

**A NEWSLETTER FOR DEFENSE COUNSEL
IN FEDERAL CAPITAL CASES**
Prepared by the Federal Defender Capital Resource Counsel
and the Federal Death Penalty Resource Counsel Projects
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Table of Contents

Upcoming Training. 1
Expanded Resource Counsel Project. . . . 1
Authorized Case Numbers. 2
Federal Death Row Update. 2
Theory Of Case Memorandum. 4
Personality Disorders. 11
Supreme Court Activity. 13
Recent Federal Capital Decisions. 15
Multiple Killings/Single Episode. 20

Upcoming Training

Regional Federal Death Penalty Training

The next Regional Federal Death Penalty Training is scheduled for **June 11, 2007** in New York City at the City Bar of New York. This is the third in a series of regional trainings intended for CJA attorneys and Federal Defenders assigned to represent persons charged with or convicted of federal capital offenses. The training is free, however, attendees are responsible for necessary travel or lodging expenses.

A fourth, and final regional program for FY 2007, is tentatively scheduled for Puerto Rico on Thursday, **July 12, 2007**.

For further information, contact Margaret O'Donnell at mod@dcrc.net.

National Mitigation Seminar

This annual conference will be held **March 29-April 1, 2007** at the Omni

Shoreham Hotel in Washington, D.C. For more information, contact Samantha Wadkins at samantha_wadkins@ao.uscourts.gov.

Death Penalty Trial Skills Training

The *Kentucky Department of Public Advocacy Death Penalty Institute* is scheduled for **April 16-20, 2007** in Louisville, Kentucky (contact mod@dcrc.net for info). The *Clarence Darrow Death Penalty College* is **May 29-June 2, 2007** at the DePaul Law School in Chicago (contact mbruke12@depaul.edu for info). The *Santa Clara Death Penalty College* is **August 4-9, 2007** at Santa Clara University in Santa Clara, California (contact ekreitzberg@scu.edu for info).

Annual Federal Death Penalty Strategy Session

The annual Federal Death Penalty Strategy Session will be **November 9-10, 2007** at the Marriott Baltimore Inner Harbor at Camden Yards, Baltimore, Maryland. Limited financial assistance is available for CJA attorneys with a pending case. For more information, or to apply for financial assistance, contact Margaret O'Donnell at mod@dcrc.net.

Expanded Federal Death Penalty Resource Counsel Project

The Administrative Office recently expanded the number of contracts for the Federal Death Penalty Resource Counsel

Project, resulting in the addition of 6 new Resource Counsel: Jean Barrett of New Jersey, Mark Donatelli of New Mexico, Richard Ney of Kansas, Margaret O'Donnell of Kentucky, Steve Potolsky of Florida and David Ruhnke of New Jersey. These six lawyers join the existing Resource Counsel - David Bruck of Virginia, Dick Burr of Oklahoma, Michael Burt of California, Kevin McNally of Kentucky and Capital Resource Counsel Project Judy Clarke of California and David Freedman of Arkansas. Robert Lominack of South Carolina continues to provide valuable assistance with the website and case summaries.

Kevin McNally has accepted the role of Project Director. Margaret O'Donnell is in charge of training, including organizing the annual Federal Death Penalty Strategy Session and the Regional Federal Death Penalty Training programs.

Upon appointment to a federal capital case, you should receive a "opening letter" and Project disk(s) from the Resource Counsel assigned to your case. If you do not know who your assigned Resource Counsel is, contact Kevin McNally at kmcnally@dcr.net or Margaret O'Donnell at mod@dcr.net.

Modern Federal DP Authorizations

There have been 416 authorized defendants to date and in the following years:

1990 - 2	1994 - 9	1998 - 33	2002 - 30	2006 - 41
1991 - 6	1995 - 20	1999 - 33	2003 - 49	2007 - 3
1992 - 16	1996 - 21	2000 - 25	2004 - 29	
1993 - 12	1997 - 28	2001 - 28	2005 - 31	

Federal Death Row Update

Increasing Size of Federal Death Row. As the population of death rows in the states continues to shrink, and some state courts and legislators call for halts to executions in light of wrongful convictions, lethal injection litigation, and financial costs of administering the death penalty, the federal row is quietly growing. During an especially troubling two-week span in late January and early February, four defendants were sentenced to die, bringing the total federal row population to 49.¹ Two of the 49 have been granted relief, but with government appeals pending.²

¹Richard Stitt (E.D. VA), Paul Hardy (E.D. LA) are not included among the 47. Stitt's §2255 motion for postconviction relief was granted in the district court in April 2005; he is awaiting resentencing. (*See Stitt v. U.S.*, 369 F. Supp. 2d 679 (E.D. VA, 2005)) Hardy is awaiting resentencing as well, after the 5th Circuit Court of Appeals vacated his death sentence on direct appeal in 1999. (*See U.S. v. Causey*, 185 F.3d 407 (5th Cir. 1999)).

²In November 2006, the district court vacated the sentence of Daryl Lawrence (S.D. OH) on his motion for a new trial; the U.S. is appealing that decision. (*U.S. v. Lawrence*, 2006 WL

On January 30, a federal jury in Staten Island, New York recommended that Ronell Wilson, a twenty-four year-old African-American man, receive the death penalty for his alleged involvement in the killing of two undercover police detectives in 2003. It was the first successful federal capital punishment prosecution in New York in more than fifty years. Just two weeks after Wilson's trial ended, jurors deliberated for only two hours in the Los Angeles, California trial of Iouri Mikhel and Jurijus Kadamovas, before recommending that the two men receive death sentences for allegedly kidnapping and killing five Russian immigrants. On the same day that trial ended, Carlos Caro, a Latino man serving a 30-year sentence for drug offenses in a Virginia federal prison, was sentenced to die for allegedly killing his cellmate.

Pending Executions. While federal prosecutions are resulting in new death sentences at an alarming rate, executions, since that of Louis Jones in 2003, have been forestalled. The next four prisoners slated to die—Cory Johnson (E.D. VA), James Roane (E.D. VA), Richard Tipton (E.D. VA), and Bruce Webster (N.D. TX), all African-American men—have had their executions stayed pending resolution in the District Court for the District of Columbia of civil litigation challenging the constitutionality of lethal injection as a method of execution.

As of March 12, 2007, in addition to five defendants awaiting formal sentencing, and the four men with execution dates set, two individuals are seeking writs of certiorari in the U.S. Supreme Court after circuit courts of appeals denied them habeas relief, eighteen are currently involved in some stage of 28 U.S.C. §2255 habeas proceedings, and nineteen are seeking relief on direct appeal.

Death Row Conditions Issues. Consistent and long-standing reports of problems related to the conditions for prisoners housed in the Special Confinement Unit (SCU) at USP Terre Haute (also known as “Federal Death Row”) have led the ACLU’s National Prison Project (NPP) to initiate an investigation into conditions there. Some of the reported problems have included failure of the prison staff to allow prisoners access to their medication, exceedingly restrictive visitation policies, and the prison’s prohibition on unmonitored legal calls with any non-attorney member of the legal team. The NPP attorney, David Fathi, has recommended that attorneys remind their clients who report conditions problems that they should exhaust all administrative remedies as soon as possible. Forwarding information about the problems reported by clients housed at SCU Terre Haute to David would also greatly aid in his investigation. His contact information is: David C. Fathi, Senior Staff Counsel, The National Prison Project of the ACLU Foundation, Inc., 915 15th St. N.W., 7th Floor, Washington, DC 20005; 202-548-6609; 202-393-4931 fax; dfathi@npp-aclu.org.

