School, absent any reference to his incarceration as an adult, could have created an inference that he did not have an adult criminal history, and the state could have rebutted this inference with his prior convictions. Again, the Court is speculating as to how the door might be opened.

(3) Evidence from a psychologist regarding brain dysfunctions that could limit Allen’s ability to control his behavior **could not have opened the door** to the prior convictions. The Court wrote that “[t]here is no nexus between Allen’s mental health status and his criminal history. To say that this evidence would open the door to evidence of prior convictions would improperly allow a jury to learn the details of a defendant’s criminal history every time a defendant introduced a mental health diagnosis as mitigation evidence.” Here, the Court is clear that mental health evidence could not have opened the door to Allen’s prior conviction.

(4) Testimony from a forensic psychologist regarding the statistical likelihood that Allen would commit dangerous acts while incarcerated, would have opened the door to Allen’s prior convictions, because in reaching his conclusions, the psychologist would have relied in part on Allen’s conduct while incarcerated on those convictions. Here, too, the Court is clear that this evidence would have opened the door.

## 2. Victim Impact Evidence

As discussed above, in Bivins v. State, 642 N.E.2d 928, 956-57 (1994), the Indiana Supreme Court held that victim impact evidence may be admitted at a capital penalty phase in Indiana **only** if it is relevant to a charged statutory aggravating circumstance or to rebut **tendered** mitigation.

In Wrinkles v. State, 690 N.E.2d 1156, 1169-71 (Ind. 1997), the Court held that where the defense had called one of the victim’s mother at the penalty phase to testify that she opposed the death penalty for religious reasons, the trial court properly allowed the state to cross-examine the witness regarding the impact of witnessing his parents’ murder on her grandson, whom she was raising as a result of the murders.

In Allen v. State, 686 N.E.2d 760, 786-87 (Ind. 1997), the Court held that where the defendant claimed that the victim had sworn at him, drawn a knife, and used a racial epithet after allowing him into her home, the victim’s daughter was properly allowed to testify that the victim was very religious, taught Sunday School, never swore, and

was not violent.

Even if victim impact evidence is ruled admissible in your case, keep in mind that the federal constitution places **some** restrictions on this evidence. The majority in Payne v. Tennessee, *supra*, wrote that, "[i]n the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the due process clause of the Fourteenth Amendment provides a mechanism for relief." Payne, 111 S. Ct. at 2608. Also, Payne did not alter the earlier holdings of Booth v. Maryland, 482 U.S. 496 (1987), and South Carolina v. Gathers, 490 U.S. 805 (1989), that admission of "a victim's family member's characterizations and opinions about the crime, the defendant and the appropriate sentence violates the Eighth Amendment." Payne, *supra*, at 2611, n.2.

#### **XIV. PREPARING FOR BATTLE: PLANNING YOUR CASE**

##### **A. Consistent Guilt and Penalty Phase Theories (Avoiding "He didn't do it, but if he did, here's why.")**

It is crucial to plan for both the guilt-innocence phase and the penalty phase of the trial, and to plan a defense case in which your guilt-innocence case works coherently and consistently with your penalty phase case. Guideline 10.10.1 of the 2003 ABA Guidelines provides:

As the investigations mandated by Guideline 10.7 produce information, trial counsel should formulate a defense theory. Counsel should seek a theory that will be effective in connection with both guilt and penalty and should seek to minimize any inconsistencies.

Recently in McCoy v. Louisiana, 138 S. Ct. 1500 (2018), the Court stated that the Sixth Amendment guarantees a defendant the right to choose the objective of his defense and to insist that his counsel refrain from admitting guilt, even when counsel's experienced-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty. You must consider McCoy v. Louisiana, when planning your defense.

2008 Supplemental Guideline 10.11(A) provides, "It is the duty of the defense team to aid counsel in coordinating and integrating the case for life with the guilt or innocence phase strategy."

Consistent guilt-innocence and penalty phase theories not only preserve your credibility, they allow you to begin building your case for life throughout the trial, beginning with voir dire. Studies of capital jurors have indicated that most of them begin thinking about the appropriate penalty before the guilt-innocence phase is over. Planning both guilt-innocence and penalty phases as a coherent strategy enables you to take advantage of this fact, and to weave your mitigation themes throughout trial. The same frailties that provide mitigation may also help you challenge the voluntariness of your client's confession, or to challenge the state's "story" of how the crime occurred. Even if the intent to kill is not an element of the charged aggravating circumstance, challenging the intentionality of the killing can carry great weight with jurors. If your client was a lesser

participant in the killing, or was easily led by a co-defendant, establishing these facts early can also help to steer jurors away from a death sentence before they even reach the penalty phase.

For more on how to “front-load” your mitigation during the guilt-innocence phase of trial, particularly mental health evidence, see Jodie English’s [outline](#) on front-loading mental health mitigation, and the special note on mental health experts in IPDC’s pamphlet, “[Getting Funds for Experts and Investigators](#).” For a fuller discussion regarding selecting and pursuing consistent theories at guilt-innocence and penalty phases, see [Integrating Theories for Capital Trials: Developing the Theory of Life](#), by Mary Ann Tally, and [Matching the Theory of the Case to the Theory of Mitigation](#), by Andrea Lyon.

If, after careful weighing and consideration, you determine that you have the rare case where there is a denial type challenge to guilt (i.e. alibi) that is strong enough to warrant pursuing at trial before a death-qualified, conviction-prone jury, you must still be prepared to proceed to a penalty phase with a theory that is consistent. You cannot argue that your client had nothing to do with the crime at the guilt-innocence phase, and then proceed at the penalty phase to explain why your client committed the offense after all.

One possible approach at the penalty phase is to acknowledge and accept, while disagreeing with, the jury's verdict, and change the focus away from whether your client committed the crime and why, to the information that jurors should know about your client before they make such a crucial decision as whether he should be killed.

As the [previous section](#) on evidence at the penalty phase suggests, you may have reliable evidence that was inadmissible under rules of evidence at the guilt-innocence phase, but which you can present during the penalty phase, in order to chip away at the jurors' certainty regarding their guilty verdict, and you can present argument appealing to any lingering doubts that they may have. **Early capital Jury Project research indicated that residual doubt was considered by jurors among the strongest mitigating circumstances, but later researchers analyzing these results suggest that what jurors mean by this is not doubt about whether the defendant had anything to do with the killing, but rather the defendant’s degree of involvement compared to others.** See Sandys, Pruss & Walsh, [Aggravation and Mitigation: Findings and Implications](#), 37 J. Psychiatry & L. 189 (2009).

This is an extremely difficult position to be in, and that is why it is so important to carefully assess the strength of any denial defense. But if in your best judgment you and your client decide to pursue a denial defense, you must be prepared for the possibility of conviction. You must develop a coherent plan for both phases so that you are prepared and do not lose your nerve or your credibility. And as with any case for life, you must begin laying the groundwork in voir dire and throughout the trial. Excellent examples of how to do this are available from [Steve Bright](#) and [Chris Adams](#).

Again, remember that *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018), states the Sixth Amendment guarantees a defendant the right to choose the objective of his defense and to insist that his counsel refrain from admitting guilt, even when counsel’s experienced-

based view is that confessing guilt offers the defendant the best chance to avoid the death penalty.

## **B. Your Battle Plan for the Penalty Phase**

Although you will want to weave mitigation evidence and themes into your case throughout trial, the penalty phase is your opportunity to coherently present your mitigation case -- your case for life. As you and your defense team work to investigate, develop, and prepare to present your mitigation case, you will at times be overwhelmed by the sheer volume of information you are gathering about your client and his life, let alone by the job of orchestrating it into a compelling case for life in the face of the horrendous crime your client is charged with. Planning your case -- identifying the stories that need to be told, selecting and preparing lay and expert witnesses and documentary and demonstrative evidence will be a huge, ongoing job that involves your entire defense team, and Guideline 10.11 in both the 2003 ABA Guidelines and the 2008 Supplemental Guidelines address this process. But what exactly is a case for life?

In [“The Mystery of Mitigation: What Jurors Need to Make a Reasoned Moral Response in Capital Sentencing”](#), 11 J. Law & Social Change 237, 237-38 (2008), long-time mitigation specialist Russell Stetler wrote:

Mitigation -- the empathy-evoking evidence that attempts to humanize the accused killer in death penalty cases -- remains a mystery some three decades after the United States Supreme Court mandated individualized sentencing in capital cases. Few have seen its power, its transformative capacity to enable jurors to feel human kinship with someone whom they have just convicted of an, often monstrous crime. It would be rare for an individual juror to sit on more than one case in which mitigating evidence was presented in the penalty phase of a capital trial. Indeed, in twenty years of federal death penalty prosecutions, very few judges have presided over more than one penalty proceeding. Some of the most experienced public defenders specializing in capital cases have presented mitigating evidence in only a handful of times over their long careers. Even mitigation specialists -- the capital defense team members who give undivided attention to the client's life-history investigation -- have few opportunities to observe penalty proceedings, to watch the entire courtroom drama unfold.

Yet we know that mitigation works. Life verdicts in cases involving horrendous loss of life demonstrate that death sentences are never automatic or inevitable. High-profile examples include the cases of Lee Boyd Malvo, the so-called “Beltway Sniper;” Zacarias Moussaoui, the alleged twentieth hijacker of 9/11; and Terry Nichols, tried twice (in federal and then state court) for the Oklahoma City bombing. More mundane examples occur week after week in courtrooms across the country, as jurors choose life sentences for serial killers, cop killers, child killers, and others guilty of the most reviled and abhorrent crimes. While concerns about wrongful convictions have dramatically altered the public

policy debate on capital punishment, mitigation evidence has continued to bring life sentences even in the face of overwhelming evidence of guilt. Mitigation is intangible and highly variable in the weight assigned to it by different individuals.

Footnotes omitted.

Stetler is right. As he writes, few people actually see the power of a mitigation case. Even the most experienced of Indiana's capital defenders have actually taken only a very few cases to trial, after all attempts at plea negotiation have failed. Since January 1996 in Indiana, there have been seventeen capital jury trials. Out of those seventeen trials, seven life verdicts were returned, three of them in cases involving the shooting of a police officer or security guard, and two involving shooting of convenience store clerks captured in chilling detail on surveillance video. And in an eighth case, involving three victims -- a woman and her two children, one of whose naked body was found tied to her bedframe a jury could not unanimously reach a death penalty verdict, ultimately resulting in a life sentence. We know that mitigation matters -- that it can reach jurors and persuade them to spare defendants' lives even in seemingly hopeless, horrific cases.

So, what kind of mitigation is it that saves clients' lives? These successful Indiana cases, as well as the comprehensive nationwide Capital Jury Project research, give us important information about what types of mitigation evidence jurors believe is important to their life or death decisions. But more important, both our Indiana experience and the CJP research tell us that it is not enough simply to present certain types or categories of mitigation -- even a number of them -- that have been found to resonate with jurors in the past. Mitigation must be fully fleshed out with rich human detail and put together into a compelling case that makes jurors want to spare your client's life.

Here is a lengthy excerpt from a law review article based on CJP research, an article which is well worth reading in toto for its insights into how jurors process the evidence presented to them in the penalty phase and how they make their decision for life or death. Its authors have many decades of experience among them, both studying and trying capital cases, and they share with us from both the CJP research and their own extensive experience.

When [jurors are] faced with the moral and normative choice - does the defendant deserve to die - it is wrong to dismiss the role of facts entirely. Facts do count, but they count in different ways than they do in the guilt-innocence phase. The empirical information - primarily the Capital Jury Project ("CJP") studies - reveals that many jurors make the life or death decision based on a misunderstanding of the law. Most significantly, many jurors believe - despite the judge's instructions - that they must impose the death penalty if the crime was premeditated, or "heinous," or intentional. But even aside from the lawless ways the facts sometimes count, they also matter in important ways that are consistent with the law of the relevant jurisdiction. The empirical studies reveal that three primary considerations drive juror decision-making at the penalty phase of a capital trial. First, many jurors' penalty determination is based

on their perception of how “bad” the crime was. Second, many jurors make the life or death decision based on how dangerous they think the defendant is. Finally, jurors choose the appropriate penalty based on their assessment of the defendant’s remorse (or the lack thereof).

A skeptical reader might ask, “What do any of those three issues have to do with mitigation?” The considerations appear to be driven by the facts of the underlying crime. But the skeptic would be wrong. Each consideration, the empirical studies also show, can be substantially influenced by the evidence in mitigation. Successfully humanizing the defendant through the mitigating evidence, for example, leads jurors to believe that the crime was not as heinous. It also makes jurors less likely to view the defendant as dangerous, and less likely to see him as remorseless. A comprehensive, consistent, coherent, and credible presentation of mitigation evidence can - and often does - influence a juror’s determination on all three issues.

Thus “facts,” as properly understood for the life or death sentencing determination, encompass much more than the “facts” as understood in non-capital trials. The juror’s life or death decision will hinge on whether the information that has been presented in aggravation and in mitigation has persuaded an individual juror as to which of the two punishments is the appropriate punishment. In short, credibly telling the defendant’s story can make the difference between life and death. The CJP studies reveal that many different types of mitigation resonate with jurors. Low intelligence, mental illness, child abuse, extreme poverty, remorse, lack of a significant prior record, and lesser culpability are just some of the categories of mitigation that, in a particular case, can lead jurors to choose life over death. As one researcher put it:

Telling a defendant’s story does appear to have its intended emotional effect. . . . If a juror believed that the defendant experienced the torment of abuse as a child, labored under the burden of a mental defect or mental retardation, was emotionally disturbed, battled with alcoholism . . . was a loner in the world, or had generally gotten a raw deal in life, the usual response was sympathy or pity.

But, as with everything else in death penalty litigation, it is not quite that simple. It is not enough to present a case in mitigation; the defense case for life must resonate with jurors. It must be comprehensive, consistent, coherent and credible. For example, a juror in a capital case will frequently reject a “half-baked” case of mental illness, a consideration which - in the abstract - is considered by jurors to be highly mitigating. On the other hand, a truly compelling case of drug addiction tied to events in the defendant’s life and its role in the crime can result in a juror deciding that LWOP is the appropriate punishment. In short, the devil is in the details.

It is essential, therefore, that the defense team - and it must be a team effort - approach the search for mitigation with an open mind. One of the most serious mistakes the defense team can make is to decide on a theory of the case too quickly. A persuasive theory of the case - including the defense theory at both guilt-or-innocence and the penalty phases of capital trial - can only be determined after a comprehensive investigation has been conducted. . . . The defense team must gather the full picture of the client's life and background and the circumstances of the crime. In short, "the good, the bad and the ugly" must be fully pursued on a multi-generational level.

Blume, Johnson & Sundby, "[Competent Capital Representation: The Necessity of Knowing and Heeding What Jurors Tell Us About Mitigation](#)," 36 Hofstra Law Rev. 1035, 1037-39 (2008) (footnotes omitted). A more analytical approach to the Capital Jury Project research on aggravation and mitigation is available in Sandys, Pruss & Walsh, [Aggravation and Mitigation: Findings and Implications](#), 37 J. Psychiatry & L. 189 (2009).

I would also encourage you to read Cyndy Short's [article](#), "Building Capital Teams and Uncovering the client's Unique Stories: The DeLong Case," The Warrior, p.5, Spring 2004. Short provides a good and detailed discussion of how her team developed mitigation evidence and how they orchestrated its presentation to the jury.

[Chris Adams' materials](#) from IPDC's 2013 Death Penalty Defense seminar also help with the process of putting together your mitigation evidence into mitigation theories and themes, identifying what to put into evidence and how, and preparing your closing argument. Adams emphasizes the need to characterize your mitigation themes credibly, with an eye toward how the prosecutor might counter them. For example, a client who spent time with his kids and took them to do fun activities, but who was also a drug dealer charged with killing his rivals, was characterized as "an engaged father," rather than "a good father."

As I mentioned earlier, 2003 Guideline 10.11 also provides guidance as you begin to consider your potential mitigation witnesses and develop your penalty phase case, and 2008 Supplementary Guideline 10.11 fleshes out this process with additional detail and also describes the role of the entire defense team in this process.

