No. 20-3

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

GARY DUBOSE TERRY,
Petitioner-Appellant,
v.

BRYAN P. STIRLING, Commissioner, South Carolina Department of Corrections and MICHAEL STEPHAN, Warden, Broad River Correctional Institution,
Respondents-Appellees.

On Appeal from the United States District Court
for the District of South Carolina, No. 4:12-cv-01798
Before the Honorable Richard M. Gergel

BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICI CURIAE* IN SUPPORT OF APPELLANT AND REVERSAL

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The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit voluntary professional bar association founded in 1958 that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense attorneys, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year in the United States Supreme Court and other federal and state courts, seeking to provide *amicus* assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

Pursuant to Federal Rule of Civil Procedure 29(c)(5), the *amicus* states that no party's counsel authored this brief in whole or in part, and that no party or person other than the *amicus* contributed money towards the preparation or filing of this brief.

INTRODUCTION

NACDL submits this brief, consistent with the collective knowledge and experience of its members who have decades of experience working as defense counsel, including as capital defense counsel, to unequivocally affirm that capital defense counsel has an unflagging and unmistakable duty to conduct a thorough and complete investigation of potential mitigating evidence to present to a jury considering a death penalty. This duty is clearly established within the profession and was clearly established in the late 1990s when Gary Terry was sentenced to death.

Gary Terry's trial counsel shirked this responsibility. They never followed up on clear red flags indicating that Terry was abused as a child and failed to present readily available and compelling evidence of that abuse. Trial counsel also failed to communicate effectively with their experts, to assemble a well-functioning defense team, or to prepare a coherent penalty phase trial strategy. Proper presentation of Terry's history of abuse would have been compatible with and significantly strengthened the mitigation evidence trial counsel did attempt to present—that Terry suffers from brain damage—because of the known correlation between childhood trauma and neurological dysfunction.

ARGUMENT

I. The Sixth Amendment requires trial counsel to investigate mitigating factors in a death penalty case.

The Supreme Court has made clear that counsel has a duty to conduct a thorough and complete investigation into a capital defendant's background. *See Wiggins v. Smith*, 539 U.S. 510, 523 (2003) (focusing on "whether the investigation supporting counsel's decision not to introduce mitigating evidence . . . *was itself reasonable*"); *Strickland v. Washington*, 466 U.S. 668, 691 (1984); *see also Porter v. McCollum*, 558 U.S. 30, 39 (2009) ("[C]ounsel had 'an obligation to conduct a thorough investigation of the defendant's background.'" (quoting *William v. Taylor*, 529 U.S. 362, 396 (2000)). Without a thorough mitigation investigation, counsel lacks the information required to make strategic judgments concerning the selection and presentation of evidence. *See, e.g.*, *Sears v. Upton*, 561 U.S. 945, 954 (2010) ("We rejected any suggestion that a decision to focus on one potentially reasonable trial strategy . . . can be 'justified by a tactical decision' when 'counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background.'"); *Wiggins*, 539 U.S. at 524 (explaining that effective assistance of counsel requires that counsel make "efforts to discover *all reasonably available* mitigating evidence" *before* making strategic decisions" (internal quotation marks omitted)). Indeed, failure to investigate a defendant's background "[makes] it impossible for [counsel] to adopt a reasonably informed strategy." *Gray v. Branker*,

529 F.3d 220, 234 (4th Cir. 2008). A thorough investigation is a predicate to making a reasonable strategic judgment. *Strickland*, 539 U.S. at 691; *Hyman v. Aiken*, 824 F.2d 1405, 1416 (4th Cir. 1987) (noting that the presumption that counsel's omissions were part of trial strategy "does not overcome [their] failure . . . to be familiar with readily available documents").

The Supreme Court affirmed these principles just this month in *Andrus v. Texas*, No. 18-9674, slip. op. (U.S. June 15, 2020) (per curiam), which held that defense counsel provided ineffective assistance of counsel by failing to adequately investigate evidence that the defendant suffered significant trauma as a young person. In *Andrus*, the defendant had been subject to significant neglect and abuse as a child and teenager that resulted in serious mental health issues. *Id.* at 1, 5–7, 10–11. However, the jury never heard this mitigating evidence because defense counsel "abandoned [his] investigation of [the defendant's] background after having acquired only a rudimentary knowledge of his history from a narrow set of sources." *Id.* at 10 (quoting *Wiggins*, 539 U.S. at 524 (first alteration in original)). Counsel also ignored other red flags presented to him by mitigation experts. *Id.* at 10–11. "No doubt due to counsel's failure to investigate the case in mitigation," the mitigation case that *was put on* by trial counsel inaccurately portrayed the circumstances of the defendant's childhood and favored the government's preferred narrative. *Id.* at 11–

12. Accordingly, trial counsel's performance was constitutionally deficient. *Id.* at 19.

a. The duty to investigate mitigating factors extends to investigating evidence of trauma and abuse.

Evidence of trauma and childhood abuse is precisely the kind of evidence that reduces a defendant's moral culpability and evokes sympathy from the jury. *Winston v. Kelly*, 592 F.3d 535, 571 & n. 11 (4th Cir. 2010) (Gregory, J., concurring in part and dissenting in part). This evidence is "persuasive mitigating evidence for jurors considering the death penalty," and "can determine the outcome." *Id.* n. 11 (quoting *Gray*, 529 F.3d at 235); *see also Smith v. Mullin*, 379 F.3d 919, 942 (10th Cir. 2004) (noting that evidence of "brain damage[] and troubled background" is "exactly the sort of evidence that garners the most sympathy from jurors"). Put differently, evidence of trauma and abuse is quintessential mitigating evidence.[1]

[1]Indeed, in the years leading up to Terry's sentencing multiple defendants were spared the death penalty, including in South Carolina, where defense counsel presented evidence of abuse and cognitive impairment as mitigating circumstances. *E.g.*, Chase Squires, *Jury splits, rejects death penalty for killer*, Tampa Bay Times (Oct. 1, 1998); Tamara Jones, *Susan Smith spared by South Carolina jury*, The Washington Post (July 29, 1995); Kate Kerwin and Dennis Schroeder, *Jury spares Fears' life, rejects death penalty*, Rocky Mountain News (Mar. 28, 1993); Michael Greenwood, *Jury in Lapointe trial rejects death penalty*, Hartford Courant (July 30, 1992); Jay Apperson, *Scoates sentenced to life in prison Queen Anne's jury rejects death penalty*, The Baltimore Sun (Nov. 20, 1991); Narutes Chichioco, *Jury votes 30-year term for slayer*, Asbury Park Press (Jun. 20, 1989).

These articles and the other publications cited by amicus are included in the attached addendum for the Court's convenience.

Because both childhood abuse and the resulting trauma to the brain have independent mitigating value, evidence of either is a significant marker that counsel is required to investigate further. Indeed, the Supreme Court has identified evidence of head injury, traumatic experiences, substance abuse, low IQ, poor academic performance, and cognitive deficits as red flags requiring further investigation. *See, e.g.., Sears*, 561 U.S. at 948–51; *Porter*, 558 U.S. at 34–36; *Rompilla v. Beard*, 545 U.S. 374, 391–93 (2004); *Wiggins*, 539 U.S. at 535; *Williams*, 529 U.S. at 398; *Winston*, 592 F.3d at 571 n. 11 (Gregory, J., concurring in part and dissenting in part) ("Evidence of a diminished mental capacity, along with evidence of a traumatic childhood is precisely the kind of evidence that reduces a defendant's moral culpability and provokes sympathy from the jury.").

b. The duty to investigate abuse and trauma was well established when Terry was sentenced to death in 1997

Before Terry's trial in 1997, the Supreme Court had long recognized the importance of child abuse and brain damage as mitigating factors and had established counsel's corresponding duty to investigate their clients' childhoods and family backgrounds. *See Penry v. Lynaugh*, 492 U.S. 302, 322–24 (1989) (holding that childhood abuse is a mitigating circumstance and juries must receive an instruction to that effect), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002); *id.* at 319 ("[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants

who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J. concurring)); *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982) ("Evidence of a turbulent family history, of beatings by a harsh father, and of severe emotional disturbance is particularly relevant"); *id.* ("Evidence of a difficult family history and of emotional disturbance is typically introduced by defendants in mitigation." (citing *McGautha v. California*, 402 U.S. 183, 187–88, 193 (1971)). Numerous lower courts had similarly recognized the mitigating effects of childhood abuse and brain damage. *See, e.g.*, *McDougall v. Dixon*, 921 F.2d 518, 522 (4th Cir. 1990) (acknowledging defendant's brain damage as a mitigating factor); *Motley v. Collins*, 18 F.3d 1223, 1227–28 (5th Cir. 1994) (citing *Strickland* and describing the petitioner's history of severe child abuse, explaining its importance in sentencing, and noting that trial counsel unreasonably failed to introduce evidence of brain damage in connection with evidence of child abuse).

Guidelines for defense attorneys, which capture contemporaneous views of defense counsel's role, confirm that the prevailing professional norms in the 1990s included counsel's duty to investigate child abuse and brain trauma. In the 1990s, the American Bar Association (ABA) standards pertaining to capital defense work provided that a sentencing phase investigation "should comprise efforts to discover

all reasonably available mitigating evidence." ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C) (1989).[2] As part of these efforts, counsel had a duty to collect information pertaining to "family and social history (including physical, sexual or emotional abuse)," and to "obtain names of collateral persons or sources to verify, corroborate, explain and expand upon [the] information obtained." *Id.*, 11.4.1(D).

II. The duty to ensure a constitutionally adequate social history investigation lies squarely with trial counsel.

a. Trial counsel does not fulfill their Sixth Amendment obligations merely by hiring experts.

The Sixth Amendment does not permit trial counsel to abandon the duty to investigate, even when trial counsel has retained an expert.

First, although trial counsel must often rely on witnesses, experts, and paralegals to aid in the gathering of evidence, the failures of third parties do not release trial counsel from the duty to investigate. While trial counsel must often rely on others to aid in the gathering of evidence, that practical reality does not relieve trial counsel of the responsibility of ensuring a thorough investigation. *Rompilla*, 545 U.S. at 381–87 (holding state court incorrectly applied *Strickland* even though defendant and other witnesses told his attorneys that his childhood was "normal");

[2] In assessing the reasonableness of an attorney's performance, the Supreme Court has looked to standards promulgated by the American Bar Association (ABA) as appropriate guides. *See, e.g.*, *Wiggins*, 539 U.S. at 524.

Gray, 529 F.3d at 230 (dismissing the argument that the defendant's "refusal to spend his own funds for a psychiatric evaluation ended his counsel's responsibility to investigate for mental health evidence"); *Johnson v. Bagley*, 544 F.3d 592, 603 (6th Cir. 2008) ("Uncooperative defendants and family members . . . do not shield a mitigation investigation (even under AEDPA's deferential standards) if the attorneys unreasonably failed to utilize other available sources that would have undermined or contradicted information received.").

Second, just as "a reasonable lawyer would not rely on his client's self-assessment of his mental health, especially in a capital case," a reasonable lawyer would not rely on an expert to conduct an investigation for him. *Gray*, 529 F.3d at 231. Trial counsel has "an independent duty to investigate." *Id.* To wit, even when counsel relied on an expert to investigate, this Court, and others, have found that failure to investigate is traceable to trial counsel. *Winston v. Pearson*, 683 F.3d 489, 505 (4th Cir. 2012) (holding trial counsel's failure "to review [Winston's] school records and interview school officials about his mental functioning amount[ed] to deficient performance" even though an expert was retained); *see also Williams v. Allen*, 542 F.3d 1326, 1339 (11th Cir. 2008) (holding "trial counsel's failure to broaden the scope of their investigation" beyond an expert report, which failed to provide any information regarding the defendant's social history and noted that the only information on the subject came from the defendant himself, "was unreasonable

under prevailing professional norms" in case from 1980s); *Johnson*, 544 F.3d at 600–03 (finding trial counsel's 1998 investigation into the defendant's childhood abuse amounted to deficient performance because trial counsel failed to read a "12-inch stack of files" that documented the defendant's "horrific childhood" even though trial counsel gave records to a mitigation specialist, who also failed to read them).[3]

Third, experts do not perform the same functions as trial counsel. Rather, an expert's duties in each case are set by trial counsel. It is counsel's responsibility to, *inter alia*, select appropriate experts when needed, define the scope of the expert's role in the case, communicate effectively with defense team members, and provide the relevant information an expert needs to fulfill his or her specific tasks in the case. The notion that these and other Sixth Amendment obligations of legal counsel can be transposed onto experts has no grounding in the law. *Wilson v. Greene*, 155 F.3d 396, 401 (4th Cir. 1998) ("This circuit consistently has 'rejected the notion that there is either a procedural or constitutional rule of ineffective assistance of an expert witness, rather than ineffective assistance of counsel.'"). Likewise, permitting trial

[3] Counsel's responsibility to investigate is even clearer considering that trial counsel must conduct a thorough investigation *before* deciding whether and which defense experts to engage. *Gray*, 529 F.3d at 231 (finding trial counsel's failure to engage a defense expert amounted to deficient performance because counsel "failed to undertake a reasonable investigation *before* making that choice"). It cannot be the case that engaging an expert relieves trial counsel of duties that they must perform *before* hiring an expert.

counsel to outsource their constitutional duties to experts, who are expected to play categorically different roles, would effectively deny capital defendants their Sixth Amendment right to affective assistance of counsel.

b. Trial counsel is required to actively oversee the mitigation investigation.

At the time of Terry's trial in 1997, the concept that capital defense lawyers must actively work and communicate with non-legal experts was well established in the field of capital defense.[4] While defense lawyers had and continue to have a duty to foster communication between experts in order to clarify strategy, ensure that information is universally shared among the team, it ultimately is the role of counsel to present the best possible evidence in mitigation. *See* James Hudson, Jane Core, & Susan Schorr, *Using the Mitigation Specialist and the Team Approach*, CHAMPION 33, 33 (1987).

By the 1990s, professional guidance firmly established that defense counsel should use a "team approach" to a capital case, coordinating with multiple people of varying skillsets to pool resources. *See id*. The team approach is essential because

[4] Robert R. Bryan, *Death Penalty Trials: Lawyers Need Help*, CHAMPION 32, 32 (1988) ("Nonlawyers must be actively involved in the pretrial and trial process."); David C. Stebbins & Scott P. Kenney, *Zen and the Art of Mitigation Presentation, or, The Use of Psycho-Social Experts in the Penalty Phase of a Capital Trial*, CHAMPION 14, 16 (1986) ("For all practical purposes, the effective use of social workers, psychologists, and psychiatrists is necessary for the effective representation of a capitally-charged defendant.").

lawyers are not trained in many of the skills required to mount a full and effective capital defense, and the stakes are simply too high for lawyers to rely on their own instincts and intuitions. Kevin McNally, *Death is Different: Your Approach to a Capital Case Must Be Different Too*, CHAMPION 8, 12 (1984); Dennis N. Balske, *The Penalty-Phase Trial: A Practical Guide*, CHAMPION 40, 41 (1984) ("When the stakes and responsibilities are extreme, as in a capital case, both the defendant and the defense attorney need a great deal of support. That is why an attorney trying a death case should make every effort to assemble a team of people to try the case."). Members of the team often include social workers, psychologists, clergy members, jury selection experts, investigators, paralegals, and members of the community. Robert R. Bryan, *Death Penalty Trials: Lawyers Need Help*, CHAMPION 32, 33 (1988). Attorneys generally do not have the required knowledge of human behavior and psychology to paint a mitigating picture for the jury of the factors in a defendant's life that may render him less culpable. *See* Stebbins & Kenney at 16 . Consequently, collaborating with experts in social science, including psychologists, psychiatrists, and social workers, is crucial for mitigation. *See id.* ("[Attorneys] do not have the skills to accomplish the goals of mitigation. . . . For all practical purposes, the effective use of social workers, psychologists, and psychiatrists is necessary for the effective representation of a capitally-charged defendant."); *Team Defense in Capital Cases*, FORUM 24, 24 (1978) ("The team itself is made up of both

attorneys and social scientists. We feel that it is impossible to separate the law from the psychology of human behavior. To win at trial, an in-depth knowledge of both disciplines is required.").

While seeking the help of a team of investigators and social scientists is necessary for a capital defense attorney to prepare a full and complete defense, the team approach "doesn't give [attorneys] license to pass the buck"—in other words, attorneys must request help from and constantly communicate with experts, not abdicate responsibility to them. McNally at 13. Regardless of the work of experts, lawyers, themselves are still under a duty to investigate "every aspect" of their clients' lives in mitigation: "In order to be able to give the jury a reason not to kill, [attorneys] must conduct the most extensive background investigation imaginable. [Attorneys] should look at every aspect of your client's life from birth to the present. . . . Failure to make that background investigation will seal your client's fate." Balske at 42. Therefore, attorneys have a ethical and legal responsibility to oversee and maintain constant communication with experts in order to present constitutionally adequate mitigating evidence. The buck stops with the lawyer.

III. The decision below departs from that precedent.

a. The district court erred in finding that trial counsel conducted an adequate investigation.

There can be no doubt that counsel's investigation here was deficient: they simply ignored the evidence their investigators collected regarding their own client.

The type of information contained in these records was exceedingly valuable in the context of a capital sentencing phase. In Terry's case, trial counsel's failure to thoroughly investigate evidence of either Terry's childhood abuse or brain damage was especially harmful to Terry's mitigation case because, had the trial experts known that Terry had both an abusive childhood and brain damage, they would have been able to explain to the jury the connection between Terry's abusive childhood and his neurological deficits, making Terry's other medical diagnoses more mitigating.

Prior to Terry's trial in 1997, the causal link between child abuse and brain damage was widely recognized and discussed in the scientific literature.[5] Numerous

[5] *See* Murray B. Stein et al., *Hippocampal Volume in Women Victimized by Childhood Sexual Abuse*, 27 PSYCHOL. MED. 951, 955 (1997) (observing that women who reported sexual victimization in childhood had significantly reduced volume in the left side of the hippocampus compared to non-victimized women, resulting in deficits in regulating memory and emotion); Frederic Schiffer, Martin H. Teicher, & Andrew C. Papanicolaou, *Evoked Potential Evidence for Right Brain Activity During the Recall of Traumatic Memories*, 7 J. NEUROPSYCHIATRY & CLINICAL NEUROSCIENCE 169, 174 (1995) (finding that child abuse causes deficits in the connection between the right and left hemispheres of the brain, the consequences of which include inability to access traumatic memories); Arthur H. Green et al., *Neurological Impairment in Maltreated Children*, 5 CHILD ABUSE & NEGLECT 129, 130 (1980) (finding that children who had been physically abused were significantly more likely to suffer from neurological damage and impairment than children who had not been abused, even though the abused children had never been hit in the head); Selwyn M. Smith & Ruth Hanson, *134 Battered Children: A Medical and Psychological Study*, 14 BRIT. MED. J. 666, 669 (1974) (revealing "permanent neurological impairment" in children who suffered abuse); Michael A. Baron et al.,

studies had revealed that individuals who had suffered abuse in childhood were significantly more likely to suffer from brain damage and other neurological impairment compared to individuals who had not experienced abuse.[6] Had Terry's trial counsel informed their medical experts of Terry's deeply troubled childhood, the experts would have been able to explain to the jury that Terry's neurological dysfunction was at least partially caused by the abuse he suffered, and that any acts that Terry committed as a result of that dysfunction similarly resulted from his childhood abuse.

Instead, Terry's counsel failed to conduct a thorough investigation and work with defense experts to facilitate an effective mitigation defense. Jan Vogelsang, the defense's social worker, told federal counsel that the defense was not an "active and cohesive team." JA078. Vogelsang, who had worked on over 100 capital cases across the country, explained that "communication between the attorneys and the experts play[s] a critical role in the thorough development of the case and the presentation to the jury during the penalty phase" and that capital defense teams "must have regularly scheduled meetings and consultation with all parties in order to share research and develop consistent themes." JA078–79. However, she could

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Neurologic Manifestations of the Battered Child Syndrome, 45 PEDIATRICS 1003, 1006 (1970).

[6] *See, e.g.*, Green, *supra* Note 5, at 130; Stein et al., *supra* Note 5, at 955.

not remember ever meeting with Terry's defense team to discuss her testimony. JA079. Vogelsang explained that she would have "argued to include the abuse" documented in her records "in the context of Gary's entire life and his development" had she communicated regularly with Terry's counsel. JA079. Further, because trial counsel failed to facilitate and insist on communication between their mental health experts and social history experts, Terry's expert medical witnesses never even learned of his abusive childhood. JA047. Without knowledge of the abuse that Terry suffered, his medical experts were unable to provide context and a possible explanation for his extensive neurological dysfunction.

b. The district court erred in attributing trial counsel's errors to Terry's experts.

The district court erred in attributing counsel's failure to investigate to defense experts. The district court concluded that any deficiency "falls to Vogelsang or Massey [the defense investigator] for not conveying the full extent of [Terry's] abuse to counsel, and not to counsel." This conclusion ignores trial counsel's well-established professional obligations. In *Winston v. Pearson*, this Court held that defense counsel was ineffective where counsel relied almost entirely on an expert's analysis and failed to thoroughly review Winston's school records themselves, which would have provided revealed evidence of Winston's low IQ. 683 F.3d at 505. The Court concluded that it was defense counsel's responsibility—not an expert's

responsibility—"to investigate to make defensible professional decisions qualifying as 'informed legal choices.'" *Id.*

Here, the trial court concluded that any deficiency fell on Terry's experts, and that "it is not unreasonable or against prevailing professional norms for counsel to rely on a qualified . . . expert." *Terry v. Stirling*, No. 12-1798, 2019 WL 4723345, at *14 (D. S.C. Sept. 26, 2019). That may be true where trial counsel performs a thorough investigation and relies on expert opinions to further develop counsel's *fully informed* legal decisions. In a cases such as this, however, where trial counsel completely delegated its responsibilities of investigating Terry's case to the experts and did not exercise his own professional legal judgment, that is not, and cannot be, the law.

In *Johnson v. Bagley*, the Sixth Circuit recognized that the ineffectiveness of a mitigation expert does not excuse trial counsel's deficient performance. In that case, Johnson's defense counsel and mitigation expert failed to read Ohio Department of Human Services records that would have revealed Johnson had suffered severe abuse as a child. 544 F.3d at 600 ("Three days before the penalty phase began . . . the defense's 'mitigation specialist[]' acquired the files from the agency. Yet he never looked at the records but simply handed them over to defense counsel."). The Sixth Circuit noted that the mitigation expert was utterly ineffective and that testimony at the mitigation hearing "only scratched the surface of Johnson's

horrific childhood." *Id.* at 602. However, the deficiency of the expert's testimony did not excuse trial counsel's failure to read the Human Services records and uncover evidence of the abuse. *Id.* Instead, the court held that the ultimate onus was on Johnson's trial attorneys to perform a reasonable investigation. *Id.*

The evidence presented to the jury in Terry's case similarly only scratched the surface of the horrific childhood that Terry experienced. Terry's trial counsel was ultimately responsible for investigating Terry's case and discovering the full extent of any evidence that may have mitigated his sentence—especially considering that the mitigation expert provided trial counsel with evidence of Terry's abusive childhood. Vivian Massey, the mitigation investigator, sent all of her interview notes to trial counsel, and Massey's notes included detailed narratives about abuse that the jury never heard. *See, e.g.*, JA053. Despite this evidence in trial counsel's file indicating abuse, trial counsel failed to investigate further to uncover the true nature of Terry's upbringing detailed in the affidavits from his mother, his uncle, his sister, and his sister-in-law. JA101–02.

CONCLUSION

Because of the inconsistency between the Panel's decision and trial counsel's clear, unflagging and unmistakable duty to conduct a thorough and complete investigation, this Court should remand for a full hearing on the merits of Terry's claims.

Respectfully submitted,

/s/ Marc Elias

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the undersigned hereby certifies that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32.

1. This brief complies with the type-word limit of Fed. R. App. P. 32 because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 4,994 words.

2. This brief complies with the requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word for Microsoft 365 in 14-point Times New Roman font.

APPENDIX

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Jury votes 30-year term for slayer

Panel rejects death penalty

By MARITES CHICHIOCO
Press Staff Writer

THE MAN convicted of shooting and killing a former Lavallette resident has been spared the death penalty and will be sentenced to 30 years in prison with no chance of parole.

An Atlantic County jury Wednesday decided Richard Highlander should be imprisoned for the April 1988 death of Gloria Simonelli, who was slain outside a restaurant in Margate.

Ms. Simonelli, 31, was a former Lavallette resident and a 1976 graduate of Toms River High School North.

She was employed at the Tropicana Hotel and Casino and had been living in Margate.

The jury deliberated about four hours before reaching a decision. Superior Court Judge Steven P. Perskie is scheduled to sentence Highlander July 21.

Last week, the same jury found Highlander guilty of murder. Under state law, the jurors sit in a second phase to decide if the death penalty is warranted.

The jurors must weigh circumstances about the crime that may call for a harsh penalty and those factors that call for leniency.

Assistant Prosecutor Murray Talasnik said the jury agreed on two aggravating factors: that the slaying was a purposeful act and that Highlander murdered to avoid prosecution on an aggravated assault charge against him.

Jurors also found mental disorders Highlander suffered to be mitigating factors.

Authorities said Miss Simonelli had broken off a relationship with Highlander after several months. Highlander assaulted her at her Margate home in March 1988 and a grand jury had indicted him on assault charges.

Talasnik argued during the trial that authorities believed Highlander thought that by killing Miss Simonelli, he could escape prosecution.

Highlander shot Ms. Simonelli as she left a Margate restaurant on the night of April 25, 1988. He fired one shot that hit her in the chest, and fired another round at her male companion before fleeing, police said.

He was later apprehended by police and FBI agents in South Carolina.

Two jurors found a mitigating factor in favor of Highlander — that he was under the influence of a mental disease that affected his judgment.

Talasnik said the defense presented testimony during the penalty phase of the trial that showed Highlander was suffering from intermitted explosive disorder related to abuse he suffered when he was a child and witnessed his father abusing his mother.

The death penalty could not be imposed because the two jurors could not decide whether the aggravating factors outweighed the mitigating factors. The death penalty can only be imposed by a unanimous decision of the jurors, he said.

Highlander will serve at least 30 years without parole, and could serve up to life in prison. His parole ineligibility could be longer because of the other convictions. Highlander has a record of drug, assault and weapons arrests.