[For additional information about federal death row, contact members of the Federal Capital 2255 Unit: Ruth Friedman at Ruth.Friedman@fd.org, Miriam Gohara at Miriam.Gohara@fd.org; and John.Nidiry@fd.org.]

3337472 (S.D. OH, Nov. 16, 2006)). In December 2005, on 2555, David Hammer was granted penalty phase relief; the U.S. is also appealing that decision.

Using a “Theory of the Case” Memorandum to Develop A Compelling and Powerful Theory for Life

A theory for life explains the reasons why the defendant committed the capital crime and why the severe penalty of life imprisonment is appropriate and sufficient for this defendant and this crime. A compelling theory for life must be fact and client specific, and supported by detailed and credible factual evidence. Incorporating a *Theory of the Case Memorandum* (Theory Memo) into the case preparation process is an excellent tool for developing a compelling and powerful theory for life.

A *Theory Memo* helps organize and coordinate the defense team efforts and facilitates interaction and coordination among and contributions from all defense team members. Furthermore, it helps the defense team develop, assess, and refine the theory taking into consideration all of the facts and in the light of newly gathered information in a structured, rigorous, and critical manner. Because the *Theory Memo* does not divide the case into two separate “guilt” and “penalty” sections, it facilitates a nuanced and sophisticated defense team approach and understanding of the case whereby “guilt” and “penalty” issues are connected and integrated. Finally, the use of a *Theory Memo* ensures that the theory for life is responsive to and helps inform the ongoing fact and mitigation investigation. This dynamic and interactive process helps focus and organize the theory development, investigation, litigation, and settlement efforts.

This article describes the *Theory Memo* and how it is an effective and valuable tool in capital case preparation. A second article, which will run in the next edition of this newsletter, addresses how the *Theory Memo* is developed and used by the defense team to facilitate collaborative and sophisticated case preparation.

The Theory at the Guilt-Innocence Phase

It is important for the defense to develop a theory for life and a theory for the guilt-innocence phase² that are consistent and integrated if at all possible.³ In most instances the most effective guilt-innocence defenses in a capital case will be directed at the element of intent (lack of intent, diminished capacity, or insanity). Although most capital cases remain penalty phase cases, presenting a reasoned and vigorous defense theory at the guilt-innocence phase is useful because it permits jurors to relieve their anger at the defendant prior to the start of the penalty phase and it can empower

² Although “guilt-innocence phase” is used in this article, in court before jurors trial counsel may find it advantageous to adopt the more convoluted expression “guilty-not guilty trial” to reinforce the concept that the defense has no burden to establish innocence.

³ The Bryan R. Shechmeister Death Penalty College directed by Professor Ellen Kreitzburg and the Clarence Darrow Death Penalty College run by Professor Andrea Lyon offer excellent opportunities for defense counsel in a capital case to develop a compelling theory for life.

life-prone jurors to extract concessions from other jurors regarding a life verdict in the penalty phase in exchange for a guilty vote in the first phase. Ideally the guilt-innocence defense theory also lays the foundation for the theory for life. The mitigating evidence “front loaded” in the guilt-innocence phase helps pave the way for an effective and persuasive presentation of mitigation in the penalty phase.

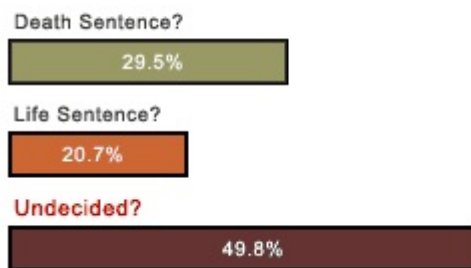
If a capital defendant pleads guilty, the jurors have only one opportunity to express their moral outrage, affirm their allegiance to community values that condemn the defendant’s conduct, and relieve their anger. By presenting a defense in the guilt-innocence phase, even in a hopeless case, jurors will begin the penalty phase, as you will remind them, having already decided that your client is to die in prison. The question for the penalty phase then becomes which of the two most severe penalties available in our law will be meted out: will the defendant die in God’s time or in man’s time when the hands of government pump poison into him? By presenting a defense at the first phase, we may also empower defense oriented life-favoring jurors to horse-trade with other jurors a guilty verdict in the guilt-innocence phase for an agreement to support a life without parole sentence in the penalty phase. Finally, the defense that “front-loads” evidence in the guilt-innocence phase that supports the mitigation evidence and themes also benefits from the psychological effects of primacy and recency. Jurors who hear, during the defense opening at the guilt-innocence phase, reasons that support a life sentence woven into the defense will be more likely to remember, be receptive to, and respond to these reasons when they are presented more fully during the penalty phase. And a defense closing in the guilt-innocence phase that highlights facts and circumstances that remain mitigating regardless of the guilt-innocence verdict, and that will immediately precede, with a break for deliberations, the beginning of the penalty phase, leverages this psychological effect.

The Theory for Life Integrates Themes and Theories from Both Phases

The most powerful theories for life integrate the theories and themes from the guilt-innocence phase and penalty phase. First, all other things equal, a theory for life that builds upon rather than contradicts the evidence, defense themes, and defense theory presented in the first phase starts with an advantage owing to this foundation. Second, settlement negotiations are more likely to be successful when the theory for life is strengthened by integrating a reasoned guilt-innocence defense. Third, if you are unable to settle your case, juror studies show that many jurors decide the penalty question during the guilt-innocence phase⁴ and counsel must incorporate the theory for life and weave the mitigation themes into the first-phase case presentation in order to persuade jurors before they have made up their minds on punishment. The Capital Jury Project, which has interviewed over 1,000 former capital jurors in fifteen states, highlights this fact.

⁴ Bowers, William J., *The Capital Jury Project: Rationale, Design, and a Preview of Early Findings*, 70 Indiana Law Journal 1043 (1995).

After the jury found [defendant's name] guilty of capital murder but before you heard any evidence or testimony about what the punishment should be, did you then think the defendant should be given . . .



Most of the jurors who indicated a stand on punishment at the guilt stage of the trial said they were “absolutely convinced” of their early stands on punishment and adhered to them throughout the course of the trial.⁵ Fourth, and perhaps most importantly, the evidence and argument presented at the penalty phase must be consistent with the presentation made in the guilt-innocence phase in order for the defense to maintain credibility with jurors⁶ and maximize the benefit from and build upon the lay witness and expert testimony and evidence presented in the first phase.⁷

The Theory Memo

A *Theory Memo* that is written and refined during the case preparation process helps the defense team discover, evaluate, and present the set of reasons, supported by facts, that will persuade the decision-maker – the government attorney who can agree to remove death from consideration or a juror in a penalty phase – that the client will be sufficiently punished by a sentence of life imprisonment instead of the death penalty. These reasons for life and supporting themes must be

⁵ Bowers, William J., Marla Sandys, and Benjamin D. Steiner, *Foreclosed Impartiality Capital Sentencing: Jurors' Predispositions, Guilt Trial Experience, and Premature Decision Making*, 83 Cornell Law Review 1474 (1998).