2003 Guideline 10.11(F) provides as follows:

- F. In deciding which witnesses and evidence to prepare concerning penalty, the areas counsel should consider include the following:
  - 1. Witnesses familiar with and evidence relating to the client's life and development, from conception to the time of sentencing, that would be explanatory of the offense(s) for which the client is being sentenced, would rebut or explain evidence presented by the prosecutor, would present positive aspects of the client's life, or would otherwise support a sentence less than death;



2. Expert and lay witnesses along with supporting documentation (e.g. school records, military records) to provide medical, psychological, sociological, cultural or other insights into the client's mental and/or emotional state and life history that may explain or lessen the client's culpability for the underlying offense(s); to give a favorable opinion as to the client's capacity for rehabilitation, or adaptation to prison; to explain possible treatment programs; or otherwise support a sentence less than death; and/or to rebut or explain evidence presented by the prosecutor;
3. Witnesses who can testify about the applicable alternative to a death sentence and/or the conditions under which the alternative sentence would be served;
4. Witnesses who can testify about the adverse impact of the client's execution on the client's family and loved ones;
5. Demonstrative evidence, such as photos, videos, and physical objects (e.g., trophies, artwork, military medals), and documents that humanize the client or portray him positively, such as certificates of earned awards, favorable press accounts, and letters of praise or reference.

The entire defense team must work together to select and prepare witnesses for direct and cross-examination and to select documentary evidence and develop demonstrative evidence in order to present the case for life effectively to the jury.

2008 Supplementary Guideline 10.11(E), (F), and (G) provide as follows:

- E. It is the duty of the defense team members to aid counsel in the selection and preparation of witnesses who will testify, including but not limited to:
  1. Expert witnesses, or witnesses with specialized training or experience in a particular subject matter. Such experts include, but are not limited to:
    - a. Medical doctors, psychologists, toxicologists, pharmacologists, social workers and persons with specialized knowledge of medical conditions, mental illnesses and impairments; substance abuse, physical, emotional and sexual maltreatment, trauma and the effects of such factors on the client's development and functioning.
    - b. Anthropologists, sociologists and persons with expertise in a particular race, culture, ethnicity, religion.
    - c. Persons with specialized knowledge of specific communities or expertise in the effect of environments and neighborhoods upon their inhabitants.

- d. Persons with specialized knowledge of institutional life, either generally or within a specific institution.
- 2. Lay witnesses, or witnesses who are familiar with the defendant or his family, including but not limited to:
  - a. The client's family, extending at least three generations back, and those familiar with the client;
  - b. The client's friends, teachers, classmates, co-workers, employers, and those who served in the military with the client, as well as others who are familiar with the client's early and current development and functioning, medical history, environmental history, mental health history, educational history, employment and training history, military experience and religious, racial, and cultural experiences and influences upon the client or the client's family;
  - c. Social service and treatment providers to the client and the client's family members, including doctors, nurses, other medical staff, social workers, and housing or welfare officials;
  - d. Witnesses familiar with the client's prior juvenile and criminal justice and correctional experiences;
  - e. Former and current neighbors of the client and the client's family, community members, and others familiar with the neighborhoods in which the client lived, including the type of housing, the economic status of the community, the availability of employment and the prevalence of violence;
  - f. Witnesses who can testify about the applicable alternative to a death sentence and/or the conditions under which the alternative sentence would be served;
  - g. Witnesses who can testify about the adverse impact of the client's execution on the client's family and loved ones.
- F. It is the duty of team members to gather documentation to support the testimony of expert and lay witnesses, including, but not limited to, school, medical, employment, military, and social service records, in order to provide medical, psychological, sociological, cultural or other insights into the client's mental and/or emotional state, intellectual capacity, and life history that may explain or diminish the client's culpability for his conduct, demonstrate the absence of aggressive patterns in the client's behavior, show the client's capacity for empathy, depict the client's remorse, illustrate the client's desire to function in the world, give a favorable opinion as to the client's capacity for rehabilitation or adaptation to prison, explain possible

treatment programs, rebut or explain evidence presented by the prosecutor, or otherwise support a sentence less than death.

- G. It is the duty of the team members to aid counsel in preparing and gathering demonstrative evidence, such as photographs, videotapes and physical objects (e.g., trophies, artwork, military medals), and documents that humanize the client or portray him positively, such as certificates of earned awards, favorable press accounts and letters of praise or reference.

Just as your investigation must be broad and deep, you should be broad-minded as you think together about how to make your client's life and circumstances real for jurors. For an illustration of how effective presentation of mitigation can persuade jurors to spare a defendant's life, I encourage you to read Alex Kotlowitz's article, "[In the Face of Death](#)," from the June 6, 2003 issue of the New York Times magazine. The article focuses on the Marion County case of Jeremy Gross, who was charged with robbing the convenience store where he worked part-time and shooting to death the young clerk on duty. A security videotape captured Gross shooting the clerk while he begged for his life, and then showed the clerk bleeding to death on the concrete under the outside payphone where he tried to call for help. Kotlowitz describes the penalty phase case developed and put on by attorneys Bob Hill and Mark Earnest and their team and describes how jurors wrestled with the case - how different aspects of the state's case and the mitigation case affected them and how they arrived at their LWOP verdict.

Between articles like this and other articles resulting from the Capital Jury Project, we have a wealth of information to guide us in putting together a case for life. It can also be helpful to run potential mitigation themes by lay people who resemble your jury pool - either formally, as with mock juries, or informally. You may also want to explore the use of psychodramatic techniques, as promoted and taught at Gerry Spence's Trial Lawyers College. See Rick Kammen's article, "[The Use of Psychodramatic Techniques in the Preparation and Trial of a Death Penalty Case](#)," The Warrior, p. 31, Fall 2002.

It is important to find ways to go beyond merely presenting a collection of potentially mitigating facts, to selecting and presenting themes that will resonate with jurors and move them to spare your client's life. For much more on the power of narrative and story-telling in presenting to the jury a story of your client's life that makes them want to save his life, see the 2009 [symposium issue](#) of the University of Missouri-Kansas City Law Review on this subject.

## **XV. PICKING AND PROTECTING YOUR JURY**

### **A. Capital Voir Dire Overview**

If you are forced to go to trial, effective jury selection will be critical to saving your client's life, and like everything else about a death penalty case, capital voir dire is quite different. Although your client is presumed innocent at the point of jury selection, you will need to identify jurors' views regarding sentencing, in order to ensure that jurors are impartial as to the sentencing outcome. This has become known as "death qualifying" (ensuring that the jurors are able to consider imposing a penalty of death) and "life

qualifying” (ensuring that jurors are able to consider imposing penalties less than death).

As a sidenote, research has long indicated that “death-qualified” juries are more conviction-prone, and if the state’s evidence of guilt is weak, you may want to seek separate juries for guilt-innocence and penalty phases, with only the potential penalty phase jury death-qualified. For more on this see [Section XII](#), above.

It is imperative that you become familiar with both the law and the procedure regarding capital voir dire, so that you are prepared to fight for your right to adequately and effectively question jurors and to protect your client against improper questioning and/or removal of jurors by the state, as well as techniques for adequately probing juror attitudes in order to life-qualify them. See 2003 ABA Guideline 10.10.2(B). It is also important not to forget other issues that arise during voir dire in any case, including protecting against the prosecution’s discriminatory use of peremptory challenges. Note that because your case involves the death penalty, each side has a statutory right to 20 peremptories. Ind. Code 35-37-1-3. When Kevin Isom went on trial in Lake County for the murder of his wife and two children and the attempted murder of three police officers, defense counsel successfully moved for additional peremptories because the different types of victims might arouse strong feelings in different jurors. [Their motion](#) is available.

The standard for death qualification was first set out in Witherspoon v. Illinois, 391 U.S. 510, 88 S. Ct. 1770, 20 L.Ed.2d 776 (1968), a pre-Furman case that set limits on the state’s ability to challenge for cause jurors who express qualms about the death penalty. The state of Illinois had challenged, and the trial court had removed for cause, all jurors who expressed “conscientious or religious scruples against the infliction of the death penalty” or against its infliction “in a proper case” ... **without any effort to find out whether their scruples would invariably compel them to vote against capital punishment.** Id., 391 U.S. at 514. The Court wrote that “this jury fell woefully short of that impartiality to which the petitioner was entitled under the Sixth and Fourteenth Amendments,” Id., 391 U.S. at 518. The Court noted that “a prospective juror cannot be expected to say in advance of trial whether he would in fact vote for the extreme penalty in the case before him. The most that can be demanded of a venire man in this regard is that he be willing to *consider* all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings.” Id., 391 U.S. at 522, n. 21.

Other language in footnote 21 of the majority opinion in Witherspoon suggested that a venire member should not be removed for cause unless their answers made “unmistakably clear” that they would “automatically” vote against death. The Court *clarified* this later in Wainwright v. Witt, 469 U.S. 810, 105 S. Ct. 844, 83 L.Ed.2d 841 (1985), in which the majority wrote that “many veniremen simply cannot be asked enough questions to reach the point where their bias has been made ‘unmistakably clear.’” Id., 469 U.S. at 424-25. The Witt Court wrote that the “standard is whether the juror’s views would ‘prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.’” Id., 469 U.S. at 424, quoting Adams v. Texas, 448 U.S. 38, 45, 100 S. Ct. 2521, 65 L. Ed. 2 581 (1980).

In Indiana, this cause challenge is codified at I.C. 35-37-1-5(a) (3) as follows: "If the state is seeking a death sentence, that [the juror] entertains such conscientious opinions as would **preclude** his recommending that the death penalty be imposed." In Dye v. State 717 N.E.2d 5 (Ind. 1999), the Indiana Supreme Court wrote that this statute "**arguably sets a higher bar [for exclusion] than Witt**," Id., at 29, although the Court found that the juror in question was properly excluded under either standard. This juror had indicated that he could consider imposing a death sentence for Adolph Hitler or Timothy McVeigh, but could not impose death under other circumstances, including for someone who, like Dye, was charged with killing two of his wife's children. Dye argued that this juror's opinions would not truly **preclude** him from ever recommending the death penalty, because there were circumstances under which he could do so. The Court wrote:

The basic logic of Witt is that it is proper to excuse jurors who are unable to carry out their duties in the case before them. A juror's willingness to recommend a death sentence under other circumstances is irrelevant to that inquiry.

Dye, 717 N.E.2d at 17.

In Morgan v. Illinois, 504 U.S. 719, 728 – 30 (1992), the Supreme Court confirmed that "life qualification" of capital jurors is also required. The Court held that jurors who would **always** or **automatically** vote for the death penalty (known as ADPs – Automatic Death Penalty) should be struck for cause, just as those who could **never** vote for death should be. The Morgan Court wrote:

A juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do. Indeed, because such a juror has already formed an opinion on the merits, the presence or absence of either aggravating or mitigating circumstances is entirely irrelevant to such a juror. Therefore, based on the requirement of impartiality embodied in the Due Process Clause of the Fourteenth Amendment, a capital defendant may challenge for cause any prospective juror who maintains such views.

Id., 504 U.S. at 729.

Given the focus, from Witherspoon through Witt and finally Morgan, on jurors' ability to consider all available penalties as instructed, in light of the evidence of aggravating and mitigating circumstances presented in the case before them, it is arguable that "life qualification" in Indiana requires the ability to consider all three sentencing options set out in Ind. Code 35-50-2-9 – death, LWOP, or neither (judge will impose a term of years).

Further, it is a reasonable extension of these cases, as well as the Indiana Supreme Court's holding in Dye, that a juror must be willing and able to consider recommending a sentence other than death "in the case before them," Dye, *supra*, at 17, and be able "in good faith the evidence of aggravating **and mitigating circumstances** as the instructions

require him to do.” Morgan, *supra*, 594 U.S. at 729(emphasis added). See also Averhart, 470 N.E.2d 666, 164 (1998):

The Indiana death penalty statute, §35-50-2-9, requires a jury assembled on the issue of capital punishment to consider any mitigating circumstances. Such consideration is required under Eddings v. Oklahoma, 1982) 455 U.S. 104, 102 S. Ct. 869, 71 L.Ed.2d 1; Enmund v. Florida, (1982) 458 U.S. 782, 102 S. Ct. 3368, 73 L. Ed. 2d 1140; Gregg v. Georgia, (1976) 428 U.S. 153, 96 S. Ct. 2909, 49 L.Ed.2d 859; *reh. denied*; and Jurek v. Texas, (1976) 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929, *reh. denied*. All of these cases **require individualized consideration of all factors involving mitigation** and the defendant’s character.

In order to ensure the jurors’ ability to consider all available penalties in the case actually before them, you must be allowed to inquire hypothetically about their ability to consider all penalties in light of the aggravating circumstances actually alleged, just as the Dye Court recognized, and also in light of the types of mitigating circumstances you intend to present. The state may argue that you are attempting to “condition” jurors to be receptive to your mitigation or seeking a pledge to give weight to your mitigation, but you are merely seeking to determine the juror’s ability to follow the law in your case, just as the Dye Court says the state must be able to do. Hypothetical questions have long been authorized in order to assess bias and elicit preconceived ideas about a planned defense theory. See, e.g., Steelman v. State, 602 N.E.2d 152, 158 (Ind. App. 1992).

Please note that you are asking if jurors can “consider” a sentence less than LWOP. In Gibson v. State, 43 N.E.3d 231, 238 (2015), the Indiana Supreme Court held that the trial court had not abused its discretion in limiting defense counsel from presenting jurors specific facts from the case before them and then asking what their verdict would be. (*citing* Davis v. State, 598 N.E.2d 1041, 1047 (Ind. 1992)).

Recent Capital Jury Project research confirms the wisdom and even necessity of this approach. See Sandys & Trahan, “[Life Qualification, Automatic Death Penalty Voter Status, and Juror Decision Making in Capital Cases](#),” 29 Justice System J. 385 (2008). Researchers Marla Sandys and Adam Trahan looked at transcripts of interviews of sixty-six jurors who had actually served on Kentucky capital juries, and who were asked a simple, straightforward Morgan-type question as part of the portion of the interview addressed to general attitudes on crime and punishment, rather than to their experience in the case on which they had served. The actual question was: “If you were sure, beyond a reasonable doubt, the defendant was guilty of a crime for which s/he could receive the death penalty, would you be able to consider a sentence of less than death?” Id., at 388. Twenty-one percent of these actual capital jurors replied that they would not be able to consider any penalty other than death for a defendant they had found guilty beyond a reasonable doubt, suggesting that a single, simple question like this might be able to identify these ADP jurors. Id., at 389.

However, Sandys and Trahan inquired further into whether the other 79% who identified themselves as “life-qualified” had accurately done so. Specifically, they looked at

whether these jurors' self-categorization was consistent with their actual decision-making process as described in their answers to other interview questions. The authors found sufficient narrative descriptions of jurors' sentencing decision-making process in fourteen juror interview transcripts to classify these jurors as either life-qualified or ADP, and then compared these descriptions to each juror's response to the single Morgan-type question. They found that some jurors who stated unequivocally that they would never consider any sentence less than death once guilt was determined described a sentencing decision-making process that was consistent with this self-categorization. These jurors they refer to as "traditional ADPs." But the authors also found a significant number of jurors who self-identified as life-qualified - said that they could consider penalties other than death even if persuaded of guilt beyond a reasonable doubt - yet whose own descriptions of their sentencing decision-making process suggested otherwise. They labeled these jurors "latent ADPs." Id., at 390.

Sandys and Trahan quote liberally from the interview transcripts of jurors they identify as latent ADPs, and the jurors' own words make it clear that, while they believed that they could follow the law and consider a penalty other than death if they found guilt beyond a reasonable doubt, the types of circumstances that they were looking for in order to open the door to such consideration generally constituted actual defenses, such as self-defense, accident, or temporary insanity, or factors such as sudden heat which would have reduced the offense to something less than murder. These jurors describe the mitigation evidence that was presented to them and dismiss it as irrelevant to their decision. Their decision-making process, as described in their own words, is no different from the decision-making process described by those jurors who self-identified as traditional ADPs. The only real difference between the two is their level of self-awareness, and as a consequence, the level of questioning that would be necessary to discover whether they are life qualified as required by Morgan. Id., at 391.