Police described him as a self-employed window washer.

During the first phase of the trial, the defense also contended Highlander should only be charged with manslaughter because he was under the influence of drugs at the time of the shooting.

NewsRoom

11/20/91 Balt. Sun 2D
1991 WLNR 810322

Baltimore Sun (MD)

November 20, 1991

Section: News (Local)

SCOATES SENTENCED TO LIFE IN PRISON QUEEN ANNE'S JURY REJECTS DEATH PENALTY

Jay Apperson Sun Staff Correspondent

A Queen Anne's County jury refused last night to condemn to death an Annapolis man convicted of murdering and robbing his former housemate last year in Crownsville.

The jury deliberated for two hours and 45 minutes before sentencing 31-year-old Ronald L. Scoates to life in prison with no chance for parole.

Scoates displayed little outward reaction to the ruling and declined to comment.

Prosecutors had sought the death penalty for Scoates, a paroled murderer from Florida convicted last month in the July 1990 stabbing death and $50 robbery of 57-year-old Robert Austin Bell.

In determining the sentence, the jury ruled Scoates' life should be spared because of mitigating factors relating to a childhood spent with a hard-drinking, dysfunctional family. The jury described the man's father as a "sadistic, lawless role model."

The sentencing was described as fair by people on both sides of the case. Robert Bell Jr., the victim's 35-year-old son, said he had mixed emotions about the death penalty. "I think justice has been served," he said.

During the two-day sentencing hearing, his lawyers suggested that co-defendant Michael D. Swartz was the killer.

Moments before the jury retired to consider its decision, a visibly nervous Scoates said, "I didn't kill Bob Bell. I took money from him, which is wrong. This really hurts me to ask you this. I'm begging for mercy because I don't want to die."

The jury ruled Scoates had caused Mr. Bell's death, but was swayed by testimony about a Florida childhood described by defense attorney Russell F. Canan as "almost too bizarre for words."

Family members and social workers said Scoates was abandoned by his mother and was pistol-whipped and taught to steal by his alcoholic father, who terrorized family members with live alligators. His most "positive relationship" was with a grandfather who started each day with a shot of liquor and liked to cradle a pistol in his hands while watching television, testimony showed.

Prosecutor William D. Roessler asked the jury to concentrate on Scoates' behavior after being paroled upon serving less than seven years of a 35-year sentence for second-degree murder in Florida. Testimony showed he beat his wife and was arrested on drug charges.

CENTREVILLE

---- Index References ----

Company: XIA MEN AN NI GU FEN YOU XIAN GONG SI

News Subject: (Social Issues (1SO05); Violent Crime (1VI27); Crime (1CR87); Death Penalty (1DE04))

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Hartford Courant (Hartford, Connecticut) · 30 Jul 1992, Thu · Page 19

Jury in Lapointe trial rejects death penalty

By MICHAEL GREENWOOD
Courant Correspondent

Richard A. Lapointe, the former Manchester dishwasher convicted of raping, stabbing and strangling an 88-year-old woman, was spared the death penalty Wednesday, but will spend the rest of his life in prison.

It took a 12-member jury at Superior Court in Hartford four hours of deliberations Tuesday afternoon and Wednesday morning to find at least one mitigating factor in Lapointe's 1987 murder of his wife's grandmother, Bernice B. Martin.

Under state law, if even one mitigating factor is found in a capital felony case, the death penalty cannot be imposed.

Jury foreman Michael A. Palin of Hartford said evidence of Lapointe's brain damage from a birth defect, known as hydrocephalus, was one of the strongest mitigating factors presented by the defense. "Something wasn't right," he said.

Lapointe's birth defect and the ensuing five cranial operations both contributed to brain damage and resulted in an IQ of 92, which is low average, a neurosurgeon from Yale University testified during the trial.

Dressed in slacks, a short-sleeve blue shirt and gray tie, Lapointe, 46, reacted without any apparent emotion as the jury returned its verdict. He turned up his hearing aid on one occasion and scratched at his mustache, but remained passive, as he had throughout the trial.

Superior Court Judge David M.

Please see Jurors, Page C9

NewsRoom

3/28/93 Rocky Mtn. News 3
1993 WLNR 478871

Denver Rocky Mountain News (CO)

March 28, 1993

Section: LOCAL

JURY SPARES FEARS' LIFE, REJECTS DEATH PENALTY KILLER FACES 224 YEARS IN PRISON IN CONSECUTIVE SENTENCES, IS UNLIKELY EVER TO BE RELEASED

KATIE KERWIN AND DENNIS SCHROEDER ROCKY MOUNTAIN NEWS STAFF WRITERS

A Denver jury spared Kevin Fears the death penalty Saturday - instead ordering the convicted double murderer to spend his life behind bars.

Fears, 24, quietly thanked the jurors, then buried his head in his hands while his defense attorneys cried. A day earlier, Fears had brought some jurors to tears as he begged for mercy. As he left the courtroom, he smiled.

The jury deliberated less than 90 minutes in the penalty phase of his trial before handing down life sentences for each of the two murders. Fears now faces total sentences of 224 years in prison.

Barring the possibility of a successful appeal, the several consecutive sentences for murder and other convictions in the assaults make it unlikely Fears ever will leave prison.

The same jury convicted Fears on nine counts earlier this month for shooting robbery witness Frank Magnuson and his housemate, Dan Smith, to death June 6, 1989, in Denver. Magnuson had been due to testify the next day against Fears' friend, Roger "Roy" Young, in a holdup case.

Fears also tried to kill Steven Curtis that night in the Bonnie Brae home Curtis shared with Magnuson and Smith, but Curtis survived a bullet wound in his head and testified at the trial. Young is accused of masterminding the murder plot from jail and faces trial next month. His brother, Joseph Young, is accused of helping Fears carry out the killings and faces trial this summer.

Curtis and Magnuson's parents sat in the packed courtroom Saturday when the verdict was announced. They acknowledged disappointment but declined to comment until the other two trials end. Prosecutors also declined to comment.

Fears' family celebrated the sentence.

"The last three years have taken me through life and death," said Fears' older brother, Terrell Fears. "I'm very sorry for the Magnusons and Smiths and all the victims involved and their families."

Terrell Fears blamed society for failing to help his brother, the son of a psychotic, alcoholic mother. Doctors testified that Fears was born with fetal alcohol syndrome and was a victim of extreme abuse and neglect.

"I think this all stems from our upbringing and the lack of social services. No one was hearing my brother's and sister's cries for help," Terrell Fears said.

All twelve jurors declined to comment Saturday. But in their verdict, they found that prosecutors proved the murders were especially heinous, citing seven aggravating factors ranging from ambushing and torturing the victims to murdering an innocent bystander. Some jurors believed, however, that mitigating factors from Fears' deprived childhood outweighed the aggravating factors. To order the death penalty, the jury must be unanimous.

In a rare move, Denver District Judge William Meyer brought in psychiatrist Doreen Orion to counsel the jurors for two hours about the horrors they had experienced during the two-month trial.

"This case was especially gruesome," Orion said. She warned jurors to get help if they have nightmares or trouble sleeping and urged them to talk about their reactions.

Terrell Fears speculated that his brother's decision to make a plea to the jurors to spare his life was pivotal.

"I think my brother's prayers and his testimony saved his life," the brother said.

LIB8 LIB

PHOTO

Kevin Fears' brother, Terrell, blames his brother's behavior on upbringing and lack of help. By Dennis Schroeder / Rocky Mountain News. FILE: FEARS, TERRELL

COLORADO

---- Index References ----

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Other Indexing: (COLORADO; FACES; PHOTO; SENTENCES) (Curtis; Dan Smith; Dennis Schroeder; Doctors; Doreen Orion; Fears; Frank Magnuson; Joseph Young; JURY SPARES; Kevin Fears; Magnuson; Magnusons; Orion; Roger; Smith; Smiths; Steven Curtis; Terrell; Terrell Fears; William Meyer; Young)

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The Washington Post

SUSAN SMITH IS SPARED BY SOUTH CAROLINA JURY

By Tamara Jones
July 29, 1995

A jury today declined to give Susan Smith the death penalty, sentencing her instead to life in prison for the drowning of her two small sons in the dark waters of John D. Long Lake last fall.

Smith closed her eyes in relief after the court clerk read the sentence, six days after the same jury found her guilty of first degree murder. Smith, 23, will be eligible for parole after 30 years.

"She was scared," said the Rev. Toni White, the chaplain who prayed with Smith behind closed doors before the verdict was announced. "She was shaking all over and very anxious. But she is relieved."

An excited gasp rose from the three rows reserved for Smith's family and friends when the verdict was read. Her mother, Linda Russell, was dry-eyed, as she had been for most of the trial. Beverly Russell, the stepfather who molested Smith at 15 and was intimate with her again weeks before the murders, cried hard from his seat on the side, isolated from the rest of the family.

But outside, on the courthouse steps, David Smith, Smith's former husband and the father of the two drowned boys, expressed his disappointment when asked if he thought justice had been done.

"Personally and on the part of my family, no," he said.

"I'll never forget what Susan has done and I'll never forget Michael and Alex. Me and my family of course are disappointed that the death penalty wasn't the verdict."

"We all felt like Susan was a really disturbed person," said juror Deborah Benvenuti. "And we all felt that giving her the death penalty wouldn't serve justice."

Sheriff Howard Wells, who coaxed a confession from Smith nine days after she reported that 3-year-old Michael and 14-month-old Alex had been abducted by a carjacker, studied her face as the sentence was pronounced.

"She was staring straight ahead," he said. "She closed her eyes and showed a great sense of relief."

Smith refused to testify in her own defense and chose not to read any statement to the court before being sentenced. As the lurid details of her life were spelled out during the trial -- her father's suicide, her

molestation, her own botched attempts to kill herself, her adultery -- she seldom wept. She jiggled her foot incessantly and sometimes rocked gently back and forth. Her head was often bowed, her eyes averting the jury of nine men and three women.

"There is no good outcome to this case," defense attorney David Bruck said afterward, describing it as "the most awful, horrible tragedy from the beginning."

"She was very relieved for her mother and for the rest of her family because she knew . . . that the people she loved could not bear a death sentence," he said.

Earlier, Bruck had implored the jury to show mercy, saying in his closing argument that Smith had made a choice that night at John D. Long Lake, "and that choice will haunt her the rest of her life."

But in his closing, prosecutor Tommy Pope challenged the sincerity of Smith's remorse and the claim that she went to the lake intending to commit suicide and take her children with her, only to lose her nerve at the last minute and jump out of the car.

Why, Pope wondered, didn't she then try to save Michael and Alex, trapped in their car seats as their mother's burgundy Mazda sank, taking nearly six minutes to hit the muddy bottom 18 feet below.

"She wasn't even wet," Pope said.

"That is a horrible thing her stepfather did to her," Pope said of the relationship used by the defense to explain much of Smith's inner torment. "But Michael and Alex have nothing to do with what went on with Bev Russell."

Pope described Smith as selfish and manipulative, an actress who could turn tears off and on at will. "She looked every one of us in the eye and lied," he said, referring to Smith's tearful appeals on national television for the return of her sons during the massive nine-day search for the missing toddlers.

Fingering photographs of the boys, Pope tried to put the jurors in Susan Smith's car as it rolled down the boat ramp the night of Oct. 25, starting his sentences over and over with the words: "The car fills up with water . . . "

"Susan Smith struck at the heart of every deep fear a child has," Pope said. "When those boys rolled down that ramp, they went into darkness. If they were asleep, they weren't asleep after this, after that car hit the water. What did they see?

"They were probably crying," he said. "They knew it was dark. They knew they were scared. They knew they were alone . . . but their mother ran with her hands over her ears."

When Smith confessed to the killings last Nov. 3, angry crowds gathered outside the courthouse to jeer her. But the lust for vengeance seemed to temper with time as her dark secrets came to light, and there was no

outcry when the verdict came in at 4:40 p.m.

Some of the spectators had lined up at 5:30 a.m. on the courthouse steps, eager to claim one of the 220 seats inside when court convened four hours later. Some, like great-grandmother Elizabeth Morris, had come faithfully each day, waiting in the punishing July sun.

"I just wanted to know the truth of it," Morris said.

Pope, defending his decision to seek the death penalty, said he would do the same thing again.

"This community can begin to heal," he said. "It's taken a tremendous toll . . . but it's something that had to be done."

David Smith said he too longs for healing. He said he's thinking about moving away from Union and all its memories.

"There are a lot of things I'd really rather not look at and have got to get away from," he said.

By the time Circuit Judge William Howard had formally sentenced Susan Vaughan Smith, the heat wave had finally broken and a storm was gathering. The cooling rain fell hard on Union County. CAPTION: Juror Deborah Benvenuti speaks to reporters. "We all felt like Susan was a really disturbed person," she said. CAPTION: Susan Smith is led from Union, S.C., courthouse after sentencing. CAPTION: Susan Smith's mother, right, leaves courthouse with unidentified woman.

Tampa Bay Times (St. Petersburg, Florida) · 1 Oct 1998, Thu · Page 72

Jury splits, rejects death penalty for killer

■ Jurors are evenly divided, leading to a recommendation that Earl Linebaugh spend life in prison without parole for the 1995 slaying of two women.

By CHASE SQUIRES
Times Staff Writer

DADE CITY — An emotionally charged argument divided a once-close jury Tuesday and may have spared convicted killer Earl Linebaugh's life, despite the two he took.

A nine-woman, three-man jury split 6-6 on whether Linebaugh, 28, should die in the electric chair or serve life in prison without parole for killing Alice Durfee, 57, and Maudeline Bailey, 84, in Bailey's Crystal Springs mobile home in November 1995.

The tie means life in prison, unless Circuit Judge Lynn Tepper overrides the jury's recommendation, which is not expected.

Jurors said the 90 minutes they spent deliberating ripped apart friendships formed during the trial and penalty process that began in June.

"We were a very close jury until this," said juror Christina Kruck, who voted for the death penalty. "After all this time, you feel like the other people got their way. You feel wronged."

The decision also hit hard for the victims' families, who were outraged that defense attorney David Parry was allowed to put Linebaugh's long-lost mother on the witness stand to plead for his life.

But it relieved Linebaugh, who beamed as he patted Parry on the back and hugged Parry and co-counsel Nora McClure as the courtroom emptied.

The jury's decision is only a recommendation to Circuit Judge Lynn Tepper, who will hear additional arguments and could also hear from Linebaugh and victims' relatives at a Nov. 5 hearing.

She said it would be highly unusual for her to second-guess the jury.

After the verdict, jurors from both sides stopped outside the courtroom to talk with the families.

"The six of us who voted for the electric chair said there weren't any mitigating circumstances," juror David Rodriguez said. "He showed no remorse. . . . To me, it was a depraved act."

Jurors on the other side, who would not give their names, said the evidence didn't show any reason to put Linebaugh to death and they weren't swayed by any particular piece of information or testimony.

But Rodriguez said he thought that the five women and one man who voted for life were swayed by the emotional testimony of Linebaugh's mother, Leona Rogers, and the fact that his cohort, Melissa Ann Harris, got a life sentence for her role.

Rogers, who hadn't seen her son since he was 18 months old until she testified Monday, begged the jury during tearful testimony to spare him. Although she sat through closing arguments Tuesday morning, she was not in the courtroom when the jury's recommendation came.

Durfee's granddaughter, Hope Malec, and daughter, Amy Cummings, felt cheated.

"I was horrified," Cummings said. "My mother never got to know her grandson. She wanted a grandson all her life. Nathaniel was 2 months old when she died. . . . I'm of the opinion if you take a life, you lose yours."

Malec said Linebaugh's history of escape after an earlier arrest in Alabama will haunt her.

"We will never feel safe until he's dead," she said.

Kruck said those in favor of the death penalty sympathized with the family, but felt the jury was deadlocked down the middle and didn't see the point of continuing the fight. "We suffered with you," Kruck told Cummings. "We suffered with you."

In closing arguments, both sides spoke for about an hour, calling on jurors to see their side.

Parry again presented brutal details from Linebaugh's childhood, from the beatings he suffered at the hands of an uncaring father and stepbrothers to brain damage reportedly caused by beatings, accidents and drug abuse.

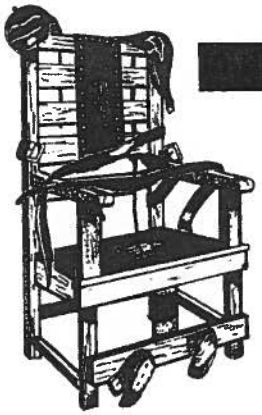
Prosecutor Phil Van Allen offered four reasons Linebaugh should die: He committed a crime while on parole; he killed two people; he killed for money and a car; and he killed in a cold, calculating manner, even pausing to find a pillow to muffle gunshots. Nothing, he said, justifies that kind of murder.

"Let's assume he had a rotten childhood. Let's assume (his father) slapped him around; that his mother ran off," Van Allen said. "Let's assume he drank too much, smoked dope, huffed gas, smoked heroin. Does that absolve him from his responsibility for the way these women were killed?"

Cummings said family members originally planned to speak at the Nov. 5 hearing and ask for the death penalty, but didn't see the point Tuesday, because Tepper already said she probably would not overrule a jury's decision.

"It would only let (Linebaugh) know he got to us," Cummings said. "I wouldn't give him the satisfaction."

Trees lose to toll road



DEATH IS DIFFERENT:

Your Approach to a Capital Case Must be Different, Too

by Kevin McNally

Kevin McNally is Chairman of the Death Penalty Task Force for the Department of Public Advocacy in Kentucky. He has handled trial and post-conviction capital cases since his graduation, magna cum laude, *in 1976 from the University of Louisville School of Law. McNally, a native of New York City, supervises public defender trial services in Eastern Kentucky. He is an adjunct instructor at the University of Kentucky Law School. The author, along with his co-counsel and mate, Gail Robinson, argued and won* Carter v. Kentucky, *450 U.S. 288 (1980).*

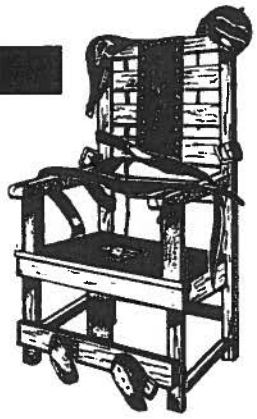
INTRODUCTION

The phone rings. It's an experienced criminal defense lawyer. "Listen," he or she says, "I'm involved in a murder trial and things haven't gone well. The jury was only out for three hours. I can't understand it. Tomorrow is the penalty hearing. Got any ideas? . . . Didn't you use an eyewitness to an execution a few years back? Where can I find him?"

This scenario has been replayed time and again. Is it because the lawyer on the phone is generally incompetent? No. Is it that (s)he doesn't care? Usually not. This lawyer, like us, would no more think of showing up in court unprepared for a murder trial, than (s)he would try the case in the buff.

DEATH IS DIFFERENT

What's the problem? The problem is that we haven't properly reoriented our thinking. Death penalty cases are different—profoundly different—from any other. We simply haven't gotten the message. We are just beginning to realize how different capital litigation is.



"In 1949 . . . no significant constitutional difference between the death penalty and lesser punishments" existed. Today, however, "five members of the Court[1] have now expressly recognized that death is a different kind of punishment from any other . . ." *Gardner v. Florida,* 430 U.S. 349, 357 (1977) (plurality opinion, Stevens, Stewart and Powell, J.J.). Even Justice Rehnquist, albeit for reasons of his own, has jumped on the bandwagon. "This theme, the unique nature of the death penalty . . . has been repeated time and time again . . . " *Rummel v. Estelle,* 445 U.S. 271, 273 (1980). It is time we took notice.

What does "different" mean?[2] To the Supreme Court, the context is, of course, eighth amendment analysis. The death penalty "is unique in its total irrevocability . . . in its rejection of rehabilitation . . . [a]nd . . . finally, in its absolute renunciation of all that is embodied in our concept of humanity." *Furman v. Georgia,* 408 U.S. at 306 (Stewart, J., concurring). But what does this "difference" mean to us as trial practitioners? It means we must free ourselves of preconceptions, learned responses and even, at times, the benefits of intense felony trial experience. Capital litigation is a new ballgame.

AN OVERVIEW

In *McGautha v. California,* 402 U.S. 183, 186 (1971), decided only one term before *Furman,* the Court rejected due process challenges from California and Ohio to death sentences resulting from "the absolute discretion of the jury." It was "beyond present human ability," the Court said, to "identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty . . . [and] which can be fairly understood and applied by the sentencing authority . . ." 402 U.S. at 205. *McGautha* also rejected a challenge to Ohio's procedure of determining guilt and penalty at a single trial with a single verdict.

Shortly thereafter, *Furman* held, of course, that the death penalty was being "wantonly" and "freakishly" applied and it, therefore, violated the Constitution. 408 U.S. at 310 (Stewart, J., concurring). Although this was only Justice Stewart's conclusion, other members of the majority relied on similar reasons. Justice Douglas found discrimination to be the key constitutional flaw. 408 U.S. at 242, 256-257. Justice White concurred because of infrequency and arbitrariness. "[T]he death penalty is exacted with great infrequency even for the most atrocious crimes and . . . there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." 408 U.S. at 313. These concepts—arbitrariness, disproportionality, discrimination and infrequency—are central to any future "as applied" consitutional attack on capital punishment.

Indeed, the thrust of Justice White's opinion in *Gregg,* joined by the Chief Justice and Mr. Justice Rehnquist, was that the new sentencing scheme would not necessarily be "administered . . . in a discriminatory standardless, or rare fashion." 428 U.S. at 223. *Furman* and *Gregg,* then, set one limit on death as punishment. It cannot result from procedures which provide no check on "the absolute discretion" of the sentencer.

A second limit on the death penalty comes from the companion cases to *Gregg. Woodson v. North Carolina,* 428 U.S. 280 (1976) and *Roberts v. Louisiana,* 428 U.S. 325 (1976), held that the death penalty cannot, with certain possible exceptions, be applied in a mandatory fashion without "consideration of the character and record of the . . . offender and the circumstances of the . . . offense . . ." *Woodson,* 428 U.S. at 304.

Lawyers handling death cases must be sensitive to this *Furman/Woodson* pincer. The tension created by these opposing limits is always present. Counsel must search for aspects of any capital case which cross either of these lines.

In response to *Furman,* and despite *McGautha,* most states passed new death penalty statutes which provide for bifurcated procedures: a guilt phase followed, if necessary, by a penalty phase. Death is different, however, in more than the particular procedures used. The bifurcated procedure means that the defendant must plead for mercy before the same jury which rejected his defense. This raises entirely new tactical questions and demands new approaches. The panicked lawyer who calls on the phone at the last minute has approached his case as two separate trials instead of one. He also failed to realize that in most death penalty cases the

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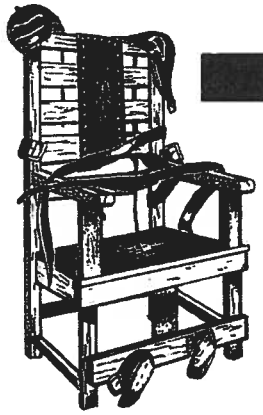
1. *Gregg v. Georgia,* 428 U.S. 153, 181-188 (1976) (opinion of Stewart, Powell and Stevens, JJ.); *id.* at 231-241 (Marshall J., dissenting); *Furman v. Georgia,* 408 U.S. 238, 286-291 (1972) (Brennan, J., concurring). Apparently, each member of the Court now embraces this position. *Eddings v. Oklahoma,* 455 U.S. 104, 117 (1982) (O.Connor J., concurring); *Rummel v. Estelle,* 445 U.S. 271, 273 (1980).

2. "Different" doesn't always mean "better" for those facing or under sentences of death. Indeed, the different standard for capital cases is a two-edged sword. Witness the loss of otherwise qualified jurors through death qualification. *Cf. Witherspoon v. Illinois,* 391 U.S. 510 (1968); *Grigsby v. Mabry,* 569 F.Supp. 1273 (E.D.Ark. 1983). These jurors have been called "defendant prone" or "acquittal prone." *Smith v. Balkcom,* 660 F.2d 573, 579 (5th Cir. Unit B 1981), *amended on rehearing,* 671 F.2d 858 (1982), *cert. denied,* 103 S.Ct. 181 (1982).

   A second example of death cases being singled out for unique and unfavorable procedures is the rush to judgment in federal habeas death cases sanctioned by *Barefoot v. Estelle,* 103 S.Ct. 3383 (1983). "In short, an appeal that raises a substantial constitutional question is to be singled out for summary treatment *solely because the State has announced its intention to execute the appellant before the ordinary appellate procedure has run its course"* 103 S.Ct. at 3404 (Marshall, J. dissenting) (emphasis in original).



real trial is sentencing and not guilt. Death is different in many ways . . .

"CONTEMPORANEOUS OBJECTION" OR CLAIRVOYANCE?

Nowhere in the law is it as important as in a death case that the lawyer be conscious of making a state appellate and federal post-conviction record. There is no room in capital litigation for "seat of the pants" lawyering. *Clients are being killed with issues unresolved because of our procedural defaults.* The practitioner can't try the case for the jury alone. We try these cases for multiple audiences: the jury, the judge, the state appellate court(s), and the federal courts. A lawyer in a death penalty trial must juggle all of these competing interests week after exhausting week.

Of course, each of us has a responsibility to "protect the record" in every trial.[3] What makes death "different" is that the stakes are so incredibly high. When a potential issue dances before a defense advocate in the midst of a trial, he mentally calculates the pluses and minuses of various approaches. In some instances tactics ("I love this jury and can't agree to abort the trial") may dictate kissing an issue off for the greater good. These instances are far fewer in number and different in kind than that imagined by the Supreme Court in *Wainwright v. Sykes,* 433 U.S. 72 (1977). Nevertheless, they exist. However, when the trial in question is a death case, the defender must think longer and harder before *any* potential legal issue is "waived." Wholly different considerations apply. If you are wrong, your client may die.

Are we "crying wolf" here? Hardly. Beginning with John Spenkelink, the federal courts made it clear they would not consider assertions of constitutional error absent proper and timely presentation of the grounds by trial and state appellate defense counsel even if the client's life depended on it. *Spinkellink* (sic) *v. Wainwright,* 578 F.2d 582, 591, 609, 619-620 (5th Cir. 1978), *cert. denied,* 440 U.S. 976 (1979). The issues deemed waived in *Spinkellink* (sic) were: 1) lack of notice of aggravating circumstances in the indictment or otherwise and (2) an alleged *Miranda* violation.[4] Spenkelink died on May 25, 1979, with these issues still unresolved. However, he wasn't to be the only one.