⁶ At trial the defense team that presents a theory for life that is not consistent with the theory presented at the guilt-innocence phase risks a devastating loss of credibility with jurors, particularly those jurors sympathetic to the defense during deliberations in the guilt-innocence phase of trial. These jurors, presented with a theory for life during the penalty phase that contradicts the defense presentation from the first phase, may feel manipulated or betrayed by the defense and thus less trusting of the defense or the theory for life presented by the defense.

⁷ Useful articles addressing the development of a consistent theory between the guilt-innocence and penalty phases include Stephen Bright's, *Presenting the Theme for Life Throughout a Capital Case*, available from the Southern Center for Human Rights at (404) 688-1202 or from Matt Rubenstein (matt@matthewrubenstein.com).

tailored to the client and case, and not rely on stock arguments against the death penalty. The decision-maker must be shown why life imprisonment is sufficient punishment in this case for this particular client, regardless of what the decision-maker thinks about the death penalty in general or for other offenders.

The *Theory Memo* Is Built Upon A Detailed Analysis Of The Facts of the Capital Crime and Your Client

As Kevin Doyle has written, some elements of the rhetorical battle in a capital case are universal. The prosecution dwells on the defendant's capital crime; the defense values the defendant's whole life. An effective *Theory Memo* built upon a thorough and detailed analysis of both subjects assists the defense in preparing for and responding to the prosecution's efforts to exploit the crime and helps prepare a compelling mitigation case that is responsive to and takes into account the crime.

A *Theory Memo* contains a number of universal topic headings. It is usually easiest to begin the *Theory Memo* by working with the fact topics, and waiting to address the more abstract sections of the memo, such as the mitigation themes and overarching theory for life. These will flow from the factual analysis.

Examples of fact based topics in the *Theory Memo* include sections on the background of the client, the victim or victims, beginning the story of the case, the relationship between the client and the victim(s), approaching the day of the crime, the day of the crime, the aftermath, the arrest, the statements, and the physical evidence. At the beginning of a case the *Theory Memo* may have many headings serving as reminders of topics that remain unaddressed.⁸

⁸ The following is a sample of the generic headings for an initial Theory Memo:

1. WHAT IS THE OVERARCHING THEME?
[E.g., Some Other "Dude" Did It, The "Dude" Deserved to It (Self-defense or Manslaughter alternative), Client Didn't Mean to Do It (Insanity or Lack of Intent), Government Can't Prove Client Did It]
2. APHORISM[S]
3. KILLER FACTS
[E.g., Urinating on the Victim, Eating the Victim's Lunch, Homicide as Humorous, Biting the Hand that Feeds You, The Client as Liar, The Serial Killer, The Victim Nun, Etc.]
4. WHAT IS THE ULTIMATE GOAL?
Plea Negotiations
The risks
The opportunities
The players
5. WHO IS THE CLIENT?
6. THEMES IN MITIGATION
7. WHO IS/ARE THE VICTIM[S]
8. BEGINNING THE STORY OF THE CASE
9. THE CLIENT & THE VICTIM[S]
10. APPROACHING THE DAY OF THE CRIME
11. THE DAY OF THE CRIME

In a case in which the defense team learned that the client had suffered a mental breakdown prior to the offense, the first draft of the memo focused on fleshing out the topic, “Who is the Client – Jeff Smith?” with sub-headings such as, “Jeff’s Childhood,” “Jeff as a Boy & Teenager,” “Jeff as a Young Adult,” “Jeff Begins Having Problems,” and “Jeff Gets Sick (Mentally Ill).” As the team digested information from the discovery and preliminary investigation efforts, the team held a brainstorming session about two weeks into the case in which all members of the defense team participated to develop thematic headings specifically tailored to Jeff Smith and the case. These thematic headings were then added to the *Theory Memo* as subheadings. In the Jeff Smith example, family members told counsel and the mitigation investigator that beginning in early adolescence Jeff’s behavior was frequently odd or bizarre.

Each incident was separately documented and analyzed in the memo. As an example, under the section “Jeff Begins Having Problems,” the subheadings were: “Jeff Is Paranoid About Men Looking at his Wife,” “Jeff Has Delusions that Patricia is Having Sex with Her Family Members,” “Jeff’s Wife has Enough and Moves Back to Connecticut,” “Jeff Returns to Connecticut & Lives with the Haitian Roommate,” “Jeff Believes his Roommate is a Haitian Drug Dealer,” “Jeff Has Delusions that his Haitian Roommate Sexually Assaulted Him,” “Jeff ‘Snaps’ (Psychotic Episode?) & Attacks his Haitian ‘Drug Dealer’ Roommate,” “During Episode with Roommate, Jeff Jumps Through a Police Window,” “Jeff is Locked Up for the Police Window Incident & His Mother and Father Bail Him Out,” “Jeff’s Behavior is Very Strange and He is Talking Crazy to His Mother and Father When the Police Pick Him Up,” and “Jeff Gets Sick.” The memo also included a separate section on the history of mental illness in Jeff’s family with the same sort of subheadings and analysis of information from interviews and documents relevant to this topic. In this manner a richly detailed and sourced account of the client’s life is developed.

The Theory for Life is the Story of the Client’s Life

If the *Theory Memo* is incorporated into the case preparation process and is the central repository for the analysis of the information gathered by the team, the story of the client’s life will begin to take shape in the memo. The mitigation themes will begin to become evident from the evidence gathered and the team can then begin developing preliminary drafts of the theory for life.

As the theory for life begins to take shape, it should convey a compelling and sympathetic story of the client’s life. It may start as a page or two and end up as a 200 page memo six months into a case. It tells the story you would tell an understanding friend who asked you about your client, his life, and why he committed the capital offense. It is not merely a catalogue of deprivations and

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12. THE AFTERMATH
 13. THE ARREST
 14. THE STATEMENTS
 15. THE PHYSICAL EVIDENCE
 16. THE REAL KILLER?
 17. OTHER IDEAS

traumas,⁹ though it should certainly address these, but includes the hills and valleys that we know real life is about. It should include details of missed opportunities, people who cared about him, stories that show his humanity, and good things he has done. The story should be rich, interesting, and vibrant; it should draw the audience in and ideally make them care about what happens to the protagonist – your client. The theory for life answers the following sorts of questions: Is this man the evil, wicked, unrepentant man for whom we reserve the death penalty? Is this man so beyond the possibility of redemption that we *must* exterminate him from the human race? In the South some advocates assert that the essence of the issue can be addressed in two questions: What would Jesus do? And, Do we *have* to kill this man?

Our answers to these questions are grounded in the factually supported mitigating themes presented in our theory for life. Mitigation is any reason that supports a sentence of life imprisonment. It includes the explanation of what influences converged in the years, days, hours, minutes, and seconds leading up to the capital crime and how information was processed in a damaged or poorly functioning brain. It cannot be over-emphasized that mitigation is a basis for compassion – not an excuse.¹⁰ Our theory for life is the story that helps us understand why this person committed this capital crime. The mitigation shows the humanity of our client, that he is not beyond redemption, and that he does not have to be killed.