In order to assuage the fears of trial judges concerned about how much time truly adequate capital voir dire might take, Sandys and Trahan suggest that self-aware jurors who clearly self-identify as traditional ADPs or anti-DP excludable jurors can be removed for cause before trial on the basis of their written questionnaires, saving precious court time for questioning of jurors whose attitudes are less clear and require more probing. Id., at 393. In order to determine, and to help jurors themselves determine, whether they are capable of considering all available penalties in the case before them, the authors suggest that you must be allowed to make real for them, at least hypothetically, both the aggravating and mitigating circumstances that will be presented, and to take away factors which they might envision as mitigating but which would in fact be complete defenses, such as self-defense. Id.

One of the best techniques for zeroing in on and probing juror views on what penalties they could consider in your case is known as the "Colorado Method." It is also referred to as "stripping," because of its focus on stripping away typical juror "hiding places" like self-defense, accident, mistaken ID, etc. The method helps you identify venire members who may be subject to challenge for cause, and to develop and lock in the challenge through your questioning. It also helps you to rank jurors along a spectrum of penalty views so that you can use your peremptory strikes as effectively as possible.

In addition to probing and identifying juror's views on penalty in your case, the Colorado Method includes a component, called "isolation and insulation," which is intended to ensure that life-giving jurors exercise their own judgment and are not bullied into going along with an anti-life majority. Some Indiana lawyers have expressed concern that this encourages hung juries, and they are concerned about the effects of this in a state like Indiana, one of the few in which a death sentence can be imposed even if the jury could not unanimously agree on the appropriate penalty. See *Wilkes v. State*, 917 N.E.2d 675 (Ind. 2009). Others suggest that the emphasis can be put on empowering life-giving jurors to stand up for their view, holding fast and attempting to persuade others. It will likely be helpful for you to talk with lawyers who have picked a capital jury in Indiana in the past few years, and to determine whether and how you want to implement this aspect of the Colorado Method. I can help you get in touch with those lawyers.

Matt Rubenstein has written an excellent, [practical article](#) on the Colorado Method for NACDL's Champion magazine. Jodie English has prepared a PowerPoint explanation of the [Colorado Method](#), with graphics and sample juror transcripts, as well as an [outline](#) on the law in this area, and both are helpful for gaining additional insight. Hands-on training in this method of capital voir dire is available nationally in stand-alone programs and as part of some death penalty trial practice programs. Check [on-line](#) for upcoming death penalty training programs. IPDC also has a set of four DVDs featuring lectures, demos, and participant practice and critiques from previous Colorado Method trainings, which you can borrow and watch.

Finally, the 2003 ABA Guideline 10.2(C), suggest that you should consider seeking expert assistance in the jury selection process. We are fortunate in Indiana to have available a leading CJP researcher, Professor Marla Sandys of IU-Bloomington's Criminal Justice Department, as well as her former student, Heather Pruss nearby in Louisville, KY. They and other jury selection experts are listed in [IPDC's on-line expert database](#).

## **B. Litigating Conditions of Voir Dire**

In addition to litigating the scope of questioning you will be allowed you will need to think about and litigate the conditions for voir dire. Generally, in order to fully tease out juror attitudes on penalty, sensitive areas of mitigation and other types of potential bias, it is important to question jurors individually, out of the presence of other venire members, and to have sufficient time for effective questioning. Capital jury project research, and testimony from CJP researchers, can be very helpful in making a case for individual sequestered voir dire on penalty views and other areas that require it, and for adequate time for questioning each juror. If your client is Black, the implicit racial bias research discussed below can educate your judge on the need to question jurors carefully and adequately in order to reveal this bias and its impact, so that neither party has to exercise peremptories based on race or racial stereotypes.

Capital Jury Project researchers, jury selection experts, and other attorneys with recent capital trial experience, can also help you think through what areas of questioning do and do not require individual sequestration, how long you will need for each juror, and the logistics of putting it all together. This includes determining how many potential jurors



the Court should call in at a time, what size panels should be used for non-individualized questioning, how long should be allowed for both individual and panel questioning, how often new jurors should report, and how long each court day should last. It will be helpful to talk with other attorneys who have been through a capital trial in recent years, to see how their voir dire was conducted and what they would try to do differently in the future. They can help you think through these issues, and they can also provide affidavits or testimony in support of your requests, based on their own experience.

If your judge remains adamant that he or she wants you to work long days in order to complete voir dire in as few days as possible, these attorneys may be able to provide affidavits or testimony regarding the intensity of concentration required and the impossibility of maintaining that kind of concentration for ten or twelve hour days. You might want to supplement your case with articles on the effects of prolonged work hours on one's rate of errors or accidents, or perhaps seek the testimony of an expert in this field. See a bibliography of research on this topic collected by the National Institute of Occupational Safety and Health, at <http://www.cdc.gov/niosh/topics/workschedules/>

Educating your judge on both the importance and the difficulty of ferreting out juror attitudes on penalty, race, mitigation, etc., can have a huge impact on your ability to obtain workable conditions for voir dire. A recent team in Lake County worked with their judge to set up a schedule that included calling jurors to fill out written questionnaires over a month before voir dire, and a full month scheduled for voir dire itself, with no time limits on individual sequestered voir dire on penalty.

[Sample pleadings and orders](#) regarding conditions of voir dire are available, as is a brief [memo](#) regarding experience in recent Indiana trials.

### **C. Written Questionnaire**

A written jury questionnaire can help you begin your probe of juror attitudes, allowing you to better prepare for voir dire and cutting down on actual in-court voir dire time. Most judges have allowed the use of these questionnaires in capital cases, recognizing the time savings they represent. As suggested by CJP researchers Marla Sandys and Adam Trahan, see above, as well as by attorneys who have picked capital juries in recent years, you may want to seek an agreement to strike clearly identified ADPs and automatic-life jurors on the basis of their questionnaire answers, in order to save precious in-court time for probing voir dire of remaining venire members.

In some cases, the state has requested that the questionnaire be denominated "Defendant's Juror Questionnaire," to encourage jurors to direct any frustrations they have about filling out the questionnaire toward you and your client. You should argue that the questionnaire should be submitted without indication of what party tendered any or all of the questions, just as jury instructions are. Ind. Code 35-37-2-2.

You will also need to think about such matters as when you will get the completed questionnaires, and what information you really need to know about your venire members to help you plan for jury selection, how much information you and your team will actually be able to process, and how you will process it (i.e., who will read

questionnaires, whether and how you will rate jurors based on questionnaires). You may also want to seek expert assistance with this important part of the voir dire process. [Sample questionnaires](#) are available.

#### **D. Race and Jury Selection**

Racial disparity persists in application of the death penalty, with defendants convicted of murdering White victims more likely to be sentenced to death than those convicted of murdering non-White victims. See, e.g., [The Application of Indiana's Capital Sentencing Law: Findings of the Criminal Law Study Commission, 123-A - J](#) (2002).

The risk of both conscious and unconscious racial attitudes affecting the sentencing decision is greatest when the victim is White and the defendant is non-White, a fact recognized by the U.S. Supreme Court in Turner v. Murray, 476 U.S. 28 (1986).

Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected. On the facts of this case, a juror who believes that blacks are violence prone or morally inferior might well be influenced by that belief in deciding whether petitioner's crime involved the aggravating factors specified under Virginia law. Such a juror might also be less favorably inclined toward petitioner's evidence of mental disturbance as a mitigating circumstance.

Id., 476 U.S. at 35.

The Court determined that this risk required that “a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias.” Id. 476 U.S. at 37. This is not so easily done. Few jurors today willingly admit to racial bias, even if they harbor it, and as the Turner Court acknowledged, “More subtle, less consciously held racial attitudes could also influence a juror's decision in this case. Fear of blacks, which could easily be stirred up by the violent facts of petitioner's crime, might incline a juror to favor the death penalty.” Id., 476 U.S. at 35. In the two and a half decades since Turner was decided, a body of research has developed which indicates that racial bias and race-based fears may be completely unconscious and may even be in conflict with an individual's explicitly held attitudes and beliefs. Researchers refer to these unconscious biases as “implicit bias.” In 1998, researchers introduced the Implicit Association Test (IAT), which provided a framework for testing and measuring implicit biases of all kinds, and established “Project Implicit,” a website devoted to this research. To learn more about implicit bias research, visit <https://implicit.harvard.edu/implicit/>, where you can take a test yourself.

Researchers have used IATs to study unconscious or implicit racial biases in a wide range of situations, many of which have implications for the criminal justice system. In one study, conducted by University of Hawaii Law Professor Justin Levinson and members of the school's Psychology Department, Research results consistently showed that White participants have strong implicit associations between “White and Good,” “Black and Bad,” and “Black and Guilty.” See, Levinson, Cai, and Young, [Guilty by Implicit Racial](#)

[Bias: The Guilty/Not Guilty Implicit Association Test](#) (September 10, 2009). Ohio State J. Crim. L., Forthcoming.

Professor Joshua Correll, at the University of Chicago, created a video simulation that measured how quickly and accurately participants were able to determine whether the object in a depicted subject's hand was a gun or an innocuous object and in turn decide whether to shoot at the subject. The results indicate a bias among all participants, and particularly among White participants, to shoot at unarmed Black subjects and not to shoot at armed White subjects. Correll, Urland, & Ito, *Event-related potentials and the decision to shoot: The role of threat perception and cognitive control*, 42 J. Experimental Social Psych. 1, 120-128 (2006). You can learn more about this research, and try the video simulation yourself, at <http://psych.colorado.edu/~jclab/research.html>.

Implicit racial bias has also been detected in research using brain-imaging technology. Researchers at the Social Cognitive Research Library at UCLA have used functional magnetic resonance imaging (fMRI) technology to measure the level of amygdala activity of participants after seeing White and Black faces. The amygdala is a region of the brain that generates emotional responses, including responses to perceived threats. The Researchers, led by Professor Matthew Lieberman, found that amygdala activity in both White and Black participants was heightened and more prolonged when shown a Black face versus a White face. The researchers concluded that the most plausible explanation for this universal increase was likely due to the activation of the "Black-threat" stereotype. See Lieberman, Hariri, Eisenberger & Bookheimer, [An fMRI Investigation of Race-Related Amygdala Activity in African-American and Caucasian-American individuals](#), 8 Nature Neuroscience 6, pp. 720 – 22 (June 2005).

Research led by Professor Jennifer Eberhardt at Stanford University focuses even more directly on the effect of implicit racial bias on capital sentencing outcomes. For instance, one study used David Baldus' data set of 600 death-eligible defendants in Philadelphia between 1979 and 1999, of which 44 were Black defendants convicted of killing White victims. The researchers had participants rate photographs of these 44 defendants in terms of stereotypical Blackness (e.g., thick lips and wide nose). Participants were not told that these men had been charged with a crime. Then, the researchers determined whether each defendant had been sentenced to death, controlled for six non-racial factors known to affect death sentencing outcomes, and calculated the degree to which stereotypical Black appearance correlated with the likelihood of being sentenced to death. Those defendants whose photographs were rated in the top half of the group for stereotypically Black appearance were more than twice as likely to have been sentenced to death. See Eberhardt, Davies, Johnson, & Purdie-Vaughns, [Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes](#), (2006) posted at Scholarship@Cornell Law: A Digital Repository; [http://scholarship.law.cornell.edu/lrsp\\_papers/41](http://scholarship.law.cornell.edu/lrsp_papers/41).

How does implicit racial bias affect juror decision making? Research suggests that it is not a simple matter of unconscious bias causing jurors to favor White defendants or disfavor Black defendants. Rather, the unconscious stereotypes and cognitive associations cause jurors to misremember evidence, or to have wholly false memories regarding evidence. These inaccurate facts in turn affect the jurors' decision making

process, as they process both correct and incorrect facts together to determine both guilt-innocence and degree of culpability or death-worthiness. See Levinson, [\*Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering\*](#), 57 Duke L. J. 345 (2007).

More recent research found that death-qualified jurors harbor stronger implicit as well as explicit self-reported racial bias than jury-eligible citizens generally. Levinson, Justin D. and Smith, Robert J. and Young, Danielle, [\*Devaluing Death: An Empirical Study of Implicit Racial Bias on Jury-Eligible Citizens in Six Death Penalty States\*](#), 87 N.Y.U. L. Rev. 513 (2014). The researchers found that stronger implicit racial bias scores predicted the likelihood that death-qualified jurors would vote to impose death when the Defendant is Black, while stronger explicit bias scores predicted the likelihood that they would vote to impose death when the victim was White. The study looked at 435 jury-eligible citizens in six leading death penalty states.

To make matters worse, new research suggests that the availability of the death penalty as a possible sentence may itself further taint jurors' decision making. Recent research at the University of California, Berkley, Goldman School of Public Policy using a randomized nationally representative sample of mock jurors suggests that the availability of death as a sentence has a significant impact on the guilt-innocence verdict, with mock jurors significantly more likely to convict a Black defendant than a White defendant in that circumstance. Participants were presented with a summary of a triple murder trial. Researchers told some jurors that life without parole was the maximum penalty available, while telling other jurors that the death penalty was available. The defendant in some of the summaries was given a stereotypically Black name, while in others the defendant was given a stereotypically White name. Mock jurors who were told that LWOP was the maximum penalty found Black and White defendants guilty in nearly equal proportions – voting to convict 67.7% of Black defendants compared to 66.7% of White defendants. However, those who were told that death was a possible punishment voted to convict 80% of the Black defendants, compared to 55.1% of White defendants. The researchers suggested that these results “provide evidence that capital punishment may be more than another *domain* of racial disparities; it may actually be a *cause*.” Glaser, Martin & Kahn, [\*Possibility of Death Sentence Has Divergent Effect on Verdicts for Black and White Defendants\*](#), <http://ssrn.com/abstract=1428943>. In an interesting sidenote, the researchers questioned the mock jurors in order to categorize them as either “death-qualified” or opposed to the death penalty. There was no significant difference in the performance of these distinct groups of mock jurors.

Implicit racial bias is pervasive and has a powerful effect on how jurors hear and recall evidence and ultimately decide guilt-innocence and penalty. There is research, however, indicating that the effects of implicit bias on jury decision making are mitigated when the make-up of the jury is racially diverse. Research conducted Professor Sam Sommers at Tufts University, using 200 mock jurors grouped into all-White juries of six and juries composed of four White jurors and two Black jurors, indicated that “racially diverse groups may be more thorough and competent than homogeneous ones. Sommers, [\*On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations\*](#), 90 J. Personality & Social Psych. 4, pp. 597-612, 608 (2006). The mock jury groups were shown a 30-minute video summary of the trial of

a Black defendant for sexual assault. Professor Sommers found that the diverse groups discussed more case facts, had fewer factually inaccurate statements left uncorrected, and more frequently discussed the impact of race, including its possible effect on eyewitness accuracy. *Id.*, at 605. The subject of race was raised more often by White jurors in the racially diverse groups, more so than by Black jurors or by White jurors in all-White juror groups, indicating that racial diversity not only improved the breadth of information exchange, but also increased the willingness, or perhaps decreased the unwillingness, of White jurors to openly discuss the issue of race and its impact.

Capital Jury Project research has also examined the effect of racial diversity on the deliberation and decision making of actual capital juries, finding that, in a case involving a Black defendant and a White victim, the presence of even one Black male juror significantly increases the likelihood of a life verdict. *See* Bowers, Steiner, & Sandys, [\*Death Sentencing in Black & White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition\*](#), 3 U. Pa. J. Const. L. 171 (2001). Interviews with jurors in these cases suggest that Black and White jurors had very different perspectives toward and attitudes about three main factors: (1) any lingering doubt about the defendant's guilt, (2) the defendant's remorsefulness, and (3) the defendant's future dangerousness. *Id.*, at 203. Further, Black male jurors were more likely to identify or empathize with the defendant and his family. *Id.*, at 216-17. *See also* Bowers, Sandys & Brewer, [\*A Closer Look at the Roots of Racial Bias in Capital Sentencing: When the Defendant is Black and the Victim is White\*](#), 53 DePaul L. Rev. 1497, 1502-03 (2004).