Charlie Brooks, Jr., was executed on December 7, 1982. The Texas Court of Criminal Appeals refused to review an illegal search claim because of counsel's failure to object as to one item and improper objection to a second piece of evidence. *Brooks v. State,* 599 S.W.2d 312, 316 (Tex.Crim.App. 1979), *cert. denied* 453 U.S. 913 (1981). No error was found in the trial court's limitation of voir dire because, in part, counsel supposedly "accepted" the suspect juror and "did not exhaust his peremptory challenges." 599 S.W.2d at 317. Likewise, complaint about an irrelevant picture of the victim's small child was waived by failure to object to related testimony. 599 S.W.2d at 318. In refusing a stay pending a federal habeas appeal, the Fifth Circuit "noted" that "both Brooks and his lawyers stated they did not wish" to present mitigating evidence. This was a "tactical decision" obviating the need for further inquiry into the effectiveness of trial counsel. *Brooks v. Estelle,* 697 F.2d 586, 589 (5th Cir. 1982), *stay denied,* 103 S.Ct. 1490 (1982), *appeal dismissed as moot after execution,* 702 F.2d 84 (1983).

Jimmie Lee Gray was executed on September 2, 1983. The Fifth Circuit refused to review his contention that the jury was precluded from considering lesser included offenses.[5] *Gray v. Lucas,* 677 F.2d 1086, 1109 (5th Cir. 1982), *rehearing denied with opinion,* 685 F.2d 139 (1982), *cert. denied* 103 S.Ct. 1886 (1983). Likewise, Gray's attempt to obtain relief in a successive habeas petition was hampered, if not barred, by procedural defaults. The issues, among others, concerned an alleged improper allocation of the burden of proof on mitigation at the penalty phase and a claim that death in the gas chamber was cruel and unusual. *Gray v. Lucas,* 710 F.2d 1048, 1052 n.2, 1056 (5th Cir. 1983), *cert. and stay denied,* 104 S.Ct. 211 (1983). The court specifically found a claim of prosecutorial misconduct barred by the failure to argue it in the preceding habeas appeal.[6] 710 F.2d at 1056-57.

Similarly, Bob Sullivan was barred from relief in federal court by *Sykes* on a number of allegations. Before his execution of November 30, 1983, he alleged: 1) *Witherspoon* violations; 2) prosecutorial argument and instructions which permitted consideration of non-statutory aggravating circumstances and limited consideration of non-statutory mitigating circumstances; and 3) the trial judge's consideration of "lack of remorse" in imposing a death sentence.[7] *Sullivan v. Wainwright,* 695 F.2d 1306, 1310-12 (11th Cir. 1983), *cert. denied,* 104 S.Ct. 290 (1983).

Robert Wayne Williams's execution on December 13, 1983 came after a 6 to 5

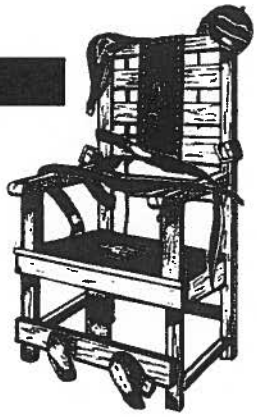
3. American Bar Association, *Model Code of Professional Responsibility,* Canons 6 and 7 (1982).

4. *Miranda v. Arizona,* 384 U.S. 436 (1966).

5. *See Beck v. Alabama,* 447 U.S. 625 (1980) [violation of due process to preclude consideration of a lesser included offense supported by the evidence in a capital case].

6. *See Hance v. Zant,* 696 F.2d 940 (11th Cir. 1983); *Brooks v. Francis,* 716 F.2d 780 (11th Cir. 1983) [death sentences vacated on the basis of prosecutorial misconduct].

7. The Florida Supreme Court recently held that "lack of remorse" is an irrelevant, constitutionally problem-laden consideration no longer to be taken into account as as aggravating factor in imposing a death penalty. *Pope v. State,* So.2d (Fla. 1983.



vote by the *en banc* Fifth Circuit in his first habeas action. *Williams v. Blackburn,* 649 F.2d 1019 (5th Cir. Unit A 1981), *adhered to en banc, Williams v. Maggio,* 679 F.2d 381 (1982), *cert. denied* 103 S.Ct. 3553 (1983). In his second habeas petition, Williams raised, among others, the issues of proportionality (again) and prosecutorial misconduct during the penalty phase argument. The Supreme Court, over 3 dissents on proportionality, vacated a stay granted by the Fifth Circuit. *Maggio v. Williams,* 104 S.Ct. 311 (1983), *vacating a stay granted in Williams v. King,* 719 F.2d 729 (5th Cir. 1983). A crucial fourth vote was lost as Justice Stevens concurred "though not without misgivings . . ." An argument by the prosecutor centering on appellate review[8] was "prejudicial to the accused . . . " Nevertheless, "competent counsel failed to object. . .at the trial" and there was no "adequate justification for [counsel's] failure to raise this argument. . . in the first habeas corpus petition." 104 S.Ct. at 316 (Stewart, J., concurring).

Still, is it an exaggeration to say that our clients may die if we lawyers "stumble"? After all, there is hardly a guarantee that Spenkelink, Brooks, Gray, Sullivan or Williams would have survived but for procedural defaults. Indeed, the issues may, in context, have been weak. Well, let's look at the latest (as of this writing) execution: John Eldon Smith, AKA Tony Machetti (December 15, 1983). Smith was married to Rebecca Machetti. At separate trials one month apart in the same county, John and Rebecca were convicted of the double murder of Rebecca's ex-husband and his new bride. Both death sentences were affirmed in a joint direct appeal. *Smith v. State,* 222 S.E.2d 308 (Ga. 1976), *cert. denied,* 429 U.S. 932 (1976).

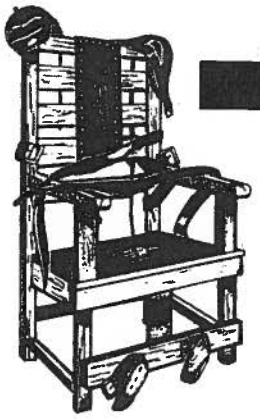
Rebecca's lawyers filed a state habeas corpus in 1979 challenging the jury composition in Bibb County as unconstitutionally excluding women. Although Georgia procedure requires such an objection prior to trial, the state habeas court

THE HANGMAN AT HOME

What does the hangman think about
When he goes home at night from work?
When he sits down with his wife and
Children for a cup of coffee and a
Plate of ham and eggs, do they ask
Him if it was a good day's work
And everything went well or do they
Stay off some topics and talk about
The weather, baseball, politics
And the comic strips in the papers
And the movies? Do they look at his
Hands when he reaches for the coffee
Or the ham and eggs? If the little
Ones say, Daddy, play horse, here's
A rope—does he answer like a joke:
I seen enough rope for today?
Or does his face light up like a
Bonfire of joy and does he say:
It's a good and dandy world we live
In. And if a white face moon looks
In through a window where a baby girl
Sleeps and the moon-gleams mix with
Baby ears and baby hair—the hangman—
How does he act then? It must be easy
For him. Anything is easy for a hangman,
I guess.

Carl Sandburg

8. Death sentences have been reversed by the Louisiana Supreme Court for similar prosecutorial arguments. *See State v. Lindsey,* 404 So.2d 466, 487 (La. 1981); *State v. Willie,* 410 So.2d 1019 (La. 1982); *State v. Copeland,* 419 So.2d 899, 909-910 (La. 1982); and *State v. Jordan,* 420 So.2d 420, 427 (La. 1982).



reached the merits and denied the petition. Apparently, John's lawyers did not or were not able to raise this attack. John had previously lost a state habeas on other grounds prior to an important Supreme Court decision[9] and prior to Rebecca's challenge. *Smith v. Hopper,* 239 S.E.2d 510 (Ga. 1977).

In federal court, Rebecca won on the basis of her jury challenge. *Machetti v. Linahan,* 679 F.2d 236 (11th Cir. 1982), *reversing* 517 F.Supp. 1076 (M.D.Ga. 1981). She "was resentenced to life in prison . . .[and] will soon be considered for parole . . ."[10] John lost his case on other grounds. *Smith v. Balkcom, supra* n.2. He was executed on December 15, 1983.

What is the point of all this Monday morning quarterbacking? We don't perform post-mortems on those executed to cast aspersions. That would be ludicrous. At one time or another, these condemned were represented by some of the best lawyers there are. We all can, however, learn from cases we lose.

The first thing we learn is that death cases are different because they demand an extraordinary focus on preserving error, especially at the trial, but at all stages. Second, capital litigation is not so different that the courts will not enforce procedural rules. That is, judges will continue to avoid issues by accusing the lawyers of "sandbagging" even if the client must die. You will be held to an extraordinary standard. Objection must be timely raised if "the tools to construct [the] constitutional claim" exist. In many instances "extraordinary vision" is required (despite what the Supreme Court says). If "other defense counsel have perceived and litigated" a claim, you better also.[11] As a practical matter, this puts great pressure on the defense bar to stay on top of death penalty law, which is, needless to say, in constant turmoil.[12]

Third, the existence of procedural defaults does not mean that a condemned inmate will receive relief on a claim of ineffective assistance of counsel. While the precise constitutional standard by which such a claim will be judged may soon be announced by the Supreme Court, it is not likely to provide much protection for many condemned.[13]

Fourth, Chief Justice Burger argues that "[t]here can hardly be any question about the importance of having the appellate advocate examine the record . . . to select [only] the most promising issues for review . . ." *Jones v. Barnes,* 103 S.Ct. 3308, 3314 (1983). This is truly bad advice in capital cases—at any level. If the past few years teach us anything, it is to *raise 'em all.* Remember, the Chief Justice also told us that "[t]he signals from this Court have not . . . been easy to decipher." *Lockett v. Ohio,* 438 U.S. 586, 603 (1978). As James Autry will tell you, no one really knows which issues will prevail on any given day.[14]

Finally, if we need to be clairvoyant in raising legal issues in capital cases, we can't do it alone. Spenkelink and those who have followed him are only a handful out of thousands. Others who have survived or never reached death row are alive because of a combination of luck, hard work by their lawyers and timing. By rethinking our approach to appellate issues, and by working together, we can increase the odds that our clients don't win the death penalty lottery.

TEAM DEFENSE

The image of the criminal defense lawyer as the lonely gunslinger standing up to a lynch mob has its place . . . but not in capital litigation. We can't do these cases alone. Did you ever hear of one attorney handling a complex anti-trust suit? In our view, it is supremely difficult for any lawyer acting alone to be truly effective in a death case, at trial or after. There is too much to do—some of which we are ill-suited or ill-trained for.

The team approach involves more than just having co-counsel, although that is a start. Our first exposure to the broad concept of team defense came in 1977 from Millard Farmer, a lawyer and author of the following article on motion practice, and Courtney Mullin, a juristic psychologist. At a death penalty seminar, Farmer and Mullin suggested that the team approach doesn't mean finding someone who thinks like you do, perhaps your law partner, "because more than likely you're going to be pooling your ignorance." What we need are people who have different perspectives, yet bring talents that we don't have or are underdeveloped—like social scientists, psychologists. "The whole court system is about people"

9. *Duren v. Missouri,* 439 U.S. 357 (1979) ["opt out" statute which permits women to choose not to serve is unconstitutional].

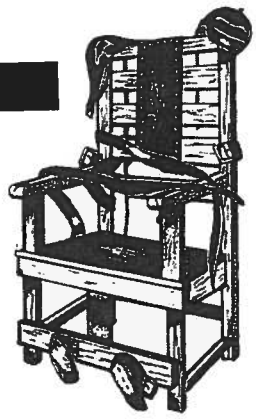
10. *Louisville Courier Journal,* A2 (Dec. 16, 1983).

11. *Engle v. Isaac,* 102 S.Ct. 1573-74 (1982) [unawareness of an objection is not cause for a procedural default].

12. The demise of NCCD's *Death Penalty Reporter* in 1981 was unfortunate. Thankfully, California's *Death Penalty Update* survives.

13. *Washington v. Strickland,* 673 F.2d 879 (5th Cir. 1982); *modified en banc,* 693 F.2d 1243 (1982), *cert. granted,* 103 S.Ct. 2451 (1983) [capital case]; *U.S. v. Chronic,* 675 F.2d 1126 (10th Cir. 1982), *cert. granted,* 103 S.Ct. 1182 (1983) [non-capital case]. Most of those executed against their will raised the claim at one point or another.

14. Autry, of course, was at least temporarily spared when the issue of proportionality was raised at the very last minute and against all odds. *Autry v. Estelle,* 706 F.2d 1394 (5th Cir. 1983), *stay denied,* 104 S.Ct. 20 (Oct. 3, 1983), *stay granted,* 104 S.Ct. 24 (Oct. 5, 1983).



and not so much about law. If anything, our training as law students and lawyers blinds us to the essence of death as punishment.[15] We can learn about the death penalty by understanding people and not by reading Supreme Court opinions. We must try death cases, or negotiate them, by understanding the people involved, not by reading the statute. Who better to help us than those who study, and sometimes understand, human behavior?

We are talking about more than employing a jury selection expert, although you should and it helps. The case must be viewed as "a unified whole"[16] from the initial client interview on. We must begin to develop our theme as early as possible before the trial starts . . . in pretrial hearings, even in casual interaction with court personnel and observers. We need help before and after voir dire. The team approach must be used throughout.

As public defenders we are accustomed in Kentucky to working without Courtney Mullin or Cathy Bennett. However, unless we can't help it, we don't work alone. While our team may be different than that assembled to work with a Joanne Little, the approach is no less essential. First and foremost, the client is a member of the team. Second, in all "real" death cases we try to have two lawyers—more if we can beg, borrow or steal them. Third, there are psychologists,[17] provided that graduate students, who are very talented and will help us on occasion for little or no remuneration, are not available. Fourth, we enlist non-lawyer employees (investigators, secretaries, clerks) or non-lawyer friends who can help us for all or part of the case. Fifth, we bring the client's family or friends into the team.

There are many people who have no professional background yet seem to grasp the dynamics of a death case as well, sometimes better, than we do. Certainly, we need as many eyes and ears as possible to keep the team informed of what is going on around us. The isolation of a solitary defense lawyer and his client enhances the government's momentum towards violence as punishment. In contrast, a team approach evidencing at least family and, hopefully, some community support for the defendant, sends a powerful message to jury and judge. Simply put, it's harder to kill in the face of group opposition.

Involving the client and his family (if any) has so many advantages we cannot begin to list them. The experience can reawaken emotions (good and bad) long since dormant. Strained or broken relationships can be improved, if not healed. No matter the outcome of the case, the sharing and working together can be a first time experience for the client and/or his family. At least, the condemned's life has been made better by this much.

In a practical sense, non-lawyer members of the defense team can do things we cannot: listening to witness/juror hallway conversations during trial, for example. Even crucial tasks are not always best for us. It may be that a minister working with the defense team, a psychologist, or even a member of the defendant's family should be the one to approach the victim's family in regard to a plea.

The psychological and physical strains of death work are no secret. The team approach doesn't give us license to pass the buck but it does give some solace from the enormous pressure of a capital trial. We can't be all things to all people. Responsibilities, such as protecting the record, can be divided (but not relinquished). Team defense permits us to focus on juggling one ball at a time. The odds are better that we can avoid dropping our client into the black hole of capital punishment.

INVOLVING THE CLIENT

Client relations are dramatically different in kind and often in duration in death penalty cases. When life hangs in the balance the relationship between the defendant and the defense team, if it is to be successful, must be more than the usual "professional" one. An honest and caring concern needs to grow. This cannot be done overnight nor without considerable expenditure of our precious time. Nevertheless, there is no easy way out. As in any other area, we only reap what we sow.

The irony, of course, is that the potential end of the relationship—death while we watch—propels us in the opposite direction. Psychologically, we feel a need to maintain our professional distance to guarantee that we will survive the loss of the client. Each of us must strike our own balance here but others have shown us that it is possible to care, to lose and to continue to fight for other clients.

We have attempted in this introduction to dissect, perhaps unfairly, the cases of those who have been executed since *Gregg* to see what we can learn about handling death cases. No statistic[18] is more revealing than the nature of "death" on the row since 1976:

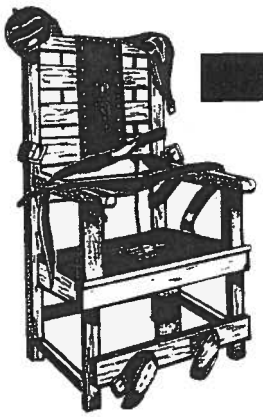
suicides on death row: 13
voluntary executions: 4
involuntary executions: 7

15. Farmer & Mullin, *Trial—Emphasis on the Punishment Stage of a Case, How to Try a Capital Case*, 9 (N.C. Academy of Trial Lawyers 1977).

16. Farmer, *supra*, *Voir Dire in a Capital Case* at 1.

17. Some of the results of these efforts may be seen in: Nietzel and Dillehay, *The Effects of Variations in Voir Dire Procedures in Capital Murder Trials*, 6 LAW AND HUMAN BEHAVIOR 1 (1982); and Nietzel and Dillehay, *Psychologists as Consultants for Changes of Venue*, 7 LAW AND HUMAN BEHAVIOR 309 (1983).

18. NAACP Legal Defense Fund, *Death Row U.S.A.* (Oct. 20, 1983).



If the client wants to die, even for a hort time during periods of despondency, the difficulty of the lawyers' task increases geometrically. Counsel must not only truggle against the public and prosecuion but against the self-destructive behavior of the client as well. Despite significant legal issues, John Evans, executed April 22, 1983 may have sealed his fate by telling the jury "[a]gainst his attorneys' advice [that] . . . he had shot [the victim] . . . and had 'no intention of ever reforming in any way . . . So, I'm asking very sincerely' [that you give me the death penalty]." The Supreme Court reversed a favorable Fifth Circuit decision while noting: "in another case, with different facts . . ." the condemned might have prevailed. Of course, similar scenarios can be found in most cases of "death penalty suicide" (i.e. Steven Judy).[19]

Death cases are different because sometimes the clients' personalities, and always the pressures they face, are very different. A lawyer who spends his time constructing a brilliant and innovative defense may, in the ordinary case, be free to ignore the seemingly unimportant concerns of the client: cigarettes, an extra blanket, a different cell, visitors, etc. It may be enough to say: "Trust me, I'm good and I'll work hard." In a death case we can't do this. Many clients react positively in direct proportion to the time spent by the lawyers involving him or her in the defense team.

Certainly, some clients are exceptional. For the most part, however, "legal strategy" isn't improved much by the hours invested in explaining each and every motion or approach to the client. While technically this is true, it is also short-sighted. Time with the client is well spent even if it only avoids the suicidal crisis seen in so many cases. This is not to suggest, of course, that "pampering" clients is either always appropriate, a sure-fire guarantee of cooperation, or that it could have worked with Evans, Judy, etc. Even after much hard work, clients will disappoint us. Sometimes, however, it helps avert disaster. To appreciate this, one must experience, as we have, narrowly avoiding a client's plea for death (in a case that ultimately ends in victory) by calling upon the "dues owed" because of counsel/client friendship.

Defending a person facing death is different if only because the commitment involved could last five or ten years. We should keep this in mind as we go about establishing rapport with the clients. Things said early on can come back to haunt us or successor counsel. Undue pessimism or doomsday scenarios can destroy hope when hope still exists or when hope is all there is. Lawyers trying unsuccessfully to coerce a plea to life by stating there would be no hope on appeal after a death verdict can and have created suicidal or problem clients when a death verdict was returned. Likewise, exaggerated opinions about pretrial reversible errors can create a situation where the client foolishly rejects a plea offer of life. We must view the case as a whole—especially in relating to the clients.

Death penalty cases are often decided on subtle considerations. This is true whether the audience is 1) a jury watching how your client relates to you (and, more importantly, how you relate to your client) or 2) an appeals court trying to decipher how "dangerous" the condemned is. Even the greatest actor could not deceive a jury as to how she really feels toward the accused as they watch every interaction for weeks on end.

So many influences, some removed from the courtroom, affect the ultimate disposition of a death case. Do you realize how devastating bad jail conduct can be to your client's chances of avoiding a death sentence? Unless you have done your homework, it takes a jury about 30 seconds to decide that the bailiffs, and even the judge, are deathly afraid of your client.

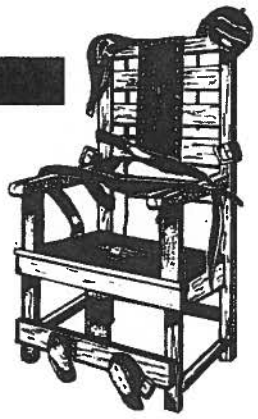
In the first jury death verdict under Kentucky's 1976 statute, the defendant, Larry, wore dirty jail type clothes, barely talked to his lawyer, chewed gum, wore sun glasses throughout the trial, jostled with the bailiffs and finished off his performance by spitting in the prosecutor's face after the jury verdict. The judge wouldn't let Larry near the bench after that.

In his second trial, as part of the defense team, Larry picked his own jury, decided on strategy, took detailed notes throughout the trial and proudly wore one of his lawyer's suits (*sans* shades). For many reasons, this among them, Larry received a minimum sentence of twenty years. What was most remarkable, however, is the way the court personnel began to treat Larry—with *respect* . . . as a human being. When the jury was deliberating and had food brought in, the bailiffs brought an extra dinner for Larry so he wouldn't have to eat jail food. The jurors saw this caring in many ways—like when the judge's secretary cried during the defense penalty phase argument. What a difference an atmosphere of respect and caring can have. The only one who can initiate, encourage, even create, such an atmosphere is defense counsel. We must involve the client.

In any case certain crucial decisions are for the lawyer and others for the client. In a death case, with a few exceptions, the client must decide crucial strategies.[20]

19. *Hopper v. Evans*, 102 S.Ct. 2049, 2051, 2054 n.1 (1982), *reversing, Evans v. Britton*, 628 F.2d 400 (5th Cir. 1980), *as modified*, 639 F.2d 221 (1981). Steven Judy, executed March 9, 1981, didn't help himself much either. His "threat . . . that the jurors or judge might be his next victims if he did not receive the death penalty swayed some jurors . . ." *Louisville Courier Journal*, B3 (March 10, 1980).

20. "[T]he accused has the ultimate authority to make certain fundamental decisions . . . whether to plead guilty, waive a jury, testify . . . or take an appeal . . ." *See Jones v. Barnes*, 103 S.Ct. at 3312, holding that the *lawyer* decides what issues to raise on appeal. Justice Blackmun concurs but says: "[T]he lawyer, after giving his client his best opinion . . . should acquiesce in his client's choice . . ." 103 S.Ct. at 3314.



The best situation is where the client gives the preferred response, but it is still important that the decision come from the client himself. In the long run, a non-dispositive tactical choice can be sacrificed in the interests of attorney/client harmony. The client's sense of involvement is more important than the damage done by a couple of supposed "dumb" decisions. Anyway, sometimes the client's instinct is better than ours. If choices in criminal law have become life or death situations, the one who is to live or die must ultimately decide.

WINNING

Can we really claim victory when our client receives a life sentence—or worse, life without parole? Death is different because avoiding execution is, in many cases, the best and only realistic result possible. Part of us gags at such a suggestion. In the non-capital case, winning means acquittal and nothing less. Even impossible cases are won. There is strong impulse within us to go for broke. "Don't ask for lesser included instructions," we think, "all or nothing." To suggest otherwise is viewed as defeatist.

What does the label "cop-out artist" mean to you? It conjurs an image of a weak, talent-less lawyer who is walked upon by prosecutors, a betrayer of his clients and his profession. Death is different because the best death penalty lawyers are not heavy hitters who never lose a case. Rather, the best are those who, when necessary, can perfect plea-bargaining to an art form. We must reorient our thinking.

At a Kentucky Death Penalty Seminar years ago, the author of one of the following articles said: "If you've never lost a death case at trial, you're not doing the really tough cases." At the time, I thought the statement was hogwash. I don't anymore. In some cases, if you begin to pick a jury, you've already lost.

We try to track all death penalty cases in Kentucky from the trial on. Last year, the batting average of defense lawyers who reached the penalty phase of capital trials in "serious" cases was not very good. These are very difficult times in which to try death cases. On the other hand, many very serious cases, which predictably would have resulted in death verdicts, ended in guilty pleas. These were important victories and we must begin to view them as such.

John Spenkelink did not have to die. Before the trial, the prosecution offered him second-degree murder. He refused. Considering the case against him and the time period, it might be hard to fault his judgment. But these are different times and we must be sure our clients realistically examine any non-death option that comes their way. Certainly, there will be capital cases that could have been won but are pled out of an overabundance of caution. This reality is one of the least articulated but most compelling reasons behind the reinstatement of capital punishment. Nevertheless, I would rather my client be alive after a mistake than dead.

Rather than being "offered," pleas in capital cases must be pursued and won. Yet, how many of us work on plea bargaining as aggressively as we might preparing our defense? There is something unseemly about suggesting this. Part of it is the normally healthy attitude readers of this journal have about pleas. "I can win it." Part of it is our fear of rejection. "I won't crawl to the prosecutor."

Pleas, however, can be earned just like jury verdicts. The greatest motivating force behind prosecutor plea agreements in "certain death" cases is aggressive and successful pretrial motion practice. Prosecutors, after all, may be certain of conviction but they understand very well that capital punishment is a lottery. You never know what 12 people (or 1 person) will do when faced with the ultimate question of life and death. Assuming the defense team is on top of it, the prosecutor must walk through a minefield of reversible errors at trial. Aggressive advocacy from the arraignment on can win the case before the first juror is questioned.

Plea negotiation in capital cases is every bit as difficult, maybe more so, than the trial itself. It requires the same type of energy and creativity. Do you or another team member go talk to the family of the victim in each capital case? If you want to do your job, you will. While we are often rebuffed, sometimes cases can be settled right there. At least you will be in touch with feelings you must know and understand to try the case.