The best place to start learning this story is through spending time with your client and his family.¹¹ Many have found the most meaningful time spent with a client or his family is when legal

⁹ Presenting a person as “doomed from the start” and describing his life as a litany of loss and deprivation that put him on an inevitable downward path to commit the capital murder is normally counterproductive because the story rings hollow, is reductionist, and is not interesting. In classical narrative tradition, balance is restored at the conclusion of the story when the tension created by a person “doomed from the start” meets his preordained end: death.

¹⁰ Stetler, *Mitigation Evidence in Death Penalty Cases*, THE CHAMPION at 49 (Apr. 1999). Russ Stetler’s three-part series published in the February, April, and June 1999 issues of THE CHAMPION provide an excellent overview of mitigation investigation and capital case preparation.

¹¹ The first meeting with a client’s father in a Louisiana capital case provided information for an initial, one page theory memo prepared by Clive Stafford Smith:

SYNOPSIS

The basic story-line upon which we need to build seems to be as follows (as told rather eloquently by his father):

“Mike was a country boy, worked all his life. Made \$28,000 a year, all on minimum wage, and you can work out how many hours that was. [roughly 100 per week, we need the pay stubs, etc.] He loved his wife, he loved his kids. He built his house from the ground up. They took it all away from him. Took away his wife, the

papers and notepads are left at the office, and when attorneys or investigators take off their legal hats and spend time getting to know the client and his family as people. Learning about what they care about, how they spend their time and what they enjoy doing, their work, music they like, what is important to them, how they view the world and their role in it is vital. An invitation to stay for coffee or share a home-cooked meal by your client's family is an opportune time to begin or further this process. Although it is likely that the mitigation investigator will eventually spend more time with the client's family than the lawyer, the relationship that the lawyer can build with the client and the client's family in the early days of a case are invaluable for learning about the client and building trust with the client and his family.

When the development of a *Theory Memo* is incorporated into the case preparation process it facilitates a collaborative and rational process for developing the investigation priorities, the litigation strategy, determining the approach for forensic and mental health experts, and building the defense team because it refines and prioritizes the ongoing fact and mitigation investigation in light of all recent developments in the case. As the theories and supporting themes for the guilt-innocence

only woman he ever loved. They took away his kids, the rest he loved in his life. They took away his house, the house he'd built all himself. They took the few miserable bits of clothing he had and threw them out the front door of that house, told him he could never come in there again. Had a nervous breakdown, who wouldn't. They told him he had to pay child support based on his old salary, when he'd lost that job. Couldn't make enough money just to pay them, and they said he'd have to go to jail if he didn't pay it all. Wouldn't even trust him to pay, they garnished his wages. Didn't even stop to ask how he'd get to work. Had to borrow gas money from us.

“Went over there [to the neighbor's house], called into the house next door [his ex-wife's house; his old house]. She [the neighbor] liked him, gave him a hug. He didn't have no gun on him then. Said he wanted to talk to his wife about the property settlement. Called his father-in-law to ask him to come on over, so there wouldn't be no trouble. He said he had no business with Mike, but he called the police saying there might be trouble. Mike went in that house, saw his wife--ex-wife, guess you'd call her, but there ain't no divorce in Tangipahoa Parish--sitting there with another man. Him with his shirt half out, his boots off, feet up in Mike's house. They took to arguing. The other man starts getting up out of the chair, Mike's worried and pulls out a gun and shoots.

“There are some bad facts. He had a five-shot revolver, and fired at least eleven (probably 15) shots in the house. Worse yet, he carried in a pocket full of ammunition when he went in there.”

There are many people who could be blamed here, but we do not want to BLAME anyone. All we are trying to do is to tell the story. It is not the fault of Smith Pawn Shop, the Social Security Administration, Greenbrier Hospital, Dr. Oden, or anyone else that Sally died, but many things could have been done to prevent it.

and penalty phases are challenged and tested, some will be refined or spawn additional theories and others will be abandoned or significantly altered.

[Matt Rubenstein is currently an Assistant Federal Defender in Portland, Oregon. He represented clients in death penalty cases in the South from 1999 to 2005 at the Louisiana Crisis Assistance Center in New Orleans and the Georgia Capital Defender in Atlanta. Matt has sample Theory Memos available. He can be reached at matt@matthewrubenstein.com.]

Personality Disorders

DSM-IV-TR states that a “Personality Disorder is an enduring pattern of inner experience and behavior that deviates markedly from the expectations of the individual’s culture, is pervasive and inflexible, has an onset in adolescence or early adulthood, is stable over time, and leads to distress or impairment.”

Simply put, personality disorders are traits which compose the core, definitional characteristics of your client. Under the DSM multiaxial diagnostic system, the difference between Axis I, often referred to as clinical disorders, and Axis II, often referred to as personality disorders, might best be understood to be the difference between a state and a trait: a state being conditions that could remit (or wax and wane) and a trait being a core definitional characteristic of the organism; or more clearly, it is the difference between defining a condition a person has compared to defining who a person is.

Since 1980 when DSM III instituted the multiaxial system, Axis I has been defined generally as comprising “clinical” disorders and Axis II the “personality” disorders. This distinction is crucial to understanding what happens when Axis II diagnoses are brought into court because rather than being conditions which might be effectively treated or which may in fact change over time, the personality disordered individual is being described for the merit of his or her character and the essential nature of his or her personhood. Therefore, rather than a story about a person who has certain experiences, it is a story of the quality of the person predicated on the notion that they are socially disordered.

In short, the reason that personality disorders do not assist you in presenting mitigation evidence is because such presentation asks the jury to judge the merit of your client’s character, rather than the more complex story concerning how and why your client has come to this situation.

In the pre-DSM-III period (before 1980), clinical descriptions of personality disorders focused on traits rather than behavior. Personality disorders under this view were juxtaposed against a non-theoretical notion of normalcy (the well-adjusted person). There was little empirical work on whether these personality types existed, whether clinicians were identifying the same conditions as deviant or whether the disorders reflected communal concerns or the concerns of a few. For instance, much of the early work on personality disorders focused on immigrant groups (Italians,

Irish and European Jews) and the desire to “treat” them in such a way as they became “normal.” The criteria for diagnosis were based on personality traits such as selfishness, lack of remorse, or incapacity for loyalty, seen in the clinical interview.

In 1980, the promulgation of DSM-III changed some of this, shifting the focus to observable behaviors rather than traits. This change was purportedly brought on by empirical research. However, extensive debate remains about the empirical support for the criteria and diagnoses on Axis II, particularly those in Cluster B.

DSM-III separated the clinical (Axis I) and personality (Axis II) disorders onto separate Axes. The move to a separate axis occurred in 1980 and was explained as an effort to keep clinicians from ignoring the personality disorders and to highlight them. DSM-III defined the personality disorders as “inflexible and maladaptive and cause either significant functional impairment or subjective distress.” It suggests that combinations or constellations of traits constitute a personality disorder, but only when they are inflexible, maladaptive or cause significant functional impairment.

As a general rule, personality disorders are not helpful to your case. Many clients have been previously diagnosed with a personality disorder and you are likely to have to deal with the appropriateness of that diagnosis versus your current evidence for mental illness. In all situations, comprehensive social history evidence is necessary for your mental health expert to make a determination about the appropriateness of diagnosing a personality disorder.