In *Peters v. Kiff*, 407 U.S. 493 (1972), in a case reversing the conviction of a White defendant from whose grand and petit juries Blacks were systematically excluded, the U.S. Supreme Court recognized the benefits of racial diversity on juries.

When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.

*Id.*, at 503-04.

Fourteen years later, in *Batson v. Kentucky*, 476 U.S. 89 (1986) the Court attempted to create a framework for reviewing the use of peremptory challenges that appear to have been made on the basis of race, and in *J.E.B. v. Alabama ex rel T.B.*, 511 U.S. 127 (1994), the Court extended this framework to the review of peremptories that appear to have been made on the basis of gender. This framework, which allows a defendant to challenge the prosecutor's use of a peremptory or peremptories that seem to be racially motivated. The prosecutor is then required to provide a race-neutral reason for the strike, which the trial court can then accept or reject. This framework does not guarantee inclusion of Black jurors, in part because they are often represented in the jury pool in such small numbers that it is an easy matter for prosecutors to eliminate them entirely,

using peremptory strikes for which they can assert race-neutral reasons. Bowers, Sandys & Brewer, *supra*, at 1533.

In his concurring opinion in Batson, Justice Marshall wrote:

A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is "sullen," or "distant," a characterization that would not have come to his mind if a white juror had acted identically.

Batson, *supra*, 476 U.S. at 106 (Marshall, J., concurring). Indeed, there is research indicating that peremptory strikes can be used in a manner that is motivated by unconscious racial bias, even where race-neutral reasons are sincerely provided. Professor Sam Sommers explains the methodology and conclusions of one such study:

We conducted such an experimental investigation using three participant samples: college students, law students, and trial attorneys. Participants were presented with a criminal trial summary with a Black defendant and instructed to assume the role of prosecutor. They were told that they had one peremptory challenge remaining and were asked which of two prospective jurors they would challenge. The two jurors exhibited different characteristics that pretesting indicated would concern the prosecution: Juror A was a journalist who had written about police misconduct; Juror B had little background in science or math and stated that he believed people often manipulate statistics such as those used to evaluate the results of forensic lab analysis. We varied the race of the prospective jurors such that in one condition, photographs revealed Juror A to be Black and Juror B to be White, whereas in the other condition, Juror A was White, and Juror B was Black. As expected, prospective jurors were significantly more likely to be challenged when Black than when White. This difference was evident across all three samples and was strongest among our sample of attorneys. We also asked participants to justify their decision to the judge, and we coded these open-ended responses. As predicted, very few participants cited race as a factor. That is, self-report measures did not reflect the significant influence of race on peremptory challenge use. Instead, consistent with the [earlier] predictions ..., participants focused their justifications on race-neutral characteristics that bolstered their decision. When Juror A was Black, participants were likely to cite as their chief influence his familiarity with police misconduct. When Juror B was Black, participants were likely to identify his skepticism about statistics as their primary concern. These differences emerged even though the content of the juror profiles was constant across conditions. Thus, even though participants were more likely to challenge Black prospective jurors, their explanations for this tendency were both plausible and race neutral.



Sommers & Norton, [\*Race and Jury Selection: A Psychological Perspective on the Peremptory Challenge Debate\*](#), 63 Am. Psych. 6, pp. 527-39 (September 2008).

Justice Marshall further suggested that trial judges reviewing the Prosecutor's asserted race-neutral reasons for striking Black jurors would themselves be subject to conscious and unconscious biases. "Even if all parties approach the Court's mandate with the best of conscious intentions," Justice Marshall wrote, "that mandate requires them to confront and overcome their own racism on all levels – a challenge I doubt all of them can meet." *Batson*, *supra*, 476 U.S. at 106 (Marshall, J., concurring). Again, there is research confirming that trial judges have implicit racial biases and suggesting that White trial judges have higher levels of implicit bias than the general public, or at least than the half-million or so subjects who have taken the demonstration test at Project Implicit.

Rachlinski, Johnson, Wistrich & Guthrie, [\*Does Unconscious Racial Bias Affect Trial Judges?\*](#) 84 Notre Dame L. Rev. 1195 (2009). Other research indicates that not even capital defense attorneys are free from implicit racial biases. Eisenberg & Johnson, [\*Implicit Racial Attitudes of Death Penalty Lawyers\*](#), 53 DePaul L. Rev. 1539 (2004).

The Hon. Mark W. Bennett, Federal District Judge for the Northern District of Iowa, has written about the "failed promise" of *Batson*, in light of research on implicit bias, suggesting that "the promise of *Batson* remains illusory for two reasons in particular: trial judges are reluctant to doubt prosecutors' proffered reasons for their challenged strikes, and appellate courts are highly deferential to the trial courts' decisions on these matters." Bennett, [\*Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions\*](#), 4 Harvard L. & Pol. Rev. 149, 162 (2010).

So, what can we do to help prevent Blacks from being excluded from our client's jury and to obtain benefits of a racially diverse jury? In one recent capital trial involving a Black defendant and a White victim, the defense presented CJP research on the impact of racial composition on jury decision making in support of its motion to dismiss the death penalty request and its motion for individual sequestered voir dire, and the trial court later relied on that in determining that the defense's use of peremptory strikes on White male jurors was race-based, despite defense counsel's proffer of race-neutral reasons for the strikes. This was affirmed on direct appeal. *Jeter v. State*, 888 N.E.2d 1257, 1265 (Ind. 2008).

We can learn from this unfortunate experience. Researchers have suggested that providing lawyers with more information about potential jurors, both through the use of expanded written questionnaires (and time to process them) and expansive voir dire questioning, would reduce attorneys' reliance on racial and other stereotypes, while allowing them to make better use of peremptories to select a diverse and impartial jury. See, e.g., Sommers & Norton, [\*Race and Jury Selection: Psychological Perspectives on the Peremptory Challenge Debate\*](#), 63 Am. Psych. 527 (2008). Judge Bennett also recommended more time for questioning and greater latitude regarding questions that include case facts that might bring into play jurors' implicit biases and stereotypes. As for the counter argument that expanded voir dire would be more expensive and time-consuming, he writes that "guaranteeing a fair trial by eradicating implicit bias seems an

overriding constitutional priority.” [Bennett, \*supra\*, 4 Harvard L. & Pol. Rev. at 166.](#) We can argue that expanded questioning of jurors, individually and sequestered, will reduce the likelihood of race-based use of peremptories.

A Lake County team trying a capital case with a Black Defendant before the same judge who had presided over the Jeter case, several years later, took the approach of enlisting the judge’s help in selecting a “racially fair” and impartial jury, from reviewing the makeup of the venire, through allowing more than a month to review written questionnaires, to scheduling a month for voir dire, with no time limits on individual sequestered voir dire on penalty, race, and mitigation.

Sommers and Norton suggest two other techniques for reducing the likelihood of racially motivated use of peremptories. One such technique is “category masking,” which would involve including questions about “legal experiences, demographics, educational and occupational history, attitudes about the case,” in the written questionnaire, while masking any information that would indicate the juror’s race, with initial strikes based on the questionnaires alone. *Id.*, at 535-36. The other suggested technique is “Prejudgment ratings,” which would require the attorneys to articulate before voir dire the juror characteristics that they prefer for their case, providing for greater scrutiny of race-neutral reasons later asserted. *Id.*, at 536.

Ben Cohen, of the Capital Appeals Project in New Orleans, has drafted a sample [“Omnibus Motion to Establish a Constitutionally Adequate Framework For Voir Dire Examination,”](#) which incorporates all of these suggestions and others, including providing the defense daily transcripts of voir dire to assist in framing *Batson* challenges, recording the name and race of every prospective juror, videotaping voir dire, and if the trial court finds these techniques inadequate, to completely ban the prosecution from using peremptory strikes.

We must educate our trial courts about implicit racial bias and the research indicating that it is nearly universal, existing in both Blacks and Whites, and that it is unconscious. In the last five years, the “Race and Ethnic Fairness in the Courts” initiative of the National Center for State Courts has developed pilot training programs on implicit bias for trial judges and staff. Resources from this initiative are available at [www.ncsc.org/ibeducation](http://www.ncsc.org/ibeducation). They include Professor Jerry Kang’s [Implicit Bias: A Primer for Courts](#) (2009), which presents the subject in a simple and non-threatening way, and includes a glossary of terms.

Equally important, we must educate our trial courts on the **benefits** of racially diverse juries. As Sam Sommers’ research indicates, racially diverse juries deliberate more thoroughly and competently, enhancing the reliability of the juries’ decisions. We can help the trial court understand that this is not a simple matter of black and white, with Black jurors being favored by the defense, and White jurors being favored by the prosecution, and it cannot be resolved simply by requiring the prosecution and defense to articulate race-neutral reasons for striking Black or White jurors and then judging the “sincerity” of those stated reasons. Given that everyone in the Courtroom is unconsciously affected by implicit racial bias, including the prosecutors, defense attorneys, and judge, *Batson* does not really create an adequate framework for reducing



the effects of such bias and ensuring a racially diverse jury that can deliberate fully and fairly.

## **E. Jury Sequestration and Activities**

Conventional wisdom has been that in areas like Indiana, where a death penalty trial is a major event for purposes of media coverage and general conversation, it is best to sequester a jury to protect them from exposure to prejudicial information or other influence. In fact, jury sequestration is mandatory in Indiana in a death penalty case upon a proper, timely request by the defendant. See Thompson v. State (1986), Ind., 492 N.E.2d 264; Lowery v. State (1982), 434 N.E.2d 868. This is not so in an LWOP case. Johnson v. State, 749 N.E.2d 1103 (Ind. 2001).

However, particularly in light of problems that became apparent during the trial of O.J. Simpson, some lawyers are beginning to question the wisdom of jury sequestration, expressing concern about its impact on the well-being and decision-making abilities of jurors, and particularly on any pro-prosecution sympathies that it may generate.

Although most capital juries are still sequestered, some defense teams in Indiana have decided not to seek sequestration. The team representing Danny Wilkes did not sequester his jury, which ultimately could not reach unanimous agreement as to penalty. Attorneys for Kerrie Price filed a pleading opposing the state's request for a sequestered jury and suggesting appropriate alternatives. Their [memorandum](#) is available. Price's lawyers are among many, however, who would caution you not to give up your client's right to a sequestered jury without ample thought and without discussing it with other experienced capital litigators.

If you plan to sequester your jury, [sample motions](#) are available. Keep in mind that sequestration does not generally begin until the entire jury has been selected, which means that jurors you've already selected are potentially exposed to ongoing media coverage, etc., while jury selection in your case continues. This is at a time when they are particularly interested in the case and particularly vulnerable to media coverage, despite any admonitions from the court. Worse still, the internet may provide all manner of information about your client and your case, from the accurate to the purely fantastical, all at the jurors' fingertips. The temptation to Google for information about the case may be too much for jurors to withstand. You may want to move for sequestration to begin for each juror from the time he or she is selected. This type of sequestration is discretionary with the trial court, but with the increased risk of prejudicial exposure inherent in near-constant internet access, it is worth making a case for. The sample sequestration motion, which is available contains such a request, and at least one Indiana trial judge has granted it. The amendments to Jury Rules 20 and 26, regarding the use of cell phones and other electronic communication or internet access devices during trial, would seem to support this request. These rules, which took effect July 1, 2010, speak to the use of these devices only from the point of opening statements through the close of deliberations, but the unusual circumstances of a capital case would seem to justify taking further measures to prevent jurors from accessing the internet from the time they are selected. If exposure to news coverage is prejudicial, the potential impact of reading the on-line comments about your client's trial is off-the-charts.

And once your jurors are sequestered, it is still important to consider what they will be doing and what they will be exposed to. You may be able to prevent their being taken past newspaper boxes and big-screen TVs as they are taken to and from their hotel. And in addition to media coverage of your case, you will want to scrutinize what activities and entertainment they will be provided. You don't want them watching vigilante movies or attending a barbeque at the home of the officer who arrested your client.

A sample [Motion For Notice Of Conditions Of Jury Sequestration](#) is available.

#### **F. Juror Discussion – Jury Rule 20(A) (8)**

Jury Rule 20(A)(8) provides for jurors to be instructed that “jurors, including alternates, are permitted to discuss the evidence among themselves in the jury room during recesses when all are present, as long as they reserve judgment about the outcome of the case until deliberations commence.” A number of states have adopted such a policy, but it appears that Indiana is the only state to allow pre-deliberation discussion in criminal cases. See, People v. Flockhart, 304 P.3d 227, 234, n.7 (Col. 2013). Twenty-six states and the federal court system explicitly prohibit pre-deliberation juror discussion in criminal cases by statute, court rule or case law. See People v. Richards, 809 N.W.2d 148, 153, n.37 (Mich. 2012) (dissenting opinion).

As pointed out in Winebrenner v. United States, 147 F.2d 322, 327-29, allowing the jurors to discuss the evidence before the defense case has even begun and before they have been properly instructed encourages them to begin forming opinions, despite the rule's caveat. It potentially colors and biases the way the jurors hear the defense case and creates a risk that they will shift the burden of proof to the defense. A [sample motion](#) to have the rule declared unconstitutional in a capital case is available, as are materials in support.

### **XVI. FINAL ARGUMENT**

It's important to keep the prosecutor from making improper arguments to the jury. Prosecutors often cannot help pointing out what they consider to be your client's bad character traits, which are constitutionally impermissible factors for the jury to consider in making their sentencing decision. Bivins v. State, 642 N.E.2d 928 (Ind. 1994). For instance, in Cooper v. State, 854 N.E.2d 831 (Ind. 2006), the Indiana Supreme Court reversed a sentence of life without parole where the prosecutor told jurors they could consider the fact that he was “an unsavory character” who was “sponging off” three different women. In Castillo v. State, 974 N.E.2d 458 (Ind. 2012), the Court found prosecutorial conduct where the prosecutor told jurors the defendant was “a problem,” “uncontrollable,” “violent, vicious, manipulative,” and “broken.” The prosecutor also told jurors not to compare the aggravating circumstance (victim under 12) to the tendered mitigating factors, in effect urging them to violate their duty to weigh aggravation against mitigation. In both cases, the Court found that the misconduct rose to the level of fundamental error.

Even assuming you have filed a pretrial [motion to exclude](#) any reference to non-statutory aggravation, it is helpful to file a [Motion to Preclude Improper Final Argument](#) shortly before final penalty phase argument, specifically identifying improper penalty phase jury arguments.

This helps educate your judge and puts the prosecutor on notice that many of the very arguments he is likely to make are improper. [Several sample motions](#) are available.

Your motion and the court's order in limine likely will not keep your prosecutor from crossing the line into improper argument, so you will still need to be prepared to object that the prosecutor has not only offered improper argument but has done so in violation of the trial court's limine order. Your objection should be specific, just as the motion is. To preserve the issue, whether your objection is sustained or overruled, you must follow it up with a request for a mistrial, and if that is denied, with a request for an admonishment telling the jury to disregard the argument, and why. See Dumas v. State, 803 N.E.2d 1113, 1117 (Ind. 2004).

Your own argument is also crucial. Although juror studies tell us that many jurors have made up their minds as to a penalty recommendation before final argument, your argument can still have the power to weave your individual mitigating circumstances into a story that need not end with execution. Your case is not simply a collection of facts - it should contain a powerful set of themes that you have been presenting to the jury since voir dire, and your closing argument is an opportunity to strike these themes in ways that resonate for the jury and lead them to finish the story with a life sentence.