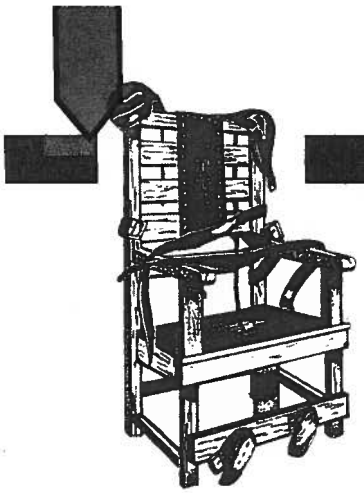
Perhaps the most difficult part of the plea negotiation can be selling it to the client. Unless the groundwork of trust and mutual respect has been laid, turning around an intransigent client may be impossible. Explaining why he should accept life or life without parole rather than risk ending an otherwise miserable life may be the toughest challenge we face. Counsel's relationship with the client will make all the difference. Failing that, family members and friends can be effective.

Death is different because a life sentence can be a victory. We need to rethink our attitudes and learn to appreciate the difficulty and beauty of reconciling through negotiation a situation in which the most basic human emotions are inflamed and in which a human life hangs in the balance.

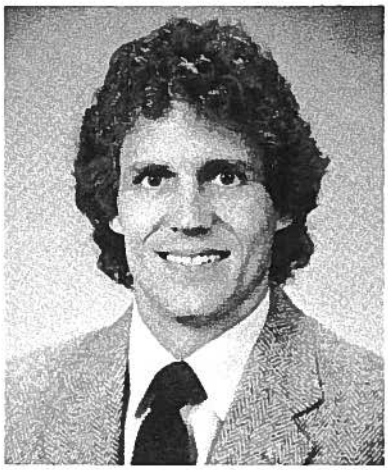
CONCLUSION

Death as punishment demands that we create new defense approaches. The bifurcated trial poses entirely new tactical dilemmas. The case must be viewed as a whole, not only guilt and sentencing phases, but trial and appeal as well. Avenues of post-trial relief cannot be shut off by waiver. We must pool our talents and open ourselves to working with others. Our client's involvement is essential because the crucial issue in most capital trials is *the client*. Even winning must be viewed in an entirely different context.

As the following articles indicate, there are no limits to what we can accomplish with a creative approach to defending capital cases. The only rule is that there are no rules. With a little luck and a great deal of hard work we can meet this most deadly challenge.



THE PENALTY-PHASE TRIAL:



A Practical Guide

by Dennis N. Balske

I. OVERVIEW

The penalty phase portion of the capital trial is like no other proceeding in our entire legal system. As the Supreme Court has noted time and again,

> [death] is a different kind of punishment from any other which may be imposed in this country." From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action.

Beck v. Alabama, 447 U.S. 625 (1980), quoting *Gardner v. Florida,* 430 U.S. 349, 358-359 (1977). Because death penalty cases are unique proceedings, success in the penalty phase, i.e., having the client avoid a death sentence, demands a skilled and intelligent approach. The purpose of this article is to outline the methods for presenting a successful penalty phase defense, thus providing guidance and hopefully stimulating thinking concerning representation of clients in capital cases.

Unfortunately, in the typical death penalty case, the chances of reaching a penalty phase are very high. Usually, no credible argument for innocence can be made and the real focus of the case becomes the "life or death" issue of punishment. Many lawyers prefer to ignore the overwhelming bad facts and treat the trial phase as a regular criminal trial wherein the sole issue is guilt or innocence. These lawyers look at the penalty phase as an unwanted stepchild and present little evidence and even less argument. Such an approach spells doom for the client.

This lawyer-created tragedy can be prevented by application of a few general principles which we know intuitively but somehow choose frequently to ignore. Application and recognition of these principles are an important first step in saving your client's life. A brief discussion of those principles follow.

A. PREPARE WELL IN ADVANCE FOR THE PENALTY PHASE

As a lawyer trying a capital case, you face the realistic possibility that your client will likely be convicted of capital murder. That means that you must have your penalty phase witnesses available to testify almost immediately after the conclusion of the trial on the issue of guilt or innocence. Courts will simply not grant long continuances so as to allow decent time to prepare between the guilt and penalty phase. An overnight recess is the most you can hope for.

B. LEARN TO OBJECTIVELY ANALYZE YOUR CASE AND ADOPT A UNIFIED STRATEGY WHICH RESPONDS TO REALITY

As lawyers, we are taught that "winning" a murder case means obtaining an acquittal. In death penalty cases winning usually means obtaining a life sentence

for a client. A lawyer who fights for an acquittal without any evidentiary or legal basis may well be arguing his client into the electric chair or gas chamber. Jurors routinely vote to kill clients whose lawyers have taken an approach in the guilt phase that seems fraudulent to them.

If a credible presentation can be made on the issue of innocence then by all means it should be actively pursued. However, if none can be made then the focus of the trial must become the penalty phase. Such difficult decisions can only be made by a hard and realistic assessment of the facts of the case by you and your client.

If you and your client have made the decision to emphasize penalty rather than guilt, that emphasis must permeate your entire presentation. All phases of the process should then be used to support your penalty phase arguments for life.

Use voir dire, for example, to prepare the jury for the bad things to come and to probe their attitudes on the life or life without parole sentence as an acceptable punishment. Use the guilt phase as a compliment to the penalty phase by presenting mitigating facts through prosecution witnesses and by establishing your credibility. Oftentimes this approach during the guilt phase will demand that you be aware of your adversary indoctrination and suppress your adversial tendencies when they will serve no purpose. For example, you might forego objecting to some evidence or testimony you would object to in the ordinary case, recognizing that being frank and open with the jury will enhance your credibility and the jury's affection toward you when it comes to seeking mercy. The more quickly and softly the damaging evidence goes before the jurors, the faster their memory of it will fade and the sooner you can shift the jury's attention from the horrible nature of the crime to the issue of the case on which you want to focus, the defendant's life.

C. HUMANIZE YOUR CLIENT

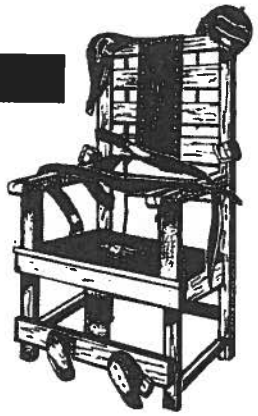
It is extremely easy for a jury to vote to kill a sack of cement. It is much more difficult for them to vote to kill a human being. Thus the threshold task facing a lawyer in a death penalty case is to make the client a human being, i.e., to humanize him.[1] Before you can portray your client as a human being to the jury, you must first accept him as one. Take the time to explain your role and what the client can expect from you. Nothing will hurt you more than a client who does not understand what you want and expect from him.

The actions of you and your associates toward and with the client in the courtroom can facilitate the humanizing process. By interacting with the client at counsel table, everyone can convey his or her feelings for the defendant to the jury. By involving the client in the proceedings, such as by having him or her take notes, ask voir dire questions, assist with jury selection decisions or make part of the closing argument, you take important steps to your ultimate goal of having the jurors view your client as a human being. It is also critically important that you require the courtroom personnel such as clerks and bailiffs to treat your client as a human being. If they are allowed to treat your client as a "mad dog killer" their feelings will be quickly transmitted to the jury.

D. USE THE TRIAL TEAM APPROACH[2]

When the stakes and responsibilities are extreme, as in a capital case, both the defendant and the defense attorney need a great deal of support. That is why an attorney trying a death case should make every effort to assemble a team of people to try the case. At an absolute minimum, the team should include two defense attorneys. Investigators, law clerks, paralegals, juristic psychologists and volunteer workers are also extremely helpful. In addition to their specific skills, these persons provide keen insights and invaluable moral support.

The defense team should also gather outside support for the client, from relatives, friends, fellow church members and citizens opposed to capital punishment. The presence of client supporters in the courtroom demonstrates to the jury that people care about your client the same way the victim's family cares about the loss of their loved one.



The team approach is particularly important in jury selection. The more input you have, the better the chances you will decide on the jurors best suited to your case. This input will be enhanced if you can obtain individual, sequestered voir dire and the use of a juristic psychologist. Individual, sequestered voir dire under the leadership of a juristic psychologist will enable you to discover the least death-prone jurors. Individual questioning also encourages jurors to express their honest views, enables attorneys to probe more deeply, and prevents jurors from avoiding service by mimicking the answers of jurors previously excluded. Moreover, this process enables you to discover juror attitudes on the relevant mitigating circumstances, as well as specific reasons why individual jurors support capital punishment. This information will help you tailor your penalty-phase presentation to the specific views of the particular jury.

E. GIVE THE JURY A REASON NOT TO KILL

The whole thrust of the penalty phase should be to give the jury a reason not to kill your client. The reason can be virtually anything. The reason may be that the jury believes, because of your evidentiary presentation, that your client is mentally impaired. The reason may be simply that the jury perceives that there are people who love and care about the defendant. The reasons may be simple or complex. No matter what, your task is to find a reason for the jury not to kill and then sell it to them.

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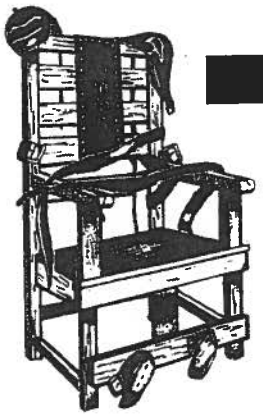
1. At the time of publication, there were 1,268 persons on death row, 1,255 male and 13 female. The male pronoun is used throughout, not to ignore female capital defendants but simply for the sake of convenience.

2. See generally McLaughlin, *The Better Defense* (Southern Poverty Law Center 1983).



F. INVESTIGATE EVERY ASPECT OF YOUR CLIENT'S LIFE

In order to be able to give the jury a reason not to kill, you must conduct the most extensive background investigation imaginable. You should look at every aspect of your client's life from birth to the present. Talk to everyone that you can find who has ever had any contact with the defendant. Somewhere in the course of the investigation you will always be able to discover important facts. In almost every situation, it will be useful to have your client evaluated by a competent private psychiatrist or psychologist. That evaluation can usually provide important mitigating evidence. A good background investigation can enable you to make a giant step forward in finding that all-important reason which will make the jury spare your client's life. Failure to make that background investigation will seal your client's fate.

II. FORMULATING A STRATEGY

An unfortunate reality of the penalty phase is that it only follows a guilty verdict. No matter how well prepared you are, you will have to stave off the natural disappointment of the verdict and set out to accomplish the most important goal of the case—avoidance of a death sentence. In this vein, a continuance can be very helpful, particularly if the guilty verdict is returned late in the day. A continuance will give the defense team time to regroup and make final preparations for the all-important penalty hearing.

After obtaining as much time as possible between the guilt phase and the penalty phase, your first priority will be the presentation of pre-hearing motions. Although pre-hearing motions are not the most important components of the penalty phase presentation, they should not be overlooked. They should serve as a vehicle by which you take the offensive, discover the prosecution's case and draw out reversible error.

A. PRE-HEARING MOTIONS

Many of your pre-hearing motions should be filed along with your regular pretrial motions well in advance of the trial. These would include motions seeking: (1) disclosure of aggravating circumstances and information relating to mitigating circumstances; (2) funds for expert witnesses, including those relevant to the penalty phase; (3) permission for the defendant to act as co-counsel; and (4) dismissal of certain aggravating circumstances, either because the evidence the prosecution intends to introduce cannot establish them or because they are unconstitutional as applied to your client's case. By filing these types of motions prior to trial you will force yourself into preparation for the likely eventuality of the penalty phase and will communicate to the prosecution your intent to fight the case.

If possible, prepare but do not file your penalty phase motions before the trial begins. File them as soon as the guilty verdict is returned. This may give you additional time to work with your witnesses between the time of the guilty verdict and the start of the penalty-phase hearing. Moreover, by filing these motions immediately after the return of the guilty verdict you may create a substantial ground for continuance, namely, the need to consider and to take evidence on the motions.[3]

Most penalty-phase motions do not require the taking of testimony. For example, those which seek discovery of the prosecution's evidence, a new jury, limitation and/or exclusion of certain prosecution evidence, dismissal of the aggravating circumstances, or permission for the defendant to give closing argument, do not require evidentiary support. On the other hand, some motions, such as those which seek funds for additional experts or a declaration that the capital statute is unconstitutional as applied lend themselves to testimonial support, if this kind of support is deemed either necessary or beneficial. Such testimony often proves beneficial because it not only improves your chances of obtaining relief, but also helps you to build a record for appeal and to buy time with which to prepare for the hearing itself.

In sum, don't wait until a guilty verdict is returned to consider additional motions. When you develop the strategy of your case include penalty-phase motions in your plans. Then draw them up, file the appropriate ones prior to the trial and reserve the rest until a guilty verdict is returned.

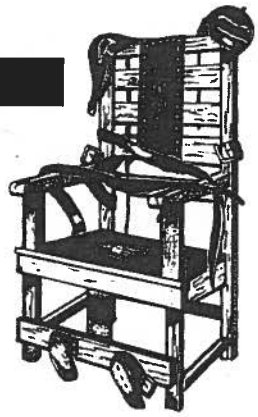
B. UTILIZING THE CLIENT

One of the most important considerations in the preparation of the penalty phase will be how to best utilize the client. The reason for this is simple: the jury has already decided your client committed the crime and now, before passing sentence, they want to know why the client should be allowed to live.

As previously noted, an important way to convince the jury to permit the client to live is to show them he is a human being. Once the jury sees the client interact with the defense team, hears the client say a few things during voir dire or closing argument, and observes the concern of the client's family, friends and other interested persons, it will be much more difficult for them to decide to kill him. Their decision will be transformed from a cold legal decision into one involving a human being with faults just like theirs and with a family and friends who will be as devastated as the victim's family by the death of a loved one.

Honesty and straightforwardness are just as important as humanization. That is, a jury will be much more sympathetic to a client who is up front with them. Thus, to enhance your credibility, consider admitting guilt in your opening statement. Of course, this must be done carefully, in a way that will not result in a waiver of your pretrial assertions. Statements like, "the facts of this case are as the prosecution has described them to you; we don't dispute them; but the judge will instruct you later on the law and you will then have to decide whether these facts amount to capital or noncapital murder," should be considered carefully. Such an opening will not only go a long way toward establishing the defense's credibility, but will also often shock and

3. Of course, state procedural rules may dictate the timing of the filing.



fluster the prosecution. Most importantly, though, by simply being straightforward and honest with the jury from the outset, you will set the stage for a bond of trust that can be called upon when you persuasively list the many reasons why the jury should follow your recommendation that a life sentence is the just sentence.

CAREFULLY WEIGH THE PROS AND CONS OF WHETHER AND WHEN THE CLIENT SHOULD TESTIFY

Perhaps the most difficult tactical decision you will face is whether and when to call the client to testify. It is one that requires the client's input and a great deal of deliberation. The following paragraphs discuss each of the four options you will have and some of the important considerations you should take into account.

One option will be to keep the client off the stand altogether. This recommendation is most obviously called for when the client is guilty, is a true s.o.b. and really comes across as one. In such a situation do everything you can to persuade the client to remain silent. Another instance where such a recommendation should be made is much less obvious. An example of a recent case in which such a decision was made best demonstrates the subtle, difficult case for the client to remain silent.

The client was young and mildly mentally retarded. He had an innocent look to him. It was possible to demonstrate that he had a terrible upbringing, which included plenty of fatherly abuse. Though the client, who was black, helped his accomplice stab the victim to death (a middle-aged, female, white store clerk), he could be portrayed as a mentally deficient follower, who was led into the crime by his meaner accomplice. Because the client would come across as quite normal and non-remorseful (though he claimed to be remorseful), it was decided that he should not testify. It was felt that his testimony would burst the semi-sympathetic profile that could be carefully drawn. A life sentence was obtained.

Two principles can be extracted from this example to help you decide whether to pursue the second option–having the client testify only at the penalty phase. First, make your decision in light of your entire presentation. Basically, you must decide whether the client's testimony will add to or detract from the image of the client you want to portray. Second, carefully gauge the client's sincerity before making your decision, especially with respect to the question of remorse. Every client knows that he should express remorse and will do so at your urging. However, most clients either do not truly feel it or are simply unable to convincingly express it. When you ask your client how he feels about what he did and he says something like, "I really feel bad, I should have left town right away" you know you are in trouble. If you spend lots of time with the client, which you must, you will know just how his expression of remorse will come across. If you think the jury will perceive it as phony, weigh this in favor of silence. Remember, the expression of remorse will probably be the only positive aspect of your client's testimony. If he can't do it well, just imagine how he'll do when the prosecutor takes him back through his feelings at the time of the gory murder.

A third option will be to have the client testify at the guilt stage only. This recommendation can be quite simple, as in the case where the client professed innocence at trial and now wants to admit guilt, in which case silence seems like the best course. It can also be difficult, as in the case where the client wants to reprofess his innocence at the penalty phase. Your decision will have to turn on your judgment of the client's credibility, the strength of the prosecution's guilt evidence, and your perception of whether the jury will be turned off by a claim they have once rejected. Your decision will also depend on how big you plan to play up possible innocence as a mitigating factor in relation to other available mitigating circumstances.

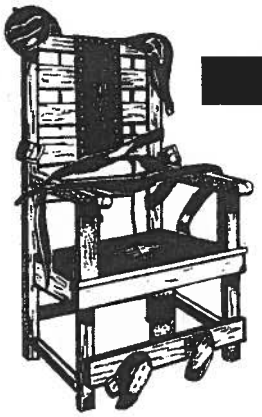
The fourth option is to have the client testify at both phases. This situation most often arises in cases where the client was called at the guilt phase in support of a defense of diminished capacity or self-defense. In such instances, remorse will be a most important consideration. This will especially be the case where the prosecutor has argued in closing that the client failed to express any remorse during his guilt-phase testimony.

In sum, there are no easy answers to this most difficult strategy question. Each case must be considered individually on its particular facts and, most importantly, the particular client and the image of him you plan to portray. Don't follow any simplistic formula but rather consider all the facts and have the courage of your thoroughly contemplated convictions.

C. GENERAL STRATEGY

In addition to deciding how the client fits into the overall strategy, you must determine whether to dispute the prosecution's evidence of aggravation. If the prosecution has charged every conceivable aggravating circumstance, including ones not even arguably applicable, and the judge has denied your motion to exclude these charges of aggravation, you will most probably want to discredit the prosecution's arguments. By minimizing the number of aggravating circumstances available you will be in a better position when the jury undertakes its function of weighing aggravating and mitigating circumstances. By contrast, if the prosecution has charged only those circumstances which it can readily establish, you will probably fare best by admitting the existence of aggravation at the outset in your opening statement. By admitting aggravation and arguing that the evidence of mitigation nevertheless compels a life sentence, you will maintain the defense's all-important credibility with the jury, a credibility you will find crucial to your life plea.

At the same time you are minimizing the number of aggravating circumstances that the prosecution may present, you should also be maximizing the number of mitigating circumstances that you present. Though the question of punishment ought never to be a simple comparison as to numbers of aggravating and mitigating circumstances,[4] sheer numbers may often have a psychological impact on the jury. Thus it is clearly to your advantage to have the jury consider as many mitigating circumstances as you can possibly present.



Remember, you are not limited in your presentation to those mitigating circumstances enumerated in your statute.

In *Lockett v. Ohio,* 438 U.S. 586, 604 (1978) (emphasis added), the Supreme Court concluded that the

> . . . eighth and fourteenth amendments require that the sentence, in all but the rarest kind of capital case, not be precluded from considering *as a mitigating* factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

Thus, factors such as a steady work record or a good record of supporting the family, or conversely such things as alcoholism, drug addiction or abuse as a child are valid mitigating circumstances which the judge should charge the jury to consider. By having the judge charge heavily on specific non-statutory mitigating circumstances you can beat the prosecution at the simplistic numbers game.

D. WITNESSES FOR THE PENALTY PHASE

There are essentially two extremes of penalty phase cases: those where family, friends, clergy, experts and combinations of these groups are available to present evidence in mitigation; and those where there is no one but you to speak in the client's behalf. Most cases fall somewhere between these two extremes. This fact underscores the need for a case-by-case tailoring of the penalty phase. However, there are general areas in every case which command attention.[5]

1. The Background Witnesses– Presenting the Real Life Story

During the guilt phase, the jury will hear nothing about the defendant except that he is a mad-dog killer. If you are to be successful in the penalty phase, i.e., if you are going to get a life sentence for your client, you will have to educate the jury about your client's life both good and bad. You are going to have to give them, in capsule form, the story of his life.

However, before you can even begin to discuss witnesses for the penalty phase, you must undertake an extensive background investigation of your client. Find out as much about him as you possibly can. Learn about his life from birth to the present. That generally means talking to family, friends, neighbors, school personnel and social workers. Inverview anyone you can find who has had any contact with the defendant. The material gleaned in this background investigation will help you in the presentation of the client's life story. Make sure that your investigation covers the time period up to the present including pretrial detention. Oftentimes, defendants, awaiting trial on a capital offense, develop strong relationships with clergy and jail personnel. These persons may be available to testify that the defendant has undergone a conversion since his arrest. The more extensive the background investigation, the more successful your penalty phase operation is likely to be. Once the investigation is done, then witnesses must be selected.

Two points bear repeating here. First, conduct this investigation well prior to trial, both to enable you to select a unified strategy and to give the investigation time to develop. Second, be sure to explain what you are doing, from the client on up. That is, be sure that those who possess the information you need to discover understand that to obtain a life sentence you are going to need to know the worst as well as the best things about the client. This message takes time to spread and often will require repeated visits with the respective witnesses before it will bear fruit, particularly if the facts involve sibling disclosure of parental abuse and other highly personal matters.

a. Family and Friends

Most of the emotion in the guilt phase is directed at the family of the victim. The prosecutor will make sure that they sit front row center and will constantly remind the jury of the grievous loss the family has suffered. It is thus extremely important that the family and friends of the defendant be available to testify at the penalty phase hearing to counter this tactic. You will have to show that the defendant is loved by people just as the victim was loved.

In addition to demonstrating love toward the client, family members can also help to express remorse toward the family of the victim. This is a critical point that should not be overlooked, particularly in cases where the client does not testify and himself express remorse. A family member can both express his or her own remorse and reveal that the client spontaneously conveyed his remorse to the family member (assuming this is true, which it most often is). If neither the family nor the client can testify concerning remorse, it will be your job to see to it that you sincerely express the defense's remorse during your arguments to the jury.

It is always best to have the family and friends testify anecdotically about incidents in the defendant's life. This is an important step in making the defendant a person. Don't hesitate to have the family and friends reveal negative thiings, such as a history of alcoholism or drug abuse. Also have the family and friends be prepared to admit that they have somehow contributed to the defendant's conduct. The penalty-phase jury wants to know about the defendant's life. Tell them. Many parents, realizing that their son or daughter may be executed will admit that they abused their child physically and psychologically. This fact alone may mean

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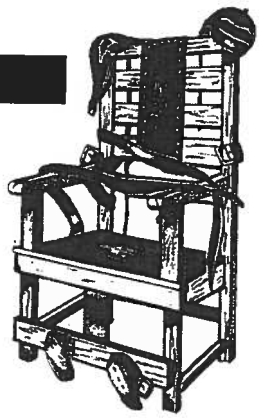
4. *See, State v. Dixon,* 283 So.2d 1, 10, (Fla. 1973) wherein the Florida Supreme Court notes:

   > It must be emphasized that the procedure to be followed by the trial judges and juries is not a mere counting process of x number of aggravating circumstances and y number of mitigating circumstances but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present.

5. There is an excellent presentation of two sample hearings contained in the Death Penalty Manual published by the Kentucky Public Advocate, at pp. 351-414 (1983).



the difference between life and death. Also, don't overlook persons like next-door neighbors. They may be willing to praise the defendant or tell the jury how he was mistreated as a child. Either way the testimony is valuable.

b. Non-family Members and Friends—Clergy, Teachers, Social Workers

Any defendant in the normal course of life will have come in contact with people like clergy, teachers and social workers who will be able to provide real insight into his life and thus be important witnesses for the jury to hear in the penalty phase.

Clergymen can provide the obvious testimony about the defendant's religious beliefs as well as testimony about him as a person. In addition, if the defendant has undergone a religious conversion while awaiting trial, clergy may be available to testify about the facts of the conversion and its authenticity. Because of the religious learnings of most jurors, this type testimony can be extremely helpful.

School personnel, principals and teachers may also be a valuable source of information for the jury. They can obviously provide extensive information about your client's childhood and young adulthood. Social workers, also, can provide a great deal of information, particularly about family life. They may well be a far more accessible source for real insight into family problems than the family itself. The value of testimony from these non-family and friend witnesses is enhanced by their neutrality. They are not related to either victim or defendant and hence have no special stake in the outcome.

2. The Expert Witnesses: Presenting Reasons Why the Death Penalty Should Not Be Imposed.

a. Psychiatrists and Psychologists

Almost every state death penalty statute has statutory mitigating circumstances which deal with the defendant's mental state. Typically, they allow a jury to consider whether "the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired" or to determine whether "the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance."

These circumstances clearly contemplate a situation wherein the defendant suffers under a mental health problem which is serious but does not fall within the legal parameters of insanity. In addition, the law permits extensive presentation of such non-statutory mitigating circumstances as alcoholism and drug addiction or usage.

It is virtually impossible to successfully present this kind of evidence without professionals such as psychologists and psychiatrists. These kinds of witnesses can explain the defendant's behavior in meaningful terms to the jury and help them understand that a particularly horrible homicide may not solely be the product of a defendant's evil but may be directly related to a mental disease or other condition such as alcoholism or drug addiction or usage. Psychiatrists and psychologists can provide that all-important reason which a jury must have in order to vote for life over death. If your client cannot afford the professional services, such as a psychologist or psychiatrist, then petition the court and request funds for their employment.

In some instances, most often cases where insanity is an open question, you will be required to make an important strategy decision respecting timing. Do you go for acquittal by using the expert in the guilt stage, or is it better to hold back the witness until the penalty phase? At first glance the answer seems simple—shoot for acquittal. However, experience has disclosed a risk when this tactic is employed. If the jury rejects the insanity defense it may by definition reject whatever mitigating testimony the expert gave (or will give if again called at the penalty phase).

This concern stems from post-trial interviews of jurors in a case where the psychiatric expert was called at both the guilt and penalty phases.[6] He testified at the guilt phase that the defendant's alcohol and drug intoxication at the time of the crime rendered him incapable of forming the requisite intent to kill. The jury found the defendant guilty. The same expert then was called to testify concerning additional mitigating factors, such as the defendant's borderline retardation and history of alcohol and drug addiction.