DSM-IV-TR recognizes that personality disorders should be considered subsidiary to the clinical disorders. Since the criteria may often overlap between clinical and personality disorders, DSM-IV-TR cautions that a “Personality Disorder should be diagnosed only when the defining characteristics ... do not occur exclusively during an episode of an Axis I disorder.” Thus, Axis I disorders must be considered and ruled-out before the expert concludes your client suffers from a personality disorder: “The enduring pattern is not better accounted for as a manifestation or consequence of another mental disorder.” In short, Axis I clinical disorders trump the personality disorders. If a clinical disorder is present and explains the behaviors, no personality diagnosis should be made. Further, the enduring pattern must not occur solely as a result of substance abuse or medical condition (neurological disease or head trauma), and when the personality changes occur as a result of extreme stress, post-traumatic stress must be considered.

Cluster A Personality Disorders: Paranoid Personality Disorders include three types: paranoid, schizoid and schizotypal. In general, these are like lesser included conditions of clinical disorders. They are defined by a pervasive pattern of distrust, paranoia and suspiciousness. People with these conditions are said to appear odd or eccentric. Cluster A disorders must not have occurred exclusively during the course of schizophrenia, mood disorder with psychotic features, or psychotic disorder. ***Therefore, like the personality disorders overall, every effort must be made to develop facts which will allow the expert to properly evaluate the presence of a clinical disorder that rules out the personality disorder.***

Cluster B Personality Disorders: Often called the dramatic disorders, Cluster B disorders include Antisocial Personality Disorder, Borderline Personality Disorder, Histrionic Personality Disorder and Narcissistic Personality Disorder. Serious conceptual and legal problems related to Cluster B are discussed below in the section on Antisocial Personality Disorders. In short, there is poor evidence currently that four disorders that make up Cluster B are in fact distinct disorders that can be accurately identified. As with all the personality disorders, clinical disorders must be ruled out prior to diagnosis.

Cluster C Personality Disorders: Cluster C disorders include Avoidant Personality Disorder, Dependant Personality Disorder, Obsessive-Compulsive Disorder and Personality Disorder Not-Otherwise-Specified. People with these conditions are said to appear anxious or fearful. The same rule-out provisions apply to these disorders as well.

[David Freedman is a capital investigator working with the Capital Resource Counsel Project. He is the author of a Guide to Mental Health Mitigation, available on the private side of the capdefnet.org website. David can be reached at freedman99@earthlink.net.]

Supreme Court Activity

We include in this section U.S. Supreme Court cases addressing death penalty trial issues, as well as issues commonly seen in capital cases. We do not include all Supreme Court decisions or grants of certiorari.

Opinions

Per Curiam Finding of Lack of Jurisdiction for Habeas Not Filed as Required

Burton v. Stewart, 127 S. Ct. 793 (2007): Rather than resolve the questions whether (1) the holding in *Blakely v. Washington* is a new rule or whether it was dictated by *Apprendi* and (2) if *Blakely* is a new rule, should its requirement that facts resulting in an enhanced statutory maximum be proved beyond a reasonable doubt apply retroactively, the Court issued a *per curiam* decision holding that the district court lacked jurisdiction to hear the habeas corpus petition because it had not been filed as required by the AEDPA gateway procedures of 28 U.S.C. § 2244(b) for a second or successive petition.

No Clearly Established Precedent Spectator Wearing Buttons of Victims Resulted in Unfair Trial

Carey v. Musladin, 127 S.Ct. 649 (2006): In a case in which the Ninth Circuit Court of Appeals granted habeas relief in a state first degree murder case because the courtroom spectators included three family members of the victim who wore buttons depicting the deceased family of murder victim, the Supreme Court reversed, holding that the Ninth Circuit exceeded its authority under 28 U.S.C. § 2254(d)(1), because there is no Supreme Court precedent clearly establishing that an unfair trial occurs, or habeas should be granted, when spectators where such buttons.

California's Determinate Sentencing Law Violates Right to Jury Trial

Cunningham v. California, 127 S.Ct. 856 (2007): The Supreme Court, relying on its precedent in *Apprendi*, *Ring*, *Blakely* and *Booker* held that California's determinate sentencing, law by placing sentence-elevating fact-finding within the judge's province, violates a defendant's right to trial by jury safeguarded by the Sixth and Fourteenth Amendments.

Court Side Steps Question of Whether Missing Element Can be Harmless

United States v. Resendiz-Ponce, 127 S. Ct. 782 (2007): Sidestepping the question whether the omission of an element of a criminal offense from a federal indictment can constitute harmless error, the Court (Justice Stevens) held there had been no error at all, since the indictment was not defective. Justice Scalia dissented, contending that the indictment was defective and that the error was structural.

Crawford Not a Watershed Rule

Whorton v. Bockting, 127 S.Ct. 1173 (2007): The Supreme Court held that *Crawford v. Washington* announced a new rule of criminal procedure that does not fall within the *Teague* exception for watershed rules that implicate "the fundamental fairness and accuracy of the criminal proceeding" because (1) it is not necessary to prevent an impermissibly large risk of an inaccurate conviction, and (2) the *Crawford* rule did not alter the Court's understanding of the *bedrock procedural elements* essential to the fairness of a proceeding.

Cert Grants:

Cause Removal of Juror

Uttecht v. Brown, 06-413 (cert. granted January 12, 2007) (case below: 451 F.3d 946 (9th Cir.)): Question presented: In *Wainwright v. Witt*, 469 U.S. 412 (1985), and *Darden v. Wainwright*, 477 U.S. 168 (1986), this Court held that a state trial judge may, without setting forth any explicit findings or conclusions, remove a juror for cause when the judge determines the juror's views on the death penalty would substantially impair his or her ability to follow the law and perform the duties of a juror. The Court further held that a federal habeas court reviewing the decision to remove the juror must defer to the trial court's ability to observe the juror's demeanor and credibility, and apply the statutory presumption of correctness to the judge's implicit factual determination of the juror's substantial impairment. Did the Ninth Circuit err by not deferring to the trial judge's observations and by not applying the statutory presumption of correctness in ruling that the state court decision to remove a juror was contrary to clearly established federal law?

Oral argument will be heard on April 17, 2007.

Competence to be Executed

Panetti v. Quarterman, 06-6407 (cert granted January 5, 2007) (case below: 448 F.3d 815 (5th Cir.)): Question presented: Does the Eighth Amendment permit the execution of a death row inmate who has a factual awareness of the reason for his execution but who, because of severe mental illness, has a delusional belief as to why the State is executing him, and thus does not appreciate that his execution is intended to seek retribution for his capital crime?

Oral argument will be heard on April 18, 2007.

Inflammatory Prosecution Closing

Roper v. Weaver, 06-313 (cert. granted Dec. 7, 2006) (case below: 438 F.3d 832 (8th Cir.)): Question presented: Since this court has neither held a prosecutor's penalty phase closing argument to violate due process, nor articulated, in response to a penalty phase claim, what the standard of error and prejudice would be, does a court of appeals exceed its authority under 28 U.S.C. § 2254(d)(1) by overturning a capital sentence on the ground that the prosecutor's penalty phase closing argument was "unfairly inflammatory?"