Stock arguments will not suffice. Your argument must present your client's story in rich and compelling detail. However, there are some basic components that will almost always have a place in your final presentation to the jury. You must acknowledge the tragedy of the crime, and the loss to the victim's survivors. Jurors must hear that you are not asking them to **excuse** your client or to "let him off." Each of the available sentences is a serious punishment, and it is almost certain that your client will die in prison - the only real question is how - whether he will die by execution. The judge will explain their decision-making process, evaluating and weighing aggravating and mitigating circumstances, but they should understand that no matter what they find in terms of aggravating and mitigating circumstances, the law **never** requires them to impose a death sentence.

They should also understand that public safety does not require that your client be executed. Although future dangerousness is not a permissible aggravating circumstance under Indiana's death penalty scheme, it is a huge concern for jurors, who not only share their fellow citizens' fears about violent crime but feel a sense of responsibility for protecting society from future acts of violence by your client. Former corrections officials have testified effectively in Indiana cases, both assuring jurors that prisons are capable of housing convicted murderers safely, and testifying that your client, in particular, will not be a danger in prison.

Jurors also tell us that they want to see some expression of remorse from your client. This does not mean that you should put your client on the stand - it is almost never a good idea to do that. It is worth the effort to work with him on his courtroom demeanor, so that he does not appear cold and remorseless. If mental illness and the medications required to treat it result in your client having a flat affect - which jurors often interpret as cold and remorseless - you will likely want to explain that to jurors, most likely through a mental health expert witness. And it is also worth the effort to try to find and present testimony regarding moments in which your client has displayed genuine remorse.

The prosecutor will no doubt paint your client as evil incarnate and paint the crime as one of the

most vile acts in human history. Your mitigation case, and your closing argument, must present a very different story. I have mentioned the possibility of reframing the crime - the way that the events took place - in a way that is more accurate and that may, in fact, negate the *mens rea* element of the state's alleged aggravator(s). But your mitigation case must go far beyond that. You must tell the jury a story that gives them a reason to choose life, rather than death, as the story's ending. Jurors are not moved by clinical diagnoses so much as by human stories and details, by stories that enable them to see your client as a young child, and even to see themselves in his place as that young child. By stories of hopes dashed, of burdens that overwhelmed, circumstances that made drug addiction all but a foregone conclusion, stories of the older brother who tried to be the protective man of the household and ended up becoming hardened and not unlike the alcoholic father who made his childhood hell. Stories of a young man with promise who became unrecognizable as schizophrenia closed in and took over his life. Better yet, these facts and stories should be linked together into a theme or structure of interrelated themes, which are touched on early, and repeated throughout both guilt-innocence and penalty phase and then struck again for the jury in the penalty phase closing.

There are excellent sample closing arguments from [Chris Adams](#) and [Steve Bright](#). You may also want to look at [Adams' PowerPoint](#) presentation from the 2013 IPDC Death Penalty Defense seminar, in which he talks about how to put your mitigation together into a powerful closing argument, with credible themes. For example, rather than say that your client who was just convicted of dealing drugs and killing his rivals, but who loves his children and takes them out to do fun activities, can be referred to as an "engaged father," rather than a "good father." The latter can be eviscerated by the prosecutor, while the former is more credible and solid.

If you have not yet read the article, "[Competent Capital Representation: The Necessity of Knowing and Heeding What Jurors Tell Us About Mitigation](#)," by John Blume, Sheri Johnson, and Scott Sundby, I urge you to read it now. Professor Scott Sundby has written an article on [how jurors reach unanimity](#), that provides helpful information about what jurors are most concerned about, and how to address those concerns. And you may want to talk with other lawyers who have been through a capital trial to learn what facts and what themes seemed to resonate with their jurors.

## **XVII. INSTRUCTING THE JURY**

Penalty phase instructions are the final opportunity to explain for the jury how to evaluate and use your mitigation evidence in reaching their final decision. It is important that the jury understand what mitigating circumstances are and how they figure in the decision-making process. A general instruction defining and explaining the nature of mitigating circumstances is essential. Guideline 10.11(K), 2003 ABA Guidelines, provides in part:

Trial counsel should request jury instructions and verdict forms that ensure that jurors will be able to consider and give effect to all relevant mitigating evidence. Trial counsel should object to instructions or verdict forms that are constitutionally flawed, or are inaccurate, or confusing and should offer alternative instructions.

The Indiana Pattern Jury Instructions for death penalty and LWOP trials, compiled by the Indiana Judges Association Criminal Instructions Committee, are available, as are [instructions actually given](#) in several Indiana Death Penalty cases over the past fifteen years. The pattern

instructions contain both good and bad language. For instance, Pattern Final No. 8 explains the wide open nature of mitigation, explains that it is not being offered as a justification or excuse for the crime, and points out that mitigating circumstances need not be found unanimously. Pattern Final No. 4 explains that even if the jury makes all of the findings necessary to impose a death sentence, it is not required to do so, and may choose among all three penalty options: death, life without parole, and a term of years.

Unfortunately, due to the way Indiana's statute is written, the same findings make a defendant eligible for either life without parole or death, and the pattern instructions do nothing to guide the jury in deciding between life without parole and death. Pattern Final Nos. 4, 8, and 15 contain particularly confusing language on this issue. The Indiana Supreme Court has rejected an 8<sup>th</sup> Amendment argument that the discretion of Indiana jurors is not adequately guided in deciding between Death or Life, in Corcoran v. State, 739 NE.2d 649, 653 (2000), but you can still object to preserve the claim. More important, you can object to the confusing language in the patterns and argue for instructions that are more comprehensible than the current patterns. And you can explain to the jury in closing argument how to give effect to your tendered mitigation and return a sentence less than death.

Pattern Final Instruction No. 9 explains that the determination that the aggravating circumstance(s) outweigh any mitigating circumstance(s) is a matter for each juror's individual judgment but goes on to say that the state need not prove this beyond a reasonable doubt. The Indiana Supreme Court has repeatedly held that this does not violate the 6<sup>th</sup> Amendment as set out in Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), see, e.g., Ritchie v. State, 809 N.E.2d 258, 264-66 (Ind. 2004); Pruitt v. State, 834 N.E.2d 90 (Ind. 2005). In light of Hurst v. Florida, 136 S. Ct. 616 (2016), in which the U.S. Supreme Court struck down Florida's death penalty statute because it allowed the judge to make this finding rather than requiring the jury to find it unanimously beyond a reasonable doubt.

Pattern Final No. 11 explains that if the defendant is sentenced to a term of years, he is eligible to earn credit time up to a maximum of 50% of the sentence imposed. Given that all but level 6 felonies earn credit time at a maximum of 25%, you should ask for this to be corrected.

Throughout the pattern instructions you will find references to the jury's decision as a "recommendation." You will want to object to these references because they diminish jurors' sense of responsibility for the life or death decision. See Caldwell v. Mississippi, 472 U.S. 320 (1985); Stroud v. State, 809 N.E.2d 274 (Ind. 2004). It is true that Pattern Prelim No. 8 and one sentence in Pattern Final No. 11 state that the judge must follow the jury's recommendation, but you can argue that this does not overcome the drumbeat repetition of the words "recommend" and "recommendation," and that they should be replaced with "decide" and "decision."

You may want to talk with someone like IU Criminal Justice Professor Marla Sandys, who has a better grasp than most of us about jurors' understanding of instructions because she interviews jurors who have served in capital cases. Professor Sandys or someone like her can help you draft more comprehensible instructions and litigate to have them given to jurors. Capital jurors, who are given the responsibility of deciding whether your client should live or die, absolutely must understand their role and the parameters of their decision-making process.

Based in part on Capital Jury Project research showing again and again that capital jurors do not

understand the instructions they are given, the ABA House of Delegates adopted a resolution in 2012 urging courts to adopt capital jury instructions that are “in language understandable by jurors untrained in law and legal terms, in the penalty phase of trials in which the death penalty may be imposed and such instructions should be provided to jurors in written form.” [This resolution and the report supporting it](#) are available and can help support your request for funds to hire a jury instruction expert and your tender of understandable instructions.

If your client is Black, you may want to request the implicit bias [instruction](#) that Federal District Court Judge Mark Bennett, of the Northern District of Iowa, uses and refers to in *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 Harvard L. & Pol. Rev. 149, 162 (2010).

One other area on which lawyers have differing opinions is whether individual instructions setting out specific tendered mitigating circumstances are beneficial. Some lawyers worry that such instructions may tend to limit jurors' consideration of potential mitigation, while others believe that jurors will not take mitigating circumstances seriously unless they are specifically instructed on them by the Court, particularly since the Court will instruct them on specific **aggravating** circumstances. Many courts will not give instructions on specific mitigating circumstances, even if defense counsel requests them. One thing is certain: you **CAN ARGUE** your tendered mitigating circumstances to the jury in your penalty phase closing argument, explaining to the jury why they matter in deciding between life and death.

## **XVIII. THE JURY'S DECISION & BEYOND**

### **A. Jury Findings Regarding the Existence of At Least One Aggravator**

In 2002, in anticipation of the holding in Ring v. Arizona, 536 U.S. 584 (2002) the Indiana General Assembly amended Indiana's death penalty statute to require that before a jury may “recommend” death or life without parole, it must first unanimously find the existence of at least one aggravating circumstance beyond a reasonable doubt. Ind. Code 35-50-2-9(d). The jury is given special verdict forms indicating whether they have unanimously found the existence of the alleged aggravating circumstance(s) beyond a reasonable doubt. Id.

If the jury unanimously finds that no alleged aggravating circumstance has been proved beyond a reasonable doubt, it is discharged and the death penalty and life without parole are no longer available when the trial court pronounces sentence. Id.

If the jury cannot unanimously agree whether any alleged aggravator has been proved beyond a reasonable doubt, they are also discharged, and if the state chooses to continue seeking a sentence of death or life without parole, a new jury must be convened for a new penalty phase. See Bostick v. State, 773 N.E.2d 266 (Ind. 2002); State v. Barker, 768 N.E.2d 425 (Ind. 2002); Kiplinger v. State, 922 N.E.2d 1261 (Ind. 2010).

If your jury hangs on the existence of an aggravating circumstance, you have a genuine opportunity to negotiate an agreed settlement. A jury that has heard all of the evidence from both the guilt-innocence and penalty phase could not unanimously agree that any

alleged aggravating circumstances had been proved beyond a reasonable doubt. If the state chooses to convene a new jury and try again, you have a second opportunity to persuade jurors to spare your client's life through challenging the alleged aggravating circumstance(s) and presenting evidence of mitigating circumstances.

If the jury unanimously finds the existence of at least one alleged aggravator, they may proceed to determine whether the aggravator(s) outweighs any mitigating circumstances, and to determine what sentence is appropriate. Ind. Code 35-50-2-9(d).

## **B. Jury's Penalty Determination**

### **1. Jury Hangs on Penalty Determination**

If your jury returns a verdict unanimously finding at least one aggravating circumstance, but cannot unanimously agree on the appropriate penalty, Ind. Code 35-50-2-9 at subsection (f), continues to provide that "the court shall discharge the jury and proceed as if the hearing had been to the court alone." In Wilkes v. State, 917 N.E.2d 675 (Ind. 2009), the Indiana Supreme Court upheld this provision, affirming a death sentence imposed by the trial court after the jury found the aggravators but could not agree on the penalty. The Court held that the finding of an alleged aggravator beyond a reasonable doubt satisfied the 6th Amendment right to jury trial set out in Ring v. Arizona, 536 U.S. 584 (2002), because only the existence of an aggravating circumstance is a "fact" making the defendant eligible for death. The Court reasoned, as it had in earlier cases such as Ritchie v. State, 809 N.E.2 258 (2004), that the weighing of aggravators and mitigators was not a "fact" but a weighing process, and therefore was not an element that needed to be found by a jury beyond a reasonable doubt.

In Hurst v. Florida, 136 S. Ct. 616 (2016), however, the U.S. Supreme Court struck down Florida's death penalty statute because it allowed the judge, rather than the jury, to weigh aggravators and mitigators and determine the appropriate sentence. You should have filed a motion to dismiss or to declare Indiana's death penalty statute unconstitutional based on this ground, and if your jury hangs at this point in their determination, you should seek dismissal of the death penalty and LWOP request, or in the alternative, a new jury.

If the trial court denies your request, you will have a fresh opportunity to make your case for sparing your client's life before a new decision maker – the judge. Realistically speaking, of course, this will not look like such an opportunity at the time. You will have put everything into the trial and the penalty phase, and one of the biggest hurdles your team will have to overcome will be your own exhaustion and paralysis. Nevertheless, it is an opportunity, and you should prepare to take full advantage of it. Because the trial judge will be acting as the sentencing decision maker, you have a right to present new evidence and argument before the judge. As the Court said in Pittman, the role of the trial court in this situation is similar to what it was before the 2002 amendments. Pittman, supra, 885 N.E.2d at 1254. In Averhart v. State, 614 N.E.2d 924 (Ind.1993), a pre-2002 case in which the jury had in fact unanimously recommended death, the Court wrote, "The job of defense counsel at this final sentencing stage is profoundly important: it is to continue being an



adversary to the prosecution and to challenge the conscience of the judge.” *Id.*, at 930. Guideline 10.11(L), 2003 ABA Guidelines, provides as follows:

Counsel at every stage of the case should take advantage of all appropriate opportunities to argue why death is not suitable punishment for their particular client.

If you are given an opportunity to talk with jurors before they leave the courthouse, you should do so, so that you can learn something about what moved them and what did not, what questions they had that were not answered, and anything else that may help you in fashioning your presentation to the judge

To prepare effectively to persuade the judge not to sentence your client to death, you may want to seek a continuance. Whether or not you ask for or get a continuance, it is crucial that you do not forget about your client as you go about your work. The strain of going through the trial, being convicted of murder, sitting through a penalty phase focusing on him and the most intimate and/or painful details of his life history, and then being left without a sentencing decision, will likely take its toll and create tremendous potential for him to act out and sabotage your efforts on his behalf. Make sure he understands that you and your team are forging ahead with a plan for preventing a death sentence. Let him know what you are working on, and stress how important his behavior during this time is to your overall effort. Monitor his mental health and be prepared to ask for funds for treatment and, if necessary, to challenge his competence to be sentenced.

In addition to any evidence and argument that you wish to present at the sentencing hearing, it can be very helpful to prepare and submit your own sentencing memorandum, setting forth your mitigating circumstances and the evidence supporting them, and your arguments concerning why death is not necessary for your client. You can compare your client and his offense to other similar cases, as well as more aggravated ones, in which death was not imposed. As with the plea negotiation stage, you can contact me as well as your fellow defenders on lifeforce and defendnet to identify comparable cases. There is also available a [list of multiple murder cases](#) in which a sentence less than death was imposed, either through the charging decision, negotiated agreement, trial, or post-conviction action.

You will also want to remind the judge that a death-qualified jury that had just seen and heard all of the evidence, convicted your client of murder, and found at least one aggravator to exist, could not unanimously agree that death was the appropriate penalty. In *Wilkes*, *supra*, 917 N.E.2d at 692, the Indiana Supreme Court held that the fact that the jury could not reach agreement is an appropriate consideration for the judge in deciding the appropriate sentence. *Id.*, 917 N.E.2d at 692 (Ind. 2009). This reversed the Court’s previous holdings in *Roche v. State*, 596 N.E.2d 896 (Ind. 1992), *Burris v. State*, 642 N.E.2d 961 (Ind. 1994), and *Holmes v. State*, 671 N.E.2d 841 (Ind. 1996); based on the jury’s new statutory role in sentencing. On post-conviction review, the *Wilkes* trial court considered not only the jury’s failure to reach a unanimous decision, but the actual vote – 11 - 1 for life – and vacated Wilke’s death sentence, imposing LWOP in its place.



You will also need to take steps to protect against a damaging presentence report. Guideline 10.12(A), 2003 ABA Guidelines, provides that counsel should become familiar with the presentence report procedure, and should:

1. provide to the report preparer information favorable to the client. In this regard, counsel should consider whether the client should speak with the person preparing the report; if the determination is made to do so, counsel should discuss the interview in advance with the client and attend it;
2. review the completed report;
3. take appropriate steps to ensure that improper, incorrect or misleading information that may harm the client is deleted from the report;
4. take steps to preserve and protect the client's interests where the defense considers information in the presentence report to be improper, inaccurate or misleading.