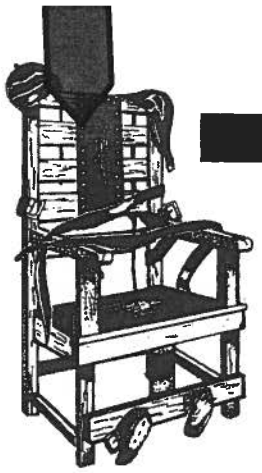
Juror interviews disclosed that the jury totally rejected the expert's penalty-phase testimony. Jurors uniformly stated they could not understand why this witness was called to testify, since he had already said the same thing and they had rejected it. In fact, none of the testimony was repetitive. Unfortunately, the jury did not bother to find this out, because it blocked out the testimony based on the incorrect assumption that the expert was simply going to reaffirm his earlier testimony.

Perhaps better communication with the jury could have overcome this impediment. This is something you should consider. At the same time, however, the second and larger consideration should be whether to use the testimony in the guilt phase, knowing that if the expert testifies at the guilt phase and a guilty verdict is nevertheless returned, the jury may reject everything the expert says at the penalty phase because it already rejected his or her expert view at the guilt phase.

b. Clergy

Jurors, particularly in the South, are persons whose lives are heavily steeped in religion. When they are forced to determine whether or not a defendant is to live or die, they often refer to their religion. It is not uncommon for jurors to pray together during sequestration and deliberation. Thus, it is often important to present, through the testimony of clergy, the ethical and theological aspects of the death penalty. Testimony from clergy matched closely to the jurors religious background—if admissible in your state—can have a tremendous impact. Testimony by a Baptist minister or Catholic priest to

6. Whenever I have spoken on this subject, attorneys in the audience invariably have told me that they, too, have experienced this problem. Thus, my concern is also based on the universality of this problem.



a jury composed principally of Baptists or Catholics that the death penalty is wrong is very powerful and can provide the "reason" not to kill that we have previously mentioned. Similarly, testimony from a minister or priest that a defendant has undergone a true religious conversion can be extremely important. Jurors may take that as a sign of the defendant's possibility for rehabilitation.

Obviously, testimony of the latter type requires that the cleric have counseled extensively with the defendant. However, even where the cleric will testify on ethical or theological considerations, care should be taken that the witness meet and counsel with the defendant. Not only will such an approach sidestep possible evidentiary problems, it will also strengthen the witness's credibility with the jury.

c. Law Enforcement/Corrections Official Witnesses

Many law enforcement officers and correctional officials are opposed to the death penalty because it serves no purpose. Their testimony can be extremely persuasive to a jury. In addition to expressing opposition to capital punishment, corrections officials can testify to the availability of secure facilities for incarceration of inmates serving life or life-without-parole sentences including the extra-security precautions and paucity of escapes.

Be careful in deciding whether to use such a witness. Be sure that you do not open up an area that will hurt more than help you. For example, watch out for a claim that you have opened the door to cross examination and/or rebuttal evidence regarding the client's future dangerousness. You may well decide that the risk of presenting a corrections witness outweighs the benefit of the testimony.

d. Eyewitnesses to Executions

There are many witnesses, such as Don Reed of Huntsville, Texas, available who have seen persons executed or who as wardens can describe the ritual which precedes an execution. Obviously use of these witnesses depends on your overall trial strategy. In the proper case, their testimony can graphically depict what happens when a person is executed and thus force the jury to deal with the physical aspects of capital punishment. Many of these witnesses have changed their views on capital punishment after witnessing executions and their testimony can bring home the brutal realities of executions.

This kind of testimony, however, is extremely risky. It provides a golden opportunity for the prosecution to emphasize the brutality of the murder for which your client has been convicted. It also gets you into an argument you cannot win in front of a jury that by definition unanimously favors capital punishment. That is, when the prosecution argues that your client, unlike the innocent victim of your client's crime, will have had the benefit of the jury's just decision before sanitarily being put to death, that argument will find a sympathetic audience. Chances are that the jury will be more upset by the details of the crime than the prospect of a state-sanctioned execution.

Therefore, it is recommended that this kind of testimony be used very sparingly, if at all. It not only will open you up to a risk that your showing of brutality will be turned against you, but may also detract from your theme–the preciousness of life.

e. Deterrence Witnesses

Many persons believe that the death penalty deters. Voir dire of prospective jurors often underscores that fact. There is a strong body of evidence that suggests that the death penalty absolutely does not deter.[7] The researchers who have analyzed this data are often available to testify concerning the studies which have led them to their conclusion that the death penalty does not deter. Their testimony, properly presented, can help dispel the myth of deterrence, thus helping to minimize juror's support for the death penalty. If you plan on placing heavy reliance on non-deterrence witnesses, then tailor your voir dire accordingly.

If you are considering the use of such an expert, be sure to: (1) research your state law to see whether you will be permitted to introduce this type of testimony (some states disallow the testimony because it is not relevant to the character or record of the client or the circumstances of the offense); (2) research the question of whether you will be permitted to argue about deterrence in closing without having introduced evidence upon which to base your argument; and (3) be sure that the testimony is both necessary and consistent with your strategy. This third consideration is often overlooked. It should be given careful attention, because in most cases you will have constructed a presentation which demonstrates why your client, the person, should not be killed.

If you feel you can humanize the client through his life story as told by family, friends and other witnesses, you may want to steer clear of deterrence. It will not only fail to mesh with your personalization goal but may also pull you into an area you want to avoid. Remember, once you get into the deterrence question, you are (1) inviting a debate regarding capital punishment, and (2) confusing the jury into thinking you are asking them to return a life sentence because you are against capital punishment. Such risks should not be taken unless you have carefully considered the pros and cons of such testimony and decided that you can neutralize the risks involved.

f. Summary

Expert witness testimony can be the key to a life sentence. However, such testimony must be considered in light of the oft-repeated caveat that each penalty phase must be approached differently. Further, the non-deterrence evidence is highly technical and may be too abstract for the average jury. In addition, the prosecutor may be able to poke simplistic

(continued on page 62)

7. *See e.g.*, W. Bowers, *Executions in America*, (Lexington, Mass. D.C. Heath & Co. 1974); Forset, *The Deterrent Effect of Capital Punishment: A Cross-State Analysis of the 1960's*, 61 Minn.L.Rev. 743 (May 1977); Zeisel, *The Deterrent Effect of Capital Punishment: Facts v. Faith*, Sup.Ct. Rev. (1976); Bowers and Pierce, *The Illusion of Deterrence in Isaac Ehrlich's Research on Capital Punishment*, 85 Yale L.J. 187 (1975).

crime. (A third case, *Colorado v. Quintero*, not involving a warrant issue without probable cause but a warrantless arrest on facts not amounting to probable cause, was dismissed because of the death of the defendant.) The attempt to undermine the warrant clause, our major bulwark against arbitrary police action, is an all important issue for the United States Supreme Court. If we are not guaranteed our privacy, our right of repose, then our political and social freedoms rest on thin legs.

This perjorative introduction is for the purpose of expressing my view that our Supreme Court will really not have the energy or time to give this important issue the study and deliberation it deserves. My prediction is a patchwork decision by a divided court, exhausted by implacable disputes, inability to reach a coherent consensus on search and seizure questions, and, most of all, exhausted by the strain of the continuing stream of death penalty cases. Each week now there are agonizing life or death decisions arising from all over the country raising complex issues regarding capital punishment as well as important decisions of fairness in individual cases. These cases must take their toll but, of course, deserve the attention they get. Here we have one of the best reasons for abolishing capital punishment and perhaps the one which will eventually carry the day.

Until next month, happy suppressing.

PENALTY-PHASE from page 46

holes in the study. Expert testimony, utilized in the wrong kind of case, can fuel the prosecution's fire. Weigh the need for expert testimony carefully and make sure it is right for your kind of case.

CONCLUSION

In sum, though death is different, the penalty phase of a capital case is not much different from most others. Like every case, it requires immense preparation and an intense presentation. In many ways, it resembles a personal injury trial, where the burden is upon the plaintiff to establish by a preponderance of the evidence that the client is entitled to damages. In the penalty phase, like the personal-injury plaintiff, you must reveal the life story of the client and establish by a preponderance that the damage inflicted upon the client—by the neglect of his parents, the abuse from his parents, the alcohol and drug addiction, etc.—establishes sufficient mitigation to outweigh the aggravating.

The analogy is rough at best. Nevertheless, it serves an important function. Hopefully, in conjunction with the preceding pages, it demonstrates the critical need for you to treat the penalty phase as a complete new proceeding in which you must present substantial evidence in order to prevail. Unless you enter the fray with this attitude, you will have not properly prepared yourself for the truly awesome matter of life and death that is before you.

The .10 Percent Solution

by John A. Tarantino

This new addition to *the CHAMPION* will focus on topics of interest in the area of drunk driving, including recent case law, scientific and technological advancements and legislative reform. As most criminal defense lawyers know, the defense of a drunk driving case has become a complicated, expensive and difficult task. When I am asked for advice on how to approach the defense of a drunk driving case, one of the first things I suggest, in addition to being thoroughly prepared, is to be creative and innovative. A creative approach will not always win a case, but in most instances, it will aid in the defense of a drunk driving case. The following are three examples of creative approaches to drunk driving defense:

I. Constitutionality of Per Se Statutes

On June 2, 1983, a California Court of Appeals held that the .10 "per se" statute enacted by the California legislature in 1981 was unconstitutionally vague. *See People v. Alfaro*, No. AO 19583 (Cal. App. First Division Slip Opinion Filed June 2, 1983). The statute, Vehicle Code §23152(b), states as follows:

> It is unlawful for any person who has 0.10 percent, or more, by weight, of alcohol in his or her blood to drive a vehicle.

The *Alfaro* case arose when a number of drivers argued that Vehicle Code §2315 (b) was constitutionally flawed and impermissibly vague. The drivers argued that the statute failed to give adequate notice of the conduct it prohibits.

Specifically, the drivers argued that the statute was based on a measured level of blood alcohol (BAC) rather than on conduct or symptoms associated with and identified by those who may be violating its provisions. The California Court of Appeals held that statute unconstitutional reasoning that "we are not concerned with laws which forbid driving a motor vehicle after some alcoholic ingestion; instead, we deal with a law which allows persons to

Zen and the Art of Mitigation Presentation, or, The Use of Psycho-Social Experts in the Penalty Phase of a Capital Trial

by David C. Stebbins and Scott P. Kenney

Introduction

When we were first approached by Dennis Balske to write an artical on the use of expert witnesses in the penalty phase of a capital trial, our initial response was, "How can we impress the world with an erudite analysis of *The Law*?" Our approach to this topic was to present more practice and procedure and less traditional legal analysis. Therefore, any mention of case law is an accidental spill-over from some brief in the memory of the computer we are using to write this article.

What Is Mitigation?

Webster's Dictionary defines *mitigate* in terms of making something become less intense, severe, or painful. Applying Webster's definition in the context of a capital case means, obviously, that the goal is to make the sentence less intense, less severe, or less painful, *i.e.*, to obtain a life verdict from the jury. (Since judges seldom overturn death verdicts, this article is written in terms of convincing the *jury* that life is appropriate.)

The question remains, however, how does defense counsel get this life verdict? *Lockett* says that the history, character, and background of the defendant, as well as the nature and circumstances surrounding the incident itself, must be considered in mitigation. *Eddings* says that the youth of the defendant must be considered. Most state statutes and/or jury instructions do not give even a rudimentary definition of what mitigation is. Most state statutes have a non-exclusive list of factors that *must* be permitted as mitigating as well as a catch-all clause that permits the presentation of virtually any relevant evidence on the question of mitigation. None of these things, however, spell out the meaning of mitigation or give any indication of what will convince the jury in any particular case that a life sentence is the appropriate punishment. Because there are innumerable variables between cases, there can be no easy answer on winning any particular case, but the primary goal of defense counsel in mitigation must be to offer to the jury an explanation of the crime. The jury will want to know how this murder could have occurred—how this defendant came to such a position that he or she could have committed such a heinous act. The explanation is not an excuse. The explanation has to be an honest (although interpreted) history of how the client grew into the "heartless monster" that the prosecutor proved him to be in the guilt phase.

At first blush, criminal defense attorneys generally have two initial ideas for mitigation: a) to humanize the client; and b) to compile all of the nice things the client has done in his life which will necessarily outweigh the facts surrounding this one unfortunate incident (the murder). While the importance of portraying the client as a loving, breathing, caring, thinking, feeling human being with family connections cannot be overstressed, that is only the first step of any successful mitigation. It is axiomatic in capital defense literature that "it is much easier to kill a sack of cement than a human being." However, with 1500 people presently on death row, it seems fairly easy for a jury to kill a human being, too.

The problem with planning mitigation as a compilation of a mass of good deeds that far outweigh the one incident of aberrant behavior is that most people facing the death penalty are not choir boys with paper routes who took care of their mothers, obeyed their fathers, and placed flags on graves on Memorial Day. There is, of course, the rare client who has previously lead an exemplary life, but even evidence that the murder was truly an aberration is not always enough to overcome the facts of the crime. Juries tend to wonder whether it might just not happen again. Painting a picture of the client's good deeds generally is impossible; even if possible, it is usually insufficient to overcome the jurors' revulsion over the facts of the crime.

The realities of mitigation are that jurors can kill human beings *and* choir boys when they cannot identify with the client and when they cannot understand why the crime occurred. Jurors need to identify with the client as a human being, if not as a social entity. They need to be able to identify with, or at least appreciate, the feelings and motivations that led up to the killing.

To mitigate a death sentence, the attorney must prove his client is not evil (or at least that he was not born evil). The facts of the crime and the arguments of the prosecutor at the guilt phase will cause this knee-jerk conclusion of the jury unless a credible explanation is given to explain the client's actions. Many prosecutors argue, and apparently believe, that some people are just born evil and that their whole lives have been a calculated plan to arrive at this one incident. Much of the prosecutor's case may be devoted to showing this evil and eliciting other opinions about this evilness. Defense counsel in mitigation must overcome this archaic notion of inherent evil and explain to the jury about the life of the defendant and the forces that shaped him into the person who could have taken the life of another. It is important to remember that the taking of another human life is beyond the conception of most jurors (except, of course, in the context of capital punishment). Jurors are likely to "buy" the

the black community. Finally, he was told by the police to either leave town or they would get him. Until the murder accusation, the most serious crime Charles had faced was distributing literature without a permit.

Finding community volunteers is of the highest priority.

The deceased was working as a gas station attendant at the time of the shooting. Apparently two men had purchased gas, and an argument ensued. When they were ordered to leave, a scuffle took place and the attendant was killed. The assailant then fled. The police conducted an intense investigation for leads, seemingly without any success. Finally they focused their attention on Charles, who lived just a few blocks from the homicide scene. Word quickly spread through the ghetto that the police had orders to shoot him on sight. In fear of his life, Charles fled to New Jersey, where he sought assistance from a peace activist group that aided political prisoners. Eventually he was arrested by the FBI and identified "as a member of a black militant group."

During our initial meeting in the county jail at Hackensack, where he was awaiting extradition, Charles and I recognized that a successful defense would entail a team effort involving a broad spectrum of people from the community. There would be a tremendous amount of prejudice and hostility to overcome. I even had word that an effort might be made on his life during the transfer by police from New Jersey to the South for trial. Consequently arrangements were made to protect Charles by having community leaders accompany him on the trip, ensuring that he would not be "accidentally" killed by the police guards.

The defense team I assembled included law students, paralegals, church leaders, people from both the white and black community, and peace activists. They were given a variety of tasks, such as background research on specific aspects of the case, exhibit preparation, tracking down leads and developing clues, legal and factual research, sampling attitudes of various sectors of the community, and getting background information for jury selection. They were also of vital importance in helping diffuse at least some of the prejudice through public education.

The investigation I instituted was wide-ranging in scope and of great complexity. I learned that Charles was playing cards in the community at the time of the homicide. The game was interrupted by someone announcing that there had been a shooting at the nearby gas station. Charles, along with others from the neighborhood, rushed the several blocks to the scene and joined the spectators watching the police. Interestingly, a police officer even told Charles to stay back from the area.

The case went to trial in a racially charged atmosphere, marked by police corruption and bigotry. I had vigorously argued against the unfair and racist conduct of the prosecutor and judge, but with only limited success. The all-white jury eventually returned a compromise verdict of second degree murder and a 23-year sentence, which many said we should consider a victory. After all, Charles would not be executed and he would eventually be released from prison. But to me it was a nightmare, for I knew Charles to be an innocent man victimized because of his political beliefs and skin color.

We had lost a battle, but the war was far from over. Our investigation continued, with the eventual discovery that the authorities had actually concealed evidence that someone other than my client had committed the homicide. They had tried to put a man in the electric chair whom they knew to be innocent. On the night of the homicide, a woman passing the gas station had observed the shooting and recognized the assailant to be a young man she had known for years, and obviously not Charles. That same evening she gave this information to the police, even showing them where the assailant lived. Yet, rather than pursue this evidence, the police chose to prosecute my client. This newly discovered evidence was presented at a new trial hearing, but was rejected as insignificant by an incredibly biased judge. The racism that clouded the trial had also affected the court.

Following a series of appeals and habeas corpus proceedings, the conviction was unanimously reversed by the Fifth Circuit. Among several major constitutional errors it recognized as having been committed was the prosecution's concealment of the eyewitness who would have cleared Charles. The prosecution had committed a fraud on the court, the jury, and my client. A short time later I was able to secure his release on bail after he had languished for four years in prison. Eventually Charles was exonerated. The new trial proceedings were conducted before a new judge, who was unaffected by the racism and prejudice that had so dominated the first trial. The success in saving Charles certainly would not have been possible without the unselfish dedication of many people from the community. The life of an innocent man had been spared. It is interesting to note that of the many people involved in the defense team, I was the only lawyer.

Too often there is a tremendous lack of involvement and input by nonlawyers in the pretrial and trial process of capital cases. Consequently, the accused is deprived of an adequate defense including the full presentation of life-saving evidence. The result is frequently a death sentence.

The wide variety of skills, talents and knowledge possessed by nonlawyers needs to be employed in defending those capitally charged.

Beyond moral and ethical considerations, we have a humanitarian obligation to become more sensitive to the need of involving nonlawyers in the defense of those facing the death penalty. We in the legal profession must understand that saving lives in the courtroom requires creativity. Narrow-mindedness, which so often is a mark of our profession, has no place in the defense of those capitally charged. The wide variety of skills, talents and knowledge possessed by nonlawyers needs to be employed in defending those capitally charged. There is a dire need to broaden the horizons of the legal community. We must all work as a team in saving those whom the state seeks to kill.

inherent evil argument solely because they cannot conceive of ever taking another human life. Thus, an explanation of the crime and the life events leading up to it is essential to giving the jurors some insight into how this could have happened.

In mitigation, it is the defense attorney who must gather and present the evidence and who must affirmatively prove the case.

Prosecutors get a lot of mileage out of the "inherent evil" argument. It is always surprising to hear college-educated men and women arguing that evil people are never sorry, they never show remorse, they can never be rehabilitated, and they are likely to commit the same crime again if not executed. Nevertheless, this is an attractive, simplistic argument that jurors will accept if the defense team does not offer any equally acceptable explanation.

The Roles of Defense Counsel

The Go-Forward Advocate

A second axiom of the literature on death penalty defense is "Death is Different." Among the myriad reasons why this is true is the role that defense counsel must play in a capital case—especially in mitigation. It is defense counsel's role to go forward in mitigation with evidence to convince the jury not to kill the client.[1] This is an affirmative obligation to present evidence—to go forward. Criminal defense attorneys are more accustomed to reacting to what the state does, reacting to evidence the state presents, reacting to theories the state has. In mitigation, it is the defense attorney who must gather and present the evidence, who must create and present the theories of mitigation, who must explain his client's life and actions, and who must affirmatively prove the case for life.

This is often an unusual role for defense attorneys. Investigating, theorizing, and presenting an affirmative case for life is something that most attorneys are neither trained to do nor particularly well-suited to do. Criminal defense attorneys are generally lacking in the experience of "going forward." The prosecutor normally has the burden to prove things in a criminal case. The defense attorney generally operates in reaction to moves of the prosecutor.

Not only are criminal defense attorneys placed in a different posture in mitigation, they are faced with a field of expertise in which they have little or no training. Mitigation involves fields of expertise that are not part of the law school curriculum. There is also virtually no equivalent in most attorneys' experiences. In law school and general criminal law experience, the important factors to worry about are the subleties of the law, the courtroom skills of direct and cross-examination, and the art of persuading the jury that the client was not there. These are also important in capital litigation.

The Team Player

What attorneys are not trained in, however, and generally have no experience in, is dealing with the psycho-social problems of their clients and explaining these to the jury. Because of this, it is necessary for attorneys in capital cases to recognize at the beginning that they do not have the skills to accomplish the goals of mitigation and to go out and seek the assistance of psycho-social professionals who are skilled in these fields. For all practical purposes, the effective use of social workers, psychologists, and psychiatrists is necessary for the effective representation of a capitally-charged defendant. Attorneys went to law school, whereas psychologists and psychiatrists and social workers spent an equal number of years specifically studying personal, family, and group dynamics. The ideal approach to capital litigation is a team of professionals including, at least, the attorneys, a criminal investigator, a social investigator, a psychological expert, and the client.

Sucessful mitigation is a blame-shifting procedure where the jury is presented with evidence to demonstrate that the defendant was not born evil, but rather was the product of up-bringing, social environment, and physical and mental limitations. These are the kind of factors that are not totally subject to individual free-will and choice. Blame-shifting is a technique of evidence presentation and organization rather than a specific topic for argument; it is a counter to the prosecutor's argument of inherent "evil" that at the same time explains how the defendant found himself in a situation to take a life. Excuses and defenses are proper for the guilt phase; *explanations* control the mitigation phase.

It is necessary for attorneys in capital cases to seek the assistance of psycho-social professionals.

Criminal attorneys are very comfortable attributing a client's behavior to his bad upbringing, depressed social environment, or substance abuse, because, from experience, there is a general feeling that these conditions do, indeed, contribute to shaping people. Juries, however, do not have the same experiences. To simply allege these conditions as explanatory factors does not *prove* anything. The jury must be told *how and why* these forces helped create this person who killed another. This is why psychologists and social workers are invaluable to the presentation of capital mitigation. Friends, family members, neighbors, teachers, prison personnel, etc., can testify to *facts*, but cannot render *opinions* as to how the family background, life experiences, physical and psychological conditions bear on the creation of the person whose life or death is to be decided.

The Team Roles

The Social History

Upon appointment to a capital case, two concurrent investigations should be begun by separate and distinct investigatory per-

1. This article is written from the perspective of the laws of Ohio. Under the Ohio statutes, aggravating circumstances are proven at the guilt phase. Thus, the penalty phase deals solely with the presentation of mitigation and rebuttal to that mitigation. Aggravating circumstances are not reproven at the penalty phase. Nevertheless, in other states defense counsel still has the obligation of proving that his client does not deserve to die.

sonnel. The criminal investigation is self-explanatory. A social investigation or ocial history is a creature of capital litigation, however, and is a key to a successful mitigation. A social history is a complete hronicle of every event of any significance in the life of the client from birth, or even before, to the present.[2] The two investigations clearly overlap in many reas and many attorneys use the same investigators to do both the criminal and social investigations. The important istinction is that the social investigation as a separate goal: a detailed history of ne client to assist a psychological expert and the rest of the defense team in understanding the client so that his actions can explained to the jury. Without a complete social history, any psychological examination is incomplete and the resulting inions, conclusions, or diagnoses are bject to severe scrutiny.

A complete social history is necessary r psychological experts to gain a full derstanding of the patient. In the iminal defense field (especially with indigent representation), however, evaluons are generally done solely for mpetency and insanity and are done on lowest-bidder basis. The use of a social history helps prevent the familiar prutorial refrain during cross-examination defense psychologists: "Doctor, isn't it a fact that all the information on the ckground of this defendant you received from his own mouth...?" A complete d professional social history is a necessi if psychological or psychiatric testimony ontemplated by the defense; this is true only for mitigation, but any phase of y criminal trial.

The ability to conduct a social investiga- and prepare a social history is a skill t is often possessed by people who have ad training in clinical social work. This not exclusive, however. Psychologists often possess these skills, but the cost or of having psychologists do this kind "legwork" is generally prohibitive. ial workers are generally trained in the interviewing process and possess the necessary skills to bring out often painful memories about the client's life from the client himself and from his family, friends, and acquaintances.

Sometimes people with little or no prior training or experience in this type of interviewing turn out to possess excellent interviewing and report writing skills. The important point is that it is essential to a successful mitigation that all of the significant events of the client's life are identified and a complete and accurate picture of the client's life is drawn. Armed with this, the defense team can explain the client's life to the jury and show what forces shaped the client into the person who committed this crime.

Some type of psychological expert should be made part of the defense team.

The Psychological Expert

The psychological expert is also a keystone to a successful mitigation presentation to a jury. This is true not only where there is an attempt to show a recognized mental disease or defect, but also where lay witnesses have testified about the client's background and developmental history. The psychologist's explanation of the client's development is evidence, not merely argument of counsel.

Traditionally, psychological experts are used in criminal cases to show that the client is, or was, suffering from some mental disease or defect and that he either is incapable of assisting in his own defense, or was insane at the time the crime was committed. Attorneys sometimes conclude after meeting their clients and doing a brief social history that the client is not "crazy" and there is no reason to look into the use of a psychological expert. In virtually every capital case, some type of psychological expert should be made part of the defense team. The fact that it is increasingly difficult to win an insanity case should tell defense attorneys that it is going to be increasingly difficult for juries to be able to return life verdicts based on the defendant's mental status or diminished capacity. This does not mean, however, that the use of psychological experts should be ignored. It means that the use of these experts needs to be expanded and refined.

The traditional use of psychological experts in mitigation has been similar to the use of psychological experts in insanity proceedings, *i.e.*, to have a battery of tests performed on the client; to have the psychological expert diagnose the disease or defect (or lack thereof); and to have the expert give his or her opinion on whether this affected the client's ability to control behavior. While there are many cases where there is a valid mental disease or defect and it does affect the defendant's behavior, it is difficult in the post-*Hinkley* era to win on this issue. In a far greater number of cases, this traditional approval will result in either a questionable diagnosis of a disease or defect, an opinion that it did not affect the client's behavior, or an opinion that the client is a sociopath. In all such instances, the presentation of this testimony in mitigation is more likely to result in a death verdict than a life verdict.