Oral argument will be heard on March 21, 2007.

[Margaret O'Donnell summarizes death penalty trial related United States Supreme Court decisions and cert grants for the newsletter. She can be contacted at mod@dcr.net].

Recent Federal Capital Case Summaries

Circuit Decisions:

Ferebe Issue Not Subject to Interlocutory Appeal in Second Circuit

United States v. Robinson (McGriff), 473 F.3d 487 (2nd Cir. 2007): Defendant filed an interlocutory appeal from the denial by the district court of its motion to strike the government's notice of its intention to seek the death penalty. The defense maintained that the notice was not filed within a "reasonable time" before trial. Addressing the issue of jurisdiction, the Court held that the appeal did not fall within the narrow confines of the collateral order doctrine. In so finding the Court disagreed with the Fourth Circuit's approach in *Ferebe*. The Fourth Circuit reasoned that 18 U.S.C. 3593(a) conferred a right not to stand trial which must be analyzed for jurisdictional purposes like a double jeopardy claim. The Second Circuit found that 3593(a) did not confer a right not to be tried as there was no argument that McGriff could not be tried on the substantive charges; rather, it confers a right to notice of a the sentence the government seeks upon conviction. This, according to the Court, resembles numerous other "pretrial rights that involve notification or disclosure for the purpose of allowing the defendant to prepare his case." The Court therefore found that a violation of the reasonable notice provision would not necessarily result in the striking of the death notice.

For this reason, it held that the district court's ruling could be reviewed in the ordinary course of any appeal after the conclusion of the trial.

District Court Decisions:

Trial Court Exercised Inherent Authority to Compel Disclosure of Mitigating Factors

United States v. Ayala Lopez, No. 03-55 (Sept. 19, 2006): The court granted the government's motion to compel the disclosure of the mitigating factors on which the defendant intended to rely at the sentencing phase. While noting that the FDPA does not require such disclosure, the court found that it had the inherent power to ensure the fairness of the proceedings. The court found that such disclosure would provide the opportunity for the government to prepare to rebut the information presented by the defendant as required by the FDPA. However, the court did hold that the government could not refer to the mitigating factors during its case in chief nor could it use this advance knowledge to bolster its case in chief.

Trial Court Orders "Informative Outline" of Evidence Supporting Aggravating Factors

United States v. Diaz, 2007 WL 196752 (N.D.Cal. Jan. 23, 2007), No. CR 05-00167: The defendants objected to the government's notice of its intent to seek the death penalty arguing that the government had not provided sufficient notice of the evidence on which it would rely to prove the aggravators. The defense requested that the aggravating factors be struck or that the government be forced to amend the notice to provide more notice. Relying primarily on *United States v. Llera Plaza*, 179 F.Supp.2d 464 (E.D.P.A. 2001), the court held that "at a minimum, due process requires a defendant to receive sufficient notice of aggravating factors to enable him to respond and to prepare his case in rebuttal." In so finding the court rejected the government's claim that the indictment and the 20,000 pages of discovery provided were sufficient in and of themselves to put the defendant on notice of the factual basis of the aggravating factors. In the end, the court ordered that the government must provide the defendant with an "informative outline" of the evidence supporting each aggravating factor, statutory and non-statutory.

Death Penalty Not Unconstitutional for 19 year old

United States v. Rejon Taylor, 2006 WL 3489099 (E.D. Tenn. 2006), No. 1:04-CR-160 (Dec. 4, 2006) : (1) The court rejected the defense contention that because portions of the brain do not reach maturity until one is in their 20s, the death penalty is unconstitutional as applied to the defendant who was 19 at the time of the crime. (2) The court rejected the defense motion to strike as an alleged aggravator the fact that the defendant was over 18 years old at the time of the crime. The court found that this fact was not included in the indictment as an aggravator but rather as an allegation which must be proved to trigger the potential sentence of death.

Trial Court Ordered List of Mitigators be Provided to Firewalled AUSA

United States v. Ronell Wilson, 2006 WL 3544709 (E.D.N.Y. 2006), No. 04-CR-1016 (Dec. 8, 2006): The trial court had previously ordered the defendant to provide to a firewalled AUSA information regarding mental health testing conducted in preparation for the sentencing phase. The court had also ordered the defense to provide a list of mitigators on which it intended to rely. The defense moved to preclude the government from providing this list of mitigators to the firewalled attorney. The court denied the defense request. It first found that the use of a firewalled attorney is primarily to ensure that no information obtained from the defendant for use in mitigation can be used in the guilt-or-innocence phase of the trial. This rationale for the use of a firewalled attorney is not jeopardized by providing the firewalled attorney with a list of mitigators on which the defense intends to rely. The second rationale for the use of a firewalled attorney is to avoid a lengthy delay between the guilt-or-innocence phase and the sentencing phase of the trial. Allowing the government to provide the list of mitigators to the firewalled attorney actually supports this goal, according to the court.

Guilt Phase Expert Excluded for Failure to Comply with Rule 16; Court Finds Rule 16 Authority Over Penalty Phase

United States v. Ronell Wilson, 2006 WL 3694550 (E.D.N.Y. 2006), No. 04-CR-1016 (Dec. 13, 2006): (1) The court granted the government motion to exclude in the guilt phase the testimony of an expert on hip-hop culture. The defense intended to introduce the testimony of this expert to explain the lyrics of a rap song found in the possession of the defendant when arrested. The government intended to argue that the lyrics of the rap song were inculpatory. The primary basis for the government's motion was the defense failure to provide timely notice of its intention to use this expert and its failure to provide the "bases and reasons for the opinion" of this expert as required by Rule 16. The defense argued that it waited until the court had denied its motion to exclude the lyrics from evidence before locating this expert. The court found this reason unavailing and found that the defense should have anticipated that the government would seek to introduce this evidence and further, that the defense should not have assumed that the court would grant the motion to exclude this evidence.

(2) The court denied the government's motion to preclude the testimony of any defense non-mental health experts in the penalty phase of the trial. The court agreed with the defense that its obligation to disclose under Rule 16 was only triggered once the government complied with a defense demand for expert disclosure. Because the government had not yet provided this notice, the defense had no obligation to provide notice of its mental health experts. Regarding whether or not the court had the authority to exclude the non-mental health experts, the Court noted "It is not clear whether the court has the authority at this time to preclude Wilson from offering non-mental-health testimony in the penalty phase. As noted throughout this Memorandum and Order, the Federal Rules of Criminal Procedure permit this court to prohibit Wilson from introducing undisclosed evidence when Wilson's failure to disclose constitutes a failure to comply with Rule 16. Fed.R.Crim.P. 16(d)(2)(C). Wilson's failure to disclose expert testimony would seem to constitute a violation of the

requirement that he provide notice of “testimony that [he] intends to use under Rules 702, 703, or 705 of the federal Rules of Evidence as evidence at trial[.]” Fed.R.Crim.P. 16(b)(1)(C). But federal law provides that in the penalty phase of a death penalty case, “[i]nformation is admissible regardless of its admissibility under the rules governing admission of evidence at criminal trials.” 18 U.S.C. § 3593(c). Because Wilson may, in the penalty phase, offer testimony that does not satisfy Fed. R. Evid. 702, 703, or 705, it may be the case that Fed.R.Crim.P. 16 does not require him to provide notice of “expert” testimony he intends to offer in the penalty phase. This would mean that the court could not sanction him for failing to comply with Rule 16 merely because he has not provided such notice. The court reaches no conclusion on this issue, however, as it has not been argued or briefed and its resolution is not necessary to the court's decision.” [See FN. 3]

The court then directed the parties to exchange penalty phase expert notice, noting that “It is clear that the court has the authority to issue such an order pursuant to Fed.R.Crim.P. 16(d)(1), which provides that “[a]t any time the court may, for good cause, deny, restrict, or defer discovery or inspection, or grant other appropriate relief.” That Rule does not distinguish in any way between evidence offered in the trial phase and evidence offered in the penalty phase.” [See FN. 4].