If the probation officer preparing your presentence report balks at your request to attend the interview, there is a [sample motion](#) for a court order to allow you to attend.

The Indiana Code requires that the probation officer preparing the presentence report solicit a victim impact statement and include such a statement in the report. Ind. Code 35-38-1-8.5 and 35-38-1-9. However, in light of Bivins v. State, 642 N.E. 2d 928 (Ind. 1994), the trial court must not consider this statement in deciding whether to impose a sentence of death or life without parole. See Veal v. State, 784 N.E.2d 490 (Ind. 2003).

## **2. Jury Returns Unanimous Sentencing “Recommendation”**

Indiana Code at 35-50-3-9(E) provides that “[i]f the jury reaches a sentencing recommendation, the trial court shall sentence the defendant accordingly.” It took the Indiana Supreme Court several years to determine what the legislature meant by that. Early on, reversing a pre-trial dismissal of the state's death penalty request *Ring*-based 6<sup>th</sup> Amendment grounds, the Court opined that the amended statute prohibited a trial court from imposing a sentence of death or LWOP if the jury unanimously “recommended” against those sentences. State v. Barker, 809 N.E.2d 312, 318 (Ind. 2004). The majority noted that Barker did not challenge the trial court's authority to impose a sentence less than the jury recommended, and thus the Court declined to address that issue. Id., 809 N.E.2d at 318, n.5.

Three years later, in Kubsch v. State, 866 N.E.2d 726, 739 (Ind. 2007), the Court referred to its assessment of the role of judge and jury in a capital case after the 2002 amendments to the statute as “a work in progress.” The Court highlighted two principles that were emerging: that there is one sentencing decision, to be made by the jury, Stroud v. State, 809 N.E.2d 274, 287, and Justice Boehm's contention that the amendments were not intended to “overturn traditional checks on jury error or jury discretion, or to eliminate the trial judge's function under Trial Rule 59,” Helsley v. State, 809 N.E.2d 292, 307 (Boehm, J., concurring).

Finally, in Pittman v. State, 885 N.E.2d 1246, 1253-54 (2008), reviewing a challenge to the adequacy of a trial court's sentencing order, the Court wrote the following:

If the jury makes a recommendation, the extent to which the judge is bound by that recommendation has not been fully resolved. See Kubsch v. State, 866 N.E.2d 726, 739 (Ind. 2007). We believe that the statutory directive to "sentence the defendant accordingly" is intended to direct the trial court to impose the sentence recommended by the jury except where the traditional allocation of functions between judge and jury authorize or require the judge to set aside the jury's findings. The trial court is obligated to follow the jury's recommendation **unless** (1) the recommendation is based on a statutory aggravator that is not supported by sufficient evidence; (2) there is error in the course of the trial that requires grant of a Motion to Correct Error or Motion for New Trial; or (3) the trial court exercises its role as the "thirteenth juror" to set aside the sentence and order a new sentencing phase.

Thus, a jury recommendation for something **less than death** should be safe from override by the trial court, while a recommendation **for death** can still be challenged pursuant to the Pittman Court's guidance. Is the state's evidence regarding the aggravating circumstance weak? If so, you can challenge the sufficiency of the evidence supporting the aggravator, and you can move for the death recommendation to be set aside and a term of years imposed. (Remember, if no aggravating circumstance has been established beyond a reasonable doubt, your client cannot be sentenced either to death or to LWOP.) If the jury found several aggravating circumstances, but even one of them can be set aside due to insufficiency of the evidence, the Pittman Court directs that the trial court can weigh the remaining aggravator(s) against mitigation and decide the appropriate sentence itself, just as it did before the 2002 amendment. Pittman, 885 N.E.2d at 1254. This gives you a new opportunity to argue for a sentence less than death before the judge.

If your client was not the sole actor, you may be able to challenge the sufficiency of the evidence as to his level of involvement in the killing, and/or challenge the *mens rea* element. Look again at the elements of the aggravating circumstance(s) in your case, and the evidence the state presented at trial. Aggravators like "lying in wait," or "torture" have been interpreted and narrowed by our Supreme Court, see, e.g., Ingle v. State, 746 N.E.2d 927 (Ind. 2001), and Nicholson v. State, 768 N.E.2d 443 (Ind. 2002). In Pittman itself the Court held that only murders which are knowing or intentional are eligible for the death penalty or LWOP. Pittman, *supra*, 885 N.E.2d at 1258-59.

Is there other trial error that warrants a motion to correct error or motion for a new trial? Are there new indications that your client may not have been competent to stand trial? Often, jailers will alter a defendant's medication to "get him ready" for trial, and these kinds of sudden changes can seriously impair your client's ability to perceive or assess his surrounding circumstances and to communicate effectively with you. This happened to Paul McManus, who was convicted and sentenced to death in Vanderburgh County for the murder of his estranged wife and two young daughters.

At trial, McManus suffered panic attacks serious enough that he was hospitalized, and the trial was continued for a week. Despite repeated requests from trial counsel, the trial court did not order a competence evaluation, but rather hired a psychiatrist to “fix him up” for trial. He was tried while under the effects of mind-altering drugs, and the Indiana Supreme Court affirmed his convictions and sentences, finding that that “the consensus of the witnesses was that the medications assisted McManus in participating in his trial.” The 7<sup>th</sup> Circuit Federal Court of Appeals ultimately reversed his convictions and sentences, finding that the state courts had unreasonably applied the federal due process standard for assessing competence to stand trial. The point is that even if the trial court rejects your request, it is important that you make it.

Finally, you can try to persuade the judge that the jury’s death verdict is against the weight of the evidence, so that, acting as thirteenth juror, the judge orders a new jury penalty phase. The state will likely argue that the judge’s consideration is limited to evidence presented to the jury, but in Justice Boehm’s concurring opinion in Helsley, he writes that the trial court can also consider mitigating circumstances presented in “the sentencing report.” Helsley, *supra*, 809 N.E.2d at 307. This reference is to the pre-sentence report which is required to be prepared by probation and reviewed by the trial court, Ind. Code 35-38-1 *et seq.* This statutory requirement predated the 2002 amendments and was not altered by them. Id. You may want to work with the probation officer who is preparing the pre-sentence report, and you may also want to prepare your own sentencing memorandum for the trial court, setting out your mitigating circumstances and arguing why the evidence weighs in favor of life and makes death inappropriate.

### **3. After the trial court pronounces sentence.**

The death penalty statute provides for a victim’s representative to make a victim impact statement **after** the trial court pronounces sentence. Ind. Code 35-50-2-9(e). Although it has no impact on the sentence, it can be very difficult to sit through, and it is important to prepare yourself, your client, and your team for this. Trial courts often allow the designated representative of the victim’s family to vent a great deal of anger at the defendant and also at the defense team. Even if the family does not vent anger, this presentation can be very difficult to sit through, especially for your client. You can file a motion to ensure that the law is followed, and the presentation is limited to one representative, but beyond that, there’s not much you can do to rein it in. Make sure that you and your team, including your client, know that it’s coming.

One final consideration is the adequacy of the trial court’s sentencing order. In Harrison v. State, 644 N.E.2d 1244, 1262-63 (Ind. 1995), the Indiana Supreme Court wrote that the trial court’s written sentencing findings must (1) identify each mitigating and aggravating circumstance found, (2) include the specific facts and reasons which led the court to find the existence of each such circumstance, (3) articulate that the mitigating and aggravating circumstances have been evaluated and balanced, (4) make clear that the jury’s recommendation has been considered, [no longer appropriate, since the court is acting without a jury recommendation], and (5) set forth the trial court’s personal conclusion that the sentence imposed is appropriate

for this offender and this offense. See Schuler v. State, 112 N.E.3d 180 (Ind. 2018), where it was necessary to remand for a clearer sentencing statement that complied with the dictates of Harrison.

In light of the 2002 amendment to Indiana’s death penalty statute, shifting the actual sentencing determination to the jury rather than the trial judge, our Court has amended its instructions regarding the written sentencing order. In Pittman, *supra*, 885 N.E.2d 1246, the Court addressed this issue. When the trial court sentences in accordance with a jury’s recommendation, the Court wrote,

[A] Harrison-style sentencing order would be out of place. Juries are traditionally not required to provide reasons for their determinations. Any reasoning provided by a trial court’s order would necessarily be that of the trial judge, not the jury. Because the final decision belonged to the jury, this reasoning would be unhelpful on appeal and could undermine confidence in the jury’s determination. We think it is enough that by entering the sentence recommended by the jury, the trial court has made an independent determination according to the trial rules that there is sufficient evidence to support the jury’s decision.

Id., 885 N.E.2d at 1254. And when the trial court exercises its “traditional Trial Rule 50 and 59(J) (7) functions” to set aside a jury’s recommendation, its order need only comply with those rules. Id.

## **XIX. THINGS NO ONE WANTS TO TALK ABOUT**

Sometimes the unthinkable happens – your client is sentenced to death. Like the ABA Guidelines, this manual focuses primarily on defending a capital case at the trial level, covering the many things that the defense team must do in order to defend against imposition of a death sentence. If your client is sentenced to death, other lawyers will take up the fight to prevent that sentence from being carried out. They have the same goal that you have had – to save your client’s life – and in a sense, you are all members of one team. Guideline 10.13 sets out “the duty to facilitate the work of successor counsel:”

In accordance with professional norms, all persons who are or have been members of the defense team have a continuing duty to safeguard the interests of the client and should cooperate fully with successor counsel. This duty includes, but is not limited to:

- A. maintaining the records of the case in a manner that will inform successor counsel of all significant developments relevant to the litigation;
- B. providing the client's files, as well as information regarding all aspects of the representation, to successor counsel;
- C. sharing potential further areas of legal and factual research with successor counsel; and

- D. cooperating with such professionally appropriate legal strategies as may be chosen by successor counsel.

Guideline 10.14 sets out the duties of trial counsel after conviction, before direct appeal counsel is appointed. The most important of these duties is to “take all appropriate action to ensure that the client obtains successor counsel as soon as possible. Criminal Rule 24(J) provides that if trial counsel is qualified to serve as appellate counsel under Crim. Rule 24(J)(1), he or she “shall be appointed as sole or co-counsel for appeal.” Trial courts often appoint one of the trial attorneys as co-counsel on appeal, but you should resist any attempt to appoint you as sole counsel on direct appeal. You will have just been through the ordeal of a death penalty trial, and neither you nor your practice will be in any shape to undertake the role of sole appellate counsel. Even new direct appeal counsel should request co-counsel – the record will be voluminous, and the job will simply be too big for one lawyer.

Guideline 10.15 sets out the duties of direct appeal, state post-conviction, and federal habeas corpus attorneys, and their work is beyond the scope of this manual. There is one more unthinkable stage I would like to touch on, though. If you represent a death-sentenced client in federal habeas corpus proceedings, you may find yourself and your client at the end of the legal review process. Shortly after the U.S. Supreme Court denies cert. from the 7<sup>th</sup> Circuit’s denial of habeas relief, the Indiana Supreme Court will contact you, or at least they have done so in the past, regarding the filing of a successive post-conviction petition. The Court will allow you to petition for leave to file a successor petition but will not compensate you for doing so. If you file a successor, and if the Court denies it, they will more than likely issue an order setting an execution date at the same time that they rule on the petition. Most often, the date has been 30 – 45 days later. During that time, if your client chooses to, you can petition the Governor for clemency. The 7<sup>th</sup> Circuit has routinely compensated habeas counsel who represent their clients in state clemency proceedings.

Clemency power is given to the Governor at Art. 5, §17. Indiana Code 11-9-2-1 – 4 address the procedure for making a clemency application to the Governor through the Parole Board, and the procedures are further set out at 220 IAC 1.1-4-1, et seq.

Deputy State Public Defender Chris Hitz-Bradley has written an [essay](#), “Things That Suck But That You Have to Do Anyway,” that describes with sickening accuracy everything you can expect to happen from the moment that cert. is denied and you get that call from Greta Scodro. I encourage you to read it if you find yourself in that position or approaching that position.

Juliet Yackel, who won a grant of clemency for Darnell Williams in 2004 – the first clemency granted in a capital case in Indiana in 50 years – put together extensive [materials](#) on seeking clemency shortly afterward, and they are available. [Statements](#) issued by Indiana governors in granting or refusing clemency, from 1994 through the present, are also available. The IPDC also has available on DVD video recordings of capital clemency hearings and interviews. Contact the IPDC if you would like copies. It can also be helpful to talk with other lawyers who have been through this process, and IPDC can help put you in touch with them.

You will also want to challenge the lethal injection protocol that will be used to kill your client. The “standard” three-drug cocktail that Indiana and most other states have used for nearly two decades has become problematic, because the first drug – sodium thiopental – has become

unavailable. Pharmaceutical companies do not want their products associated with causing death, and the European Union prohibits the sale of European drugs for use in lethal injection. States are scrambling to come up with new drug combinations, and a number of states have also passed statutes to keep information about execution procedures secret, including a statute inserted into Indiana's 2017 budget bill, Indiana Code 36-38-6-1(e) and (f) which made confidential the identity of any outsourcing facility, wholesale drug distributor, pharmacy or pharmacist who contracts with the DOC to provide lethal injection drugs to the State. The Indiana Supreme Court heard oral argument in 2020 in a case challenging the secrecy of Indiana's lethal injection cocktail and a decision is expected in 2021, in Indiana Department of Correction v. Toomey. In Baze v. Rees, 535 U.S. 35 (2008), the U.S. Supreme Court held that in order to prevail on an Eighth Amendment challenge to an execution method, the prisoner must show that there is a "substantial risk of serious harm" that is "objectively intolerable." Id., at 50. A death-row inmate alleging that the State's method of execution constitutes cruel and unusual punishment in violation of the Eighth Amendment, either on its face or applied to that inmate, must show: (1) a feasible and readily implemented alternative method that would significantly reduce a substantial risk of severe pain and (2) that the State refused to adopt the method without a legitimate penological reason. Bucklew v. Precythe, 139 S.Ct. 1112 (2019).

Unfortunately, the information that is needed to make this showing – evidence regarding the training of the individuals who administer the drugs, how many other states use the same drugs, expert testimony regarding the efficacy of the specific drug combination, is difficult if not impossible to obtain. The ABA House of Delegates recently adopted a resolution calling for transparency in execution procedures. The [Resolution](#) and the [Report](#) submitted with it are both available. More recently, in Glossip v. Gross, 135 S. Ct. 2726 (2015), the Court rejected another challenge to Oklahoma's lethal injection protocol.

At this writing, the Indiana DOC has announced that it intends to substitute a drug called Brevital for sodium thiopental. Brevital is faster acting than the original drug, but also acts for a much shorter time, creating a risk that it will wear off too soon. Upon learning that Indiana plans to use Brevital in future lethal injections, Brevital's maker, Par Pharmaceuticals, issued a [press release](#) indicating that it has taken action to prevent further sales of the drug for this purpose but will not act to stop the Indiana DOC from using what it has already purchased. The company points out that the drug has not been approved for this purpose. See [CBS News - Indiana use of new execution drug draws opposition](#).

The UC Berkeley School of Law Death Penalty Clinic has created a web-based clearinghouse for information about lethal injection and 8<sup>th</sup> Amendment challenges to lethal injection. [www.lethalinjection.org](http://www.lethalinjection.org). You will need to request a password to access some of these materials.

You may also need to challenge your client's mental competence to be executed. In Ford v. Wainwright, 477 U.S. 399 (1986), the U. S. Supreme Court addressed a claim that the Eighth Amendment prohibits the execution of an individual who is insane. A plurality of the court agreed that it does and embraced a variety of rationales for so holding. Only Justice Powell attempted to define insanity in this context, writing that an individual who "know[s] the fact of [his] impending execution and the reason for it" is not insane. Id. at 422. Over the years, this definition, which seemingly required only that an individual be aware that he was about to be executed and why, became the standard for competence to be executed.