The use of a psychologist by the defense team goes beyond testing and diagnosis and the giving of opinions at trial. The psychologist is a valuable resource to the defense team. Not only can the psychol-

[2] For further discussion of this, see Blum, *Investigation in a Capital Case: Telling the Client's Story*, THE CHAMPION, August 1985, at 27; Alfonso & Baur, *Capital Cases—Enhancing Capital Defense: The Role of the Forensic Social Worker*, THE CHAMPION, June 1986, at 26.

ogist provide the necessary expertise to determine if there is a mental disorder or defect and some analysis of its chances of success, but also can lead the defense team to other possible areas of inquiry (such as organic brain damage or post-traumatic stress disorder) and to various specialists who can possibly assist the defense team in preparing for mitigation. Many of these areas may be totally out of the realm of knowledge of the attorney.

If the psychologist sees some type of real mental disease or disorder and is of the opinion that it definitely affected the client's behavior (*i.e.*, insanity or some type of diminished capacity), then the defense team may want to consider pursuing the more traditional psychological defense for mitigation. At that point, it may well be best to bring in another professional, perhaps a psychiatrist, to buttress the opinions of the psychologist.

If the tests and interviews reveal no serious mental disease or defect, then the defense team needs to look to the social history for clues to explaining the client's behavior. A psychologist, in conjunction with the social investigator, can often develop a theory from the social history to explain the client's lack of control or the situation at the time of the crime. Unless one accepts the theory of inherent evil, most cases will reveal an explanation for the client's personality and actions. In some cases this explanation will not be sufficient to mitigate the crime for the jury. Without the explanation, however, the jury will not comprehend the crime, and the reaction will be to kill the client.

Without the explanation, however, the jury will not comprehend the crime.

Explaining the client's life, personality, and involvement in the crime goes beyond the diagnosis of a personality disorder to discover and show to the jury why this client acts the way s/he does—how all of the factors of his or her life added up to create the person who, at the time of the crime, could commit such a heinous act. There is more to the explanation than presenting evidence of a "bad childhood," sexual abuse, or unstable family relationships. Many jurors' reactions to such evidence is that a great number of people (often including themselves) have suffered through "bad childhoods" and do not go around killing people. What is needed in mitigation is, after all of the direct testimony from family, friends, school teachers, acquaintances, juvenile authorities, prison officials, medical personnel, and anyone else who had significant contact with the client, the testimony of a psychological expert who can interpret all of these varying factors and tell the jury how all of the myriad factors in the client's life gathered together to form the person who committed this murder. Without this focus, the jury is left to speculate on why any of these individual factors make any difference in whether death is the appropriate punishment.

The use of a psychological expert this way gives the defense team essentially two opportunities for closing argument; one, through the testimony of the expert, and two, through a repetition of the explanation in the attorney's closing argument. If an expert is unavailable, the attorney must make the same explanation in closing argument. If there is an expert available, having the explanation in testimony and reinforced by argument strengthens the presentation to the jury dramatically.

Once the psychological expert has been made part of the defense team, preferrably very early on in the proceedings, defense counsel must work closely with him or her throughout, not only to gain as much possible insight into the client and how to present the case, but also to prepare the expert for testimony. Serious preparation for expert testimony is always essential. In mitigation, the client's life may depend on it. All defense attorneys have been in courtrooms where the dialogue between counsel and the expert on the stand is punctuated with five syllable words and is totally unintelligible to the jury. If a jury is going to believe an explanation of a defendant's life so that it will not return a death verdict, it must first understand the explanation. Perhaps more in mitigation than anywhere else, clear, simple, understandable language is essential to bringing across the explanation. Testimony that sounds like a doctoral dissertation is clearly out of place when explaining a client's life history. This will help to meet the first goal of mitigation—humanizing the client rather than making him/her sound like a page out of textbook.

The expert's testimony is the glue that cements all the factors of the defendant's life into one cohesive picture; the explanation of how accident of birth, injury, family and environmental background, accident, chance, disease, or substance abuse put him/her in a position to commit the murder on the day in question. These are not defenses, they are the identification and explanation of the factors beyond the client's control that may give the jury a reason to keep the client alive. The psychologist will be able to explain how the many significant life factors placed the defendant in a position to intentionally kill another. This explanation hopefully, at the same time, shifts moral blame to external sources and counteracts the prosecutor's inevitable argument of "evil."

The use of social workers and psychologists as part of the defense team is a necessity—not a luxury.

Conclusion

In death penalty defense, an attorney must treat each case as the most important, possibly last, case s/he may ever handle, and use the most sophisticated tools available. Public opinion in favor of the death penalty is continuing to grow. There appears to be no sign that this trend is going to reverse itself in the near future. Therefore, it is unreasonable, as a criminal defense bar, to expect *Furman*- or *Lockett*-type decisions. The capital defense attorney must recognize that the profession demands a higher standard of practice in capital cases than that required by *Strickland v. Washington*. The use of social workers and psychologists as part of the defense team for mitigation in a capital case is a necessity—not a luxury. Before the courts and legislatures recognize this fact, the practicing defense attorney must recognize this and demand their assistance as a necessity to effective representation.

Using the Mitigation Specialist and the Team Approach

by James Hudson, Jane Core and Susan Schorr

Introduction

As states began reinstituting the death penalty, the literature from experts in capital litigation began growing to provide direction in the preparation and trial of such cases. As the machine for prosecution of death penalty cases geared up in the thirty-seven states with death penalty statutes, sixty-nine persons have been executed since 1977, while another 1,874 inmates have been sentenced to die. In these past years a growing body of experts nationwide has gained insight into the unique process of death penalty defense.

In a death case, the ultimate goal is the preservation of the client's life. The entire preparation of the case must be directed to that end. Because of this all-important goal, these cases are, in essence, prepared in reverse order. Regardless of guilt, the attorney(s) must aim their energies from the beginning at saving the client's life. For this reason and because the death penalty is, in part, a sociological issue, it makes sense to include human service professionals on the defense team. Experts in numerous states strongly promote this concept and encourage any attorney involved in capital litigation to follow the guidelines suggested in this article. Presently, the limited number of human service experts working on capital defense teams represent the disciplines of social work, psychology, and counseling. They should demonstrate both sound clinical skills for interviewing and assessment and a thorough working knowledge of the court system. Hopefully, as the death penalty gains recognition by the public as a contemporary social issue and attorneys gain more knowledge about the process, the valuable resource of these experts (referred to here as Mitigation Specialists) will be recognized. This recognition should lend increased credibility to the process and thus increase the availability of the resource.

Use lay witnesses, psychologists, psychiatrists, and any other experts to testify about all the information.

This article discusses the foundation for an interdisciplinary team approach to death penalty defense and offers guidelines for utilization of the mitigation specialist on the defense team.

The Team Approach

Team approach refers to a team of two or more persons coordinating their activities to accomplish a common task: saving the client's life with the resources available. Because of the nature of these cases and a finite amount of available resources, the attorney must start with mitigation and work backward to the guilt phase defense. With a multitude of tasks facing the attorney, it is essential that the team approach be used to coordinate strategies throughout the case's investigative, guilt, and mitigation phases. The team approach has proven to be the best method of increasing the chances of a life sentence; the collective efforts of the team heighten productivity and lead to a better defense for the client. Benefits of the team approach include: (1) *increased efficiency*, since tasks can be delegated to appropriate team members, allowing attorney time to be devoted to legal-oriented problems; (2) *expanded knowledge* of various disciplines and backgrounds, providing for more informed decision-making and strategy planning; (3) *reduced duplication* since each team member has specific tasks; and (4) *increased support* to attorneys to help combat the extreme physical and mental stresses of a death penalty case. In short, team support can help combat case-related stresses, allow for ventilation of problems and provide strength and encouragement against bleak odds.

The size of the team will vary from case to case depending upon the specific services needed for the client in question. Every member of the team is an expert in his/her own sub-specialty. Generally, the defense team should be composed of, *inter alia,* attorneys, mitigation specialists, criminal investigators, psychologists, and psychiatrists. In addition, specific problem areas like alcoholism, neuropsychological deficiencies, etc., are addressed by other appropriate professionals. Because the role of the mitigation specialist is a relatively new area of expertise and is unfortunately poorly understood, this article will take an in-depth look at the mitigation specialist, including roles and responsibilities, and will define potential problems and their management.

The Mitigation Specialist

The mitigation specialist is a professional

The authors of this article were instrumental in the development of the field of mitigation specialists in Ohio.

James Hudson, presently a doctoral candidate in social work in New York City, previously worked as a mitigation specialist in the office of the Ohio Public Defender.

Jane Core currently heads the Mitigation Specialists Department of the Ohio Public Defenders.

Susan Schorr, Ph.D., is head of the Social Services Department of the Cuyahoga County Public Defenders Office and an independent licensed social worker.

who works collaboratively with the attorneys throughout an entire death penalty case providing expertise in the areas of psycho-social investigation, mitigation development and organization, coordination between other experts and lay witnesses,

The mitigation specialist can lend emotional support and encouragement.

and preparation of witnesses. Although the mitigation specialist's primary focus is the development of mitigation, his/her assistance and expertise can be invaluable in planning and coordinating a cohesive trial strategy throughout the guilt and mitigation phases. The mitigation specialist investigates the psycho-social history of the client and works toward developing that history into a viable strategy for mitigation. While the mitigation specialist can come from a variety of professional areas, to date, the field is dominated by those trained in social work and counseling.

Since the penalty phase is *always* a possibility and the entire case strategy needs to be planned and prepared around mitigation, the mitigation specialist should be obtained as soon as the attorney is retained or assigned. The professional needs not only the appropriate skills, but also the temperament needed to effectively work with the attorneys throughout the case.

A mitigation specialist should possess an understanding of the psycho-social aspects of human development, human relations skills, and management skills. Try to select a mitigation specialist with a background in any combination of the areas of clinical social work, counseling, or other human service professions coupled with some sort of forensic or criminal justice knowledge. Since most attorneys rarely handle cases that require the use of such professionals, it may be difficult to target and secure the service of professionals with these skills. This may be especially true in smaller counties with minimal human service systems. However, attorneys should be aware of some existing resources available to them for finding qualified professionals. State and local public defender offices, professional organizations such as the National Association of Social Workers or the National Legal Aid and Defender Association's Social Service Section, or state and local human service departments such as mental health or public assistance offices will probably be aware of professionals with expertise in the needed areas.

Role and Responsibilities

The mitigation specialist is essential to the team in many areas, and brings to it a multitude of skills that can be used to perform numerous roles and their related responsibilities. It is important for attorneys to recognize these roles and responsibilities in order to utilize the mitigation specialist to maximum potential.

Social Investigation

The largest role of the mitigation specialist is that of an investigator. The complete social investigation compiled by the mitigation specialist is the base upon which a successful mitigation is built. Since the purpose of mitigation is to explain how the client reached the point of being involved in the type of crime with which he is charged, it is imperative that this explanation grow out of the client's life history. This social history, or psycho-social investigation, will provide the attorneys and mitigation specialist with the information needed to begin construction of the mitigation, and, quite possibly, guilt strategies.

The psycho-social investigation culminates in a written social history—a compilation of all pertinent information about the client organized in a concise, cohesive

Preparation for mitigation should be started as soon as possible.

form. It should be a chronicle of the client's life history, including all significant life events from birth (or before) to the present, including but not limited to: the basic history of the client and his family as well as social relationships; medical history, including head injuries and drug and alcohol usage; mental health; educational history; employment history; military history (if applicable); and legal involvement. These facts about the client should be based on information received not only from the client but also from family, friends, teachers, employers, counselors or agency personnel the client has had contact with, any and all available records pertaining to the client, or any other valid source of information. The social history should contain both good and bad information about the client; only an accurate, well-substantiated history will ultimately be of value.

The largest role of the mitigation specialist is that of an investigator.

As the social history is developed, plotting significant life events on a time line can be a helpful tool. Because there will frequently be a pattern of events corresponding with a pattern of behavioral changes, the time line can be a useful tool for the team's understanding of the client. A time line can take numerous forms depending on the case and the chart's intended uses.

The social history helps the attorney understand the client and what happened and aids the attorney in explaining to the court and jury what the client is about and why. The social history is also invaluable information for other team members, such as the psychologists and psychiatrists. This material supplements their examinations, supports their diagnostic conclusions, and lends substance and credence to the psychological testimony.

Coordinator, Liaison, and Information Disseminator

In many respects the mitigation specialist is a "jack-of-all-trades," having a range of roles with numerous responsibilities. Three of the more administrative roles that the mitigation specialist can perform for the team include that of coordinator, liaison, and information disseminator, all three being closely related and intertwined.

As a *coordinator*, the mitigation specialist assists in and organizes the selecting, contacting and working with other professional experts, especially those in the mental health field. Because mitigation specialists have professional knowledge and experience that often overlaps the

knowledge bases of potential experts, they will be able to coordinate the professional experts' experience, expertise, and understanding of mitigation with the needs of the team and the client.

The role of *liaison* is one of the most important administrative roles a mitigation specialist can handle; keeping the lines of communication open between all participants is crucial. This means acting as a liaison when necessary between the client and attorneys, client and family, client's family and attorneys, expert witnesses and attorneys, and among other team members.

Very closely related to acting as a liaison among participants is the role of *information disseminator*. This task insures that attorneys, experts, team members, client, client's family, and other lay witnesses have the information needed to fulfill their responsibilities and tasks. To insure consistency in the overall mitigation strategy, information dissemination is a responsibility of *all* team members; however, it is a function that can be efficiently carried out by the mitigation specialist because of his/her wide-ranging contacts.

The mitigation specialist should be obtained as soon as the attorney is retained or assigned.

Another preparation task that the mitigation specialist can perform is helping the attorney prepare for the trial itself by exchanging ideas and being available to help test arguments. The mitigation specialist can give the attorney helpful suggestions about what might work and what might not, providing support and encouragement.

Preparing for Mitigation

The mitigation specialist can be invaluable at the time of trial while the attorney is dealing with courtroom tasks of the guilt phase. Because the mitigation specialist knows the themes and strategies of the mitigation hearing, s/he can be organizing the witnesses and preparing an information sheet about each individual that details who each witness is and what contribution can be made through testimony. The witness sheets can also note cautions regarding all witnesses, suggestions about effective ways to elicit the most beneficial testimony, and a suggested witness order. After a guilt phase conviction has been returned and the attorney has reviewed the witness sheet package, the attorney will want to conduct his own interview with each witness to familiarize himself with the witness, discuss the testimony, assess potential difficulties, and develope a rapport with the witness. Inclusion of the mitigation specialist in these interviews is valuable not only in helping to put the lay witness at ease, but also in clarifying problem areas for either the attorney or witness.

The client needs to be prepared for what he will hear.

Witness Preparation

On the unfortunate occasions when time does not permit the attorneys to meet with each witness prior to their mitigation testimony, the mitigation specialist can prepare the witnesses, review the information needed, and "role play" testimony in an effort to acquaint witnesses with courtroom procedures and style.

The Client

The most important person the mitigation specialist can prepare is the client. This preparation should not wait until mitigation, but should be an ongoing process beginning prior to the guilt phase. There are several aspects to preparing the client for trial. First, the mitigation specialist ca make arrangements for the client to ha appropriate clothes for trial, help the clie decide on an appropriate appearance f court and educate the client about body la guage for the courtroom. These are impo tant details because appropriate appearan and demeanor help make the client "huma to the jury and judge and help redu their preconceived ideas of a "cold-hear ed monster."

The next preparation involves discus ing with the client the testimony that wi be heard in court, especially during mit gation. The client needs to be told in d tail what will be presented, as a great de

The team approach has proven to be the best method of increasing the chances of a life sentence.

of the testimony may deal with unpleasar or disturbing childhood experiences, dru and alcohol problems, psychological prob lems, and possibly information not previ ously known to the client. The client need to be prepared for what he will hear; un expected testimony that causes surprise anger, or embarrassment in the client ma seriously impair the chances for a success ful mitigation.

The final, and probably the most impor tant area of client preparation for the miti gation specialist, is working with the clien for his own testimony in mitigation, be i sworn or unsworn. Some clients are ini tially unwilling to make statements in cour and convincing them that making a state ment is critically important is often a dif ficult task. Once the client has agreed t

make a statement, the mitigation specialist can work with the client, find out what the client wants to say, discuss with the client what should or should not be included and rehearse the statement with him. Past experience indicates that a short statement expressing remorse about occurrence of the crime, apologies to the victim's family and his own family, and asking the jury to spare his life are crucial elements to be included in this statement. Because the sentence could very possibly hinge on what the client says or does not say, it is imperative that the client feel comfortable with the statement and be able to speak to the jury and court in a convincing manner.

Experts

Because the mitigation specialist has been working throughout the case with the professional experts, keeping them informed on new developments, and consulting with them about impressions and opinions, mitigation specialists can work with the professional experts and attorneys to make sure that the expert testimony will be appropriate, that the expert's testimony will fit into the overall theory of mitigation, and that the testimony will be well-organized and cohesive. The mitigation specialist can work with the attorneys and the expert(s) to formulate questions that most effectively elicit the information needed. Ideally, the psychologist (or psychiatrist) will be the last witness before the client's statement and will bring together all the pieces offered by previous testimony into a complete picture of the client that explains the client and his actions as clearly and simply as possible.

The ultimate goal is the preservation of the client's life.

Lay Witnesses

Lay witnesses who will be testifying about the client are, in their own right, also "experts," in that they have specific knowledge and expertise about the client and the client's life. These people are crucial to the defense and need to be treated with respect and honesty. Most of them have probably never testified before and will be extremely frightened about their performance. They need special attention. Keeping them informed and maintaining a good rapport will reduce potential dangers if they must testify without adequate preparation. The mitigation specialist can answer questions about the legal process, advise them about proper court attire, and inform them about important areas of information they should stress during their testimony as well as those areas to avoid during their testimony. The mitigation specialist can also lend them emotional support and encouragement before and after their testimony.

Potential Problems and Problem Management

Since attorneys do not usually share the management of their cases, the team approach in death penalty cases may make an attorney uneasy—a feeling s/he has lost control of the case. On the contrary, the attorney is still the chief administrator of the case; it is only the administration of case preparation that has changed. Because death cases are different, it is in the attorney's and client's best interests for the attorney to delegate some authority and duties to other team members for more effective and efficient management of the case.

Another problem that can develop centers around the fact that attorneys and the type of professionals qualified to be mitigation specialists (i.e., social workers and counselors) have had a history of strained relationships throughout the years. Possible areas that might create disagreements between attorneys and mitigation specialists deal with client self-determination and confidentiality. Early discussions about these conflicts, continued dialogue when specific problems arise, and a constant awareness of the ultimate goal—keeping the client alive—should keep these problems from becoming insurmountable.

A third problem that can arise is whether the mitigation specialist herself should testify at the mitigation phase. Although the idea might sound attractive, there are some serious drawbacks. The first problem deals with qualifying the mitigation specialist to testify and the scope that testimony will be allowed to encompass. The second concern is one of interference; if the mitigation specialist is preparing for her own testimony, she will be limited physically and mentally not only in her abilities to help prepare other witnesses (client, expert, and lay), but also in her abilities to lend support to other witnesses and attorneys and to provide coordination throughout mitigation.

One solution to these problems is to use lay witnesses, psychologists, psychiatrists, and any other experts to testify about all the information the mitigation specialist could have contributed. This allows the mitigation specialist to fulfill all the roles and responsibilities previously detailed. This is obviously not the only answer and may not be the preferred answer for all attorneys or mitigation specialists; like the area of professional differences, this issue needs to be discussed by team members at the onset of the team's formation, always keeping the client's best interest in mind.

Conclusion

What should be remembered above and beyond all else is that, in order to have the best opportunity to save your client's life, *preparation for mitigation should be started as soon as possible*. Experience in capital litigation has shown us that one of the earliest tasks that needs to be performed is the assembling of a defense team which consists of a variety of professionals who will, through their areas of expertise, work to save the client's life. The mitigation specialist is a professional who, as attorneys across the nation are recognizing, should be included and will be primary to the defense team. Obviously, there are no guarantees for a sentence less than death, but proper utilization of the team approach and the mitigation specialist will greatly increase the likelihood of a successful mitigation and a life sentence.

Death Penalty Trials: Lawyers Need Help

by Robert R. Bryan

Never have so many men and women in our nation faced legally sanctioned death. The death row population is now the largest in our history, and continues to grow at an alarming rate. It has swollen beyond 2000, a number unparalleled in the modern world. One hundred men and women have now been executed in this country in the past 10 years. We are now in a crisis of epidemic proportions, with no relief in sight.

The likelihood of success at trial is significantly increased if nonlawyers are included in helping the accused. In fact, failure to involve community members is incompetence.

Many people are dying today in the name of the law, because of the failure by lawyers to provide their clients with quality representation. Saving lives should begin at the trial level, and must include the direct involvement of nonlawyers as part of the defense team.

Much of the focus on sparing those whom the authorities are seeking to kill has been on what can be done after people have been sentenced to the ultimate penalty. However, by the later stages of a case, the possibility of avoiding the death penalty is greatly diminished. Without question, there is much more that should be done at the pretrial stage, which will result in saving countless lives. I think of it as preventive maintenance.

It is important for all of us who are concerned with the many evils of capital punishment and providing the best in representation to be aware that preventing death judgments should not be the exclusive province of members of the legal profession. Nonlawyers must be actively involved in the pretrial and trial process. Having tried over 100 murder cases, my experience is that the likelihood of success at trial is significantly increased if nonlawyers are included in helping the accused. In fact, failure to involve community members is incompetence. We in the legal profession need to be enlightened to the fact that the fight to rescue the damned must include people from diverse walks of life. Often there are insufficient funds to hire a battery of case workers, since the focus of capital prosecutions is inevitably on the poor. In those situations, finding community volunteers is of the highest priority.

Beginning with winning the first murder case I tried at the age of 26, I have found the contributions of nonlawyers invaluable in a wide variety of areas. Their involvement should begin in the very initial stages and continue through trial. There is a requirement in every case for a comprehensive investigation not only of the facts, but also the entire life history of the client. It is of great importance for someone, in addition to the lawyers, to develop a rapport with and maintain close contact with the client. Cultivating positive relationships with family members and friends of the accused is also of tremendous value, and can often be accomplished by nonlawyer team members. Invariably, there is a need for assistance in community surveys, jury selection, and research. The clergy is also needed to provide moral support.

We employ in my office a number of people with a wide range of skills. Only three are attorneys. I depend greatly upon my chief investigator. Complementing him are individuals with backgrounds in areas such as investigative journalism and research. Also essential is my principal paralegal. Her work entails analyzing testimony, reviewing and cataloguing discovery materials secured from the prosecution, and general trial strategy. Involved in all of our homicide work is a jury selection expert and trial consultant, who possesses a doctorate in psychology. She is deeply involved in defense planning, and sits at my side during voir dire in all capital trials. We also solicit the services of social workers, ministers and rabbis, computer consultants, psychiatrists, psychologists, criminalists, and community members in trial preparation.

Too often there is a tremendous lack of involvement and input by nonlawyers in the pretrial and trial process of capital cases. Consequently, the accused is deprived of an adequate defense.

We consider it essential to involve people from outside the legal profession. To appreciate the importance of nonlawyers working with lawyers, it would be helpful to give examples from several cases.

I once represented a woman in Pennsylvania whom the police contended should be sentenced to death. Shirley had killed her husband by shooting him a number of times with a high-powered rifle, while he,

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supposedly, was taking a nap. By the time I entered the case, my client had already been tried and convicted—in the eyes of the community—through a barrage of publicity. To the prosecutor, it was an open-and-shut case that warranted the maximum punishment. My goal was not just to save Shirley's life, but to spare her from wasting many years in prison. I assembled a team with varied backgrounds to work on the case. Only two of us were lawyers. The people assisting me included a minister, community members, a local psychologist, various psychiatrists, physicians with expertise in hypnosis, a paralegal, and my investigator. Through a thorough investigation, we discovered that my client had been severely battered by her husband. Shirley had a deep love and unshakable faith that eventually things would be okay in the marriage. Even close friends were unaware of the violence existing in her life. We discovered that on one occasion her husband nearly broke her back. Because of the trauma of the shooting and the abuse she had suffered, Shirley was suffering from retrograde amnesia. She had actually blocked thoughts of those horrible experiences from her conscious memory. Thorough preparation and creative techniques finally revealed the truth, which was presented at trial. My client's life was saved and her freedom won.

The contributions of non-lawyers is invaluable in a wide variety of areas. Their involvement should begin in the very initial stages and continue through trial.

During the jury selection phase, the court granted my request for selected members of the defense staff to sit close to me at the counsel table. Those included a jury selection expert, a psychologist, and my investigator. Our purpose was to weed out as much prejudice as possible. That goal was achieved. The investigator in her prior research on prospective jurors, with the assistance of community members, was able to provide a detailed profile on each as he or she entered the courtroom. The experts advised me on such things as interpretation of responses to my questions and the significance of mannerisms.

As the trial unfolded, we were able to transform Shirley from being viewed as a cold-blooded killer into a perception of a woman who had been tragically victimized by a brutal husband. What the press observed as "Perry Mason-like courtroom tactics" was, in reality, the product of a tremendous amount of creative work by the legal team. We established that the husband, who was recognized as a community leader, in fact had a split personality. I referred to him as "a Dr. Jekyll and Mr. Hyde" type character. We proved that my client had been in mortal fear for her life, because of a series of beatings. Just before the fatal shots were fired, the husband threatened to break her back, and was beginning to move off the sofa in her direction. Instinctively Shirley grabbed a nearby rifle and began firing in self defense. The loaded weapon, as I proved, had been placed in the living room several days earlier at the suggestion of a police officer who was investigating a rash of neighborhood burglaries.

The jury returned a favorable verdict, which stunned the community. I credit much of our success to the invaluable efforts of the nonlawyers who worked with me.

Some years ago I represented a black activist who had been working with impoverished children in a ghetto area of a major Southern city. He was charged with killing the white police chief's son. My client, Charles, who had been seriously wounded while fighting in Vietnam, returned home with a burning desire to help others and oppose all forms of violence. Charles had become a thorn in the side of local officials for being an outspoken critic of racism, police misconduct, and the mistreatment of the poor. He began operating a free breakfast program for children and helping destitute members of

Solicit the services of social workers, ministers and rabbis, computer consultants, psychiatrists, psychologists, criminalists, and community members.

the black community. Finally, he was told by the police to either leave town or they would get him. Until the murder accusation, the most serious crime Charles had faced was distributing literature without a permit.