Multiple Evidentiary Rulings: (1) Knowledge of Law Enforcement Status of Victim; (2) Gangs; (3) Documentary on Undercover Police Work; (4) Notes of Expert on Draft Reports; (5) Execution Impact; (6) Hip-Hop Expert; (7) Rates of Violence in Prison (Cunningham) and (8) Capacity of Prison to Manage (Romine)

United States v. Ronell Wilson, 2007 WL 81935 (E.D.N.Y. 2007), No. 04-CR-1016 (Jan. 9, 2007):

(1) The court rejected the defense motion to preclude the government from using as an aggravating factor the fact that the victims were law enforcement officers. The defense argued that because the government did not, in the guilt-or-innocence phase, prove that the defendant knew that the victims were law enforcement officers, the evidence was not admissible. The court first rejected the claim that the defendant was required to have knowledge of the victims’ status as law enforcement officers finding that the federal statute does not require such knowledge when the victim is a federal law enforcement officer. Second, the court found that the government was not precluded from proving a fact in the sentencing phase which it had not proven during the guilt-or-innocence phase. Therefore, there was still ample opportunity for the government to prove that the defendant did, in fact, know that the victims were police officers.

(2) The court rejected the defense motion to preclude the government from introducing evidence of defendant’s involvement in the Bloods street gang to support the future dangerousness aggravating factor. First, the defense objected to this evidence because the government, in its notice of aggravating factors, had indicated that it would introduce evidence of the defendant’s involvement in the Stapleton street gang but it made no mention of the Bloods. Subsequent to the filing of its Notice the government sent the defense a letter indicating its intention of introducing evidence relating to the defendant’s involvement in the Bloods gang. This letter, the court found, was

sufficient notice to the defense. Second, the defense contended that the evidence relating to the Bloods gang was too prejudicial in part because of the wide name recognition of this gang. The court rejected this argument but held that it would limit the government's presentation of evidence relating to the defendant's gang membership to that evidence directly relating to his future dangerousness.

(3) The court rejected the defense contention that a portion of a video documentary about undercover police work was not admissible as victim impact evidence. One of the victim's colleagues was the subject of the documentary which also featured an interview with one of the victims describing the dangers of undercover police work. The court found that this evidence was admissible because it would allow the jury to become acquainted with the victim. The court did order the government to provide the defense with the proposed testimony of each victim impact witness.

(4) The court granted the defense request that the government provide any written comments made on drafts of the report of the government's mental health expert, Dr. Welner.

(5) The court rejected the government's motion to preclude any defense testimony relating to the negative impact that the defendant's execution would have on his family and/or friends. The court found that the limiting language of 18 U.S.C. 3592(a)(8) ("the defendant's background, record, or character or any other circumstances of the offense") did not trump the broad language of 3592(a) that the jury should consider any mitigating factor. Further, the court found that such evidence could be construed to be relevant to the defendant's "background" as construed in 18 U.S.C. 3592(a)(8).

(6) The government moved to preclude the testimony of an expert on hip hop culture whom the defense intended to use to help explain the lyrics of songs found in the possession of the defendant during his arrest. The court had previously prohibited his testimony in the guilt-or-innocence phase because it found that the defense notice of this proposed testimony was untimely and insufficient. The government's primary basis for its motion was its argument that the expert's speculation about what the lyrics meant to the defendant would not assist the jury in evaluating the evidence. Further, it contended that the expert, never before qualified by a court as an expert in this area, should not be qualified as such. The court rejected both arguments finding that the expert possessed sufficient knowledge of the subject area to provide an opinion. Further, the court found that the defense should be allowed to utilize the expert to address the import of the lyrics which the government intended to use to demonstrate that the defendant was a remorseless killer.

(7) The court rejected the government's motion to preclude the testimony of Dr. Mark Cunningham whom the defense intended to use to provide expert testimony about rates of violence in federal prisons and the various security measures available to federal prisons to deal with inmates. The government argued that Dr. Cunningham's testimony was not sufficiently specific to the defendant to be admissible. The court found that since the defense was simply rebutting the government's evidence in support of its future dangerousness aggravator rather than merely in support of a mitigating circumstance, it was admissible. However, the court did hold that any

testimony about a particular institution at which the defendant was unlikely to be housed (i.e. ADX Florence) would be inadmissible because it was too speculative. Furthermore, the court ordered the defense to provide the government with notes taken by Dr. Cunningham during an interview with the defendant despite the fact that the defense stated that Dr. Cunningham was not going to base any testimony on this interview.

(8) The court rejected the government motion to preclude the testimony of a defense witness, Donald Romine, a former BOP warden, who would testify about the BOP was capable of managing inmates convicted of serious crimes including capital murder. The government argued that the proposed testimony was not sufficiently linked to the defendant himself. The court rejected this contention finding that since the defense was simply rebutting the prosecution evidence relating to the future dangerousness aggravator, the testimony was admissible.

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Multiple Killings in a Single Criminal Episode 18 U.S.C. § 3592 (c) (16)

“Single criminal episode” is a term that is undefined either by statute or federal case law in context of the “multiple killings” aggravating factor. Though there are cases where the aggravator has been challenged, there are no federal cases which distinguish or define the element “single criminal episode.” The courts discuss the constitutionality of the “multiple killings” aggravator but generally uphold the aggravator with little or no analysis of the “single criminal episode” element.

Legislative History:

On June 9, 1995, Sen. Bill Bradley of New Jersey addressed the Senate introducing a bill to amend 18 USC 3592 to include a new aggravating factor. Bradley described a Montclair New Jersey robbery in which Christopher Green walked into a post office, ordered two employees and three customers into a back room, ordered them to lie on the floor, and then shot them. One of the customers survived a shot through the back of the head. Bradley told the Senate that the U.S. Attorney was not able to seek death because there was no aggravating factor which fit the offense. Bradley proposed a new aggravating factor be added to subsection (c):

"(16) MULTIPLE DEATHS.-The death, or injury resulting in death, of more than 1 person, occurred during the commission of the crime."

(141 Cong.Rec. S8098-02, sec. 906.)

On the same day, Congressman Martini of New Jersey introduced an identical bill. The Bradley/Martini language was not adopted as a part of the Death Penalty Act of 1995.