Two decades later, in Panetti v. Quarterman, 551 U.S. 930 (2007), the Court considered the substantive and procedural issues involved in determining whether an individual is competent to be executed. The Court *clarified* that Ford requires a rational understanding of the fact that the individual is about to be executed and the reason for it, not a mere factual awareness. Panetti suffered from the delusional belief that the state of Texas was acting in league with the devil in executing him, to prevent him from preaching the gospel. The Court also addressed what due process required in determining whether an individual is competent to be executed. The Court upheld the requirement that an individual facing execution make a threshold showing of incompetence in order to trigger a hearing and found that Panetti had satisfied this requirement by including the observations of mental health experts and references to Panetti's mental illness from prior legal proceedings. For more on this issue, see Blume, Johnson & Ensler, [Killing the Oblivious](#), 79 UMKC L. Rev. 1 (2013); and Jeffrey Kirchmeier's article on [comprehending death](#). In Madison v. Alabama, 139 S. Ct. 718 (2019), the Court held that the Eighth Amendment does not prohibit a state from executing a prisoner who due to mental disability cannot remember committing his crime, but it does prohibit executing a prisoner who cannot rationally understand the reasons for his execution, whether that inability is due to psychosis or dementia.

In 2014, in Indiana, attorneys for Michael Dean Overstreet successfully challenged their client's competency to be executed in successive post-conviction proceedings. Their [memorandum of law](#) in support of their petition for permission to file the successive PC petition, the [expert competency assessment](#) filed with the petition, the [state's response](#) to their petition, [their response](#) to the State's motion to dismiss their petition, and Judge Jane Woodward Miller's [final order](#) finding Overstreet incompetent are all available. The Attorney General chose not to appeal Judge Miller's order. I hope that you never need any of these resources, but if you do, they are available.

## XX. DIRECTORY OF LINKED RESOURCES & SAMPLE MOTIONS

**Note: You will find the collection of sample motions at the end of this directory.**

[ABA Guidelines](#) -- 1989 and 2003 ABA guidelines for death penalty defense, and 2008 supplemental guidelines for mitigation function.

[ABA Indiana Assessment](#) – A project of the ABA Death Penalty Moratorium Implementation Project, the Indiana Assessment is one of eight state assessments completed, researching and reviewing the twelve issues that the American Bar Association identified as central to the analysis of the fairness and accuracy of a state's capital punishment system: (1) collection, preservation, and testing of DNA and other types of evidence; (2) law enforcement identifications and interrogations; (3) crime laboratories and medical examiner offices; (4) prosecutorial professionalism; (5) defense services; (6) the direct appeal process; (7) state post-conviction proceedings; (8) clemency; (9) jury instructions; (10) judicial independence; (11) racial and ethnic minorities, and (12) mental retardation and mental illness.

[ABA Resolution on Capital Jury Instructions](#) – Resolution and Report urging courts to adopt jury instructions that are written in language comprehensible to jurors who are not trained in law and legal terms, and to provide instructions to jurors in writing.



[ABA Report – Execution Protocol – 108B](#) – Proposed resolution and report calling for transparency in execution protocol.

[ABA Resolution – Execution Protocol – 108B](#) -- Adopted resolution calling for transparency in execution protocol.

[ABA Resolution MI & DP](#) – Recommendation and supporting report, endorsed by the ABA, American Psychological and Psychiatric Associations, NAMI, and Mental Health America, extending the [Atkins](#) and [Roper](#) exemptions from the death penalty based on mental retardation and age to defendants whose cognitive deficits result from brain damage after the age of 22 and those with serious mental illness that impairs their ability to appreciate the wrongfulness of their actions, conform their behavior to the law, or make rational judgments about their behavior at the time of the offense. *See also MI & DP Special Issue Cath. U. L. Rev.* below.

[Aggravation & Mitigation Findings & Implications](#) – Article by Marla Sandys and two grad students analyzing Capital Jury Project findings on the most powerful types of aggravating and mitigating factors.

[ALI DP Report](#) – Report on the intractable problems in administering capital punishment, commissioned by the American Law Institute (ALI), which led to ALI's vote to withdraw the death penalty provision from the Model Penal Code.

[Amador –poor insight-special report](#) – Article by psychologist Xavier Amador on anosognosia, the lack of insight that many individuals with schizophrenia and bipolar disorder have about the very fact of their illness. *See also* his LEAP Outline, below.

[Andrea Lyon – Litigating Race](#) – Article by capital litigator, trainer and law professor Andrea Lyon on litigating issues of race in a death penalty case.

[Bowers Sandys Brewer A Closer Look](#) – Article from DePaul Law Review special issue looking at the roots of racial bias in capital sentencing when the defendant is Black and the victim is White.

[Capital Voir Dire Law](#) – Outline of case law on capital jury selection, prepared by Jodie English for 2006 IPDC death penalty defense seminar.

[Capital Voir Dire Pres](#) – PowerPoint presentation by Jodie English and Bob Hill at 2006 IPDC death penalty defense seminar.

[Case Law Outlines](#) – Outlines containing summaries of Indiana and U.S. Supreme Court capital cases.

[Clemency Statements](#) – Governors' statements of reasons for granting or denying clemency.

[CLIENT](#) – Outline on working with clients, prepared by Jodie English for 1996 IPDC death penalty defense seminar.



[CLSC DP Study 2002](#) – Report from study of Indiana’s death penalty process, commissioned by Gov. Frank O’Bannon and carried out by the Criminal Law Study Commission. Although it was for the most part pretty superficial, the section comparing the cost of the death penalty compared to life without parole, and the section looking at the relationship between sentencing and the race of offender and victim are based on empirical data.

[Colorado Method article](#) – Excellent practical article on the Colorado Method of jury selection (but be aware that Indiana law does not provide that a non-unanimous jury penalty vote automatically results in life).

[Competence to Stand Trial](#) – articles on emotional competence & rational understanding, and a list of 20 tasks a competent capital client must be able to perform.

[Comprehending Death](#) – article on competence to be executed.

[Constitutional OVERVIEW](#) – Overview of constitutional principals involved in death penalty jurisprudence, put together by John Blume and Mark Olive and updated.

[Cooley NAS Outline](#) – Outline on using the National Academy of Sciences report on forensic sciences, by Innocence Project attorney Craig Cooley.

[Cost of Seeking DP in Indiana](#) – Single page summary comparing cost of death penalty and cost of lwop in Indiana, based on fiscal impact study prepared by Legislative Services Agency for 2010 General Assembly.

[CR24 Provisional Order](#) – Supreme Court order allowing attorney to accept appointment in capital case contingent upon attending a future DP seminar.

[Cultural Competence](#) – articles on the need to investigate, develop and present your client’s essential humanity within his own cultural context.

[Cultural & Social – Major Mental Illness](#) – Memorandum prepared by Dr. Kathy Wayland for investigators explaining how individuals from different cultural and social backgrounds might experience and describe symptoms of major mental illness.

[Death Sentencing in B & W](#) – Article by William Bowers, Marla Sandys & Ben Steiner containing empirical analysis of impact of juror race and jury racial makeup on death sentencing decisions.

[Developing & Presenting Mental Health Evidence](#) – article by John Blume and Pamela Leonard.

[DISCOVER](#) – Outline on discovery by Lorinda Youngcourt.

[DP Cost Articles](#) – Indiana newspaper articles about the high cost and doubtful benefits of death penalty cases, as well as positive articles about plea agreements and the money saved.

[Effects of Child Abuse & Neglect on Developing Brain](#) – articles on the effects of childhood abuse & neglect.

[Elements of Competent & Reliable Mental Health Evaluation](#) – article by John Blume and Pamela Leonard.

[Ethics Materials](#) – Ethics materials prepared for IPDCs 2015 death penalty defense seminar by Marce Gonzalez, Jr.

[Experts](#) – Outline on finding and working with experts, prepared by Dr. James Clark and Ed Monahan for NLADA's Life in the Balance, 1996.

[Groundwork for Mitigation](#) (LMY) – Outline on steps involved for creating effective working relationship with mitigation specialists, prepared by Lorinda Youngcourt for 2007 IPDC death penalty defense seminar.

[Hofstra L. Rev. special issue](#) – Collection of articles on the investigation and development of mitigation evidence and the presentation and impact of a compelling case for life.

[How Jurors Reach Unanimity](#) – article by Scott Sundby based on Capital Jury Project research. Discusses how jurors deliberate and decide penalty, what their biggest concerns are, and how to address those concerns.

[Implicit Bias](#) -- Research on the pervasiveness and effects of unconscious racial bias, the benefits of a racially diverse jury, and sample motions based on this research.

[Indiana Death Penalty Statutes, 1977 - Present](#) -- Each permutation of Indiana's death penalty statute, from its enactment in 1977 to the present.

[Interviewing Tips NASA](#) – List of interviewing tips prepared by the National Alliance of Sentencing Advocates and Mitigation Specialists.

[In The Face of Death](#) – New York Times magazine article by Alex Kotlowitz about the trial of Jeremy Gross, an 18-year-old represented by Bob Hill and Mark Earnest in Marion County and sentenced to life without parole. Describes the crime and the evidence presented, and interviews jurors on their thoughts and feelings throughout the trial and deliberation process, and the impact of mitigation evidence.

[JE-Frontloading](#) – Outline prepared by Jodie English for IPDC's 2008 Mental Health & Mitigation Seminar, on ways of getting mental health evidence in at the guilt phase of trial.

[Juror Questionnaires](#) – Juror Questionnaires used in recent Indiana death penalty trials.

[Juror Trauma](#) - Articles on the psychological impact of serving on a death penalty jury.

[Jury Instructions](#) - Indiana Pattern Jury Instructions for DP & LWOP trials, as well as defense instructions given in Indiana death penalty trials.

[JURY SELECTION IN RECENT INDIANA DEATH PENALTY TRIALS](#) – short discussion of jury selection conditions (i.e., time allowed, individual or group/#, length of court day), how questionnaires were handled and whether any jurors were struck on basis of

questionnaire, and how each team modified the Colorado method to fit Indiana's hung jury provisions.

[Kammen – Psychodrama](#) – Article by Rick Kammen on the use of Psychodrama techniques learned at the Trial Lawyers College death penalty defense program, in the preparation and trial of a capital murder case. These techniques include “scene-setting,” asking witnesses to describe physical sensations, colors, smells, and other physical details of an experience in order to help them access emotions and compelling details in ways not otherwise available.

[Killing the Oblivious](#) -- 2013 Law Review article on competence to be executed.

[LEAP Outline](#) – Psychologist Xavier Amador's process for working with clients and others who have serious mental illness but lack any awareness of it. LEAP stands for Listen, Empathize, Agree, and Partner. Essential help for working cooperatively with mentally ill clients.

[Mandatory Justice Revisited](#) – The Constitution Project's Death Penalty Project report and recommendations for a fairly administered death penalty, in light of five years of further experience.

[Mandatory Mitigation](#) – Law review article arguing that allowing a defendant to waive presentation of mitigation violates the 8<sup>th</sup> Amendment.

[Massachusetts Report – 80 Ind. L. J.](#) – Report of then-Massachusetts Governor Mitt Romney's Panel on Capital Punishment. The Council, co-chaired by IU-Bloomington Law School Professor Joseph Hoffman, attempted to design a better death penalty. Suggested provisions include allowing defense to try two phases before separate juries, with guilt-innocence phase jury not death qualified; and prohibiting death sentence where evidence is circumstantial only.

[MATCHING](#) – Article by Andrea Lyon on matching guilt-innocence phase theory of defense to penalty-phase theory for life.

[Mediation in DP Cases](#) – article on the use of mediation to resolve death penalty cases.

[Mental Health Evaluation Standards](#) – article by two forensic psychiatrists on standards of practice for mental health evaluations in capital cases.

[Mental Illness & DP](#) – 2008 Law review article on the U.S. Supreme Court's emerging 8<sup>th</sup> Amendment jurisprudence that has led to exemptions for defendants with mental retardation (Atkins) and age (Roper), and its potential extension to defendants with serious mental illness.

[Mental Illness & DP Special Issue Cath. U. L. Rev.](#) – Collection of articles about extending the Atkins and Roper exemptions from the death penalty based on mental retardation and age to defendants whose cognitive deficits result from brain damage after the age of 22 and those with serious mental illness that impairs their ability to appreciate wrongfulness of their actions, conform their behavior to the law, or make rational judgments about their behavior at the time of the offense.

[Mitigating Death](#) – Law review article on social workers as mitigation specialists.

[Mitigation Abroad](#) – article on the special duties and issues that arise when representing a foreign national.

[Mitigation specialist outline](#) (JSD) – Checklist of mitigation specialist’s obligations in death penalty or LWOP cases, prepared by Jan Dowling for 2007 IPDC Death penalty defense seminar.

[Mitigation overview](#) – Outline on the many areas of mitigation investigation and how they can integrate into a compelling case for life, prepared by Dr. George Savarese for the 2016 IPDC Death penalty defense seminar.

[MITLIST](#) – Outline of some potential areas of mitigation.

[Motions](#) - Outline of pretrial motions practice, including potential areas of litigation and how to preserve claims for appellate review.

[MR/ID Materials](#) – Articles on assessing mental retardation/intellectual disability, outlines of case law and case developments in Indiana, and orders from death penalty cases in which the trial court dismissed the state’s death penalty and/or LWOP after finding the defendant to have mental retardation. Also includes a comprehensive Practitioners Guide prepared by MR litigation experts like Dick Burr.

[Multiple Murders](#) – List of multiple murders that did not result in death sentence.

[Mystery of Mitigation](#) – Law review article by long-time mitigation specialist Russ Stetlar on the nature of mitigating evidence and what makes an effective presentation to capital jurors, based on real case experience.

[Neuroscience & Neuroimaging](#) – articles on neuroscience (the study of the brain & its functioning) and techniques for visually capturing brain function.

[NM two-jury rule 5-704](#) – New Mexico trial rule giving defense option of separate guilt-innocence and penalty phase juries, with guilt-innocence phase jury not death qualified.

[OJJDP Risk Factor Research](#) – Research by the Office of Juvenile Justice and Delinquency Prevention regarding recognized risk factors during childhood and adolescence that make later violent behavior more likely, and protective factors that help make it less likely.

[Overview of CJP And Other Findings](#) – John Blume’s outline of CJP and other DP research findings, with citations.

[Phases](#) – Outline on the phases of a comprehensive mitigation investigation, prepared by Juliet Yackel for the 2007 IPDC death penalty defense seminar.

[Practitioners Guide – Mental Disorders](#) (2008) – Comprehensive manual on recognizing, investigating, developing, and presenting mental disorders to decision makers, litigating legal claims, etc. Put together by experts like Dick Burr, David Freedman, Russ Stetlar and Kathy

Wayland.

[Premature](#) – Law review article by William Bowers, Marla Sandys and Ben Steiner based on Capital Jury Project research, indicating that jurors begin to make up their minds about penalty during the guilt-innocence phase.

[PRESREC](#) – Champion article by Andrea Lyon on preserving claims for federal review.

[Principled Executioner – Bifurcation](#) – Law review article on the need for using two juries in a capital case – one for guilt-innocence phase which is not death-qualified, and then a death-qualified jury for penalty if the defendant is convicted.

[Reframing Gang Stereotypes](#) – Law review article on responding to gang stereotyping in capital cases.

[Representing the Borderline Personality Client](#) – training materials on working with and developing mitigation for clients with diagnosed with borderline personality disorder.

[Reverse Calendar \(JE\) 2009](#) – “Non-inclusive” outline of trial counsel’s pretrial responsibilities from appointment through trial, prepared by Jodie English for 2007 and 2009 IPDC death penalty defense seminar.

[Sandys & Trahan](#), Law review article by Marla Sandys and Adam Trahan, based on Capital Juror Project interviews, identifying the prevalence of “latent ADP” jurors who believe they can follow the law and consider a sentence less than death, but who describe their decision making process in ways that make clear they did not consider mitigation, or could not consider a sentence less than death once they saw crime scene photos or heard the brutal facts of the crime. Contains support for individualized sequestered voir dire, with time and latitude allowed to present both the gruesomeness of the crime and the nature of your mitigation.