Finding community volunteers is of the highest priority.

The deceased was working as a gas station attendant at the time of the shooting. Apparently two men had purchased gas, and an argument ensued. When they were ordered to leave, a scuffle took place and the attendant was killed. The assailant then fled. The police conducted an intense investigation for leads, seemingly without any success. Finally they focused their attention on Charles, who lived just a few blocks from the homicide scene. Word quickly spread through the ghetto that the police had orders to shoot him on sight. In fear of his life, Charles fled to New Jersey, where he sought assistance from a peace activist group that aided political prisoners. Eventually he was arrested by the FBI and identified "as a member of a black militant group."

During our initial meeting in the county jail at Hackensack, where he was awaiting extradition, Charles and I recognized that a successful defense would entail a team effort involving a broad spectrum of people from the community. There would be a tremendous amount of prejudice and hostility to overcome. I even had word that an effort might be made on his life during his transfer by police from New Jersey to the South for trial. Consequently arrangements were made to protect Charles by having community leaders accompany him on the trip, ensuring that he would not be "accidentally" killed by the police guards.

The defense team I assembled included law students, paralegals, church leaders, people from both the white and black community, and peace activists. They were given a variety of tasks, such as background research on specific aspects of the case, exhibit preparation, tracking down leads and developing clues, legal and factual research, sampling attitudes of various sectors of the community, and getting background information for jury selection. They were also of vital importance in helping diffuse at least some of the prejudice through public education.

The investigation I instituted was wide-ranging in scope and of great complexity. I learned that Charles was playing cards in the community at the time of the homicide. The game was interrupted by someone announcing that there had been a shooting at the nearby gas station. Charles, along with others from the neighborhood, rushed the several blocks to the scene and joined the spectators watching the police. Interestingly, a police officer even told Charles to stay back from the area.

The case went to trial in a racially charged atmosphere, marked by police corruption and bigotry. I had vigorously argued against the unfair and racist conduct of the prosecutor and judge, but with only limited success. The all-white jury eventually returned a compromise verdict of second degree murder and a 23-year sentence, which many said we should consider a victory. After all, Charles would not be executed and he would eventually be released from prison. But to me it was a nightmare, for I knew Charles to be an innocent man victimized because of his political beliefs and skin color.

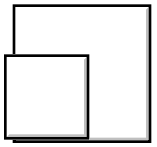
We had lost a battle, but the war was far from over. Our investigation continued, with the eventual discovery that the authorities had actually concealed evidence that someone other than my client had committed the homicide. They had tried to put a man in the electric chair whom they knew to be innocent. On the night of the homicide, a woman passing the gas station had observed the shooting and recognized the assailant to be a young man she had known for years, and obviously not Charles. That same evening she gave this information to the police, even showing them where the assailant lived. Yet, rather than pursue this evidence, the police chose to prosecute my client. This newly discovered evidence was presented at a new trial hearing, but was rejected as insignificant by an incredibly biased judge. The racism that clouded the trial had also affected the court.

Following a series of appeals and habeas corpus proceedings, the conviction was unanimously reversed by the Fifth Circuit. Among several major constitutional errors it recognized as having been committed was the prosecution's concealment of the eyewitness who would have cleared Charles. The prosecution had committed a fraud on the court, the jury, and my client. A short time later I was able to secure his release on bail after he had languished for four years in prison. Eventually Charles was exonerated. The new trial proceedings were conducted before a new judge, who was unaffected by the racism and prejudice that had so dominated the first trial. The success in saving Charles certainly would not have been possible without the unselfish dedication of many people from the community. The life of an innocent man had been spared. It is interesting to note that of the many people involved in the defense team, I was the only lawyer.

Too often there is a tremendous lack of involvement and input by nonlawyers in the pretrial and trial process of capital cases. Consequently, the accused is deprived of an adequate defense including the full presentation of life-saving evidence. The result is frequently a death sentence.

The wide variety of skills, talents and knowledge possessed by nonlawyers needs to be employed in defending those capitally charged.

Beyond moral and ethical considerations, we have a humanitarian obligation to become more sensitive to the need of involving nonlawyers in the defense of those facing the death penalty. We in the legal profession must understand that saving lives in the courtroom requires creativity. Narrow-mindedness, which so often is a mark of our profession, has no place in the defense of those capitally charged. The wide variety of skills, talents and knowledge possessed by nonlawyers needs to be employed in defending those capitally charged. There is a dire need to broaden the horizons of the legal community. We must all work as a team in saving those whom the state seeks to kill.



1989 Guideline 11.4.1

GUIDELINE 11.4.1 – INVESTIGATION

A. Counsel should conduct independent investigations relating to the guilt/innocence phase and to the penalty phase of a capital trial. Both investigations should begin immediately upon counsel's entry into the case and should be pursued expeditiously.

B. The investigation for preparation of the guilt/innocence phase of the trial should be conducted regardless of any admission or statement by the client concerning facts constituting guilt.

C. The investigation for preparation of the sentencing phase should be conducted regardless of any initial assertion by the client that mitigation is not to be offered. This investigation should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.

D. Sources of investigative information may include the following:

1. Charging Documents:

Copies of all charging documents in the case should be obtained and examined in the context of the applicable statues and precedents, to identify (inter alia):

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) which can be raised to attack the charging documents.

2. The Accused:

An interview of the client should be conducted within 24 hours of counsel's entry into the case, unless there is a good reason for counsel to postpone this interview. In that event, the interview should be conducted as soon as possible after counsel's appointment. As soon as is appropriate, counsel should cover A-E below (if this is not possible during the initial interview, these steps should be accomplished as soon as possible thereafter):

A. seek information concerning the incident or events giving rise to the charge(s), and any improper police investigative practice or prosecutorial conduct which affects the client's rights;

B. explore the existence of other potential sources of information relating to the offense, the client's mental state, and the presence or absence of any aggravating factors under the applicable death penalty statute and any mitigating factors;

C. Collect information relevant to the sentencing phase of trial including, but not limited to: medical history, (mental and physical illness or injury of alcohol and drug use, birth trauma and developmental delays); educational history (achievement, performance and behavior) special educational needs including cognitive limitations and learning disabilities); military history (type and length of service, conduct, special training); employment and training history (including skills and performance, and barriers to employability); family and social history (including physical, sexual or emotional abuse); prior adult and Juvenile record; prior correctional experience (including conduct or supervision and in the institution/education or training/clinical services); and religious and cultural influences.

D. seek necessary releases for securing confidential records relating to any of

the relevant histories.

E. Obtain names of collateral persons or sources to verify, corroborate, explain and expand upon information obtained in (c) above.

3. Potential Witnesses:

Counsel should consider interviewing potential witnesses, including:

A. eyewitnesses or other witnesses having purported knowledge of events surrounding the offense itself;

B. witnesses familiar with aspects of the client's life history that might affect the likelihood that the client committed the charged offense(s), possible mitigating reasons for the offense(s), and/or other mitigating evidence to show why the client should not be sentenced to death;

C. members of the victim's family opposed to having the client killed. Counsel should attempt to conduct interviews of potential witnesses in the presence of a third person who will be available, if necessary, to testify as a defense witness at trial. Alternatively, counsel should have an investigator or mitigation specialist conduct the interviews.

4. The Police and Prosecution:

Counsel should make efforts to secure information in the possession of the prosecution or law enforcement authorities, including police reports. Where necessary, counsel should pursue such efforts through formal and informal discovery unless a sound tactical reason exists for not doing so.

5. Physical Evidence:

Where appropriate, counsel should make a prompt request to the police or investigative agency for any physical evidence or expert reports relevant to the offense or sentencing.

6. The Scene:

Where appropriate, counsel should attempt to view the scene of the alleged offense. 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).

7. Expert Assistance:

Counsel should secure the assistance of experts where it is necessary or appropriate for:

A. preparation of the defense;

B. adequate understanding of the prosecution's case;

C. rebuttal of any portion of the prosecution's case at the guilt/innocence phase or the sentencing phase of the trial;

D. presentation of mitigation. Experts assisting in investigation and other preparation of the defense should be independent and their work product should be confidential to the extent allowed by law. Counsel and support staff should use all available avenues including signed releases, subpoenas, and Freedom of Information Acts, to obtain all necessary information.

TEAM DEFENSE IN CAPITAL CASES

A new era is dawning within the area of criminal law. The appeal remedy, long the focus of trial strategy, no longer affords the relief which has traditionally been in many states. A new dynamism has entered the trial court with new strategies directed at winning at that level.

Though a variety of successful techniques are being employed, we of the Team Defense Project see that new trial strategy is best developed in the trial of death cases. Death cases provide the scope necessary for the development and refinement of new trial techniques. Before accepting a case, we analyze it carefully to determine whether it reaches the criteria we have established. It must be a hopeless, unwinnable, case.

Our practice is primarily in the south. Nowhere else are defendants more likely to be charged with a death penalty offense or are they more likely to receive the death penalty. Our clients are all poor, mostly young, black and have had as their victim a white. Seldom is a factual defense available—I don't believe that we have ever had a client who had not made at least one confession to law enforcement officers. Our effort is directed at saving this person's life. Because of a nearly 100% probability that this person will receive the death penalty, we feel we can and *must* employ extraordinary measures to save her/his life.

Thus, our situation allows experimentation with new techniques. Our overall success is measured by the outcome of the trial. Also, more specific knowledge of the success of our techniques is gained through scientifically designed post-trial interviews with jurors.

Our basic approach to trying a case is offensive, not defensive as has been traditional in the law. This strategy is based upon our theory of the case. Early in the case, we develop a theme for the case. We express that theme in every facet of the various strategies that we employ. We never, in any way whatever, simply respond to the case being presented by the prosecution. All aspects of the case, legal or societal, are brought together as an integrated whole under the theory that centers the case. What is being expressed here is a basic conceptual difference which may seem somewhat obtuse when first considering it. Traditionally, the prosecution has set up the theme of the case and the defense effort has been to defend itself against this theme. We are suggesting that the existing facts in the case be presented in a way that is beneficial to the defense. Facts do not exist in and of themselves, but are seen in light of the manner in which they are presented. For instance, in one murder trial, the client not only was young in years, but also *looked* very young and innocent. The theme developed in this case was this: our client is a naive child, who though guilty of associating with the wrong kind of people, still deserves the benefit of reasonable doubt. He is at a cross roads in his life and deserves to be given a second chance.

This theory was presented in part by calling him his childhood name, Little Joe. His family, respectable and very likable, were called to testify. They gave the jury an indication of what kind of people Little Joe came from as well as being able to inform the jury that each of them had been concerned about the undesirable company Little Joe was keeping and had talked to him about it. We raised the tone of the trial to the level of a moral decision, not just whether Little Joe was guilty or not guilty. Placed in the minds of the jurors was the thought that real good could be done by acquittal and they could "save" this young man. Though the prosecution's case was factually strong, the jury returned a not guilty decision in only 20 minutes.

A major difference between our effort and that of others is our concept of a team approach to trying cases. Our team shares a central purpose—the defeat of death as a form of punishment. Our goal is accomplished through the development of new legal skills.

The team itself is made up of both attorneys and social scientists. We feel that it is impossible to separate the law from the psychology of human behavior. To win at trial, an in-depth knowledge of both disciplines is required.

The team structure provides that each member have an equal voice in all decision-making processes. The idea that one lawyer assumes final responsibility for all decisions is an efficient, yet non-productive approach to decision making. Research has proven that decisions made by concensus are the best decisions that can be made.

At the central core of our team is the client. We feel it essential to establish a strong bond between our clients and ourselves. The establishment of this relationship begins with our first meeting with our clients, and rather than attempting to determine the facts of the case, we seek to find out how we can be of help to the client—Does she/he need personal items, medicine? Is there somebody whom we can contact for her/him? Are the conditions in the jail acceptable? Contrary to the initial reaction of most lawyers, this approach actually saves us time and energy in the preparation of our case. We find that our clients are highly cooperative and that the story that they ultimately tell us is truthful. All legal processes are fully explained and copies of the motions are given to them. They participate fully in the jury selection and may even go *pro se* during the trial.

A distinguishing trait of Team Defense is the actual number of motions we file in every case. One judge in Georgia has termed these the "Sears and Roebuck motions." A minimum of 30 motions are filed at arraignment and many more are filed throughout the duration of the trial.

Motions serve as vehicles for a great many purposes beyond that which is typed on the paper and filed. Through motions, social injustices both within the court and within the society can be

pointed out in a way that can't be matched.

Racism is an important factor in almost every trial. The racism evidenced in the community can be expressed clearly in both a composition challenge and a change of venue motion. Motions made to prevent the prosecution from striking only blacks from the panel are effective. We look also for symbols of racism. A good example is the fact that a Confederate flag still hangs in South Carolina courtrooms.

Our motions always include a challenge to the composition of the jury. This motion is perhaps the most important motion we file. A successful challenge results in better, more representative juries for *all* defendants flowing through the judicial system.

This motion alleges a discriminatory underrepresentation from the jury pool of a particular cognizable group or class of persons; blacks, women, young people and old people. My ordering of the classes reflects the state of the law supporting each of these groups as cognizable classes. Race is a solid challenge, particularly when the disparity is 10% or greater. Even dissimilarity of race does not preclude a challenge to the representativeness of the pool. For example, a white defendant may challenge the pool alleging the underrepresentation of blacks.

In some parts of the country, more work needs to be done to firmly establish age as a cognizable class. Another class of people, the poor, have received little judicial recognition as a specifiable class. This, even though considerable sociological data exists supporting the contention that persons from low socio-economic status differ significantly from those of high socio-economic status. The courts have been extremely reticent in granting these challenges.

Commonly used jury pool source lists–voters lists, tax lists and the like–bias the pool. Though successful racial attacks are being made, more work needs to be done.

The motion hearings require from two to three weeks, as evidence is put up on each. For the more complex motions, we make an opening statement, make use of expert testimony, and present visual aids such as bar graphs.

When the information to be presented is unfamiliar and/or complex, affidavits are filed prior to the hearing which facilitates the process. For example, we file an affidavit explaining the use of the statistical tests we have employed in analyzing the data obtained from our telephone surveys. The in-court explanation by our expert witnesses then makes better sense to the judge.

The motion hearings serve an important purpose in our handling of death cases. We apply enormous pressure at the front end so as to accomplish our ultimate goal–a plea bargain for a life sentence.

The concept works well in all cases. Courts have a difficult time contending with cases as costly as ours. They are well aware of the amount of time and money involved when an attorney represents his/her client to the fullest extent of the law. Many times, a plea bargain seems to a reasonable solution.

A police chief killing is an example of the usefullness of the motions. Our clients are black; the evidence is overwhelming; the location of the trial is in the very buckle of the Death Belt. Though the original trial date was set over a year ago, the case still hasn't been tried. Why the delay? The answer is simple. We don't have a judge. Up to this point, we have caused all four trial judges to recuse themselves. In cases just as these, a delaying tactic is often beneficial. The hope for a plea bargain increases, public sentiment against the client dies down, and space for legal maneuvering is available.

Evidentiary hearings for motions can serve a variety of purposes. A change of venue motion is a good example.

When a case has received publicity which would make it extremely difficult to impanel a fair jury or when the issues surrounding the case arouse the racial, political, sexual or other prejudices of a large segment of the population of the judicial district, a change of venue is one means of increasing the likelihood that the defendant will recieve a fair trial. The usual grounds for a change of venue motion are prejudicial publicity or prejudicial attitudes toward the client in the district.

To secure evidence for presentation to the judge, we make use of a telephone survey of the community. It is an excellent tool for measuring the amount of prejudice felt by those who may be prospective jurors. The results of this survey may then be compared to a survey taken in a neutral county. Questions should be aimed at determining (1) the population's general attitude about crime and justice, (2) their attitude about the specific issues of your case (e.g. racial prejudice or prejudice against the persons with extensive criminal records), and (3) the level of prejudgment about the case in hand–the degree to which the people have already made up their minds as to the guilt or innocence of the defendant. Such prejudgment can then be tied to the levels of knowledge about the case in hand by questions such as "How much have you heard about this case?

We also present more traditional evidence of unfavorable publicity (such as newspaper editorials or news stories and affidavits from concerned individuals who do no feel a fair trial is possible) for consideration by the judge.

The evidence presented in the venue motion may be tied to motions for more extensive voir dire, for individual voir dire, and for sequestration of jurors. Though obtaining a change of venue is difficult, the weight of the evidence may well be sufficient to cause the judge to grant one or all of these important motions.

Beyond this, gains are made in educating people about the prejudicial attitudes existing in the community and how these attitudes may affect our clients right to a fair trial. Through publicity abut the content of motion, the community at large, as well as the court itself, is confronted with their prejudice in such a way that changes in community attitudes may result.

Though Team Defense techniques have been developed to defend the poor from the death penalty, our committment extends to the education of others, broadening legal skills. Our techniques are not difficult to learn and most are applicable to all cases. We lecture often at legal seminars, law schools and the like. We function also as resource persons and offer copies of our motions, briefs, and sample charges to anyone who requests them. Those who are interested may write to us: Team Defense Project, Inc., 15 Peachtree Street, N.E., Atlanta, Georgia 30303 or call (404) 688-8116.

NEUROLOGIC MANIFESTATIONS OF THE BATTERED CHILD SYNDROME

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ABSTRACT. An infant with no external signs of trauma and a picture closely mimicking organic brain disease was treated for months before battering was considered as a possible cause of her difficulty. The similarity of her symptoms to neurologic disease was so striking that battering continued undetected until she finally showed external bruises. Neurologic findings, which included exaggerated startle, hyperreflexia, and increased muscle tone, were not due to organic neurologic disease, and all disappeared within 1 week after hospital admission. The battered child syndrome must be included in the differential diagnosis of developmental failure with diffuse or nonfocal neurologic signs; and, all infants who show these symptoms should be hospitalized. *Pediatrics*, 45:1003, 1970, BATTERED CHILD, CHILD ABUSE, NEUROLOGIC MANIFESTATIONS.

SINCE the clinical course of the undiagnosed battered child syndrome is often one of repeated and increasingly severe injury,[1-6] it is essential that this condition be detected as early as possible and reported immediately to the proper community agency as required by law. Delay in diagnosis can be fatal;[1-6] Helfer and Kempe[3] found that, in unreported cases, ". . . 25 to 50 percent of the time the child will be permanently injured or killed within the next several months."

One of the factors preventing proper reporting is some physicians' denial of the reality of child abuse or their unwillingness to question parents about this possibility.[2-7] Another factor is failure to realize that, when the physician has reasonable cause to suspect battering, he is not only justified in reporting the case, but in all 50 states he is also obligated by law to do so.[2-4]

The following case presents still another cause, as yet unrecorded, of seriously delayed diagnosis of the battered child syndrome: the presence of a functional neurologic picture so striking as to cause a mistaken diagnosis of primary disease of the nervous system.

CASE REPORT

The patient, a 9½-month-old girl, was the first-born infant of young, healthy parents. Pregnancy and delivery were normal. Her birth weight was 3,500 gm (50%), and she was 3,300 gm on discharge at age 5 days.

Vomiting was noted from the time of discharge. Weight at 3 weeks of age was 3,470 gm, 30 gm below birth weight. She was admitted to a hospital where an upper gastrointestinal series showed no evidence of obstruction. Vomiting persisted with decreasing frequency, occurring about once weekly, and weight gain improved. However, irritability, poor feeding, and slow development led to a second hospital admission at the age of 6 months, this time for possible neurologic abnormality.

Admission weight was 5.6 kg, which is below the 3rd percentile. She was a thin, Caucasian female who showed alternating esotropia. She could sit briefly without support. She reached for and grasped objects but did not transfer them from hand to hand. Skull and chest x-rays were normal. In the hospital she gained 500 gm during her 2-week stay, and she was asymptomatic. She was discharged as normal, except for alternating esotropia, but was to be observed for evidence of "possible cerebral palsy."

Because of persistent irritability and slow development, she was referred for pediatric neurology consultation at the age of 7 months. History revealed that she had not smiled until 5 months of age and could not sit or roll over at 7 months. Between the ages of 3 and 6 months she had done little except look at her hands. She startled easily.

Physical examination showed a weight of 6.2 kg (3rd percentile) and an occipitofrontal circumference of 41 cm. She showed alternating esotropia but followed objects visually to 180 degrees. When lying supine, she held her hands over her head most of the time. Head lag was noted. She could sit only with support and did not transfer objects. An automatic walking reflex was present. The par-

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achute reflex yielded no protective response. There was a marked startle reaction and the deep tendon reflexes were hyperactive in all extremities.

Skull x-rays and bone age were normal. Antibody titers for rubella and cytomegalic inclusion disease were negative. A diagnosis of neuromotor abnormality was made, and the parents were given a return appointment which they failed to keep.

She was seen at Valley Forge General Hospital at 9½ months of age because of persistent irritability and slow development. The chief complaint was multiple including: (1) vomiting and poor feeding since birth, (2) head-banging, rocking, and irritability, (3) "cross-eyed" since birth, (4) slow achievement of milestones, and (5) confusion about diagnoses and recommendations made by four previous physicians after two prior hospitalizations.

On physical examination her weight was 6.1 kg, well below the third percentile. Length was 67 cm (3%). Occipitofrontal circumference was 41.8 cm (3%), and chest circumference was 39.5 cm. She was small but well proportioned. There were five fading green-brown ecchymoses noted: two on the dorsum of her left wrist, one over the midvertebral column, and two on the right frontal scalp. When lying supine she maintained a peculiar posture with her elbows and wrists flexed and abducted, her feet in a passively reducible equinovarus position. When placed prone she held her chest up but did not get up on her hands and knees. Her grasp was ulnar in approach; she did not transfer objects. When holding objects she repeatedly flexed and extended the wrist in stereotyped movement. She showed exaggerated startle to handclap. Deep tendon reflexes were four plus in all extremities. There was increased resistance to passive hip and knee flexion, with normal resistance to passive motion in the ankles and upper extremities.

The following studies were normal: urinalyses, complete blood counts, tine test, blood urea nitrogen, serum sodium, potassium, chloride, carbon dioxide, calcium, phosphorus, and alkaline phosphatase, serum cholesterol, and carotene. Twenty-four hour urine for amino acids was normal. Skull series and chest x-rays were normal. Intravenous pyelogram was normal. Skeletal survey revealed a nondisplaced fracture through the left acromion with periosteal reaction and callus formation. There was a nondisplaced fracture of the distal half of the right humerus with periosteal new bone formation. The age of both fractures was estimated at 2 to 3 weeks.

Two days after admission the tonus of her legs had decreased and she was pulling herself up by the crib rails. The unusual posture of the upper extremities and her stereotyped movement gradually disappeared. Hyperreflexia and increased resistance to hip flexion were no longer evident by the seventh hospital day. By the tenth hospital day she had radial approach to objects, showed pincer grasp, transferred objects readily, and could pull to standing. An ophthalmologist found only alternating esotropia. A neurologist found no evidence of neurologic deficit on the fifteenth hospital day.

Conversations with the parents revealed their early disappointment over the baby's strabismus, her "skinniness," and feeding difficulty. Early attempts to feed had included removal of the nipple from the bottle and pouring milk into baby's throat. The mother had also tried making the nipple holes large, which resulted in finishing the bottle too rapidly and gagging. There were multiple formula changes, including bizarre mixtures of powdered milk, water, and whole milk. The baby's irritability had led the parents to limit handling to feedings, diaper changing, and bathing; but, this policy was later changed because she "just lay there like a vegetable."

Head banging and rocking were first noted at age 8 months. Head banging, according to the parents, had produced ecchymoses on the forehead. She liked to scratch the wall, apparently listening to the sound. In the chart of her first admission was a laconic note by her physician that "these are not the best parents." The doctor had also noted that a nurse at the hospital, who happened to live beneath the patient's family, had often heard screams from the patient's apartment.

Review of the baby's previous weights revealed a "stair-step" growth curve. During all her hospital admissions she showed very rapid, "catch-up" growth which plotted almost vertically on the percentile chart. While at home between admissions she showed absent weight gain, which plotted horizontally on the graph (Fig. 1.).

A see-saw developmental history was also documented. On admission to the hospital for the second time, the patient did not transfer objects from hand to hand. By the time of discharge 1½ weeks later she transferred readily; on admission to Valley Forge after 3 months at home, she again did not transfer objects from hand to hand.