In April 1996, the Conference Committee of the House and Senate debated the antiterrorism legislation which came to be known as the “Antiterrorism and Effective Death Penalty Act of 1996”(EDPA).¹ Title VII, “Criminal Law Modifications to Counter Terrorism”, Subtitle B – “Criminal Procedures” included the following amendment:

SEC. 728. DEATH PENALTY AGGRAVATING FACTOR.

Section 3592(c) of title 18, United States Code, is amended by inserting after paragraph (15) the following new paragraph:

"(16) Multiple killings or attempted killings.-The defendant intentionally killed or attempted to kill more than one person in a single criminal episode."

(H.R. Conf. Rep. 104-518.)

In Senate debate the “Multiple Killings” aggravator was referred to solely in the context of terrorism. Referring to the Oklahoma City Federal Building bombing, Senator Biden of Delaware said:

“We have the protection of Federal employees in here mainly because it is needed now in this day and age with some of the vicious people we have to put up with in our society. We have the protection of current and former officials in here, officers, employees of the United States. We have the death penalty as an aggravating factor. We solve that and add multiple killings to the list of aggravating factors in the imposition of the death penalty.”

(142 Cong.Rec. S3454-01.)

During House debate, Martini was the only Congressman to mention the “multiple killings” aggravator, this time in context of the Montclair killings:

“On March 21, 1995, in the early evening a man walked into the Montclair, NJ, postal substation in my congressional district and summarily killed two postal employees and two customers. I offered the Martini amendment because I wanted to

¹ The EDPA was an omnibus bill that created new offenses specifically related to nuclear, chemical and biological terrorism, espionage, and weapons of mass destruction and granted new authority and funding to enforce those laws. It restricted habeas, expanded surveillance, granted victims’ rights and restitution, restricted the flow of money from foreign entities and limited appeals in death cases. The wording of the bill and the politicians’ speeches surrounding the bill suggest that it was in large part reactive to the 1993 World Trade Center Bombing, the April 1995 Oklahoma City Federal Building bombing, and to the PanAm jet bombing over Lockerbie.

ensure that criminal acts like the Montclair postal shooting would be covered by the death penalty. The Martini language, formally known as the Death Penalty Clarification Act of 1995 (H.R. 1811), would expand the Federal death penalty statute to include situations in which a defendant, “* * * intentionally kills or attempts to kill more than one person in a single criminal episode.”

(142 Cong. Rec. H3605-04.)

The bill, basically unchanged, passed by the House and Senate and signed into law on April 24, 1996.²

The legislative history is not helpful in clarifying the intended application of the “multiple killings aggravator” – is it intended to be an aggravator for terrorist activities where many people are killed or is it intended as a punishment for circumstances like Montclair? The legislative history is equally unenlightening in determining the definition of “single criminal episode.” That notwithstanding, the Montclair Post Office killings would likely be a “single criminal episode.”

Meaning of “single criminal episode” in other federal criminal statutes:

The expression “single criminal episode”, as well as “same criminal episode” and their opposite, “different criminal episode,” has been addressed in federal case law interpreting 18 U.S.C. § 924(e)³. The courts follow the “separate and distinct criminal episode” test when determining whether a defendant is subject to sentence enhancement under § 924(e). *United States v. Schieman*, 894 F.2d 909, 913 (7th Cir.1990); *United States v. Hudspeth*, 42 F.3d 1015, 1019 (7th Cir.1994) (joining nine other circuits “in holding that a defendant is subject to the sentence enhancement if each of the prior convictions arose out of a ‘separate and distinct criminal episode.’”)

²Ed. Note: Resource Counsel David Runhke, counsel in the Montclair postal robbery case, notes that federal death penalty counsel need to be aware of the effective date of this amendment, as it could be important in some of the historical RICO and drug prosecutions where murders are charged from a decade ago or longer.

³Section 924 enhances penalties for persons convicted of prior violent felonies and serious drug offenses. It states:

In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, *committed on occasions different from one another*, such person shall be fined not more than \$25,000 and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

The “separate and distinct criminal episode” test explains that:

1. Crimes committed against separate victims in separate locations are “different criminal episodes.”

In *Hudspeth*, the defendant committed burglaries of three businesses in three different locations in 30 minutes. Crimes against separate victims in separate places at temporally distinct times indicate different criminal episodes. *Hudspeth*, at 1020; *United States v. Williams*, 68 F.3d 168, 170 (7th Cir.1995), *cert. denied*, 116 S.Ct. 971 (1996) (noting that inquiry “is not whether one crime overlaps another but whether the crimes reflect distinct aggressions”).

2. Crimes against different victims in different locations are “different criminal episodes” even if they occur close in time.

In *U.S. v. Godinez*, 998 F.2d 471 (7th Cir.1993), the court was to decide as a matter of law, whether the defendant had committed his 3 prior violent felonies “on occasions different from one another,” as required by § 924(e)(1). We have held that a “different occasion” means a “separate and distinct criminal episode.” *Schieman*, 894 F.2d at 913. Ordering six poker players at the same game to empty their pockets is one criminal episode. But one crime hard on the heels of another can be a “separate and distinct criminal episode,” as *Schieman* itself shows. *Schieman* committed a burglary. Three blocks away he attacked and wounded a police officer. This was a distinct transaction, we held, because the burglary was over. *Ibid.* *Schieman* could have committed either crime without the other; a person willing to commit both is more dangerous than a person who confines himself to one. That the two crimes were close in time did not matter, we concluded. Several other courts similarly have concluded that offenses in rapid succession can be separate “occasions.” E.g., *United States v. Brady*, 988 F.2d 664, 668-69 (6th Cir.1993) (en banc) (robberies of different victims 45 minutes apart); *United States v. Washington*, 898 F.2d 439 (5th Cir.1990) (two robberies of same clerk at a convenience store separated by several hours); *United States v. Wickes*, 833 F.2d 192 (9th Cir.1987) (burglaries of different places on the same evening). (*Id.*, at 472-473.)

3. Crimes that are separated by a meaningful opportunity to desist even if they represent one course of action are “different criminal episodes.”

In *U.S. v. Pope*, 132 F.3d, 684 (11th Cir. 1998), defendant committed two burglaries two hundred yards apart on the same night. In *United States v. Lee*, 208 F.3d 1306, the defendant robbed a credit union, drove two miles away and broke into a shed to hide. In *Pope*, the two robberies and in *Lee*, the robbery and burglary were ruled to be separate criminal offenses “because of the significant separation” between the crimes. “‘So long as predicate crimes are successive rather than simultaneous, they constitute separate criminal episodes for purposes of’ ” § 924(e)(1). *Lee* at 1307, citing *Pope* at 692.

Lee explains, “by ‘successive,’ the *Pope* panel meant that the crimes were separated by ‘a

meaningful opportunity to desist ... activity before committing the second offense,' and that the crimes reflected 'distinct aggressions, especially if the defendant committed the crimes in different places.' ” Moreover, the Court explained that the crimes may represent one course of criminal conduct but still be considered separate crimes where one crime was completed successfully and then the second “crime was committed in a completely different venue.” *Id.* at 1308. [emphasis added.]

By contrast, the “single criminal episode” element of the “multiple killings” aggravator should be read to require multiple victims, in the same location, at the same time. Killings of different victims, at different times or at different locations, even if the killings were part of a single course of conduct, should comprise “different criminal episodes.”

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