[Sample Budget](#) – sample defense budget from federal capital resource counsel.

[Shepherd - deterrence](#) - Law review article by law professor/economist looking at deterrent effect of death penalty state-by-state and finding that Indiana is one of 13 states in which the death penalty actually increases the number of murders. Professor Shepherd is one of the economists involved in studies finding a deterrent effect nationally. This study applies the same analytical methods on a state-by-state level, where the death penalty is actually applied. Professor Shepherd theorizes that states like Indiana, which have the death penalty "on the books" but rarely use it, create a "brutalizing" effect with publicly reported state-sanctioned killings that is not overcome by any sense of "swift and certain punishment" that might have a deterrent effect. This article is cited as support in the sample motion to declare the death penalty request statute unconstitutional.

[Short – Building Defense Team](#) – Article by attorney Cindy Short on how to put together an effective capital defense team.

[Signs](#) – Article by Deanna Logan on learning to recognize signs of mental impairment.

[Social Hist](#) – Outline prepared by Jan Dowling on how to conduct a mitigation

investigation.

[Stetlar MitAff](#) – Affidavit from mitigation expert Russell Stetlar setting out the scope of mitigation investigation required by the prevailing professional norms and ethical obligations of counsel in capital cases.

[Theories](#) – Champion article by Mary Ann Tally on developing and integrating guilt-innocence and penalty phase theories into a case for life.

[Things that suck](#) – Article by former Deputy State Public Defender Chris Hitz-Bradley on everything that will happen for you and your client once an execution date is set.

[Trauma Resources – Complex & PTSD](#) - Articles, memoranda, and a bibliography on the impact complex trauma (repetitive, lesser trauma) and PTSD (a single acute traumatic incident).

[UMKC L. Rev. Special](#) – Collection of articles on the power of story at every stage of death penalty litigation.

[Victim Trauma](#) – articles on the impact of death penalty litigation on victims’ families.

[Who client](#) – One-page outline by Deanna Logan setting out mental impairments your client may have, challenges and tasks they create for you and your team, and their impact on various stages of trial.

[Working With Mentally Ill Clients](#) – Outline on working with mentally ill clients, prepared by Dr. George Savarese for the 2016 IPDC death penalty defense seminar.

[Yackel Clemency Materials](#) – Extensive materials prepared by Juliet Yackel on conducting a clemency campaign, beginning long before an execution date is set.

## **SAMPLE MOTIONS**

### ***Conditions of Detention***

[2008-07-24 Motion Transfer ISP](#) -- Motion to transfer Desmond Turner from Wabash Valley to Indiana State Prison to improve attorney visit conditions.

Barker [Motion to Intervene Re Placement](#) – Motion to move Charles Barker to improve living conditions and attorney visit conditions.

Barker [Followup Motion](#) – Motion to move Charles Barker in order to provide minimally competent representation or dismiss death penalty.

[DOC Safekeeper Transfer](#) Motion to move Desmond Turner from County Jail to DOC for safekeeping.

[Motion for Clergy](#) – Motion for Clergy visits and personal mail for Desmond Turner.

[Motion for Physician Treatment](#) – Motion for medical treatment by physician for

Desmond Turner.

[Motion on Safekeeping](#) – Motion to move Desmond Turner from Regular Population to Administrative Segregation for safekeeping.

[Move Client](#) – Motion to move Charles Barker to improve attorney visit conditions.

### ***Continuance***

Davis [Accept Scheduling Order](#) - Motion asking court to accept proposed scheduling order for Ronald Davis, setting out specific reasons for additional time requests, and *citing* ABA Guidelines.

[Davis ExParte Addendum](#) – Exparte report accompanying above motion.

[Sample Continuance Motion](#) – Motion for continuance *citing* ABA Guidelines.

### ***Discovery***

[Def 3<sup>rd</sup> Prty MCJ](#) – Third-party request for production of Marion County Jail Management Records, Desmond Turner case.

[Def Motion to Enter and Inspect Crime Scene](#) – Desmond Turner case.

[Motion for Protective Order and to Quash-DOC](#) – Motion to quash state’s third-party request to DOC for Desmond Turner’s Disciplinary and other records.

[Motion for Protective Order and to Quash-MCJ](#) – Motion to quash state’s third-party request to Marion County Jail for Desmond Turner’s Disciplinary and other records.

[Motion to Preserve Notes](#) – Motion to preserve and produce handwritten notes of officers involved in investigation of Desmond Turner case

[Third Party Request CPS](#) – Original Request to CPS for Desmond Turner records.

[Motion to Compel CPS](#) – Motion to compel Marion County Department of Child Protective Services to comply with third-party request for records on Desmond Turner (See original 3<sup>rd</sup> party request and order below).

[Order Compelling CPS](#) – Trial Court order compelling Marion County CPS to permit inspection and/or copying of Desmond Turner’s records.

[Order Preserve Myspace](#) – Trial Court order to preserve and produce to the Desmond Turner defense any Myspace posts by state’s material witnesses of photographs showing them with guns or text related to these photographs.

### ***Dismiss Death Penalty/Declare Statute Unconstitutional***

[Hurst/Ring Motion to Declare IN DP Unconstitutional](#) – Motion filed in *State v. Darren Vann*, focusing on 6th Amendment Ring challenge as bolstered in Hurst v. Florida.



[Word version](#) of above motion.

[Motion to Declare DP Statute Unconstitutional](#) – Motion to dismiss the state’s death penalty request, raising constitutional and other claims, filed in [State v. Andrew Schuler](#).

[Memo in Support of above motion](#) – Memorandum of law in support of above Motion to dismiss the death penalty request filed in [State v. Andrew Schuler](#), with updated social science and legal research.

[Word version](#) of above memo.

[Leonard Motion to Dismiss LWOP Request](#) – filed in Richmond Hills explosion case.

### ***Evidentiary Motions***

[Exclude NonStat Agg](#) – Sample motion based on motion filed on behalf of Ronald Davis to exclude evidence regarding or references to aggravating circumstances other than the state’s alleged statutory aggravator(s).

[Exclude Photos](#) – Motion filed on behalf of Ronald Davis to exclude gruesome and gory photographs of the crime scene and victims.

[Gruesome and Gory Depictions of the Crime Scene](#) – Motion filed on behalf of Desmond Turner to exclude gruesome and gory crime scene photos.

[Implicit Bias Memo](#) – memo supporting motion to preclude prosecutor from using bestial language with regard to the accused or the crime, from pre-trial comments in and out of Court through final penalty phase argument, if necessary.

[Memo Evident Hearing 702\(b\)](#) – Motion filed on behalf of Desmond Turner seeking evidentiary hearing on admissibility of state’s expert witnesses on firearms and blood spatter.

[Motion to bar prior homicide](#) – Motion filed on behalf of Zolo Agono Azania for a pre-trial ruling barring state from admitting evidence regarding prior unrelated homicide, for which Azania had pled guilty to voluntary manslaughter, had later gotten guilty plea set aside on PCR review, and state had elected not to re-prosecute. Motion was granted – [see](#) order below.

[Response to State – Prior Homicide](#) – Responsive pleadings in Azania litigation excluding evidence of prior homicide charge.

[State’s Reply – Prior Homicide](#) – State’s reply to Azania motion to exclude evidence of prior unrelated homicide charge.

[Order – Prior Homicide](#) – Pretrial order barring the state from tendering evidence regarding 32-year-old unrelated homicide charge against Zolo Agona Azania.

[Motion to Exclude Autopsy Photos](#) – Motion filed on behalf of Desmond Turner to exclude autopsy photos of victims.



[Order Autopsy Photos](#) – Order setting evidentiary hearing on Desmond Turner’s motion to exclude autopsy photos, in order to produce ruling on which pictures could be admitted well before trial.

[Motion to Suppress Media Statements](#) – Motion filed on behalf of Desmond Turner to suppress statements he had given to television reporters.

[Motion re Mitigation Proof](#) – Motion filed on behalf of Andrew Schuler for instruction that defendant bears no burden of proof with regard to the existence of any mitigating circumstance each individual juror may decide to consider.

## ***Funds***

### ***Helpful case:***

*McWilliams v. Dunn*, 137 S. Ct. 1790 (2017), *citing Ake v. Oklahoma*, 470 U.S. 68, 83 (1985), trial court failed to meet the standard established in *Ake* that where a defendant’s mental health is at issue, the State must provide access to a mental health expert to effectively: conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense, death penalty reversed.

[Exparte bill mot](#) – Motion filed on behalf of Chad Cottrell seeking *in camera* filing of interim attorney billing statements.

[Exparte bill ord](#) – Trial court order granting above motion.

[Exparte req mot](#) – Motion filed on behalf of Chad Cottrell seeking *ex parte* hearing and determination regarding requests for funds to hire experts and investigators.

[Exparte req ord](#) – Trial court order granting above motion.

[Funds – Brantley](#) – Motion filed on behalf of Roy Ward for funds to hire expert in educational psychology.

[Funds – Special Ed](#) – Motion filed on behalf of Roy Ward for funds to hire expert in special education.

[Funds – Friedman](#) - Motion filed on behalf of Roy Ward for funds to hire expert to conduct battery of neuropsychological and personality tests.

[Funds – Sex Offender – Treatment](#) - Motion filed on behalf of Roy Ward for funds to hire expert in the treatment of sex offenders.

[MITspecialist](#) - Sample motion for funds to hire a mitigation specialist.

[Order to seal bills](#) – Trial court order in case of Frankie Salyers, sealing time inventories and bills and ordering that vouchers provided for payment not contain specific detail. This is a county with a PD office, where funds for attorney compensation, experts and investigators come out of PD office budget.

### ***Jury Rule 20(A) (8)***

[Davis Sample Motion](#) -- Motion filed on behalf of Ronald Davis seeking to exempt death penalty trial from Jury Rule 20(A) (8), which allows jurors to begin discussing the case before deliberations.

[Final Report – Florida](#) – Report of Florida Supreme Court committee that recommends allowing jurors to discuss prior to formal deliberations in civil cases only. Cited in Davis Sample Motion.

[Let Jurors Talk - Military Law Review](#) – Law review article discussing the practice of allowing jurors to talk prior to formal deliberations, and noting that at the time of publication, no state had allowed this practice in criminal trials. Cited in Davis Sample Motion.

[Randall Shepard “jury trials” article](#) – article by former Chief Justice Shepard discussing the adoption of the new jury rules, noting that Jury Rule 20(A)(8) was met with skepticism from members of the Supreme Court Rules Committee. Cited in Davis Sample Motion.

[Still Singularly Agonizing](#) – Article by William Bowers and Wanda Foglia discussing “premature” decision-making by jurors. Cited in Davis Sample Motion.

### ***Jury Sequestration***

[Conditions of Sequestration](#) – Motion filed on behalf of Ronald Davis seeking notice of planned conditions for juror sequestration.

[Jury Sequester](#) – Motion filed on behalf of Desmond Turner seeking sequestered jury, beginning from time each juror is selected.

[JURY SEQ MOT](#) – Sample motion for sequestered jury

[NO SEQ](#) – Memorandum of law filed on behalf of Kerrie Price objecting to jury sequestration.

### ***Miscellaneous***

[Leonard Memo - Perp Walk Media Contact](#) – Memorandum in support of motion to preclude media access to Defendant on his way to and from court.

[Motion for Notice of 3d Parties Consulted](#) - Motion for notice of all third parties consulted by trial judge, as required by the Code of Judicial Conduct, Rule 2.9(2).

[Motion to Limit Number of Uniformed Officers](#) – Motion filed on behalf of Tommy Pruitt seeking to limit the number of uniformed officers present at trial.

[Psych lim motion](#) – motion to limit the scope of competence examination by court-appointed psychiatrist.

[Turner Motion Perp Walk](#) – Motion to prevent news media from videotaping Defendant being transported in shackles & jail clothes.

[Turner Order Perp Walk](#) – Order granting above motion.

### ***Other Jury Motions***

[Jury View Protocol](#) – Motion filed on behalf of Desmond Turner seeking to establish protocol for jury's views of crime scene at trial.

[Motion Re Pattern Instruction on Jury Nullification](#) – Motion filed on behalf of Andrew Schuler seeking to have pattern jury nullification instruction modified in order to instruct jurors they are never required to impose a sentence of death or life without parole.

[Sever GI and Pen](#) – Motion filed on behalf of Ronald Davis seeking to sever the Guilt-Innocence phase from the Penalty Phase, using a guilt-innocence jury that is not death qualified, and then using a new, death-qualified jury only if Davis is convicted.

### ***Prosecutor's Argument***

[Black D – Animal References](#) – Motion to prohibit prosecutor from referring to Defendant with non-human terminology both in statements to media and argument to jury, with citations to research on implicit racial bias. Prepared by Louisiana Capital Assistance Center.

[Prosarg - DP](#) – Sample Indiana Motion to preclude improper penalty phase closing argument.

[Pros-Miscon-Motion](#) – Sample motion to prohibit improper penalty phase closing argument, prepared by Federal Defenders organization. Good outline of potential misconduct and case law.

### ***Publicity & Venue***

[Motion Change Venue – Turner](#) – Motion for change of venue filed on behalf of Desmond Turner.

[Proposed Findings Venue Motion – Turner](#) – Proposed findings of fact and conclusions of law on venue motion filed on behalf of Desmond Turner.

[Motion for Gag Order](#) – Sample motion for protective order prohibiting the parties and law enforcement from releasing information or making extra-judicial statements.

### ***Sentencing***

[Counsel-attend-psi](#) – Sample motion to allow counsel to attend psi interview.

[Mit effect of guilty plea, harm of trial](#) – Cottrell – Motion filed on behalf of Chad Cottrell setting out the benefit to the prosecution, the court, the county, and the victims’ family as a result of Cottrell’s guilty plea and requesting trial court to give guilty plea mitigating effect.

### ***Severance***

[Motion to sever defendants – Turner](#) – Motion for separate trial filed on behalf of Desmond Turner.

[Sever Counts – Holland](#) – Motion to sever charged offenses for separate trial, filed on behalf of Tommy Holland.

[Sever Defendants Motion – Huffman](#) – Motion to sever defendants for separate trials, filed on behalf of Richard Huffman.

[Sever defendants memo](#) – Memorandum of law filed in support of above Motion to sever defendants for separate trials, filed on behalf of Richard Huffman.

[Sever GI & Pen Phases](#) – Motion filed on behalf of Ronald Davis seeking to sever the Guilt- Innocence phase from the Penalty Phase, using a guilt-innocence jury that is not death qualified, and then using a new, death-qualified jury only if Davis is convicted.

### ***Voir Dire Conditions***

[Implicit-Bias-Voir-Dire-Motion](#) – Sample motion to create a constitutionally adequate framework for voir dire, in light of implicit bias research, in order to increase likelihood of selecting a racially diverse jury, prepared by Louisiana Capital Assistance Center.

[Ind Seq Voir Dire – Turner](#) – Motion for individual sequestered voir dire, filed on behalf of Desmond Turner.

[Proposed FFCL Ind Seq VD – Turner](#) – Proposed findings of fact and conclusions of law filed on Desmond Turner’s motion for individual sequestered voir dire.

[Individual Seq VD – Davis](#) – Motion for individual sequestered voir dire, filed on behalf of Ronald Davis.

[Isom Motion 30 Strikes](#) – Motion for additional peremptories due to charges of Defendant murdering his family and charges of attempted murder of police officers.

[Judge's Intro – Schuler](#) – Motion for introductory instruction about voir dire procedures in a capital case.

[M Jury Mini Opening – Turner](#) – Motion for Defense to present mini opening statement during jury selection, filed on behalf of Desmond Turner.

[Motion to Preclude Death Qualification – Schuler](#) – Motion to preclude death qualification of jury, filed on behalf of Andrew Schuler, and based in part on Indiana's Religious Freedom Restoration Act.

[Turner Motion Jury Selection Procedures](#) – Motion filed on behalf of Desmond Turner for written notice of trial court procedures for jury selection.

[Turner Order Jury Selection Procedures](#) – Order in response to above motion.