When the parents were confronted with the infant's multiple ecchymoses and her two fractures, their explanations seemed untenable. Nor could they explain the baby's failure to gain weight at home in view of her excellent gain during three hospitalizations. It was pointed out that their case would therefore have to be reported to the County Child Welfare Department as one of suspected child abuse, but that the purpose of reporting and follow-up was to obtain further help for the parents as well as the child. The Child Welfare Department, it turned out, already knew of the case through many complaints by neighbors of repeated episodes of screaming and noises from both the patient and her parents. However, they had not ini-

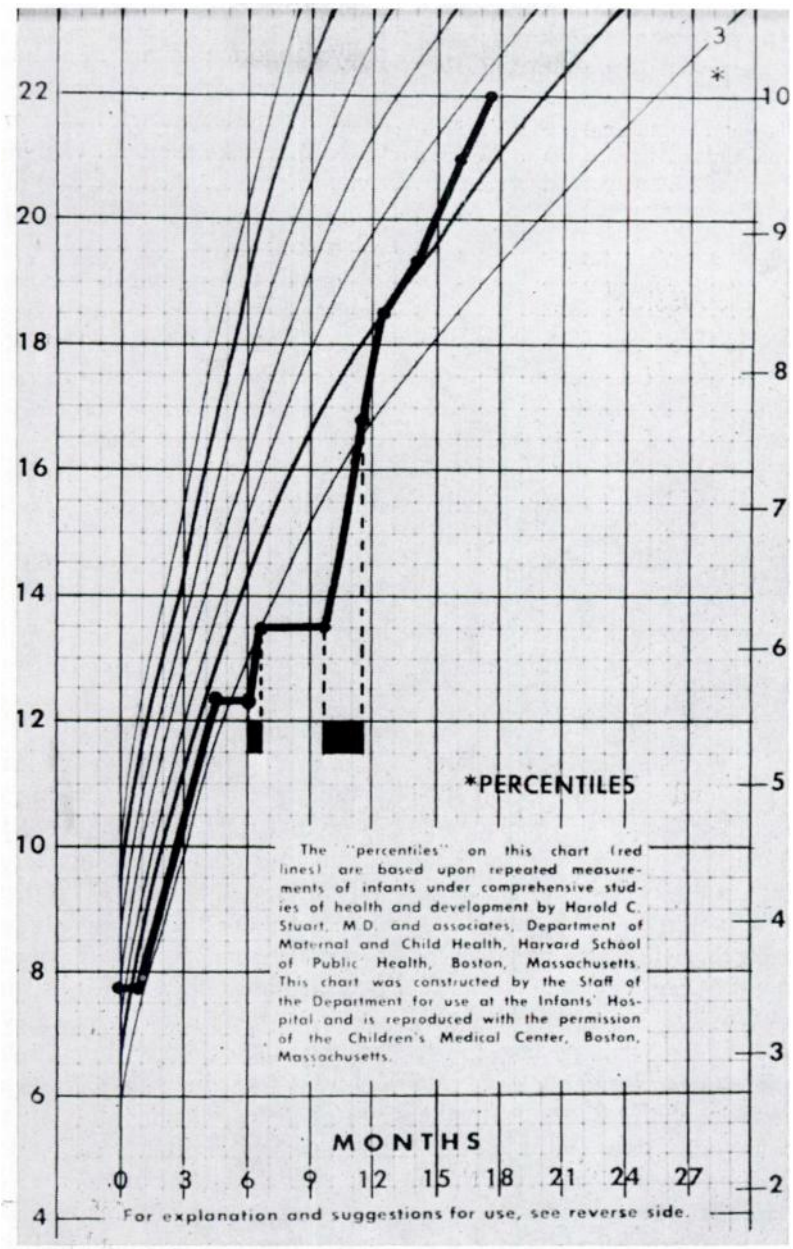

FIG. 1. "Stair-step" growth curve showing catch-up growth during the patient's second and third hospitalizations, which are indicated by the black areas. Note absence of weight gain before and after the second hospitalization.

tiated investigation because there was no formal report. Now, with this obstacle removed, the Child Welfare Department began a full-scale inquiry into the matter. Finally, after many interviews with a sympathetic, nonjudgemental social worker, the baby's father admitted having a "terrible temper" and that he once smashed his fist through the windshield of his car. He also admitted having struck the baby many times, involuntarily, in outbursts of uncontrolled rage.

He obtained regular outpatient psychiatric care for himself and arranged to live alone while under care; he periodically visited his wife and baby, who stayed with the maternal grandparents after

the infant's discharge from the hospital at the age of 1 year.

Meanwhile, the baby's condition steadily improved. By 17 months of age, 5 months after discharge, her weight and length were both in the 25th percentile and head circumference was in the 20th percentile. She walked well without support, spoke 9 or 10 words, and was neurologically and developmentally normal.

DISCUSSION

This patient showed many clues to the diagnosis of battered child syndrome. A history of consulting many physicians but following up with none of them is typical of this condition, as is an unclear history containing many unrelated complaints.[3,5,6] Vomiting is frequent in mistreated infants. Developmental progress following each hospital admission, and regression with each return home, clearly pointed to the inadequacy of the home environment. Her "stair-step" weight curve proved beyond a doubt her potential for normal growth.

The presence of ecchymoses in various stages of healing, and only on exposed surfaces of the body, is strongly suspicious for repeated trauma;[1-6] the presence of nondisplaced healing extremity fractures is a classical sign of the battered child syndrome.[2-6] However, incontrovertible proof of battering was finally obtained when the patient's father admitted having repeatedly beat the infant and asked for psychiatric help in order to stop himself from repeating this.

The relationship of the battering to the abnormal neurologic signs must be explained. It must be recalled that all of these findings were bilaterally symmetric, and that they had all disappeared by her seventh hospital day.

Neither peripheral nerve damage, spinal cord damage, nor subdural hematoma produce symmetric disappearing signs. This child's lower extremity findings could not have been protective against pain, as there were no fractures or bruises on the lower extremities and the hips were normal. She showed no fever, retinal hemorrhage, seizure, drowsiness, or pupillary signs; her strabismus had been present from birth. Vomiting disappeared upon admission to the hospital. Head growth was normal. Finally, abnormal signs in subdural hematoma do not disappear, leaving a developmentally and neurogically normal infant, without specific therapy. Therefore, we feel that structural, infectious, and other "usual" causes of nervous system disease have been ruled out.

Growth failure and developmental retardation are well-known aspects of the mistreated child syndrome.[4,5,8-10] Krieger and Sargent[11] have reported a stereotyped posture in the sensory-emotional deprivation syndrome, and they warn that "the association (of this posture) with developmental retardation may suggest a diagnosis of primary organic brain disease and a poor prognosis may thus be given." However, the added, combined findings of exaggerated startle, four-plus deep tendon reflexes and increased muscle tone of this patient have not been reported in battered children showing no structural neurologic lesions.

Since they were not due to disease, these findings must have been "functional" in the sense that they were mediated by the preferred utilization of certain normal neural pathways over others. Fulton[12] states that, in the presence of an anatomically normal nervous system, increased muscle tone and deep tendon reflexes must be due to an increased background of impulses impinging on the motoneurons from higher centers. Intense fear in adults can cause such stretch reflex changes through this mechanism of "impulse overload" of lower motor neurons by higher centers; the same mechanism may occur in infants. Exaggerated startle, too, can be found in fright or anxiety and may have been an expression of fear in this infant.

In contrast to the "impulse overload" shown by this patient is a group of babies with the sensory deprivation syndrome described in detail by Bakwin;[13] those infants showed decreased muscle tone and normal deep tendon reflexes.

Apathy, abnormalities of posture, and stereotyped movement are well recorded aspects of emotionally deprived infants.[11,13] When present with retardation of develop-

ment and growth, exaggerated startle, and stretch reflex changes, these findings strikingly mimic those of organic brain disease. However, misdiagnosis can lead to continued undetected battering, severe injury, and even death.[1-6] The differential diagnosis is easily made. Upon admission to the hospital, functional neurologic signs rapidly disappear; findings of organic nervous system disease do not.

It is worth mentioning that the parents of our patient have done as well as the baby. For the first time they are faithfully continuing outpatient follow-up, thus receiving the education in health supervision and normal development which they so badly need as young parents. With careful follow-up and continued psychiatric care, battering has not recurred and foster home placement has been unnecessary. A moralistic approach to battering parents is most harmful and must be avoided, as it prevents development of the rapport so necessary to the physician's proper management of the parents.

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MEDICAL PRACTICE

Contemporary Themes

134 Battered Children: A Medical and Psychological Study

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British Medical Journal, 1974, 3, 666-670

Summary

A controlled investigation of 134 battered children showed that nearly half had serious injuries and 21 died. Sixty-five had been battered more than once, 20 had permanent neurological sequelae, a quarter were low birth weight babies, and 10 had serious congenital defects. Twenty-three had been previously admitted to hospital with failure to thrive and the overlap with physical neglect was considerable. Mortality and morbidity among their siblings was also high. Difficulties with the child were attributable to interaction with neurotic mothers.

The risk of battering diminishes after a child's second birthday. The establishment of specialized hospital teams to tackle the overall problem is suggested as a method of improving management. Prevention may lie in educating mothers in the basic physical and psychological requirements of children and overcoming their reluctance to avail themselves of medical care.

Introduction

Growing awareness of violence to infants dates from 1946, when Caffey[1] described the association between subdural haematomata and fractures of the long bones in young children. The recognition almost a decade later that such injuries could be inflicted by parents[2] and the coining of the emotive term "battered child syndrome"[3] stirred doctors in America to recognize the alarming frequency with which such children had mistakenly been regarded as accidentally injured. Interest was aroused in England after case reports[4] in 1963 and the British Paediatric Association's warning memorandum[5] in 1966, which helped define the problem and offered guide lines for treatment.

Despite clinical descriptions of battered children[3 6-10] and their parents[11-13] there has been no previous comprehensive and controlled study which has included both medical and psychological assessments. Because the correct diagnosis is often missed and doctors are still unsuspecting[14] this paper reports birth abnormalities, age, sex, types and degree of injury and their sequelae, and other important factors in 134 battered children.

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Patients and Methods

Over two years 134 battered infants and children aged under 5 years and their parents were studied in detail. Fifty-three children who were admitted to hospital as emergencies other than on account of accident or trauma acted as a control group. The mothers' ages, areas of origin, and consultants referring were the same in both groups.

Procedure.—All parents were seen as soon as possible after their child's admission. The general health and behaviour of the child and his siblings were recorded by standardized psychiatric and psychological interview.[12 15] The medical notes were examined and the extent of the injuries recorded. All survivors were photographed and underwent full blood counts and skeletal surveys. Birth weights were recorded from maternity hospital notes. Eighty-four family doctors were asked to examine their records and 48 replied. The rest of the children had no doctor. The subscales (locomotor development, personal-social behaviour, hearing and speech, hand-eye co-ordination, and performance) on the Griffiths' Mental Development Scale[16] were measured in all children whose physical condition did not obviously entail brain damage.

Results

Sex and Age.—Sixty-eight patients were boys and 66 (49%) were girls, and 110 were under 2 years (mean age 18·5 months). Emergency admissions to Birmingham Children's Hospital were significantly younger than non-emergency admissions ($\chi^2=79{\cdot}30$; D.F.=4; $P<0{\cdot}001$; fig. 1). Battered children were significantly younger than all other emergency admissions to the same hospital during 1971 ($\chi^2=9{\cdot}5$; D.F.=4; $P<0{\cdot}05$).

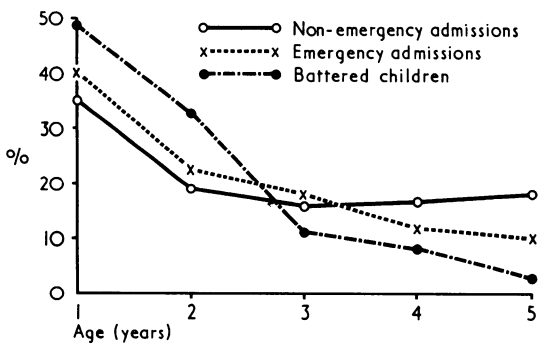

FIG. 1—Children under 5 years of age admitted to Birmingham Children's Hospital.

Bruises, Burns, and Scalds.—Thirty-eight children presented with conditions other than injuries. One-hundred-and-ten had bruises, most often on the head (75 cases) and thighs (45). Twenty-three had burns or scalds; in nine the buttocks and in six the lower limbs were affected, and injuries were most commonly caused by hot liquids or a metal stove. Cigarette burns occurred in two cases. Children with burns or scalds were older (mean age 24·8 months) than the remainder of the sample ($t=2{\cdot}35$; $P<0{\cdot}05$).

Fractures.—Forty-two children had recent or old fractures. The sites were skull (37 cases), humerus (19), radius and ulna (18), femur (17), tibia and fibula (17), other sites (28). Of those with burns 11 also had a fracture.

Intracranial and Intraocular Haemorrhages.—Forty-seven children had an intracranial haemorrhage—subdural in 30 cases, subarachnoid in nine, and cerebral in eight. Of these 15 had no skull fractures and seven no head bruises. Of the total sample eight had ocular damage in the form of intraocular haemorrhages, exudates, papilloedema, or retinal detachments.

SERIOUSNESS OF INJURY

Twenty-one children died, 20 had serious injuries resulting in permanent damage, 62 had serious injuries but no apparent permanent damage, and 31 had superficial injuries.

Fifty-nine children had to stay in hospital for up to one week, 16 for 2-4 weeks, and seven for five weeks or more. Forty-eight remained in hospital for non-medical reasons for at least one extra week and seven stayed for at least five weeks.

Six dead children compared with 25 live children had a sibling who had been battered. Seven dead children compared with 65 of the rest had been battered more than once. Neither difference was significant. Twelve parents were convicted of either murder or manslaughter. In nine cases the coroner reached an "open verdict," and these parents were not prosecuted.

COMPARISON WITH CONTROL CHILDREN

Abilities of Children.—Altogether 87 battered children were tested for mental development. Of these, 36 (27% of sample) had recovered from head injury (though the results of four cases were excluded because of serious congenital defects) and 51 (38%) had no injury other than bruising. Forty-one (31%) were untestable because of permanent damage and six (5%) were unavailable for testing. The mean general quotients on the Griffiths scales were 89 for battered and 97 for control children ($t=2{\cdot}79$; $P<0{\cdot}01$). Excluding those who recovered from their head injuries the contrast between battered children and controls was of smaller significance ($t=2{\cdot}03$; $P<0{\cdot}05$). Mean general quotients for battered children with head injuries from which they had clinically recovered and those without any head injuries were 87 and 90 respectively. Battered children tested after head iniury scored significantly lower than controls on personal-social, hearing and speech, and hand-eye co-ordination scales (fig. 2). There was no significant difference between battered children who had no head injuries and controls on the personal-social or hand-eye scales; only hearing and speech quotients were significantly lower for this subgroup of the battered sample The mean developmental quotients of battered children of low birth weight was 73 and of those with failure to thrive 78.

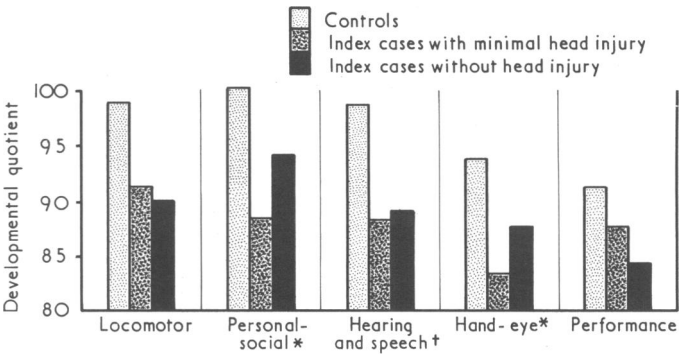

FIG. 2—Developmental quotients on Griffiths scale. Cases with relevant congenital defects were excluded from each group.
*Difference between controls and index cases with head injury are significant at 0·05 level.
†Differences between controls and index cases with head injury and between controls and index cases without head injury are significant at 0·05 level.

Physical Neglect and Failure to Thrive.—Twenty-two batterred children (16%) compared with one control (2%) were physically neglected on admission ($\chi^2=6{\cdot}51$; D.F.=1; $P<0{\cdot}05$), and 23 (17%) battered children compared with one (2%) control had previously been in hospital with failure to thrive ($\chi^2=6{\cdot}62$; D.F.=1; $P=0{\cdot}01$). Among the battered children failure to thrive occurred in 11 (50%) of the neglected children and 11 (10%) of the remainder ($\chi^2=17{\cdot}64$; D.F.=1; $P<0{\cdot}001$).

Birth Weight.—Of the battered children born in hospital 58 had normal birth weights, eight weighed between 2,000 and 2,500 g, and 11 weighed less than 2,000 g. The occurrence of low birth weight among the different social classes is shown in table I and compared with national norms.[17 18] In both upper and lower social classes the prevalence of low birth weight among the battered sample born in hospital was four times greater than the national rate.

Number of Deceased Siblings.—Ten battered children had a deceased sibling. Four of these had died under "suspicious" circumstances. In two cases more than one sibling had died. None of the controls had a deceased sibling.

TABLE I—*Percentage of Low Birth Weight Babies (<2,500 g) according to Social Class in Three Studies*

Social Class	Drillien[17]	Present Study	National Survey of Health and Development[18]
I and II	3·3	24	5·6
III	5·9		
IV and V	7·6	24	

Congenital Defects.—Altogether 7·46% (10) of the battered children had serious congenital defects as compared with 1·75% of the general population.[19] There were two cases each of spina bifida, hydrocephalus, and encephalocele and one each of Hirschsprung's disease, coeliac disease, congenital spherocytosis, and congenital dislocation of the hip. A further eight children had minor congenital abnormalities.

Precipitants.—Eighty mothers and 63 fathers initially denied inflicting injury but gave no adequate explanation of it, and 13 mothers and six fathers later changed their initial account into an adequate explanation of the injury. Battering incidents occurred equally in the morning (35 cases) and late afternoon (36). Thirty-one incidents occurred in the evening. Only five parents reported they battered the child late at night. Among mothers 16 had had a confinement less than three months previously, 56 between three and 12 months previously, and 62 more than 12 months before the battering incident.

Behaviour of Child and Neuroticism among Mothers.—Battered children were significantly less wakeful at night, excitable or lively, or tired during the day than the controls (table II). No significant differences were found in time of rising or going to bed or poor appetite. One child who failed to thrive was considered by its mother to have a feeding problem compared with 14 of those who did thrive. The difference was not significant.

TABLE II—*Comparison between Behaviour at Home of Battered Children and Control Children*

	Battered Children		Controls		Significance	
	No.	%	No.	%	χ^2	P
Wakeful at night (½ hr or longer)	11/23	9	11/51	22	4·12	<0·05
Excitable or lively	76/25	61	40/51	78	4·26	<0·05
Tired during day	49/124	39	31/51	61	5·76	<0·05
Rose 5-7 a.m.	38/123	31	16/51	31	0·01	N.S.
Went to bed 9-12 p.m.	30/123	24	15/51	29	0·25	N.S.
Poor appetite	15/124	12	7/51	14	0·00	N.S.
Crying a problem	39/107	36	4/48	8	11·69	<0·001

Forty (30%) mothers of battered children compared with five (9%) control mothers considered the child difficult ($\chi^2=8·40$; D.F.=1; P<0·01). Of the 40 mothers 30 (75%) were neurotic whereas only 29 (31%) of those who did not find their children difficult were ($\chi^2=16·21$; D.F.=1; P<0·001). Thirty-six (27%) mothers of battered children compared with four (8%) control mothers described their other children as difficult ($\chi^2=14·12$; D.F.=1; P<0·001). More (39; 29%) mothers of battered children—of whom 27 (69%) were neurotic—than control mothers (4; 8%) said crying, clinging, or whining behaviour was a severe problem ($\chi^2=11·49$; D.F.=1; P<0·001). Fewer of the mothers who did not find such behaviour a problem were neurotic—only 29 (31%) ($\chi^2=7·51$; D.F.=1; P<0·01).

Delay in Attending Hospital and Previous Contact with General Practitioners.—The parents of 82 battered children attended the hospital casualty department at least 24 hours after injury occurred. Eleven children with serious injuries (including some who later died from their injuries) were also presented after similar delay. According to the family doctor's reports no parent had made unnecessary visits. According to their own reports 113 had rarely or never consulted their general practitioner before battering their child.

Discussion

Some maintain that more boys than girls are battered,[11 22 23] but, along with others,[20 21] we have found equal numbers of both sexes. Several authors[23–26] suggest that younger children are particularly at risk. We have found that emergency admissions tend to be younger even if not battered. Nevertheless, battered children were significantly younger than other emergency admissions. Furthermore, most children were under 2 years of age and many had been previously battered, supporting suggestions that "any injury other than a road traffic accident to a child under 2 must be considered to be an instance of the battered baby syndrome."[14]

Our results confirm those of others who have shown that battered children have a multiplicity of injuries in various stages of healing.[3 10 20] Vague accounts—"must have knocked his head against the cot," "fell off the bed," "bruises easily,"—were offered as initial explanations by parents. In no case was a bleeding disorder detected. Bruising to the head or cheek, a black eye without gross bruising of the forehead, a "purple ear," or fading bruises of the ear and surrounding scalp were prominent features, supporting those who rate the head as an important site of trauma.[23 27]

Over a third of the children had an intracranial haemorrhage (usually subdural); many of these had no associated skull fractures, and 15% had no head bruising but showed instead minimal finger and thumb mark bruises on the trunk and arms. These children had been shaken violently, supporting Guthkelch's suggestions[28] that repeated acceleration/deceleration (whiplash injury) rather than direct violence accounts for intracranial bleeding. Diagnostic confusion also arose in those children with ocular damage. Here our findings concur with others[8 9] who have concluded that physical maltreatment must be stongly considered when intraocular haemorrhages, with or without an associated subdural effusion, occur.

BURNING

Though bruises, fractures, subdural haematoma, and malnutrition are being increasingly recognized as stigmata of baby battering little emphasis has been placed on child abuse by burning. Our finding that nearly one-fifth had serious burns or scalds and that such children were significantly older then the remainder of the sample supports suggestions that many incidents of child abuse by burning pass for accidents.[29] The importance of skeletal surveys (repeated two weeks later if negative) was shown by the fact that nearly half also had fractures. Cigarette burns were not common but burning of the buttocks or perineum by placing the child on a hot metal surface was a particularly striking feature—a finding also observed by Vesterdal.[30]

One-third of dead children had been battered previously and they had familiar injuries.[10 31] Most fatal injuries resulted from a single act of parental violence. A third had a sibling who had also been maltreated, and in 9% of cases the sibling had died—some under suspicious circumstances. These considerations should caution against the over-optimistic belief that only one child in a family is affected and emphasize the importance of considering care orders on siblings.

Adelson[6] and Emery[32] suggest that some "accidental" cases and "cot deaths" may be the results of parental assault. Sudden infant deaths are characterized by a long delay between the child last being seen alive and the discovery of death, illegitimacy, and low birth weight. Poor use of welfare services, poor living conditions, marital disharmony, and poor work records characterize the parents of such children.[33] Baby batterers share all these adversities.[15] Furthermore, half the sample of dead children were "discovered" after a delay of 24 hours or longer.

Mortality rates for children subjected to wilful violence vary among different series—less than 2%,[23] 3%,[7] 11%,[3] 25-30%,[34] and 55%.[30] Among our cases, after excluding cases where the parents had gone to prison, the rate was 8%—similar to that of Kempe[3] and Cooper.[35] Other series in this country have found higher rates.[36 37] The commonest cause of death in 0-4-year-olds are birth injuries, infections, and congenital abnormalities. Apart from "accidents," battering in Birmingham in 1971 ranked next above motor vehicle accidents as a cause of death.[38] But unless medical personnel overcome their reluctance to record a diagnosis of "battered child syndrome"[39] statistics will underestimate the problem. National statistics are also ham-

pered; in five of our patients who died in Birmingham in 1971 the coroner reached an "open verdict." Thus none appeared in the Registrar General's figures[40] for "homicides and injuries purposely inflicted" in 1971.

NEUROLOGICAL AND INTELLECTUAL IMPAIRMENT

Our findings support those of others[34 41] who showed that battering often results in permanent neurological impairment. Spasticity, paraplegia, blindness, and other neurological sequelae that required long term rehabilitation developed in 15% of our cases. One child developed West's syndrome (infantile spasms, subnormality, hypsarrhythmia) after violent shaking.

Our findings also show that battering leads to developmental retardation. Abnormality of social responsiveness and visuo-motor co-ordination were found in those children who had suffered only slight head injuries. Such behaviour was, therefore, probably due to damage of the central nervous system and not to "frozen watchfulness" (gazing silently and fixatedly out of mistrust).[42] Because the capacity for showing mistrust develops slowly in early childhood[43] observations of frozen watchfulness in young babies may be misinterpretations. In older children immobility can be a normal reaction to a new experience such as admission to hospital.[43] Children in our sample were tested after adaptation to hospital, and only one child behaved mistrustfully throughout testing.

Regardless of head injury, language retardation was found in our sample. This has also been observed by Martin.[41]

Thirty-eight per cent of the sample were without head injury or neurological damage, but their overall ability was also significantly lower than that of the controls. This may have been due to previous head trauma or genetic endowment.[12] Parental neglect may result in congenitally defective babies of low birth weight who fail to thrive.[44] Lower developmental quotients were obtained by children having such handicaps. Only 22 battered children were without brain damage, head injury, low birth weight, or failure to thrive.

Considering that most parents offer no adequate explanation of the injury and that in about half the patients with cerebral palsy and mental deficiency attending paediatric outpatient departments no adequate cause is identified[45] the possibility that battering is responsible for a sizeable proportion needs further exploration.

The possibility that childhood marasmus represents an associated form of rejection should be strongly considered.[46 47] A significant proportion of our sample had been previously admitted to hospital because of failure to thrive and were physically neglected, supporting the suggestion that maltreatment of children is a spectrum ranging from infanticide to nutritional and emotional deprivation.[25 26 41 48] It is established that lack of calorie intake and deprivation of maternal affection[50] may impair growth and curtail intellectual development.[51]

A quarter of battered children born in hospital had low birth weights. This figure falls to 15% if we assume that babies born at home were of normal weight and compares with 5-7% in the general population.[18 19 44] Several authors[7 23 26] have asserted that low birth weight babies are particularly at risk from battering, and others[52 53] have interpreted this as failure of bonding due to separating the mother from her child during the neonatal period. Many low birth weight babies in our own and other series[7 23 26 53] may, however, be simply explained as reflecting those maternal characteristics that predispose to delivery of low birth weight babies—low social class, youthful and single status, and rejecting attitudes during pregnancy.[17 44] All these characteristics were prevalent in our sample.[15] Newson[54] has pointed out that responsiveness to a baby is not a simple matter of biological necessity but a general characteristic shared by many people who are not mothers. Furthermore, unfavourable mother-child relationships are related to undesirable maternal attitudes long before the neonatal period[55] and to personality abnormality.[56] Considering also that only a few babies weighed under 2,000 g at birth or required long-term separation from the mother it is unrealistic to expect that increased or improved maternal child contact after confinement[52 53] will substantially reduce the risk of subsequent battering.

MOTHER'S OBSTETRIC HISTORY

No support was found for suggestions that difficulties during pregnancy, labour, or after birth[13 23 25] are responsible. Most mothers had normal confinements and only a few babies were battered during the post-partum period. Indeed, many mothers had longstanding emotional and personality problems[12] and displayed rejecting attitudes towards their children irrespective of puerperal factors.[15]

Possibly some children are particularly at risk and unwittingly invite physical abuse from their parents.[57] Failure to take account of the fact that child-parent I.Q. correlations are low before the age of 3 years[58] and failure to use well validated tests such as the Griffiths developmental scales[59] may exaggerate the significance of clinical impressions that a child's intellectual endowment exceeds or falls short of the parents'.[41]

Our results show that battered children were in some respects lethargic. Difficult, especially crying or clinging, behaviour was encountered by the mothers and may have precipitated battering. After being some time in hospital, however, they were no more irritable than the controls. Thus, difficult behaviour probably results from interaction with a neurotic mother.[60] Our results bear this out.

Kempe[24] has asserted that in the prodromal stages mothers often and recurrently bring their infants with non-existent complaints and that family doctors are slow to identify and refer suspected cases.[23] We found, however, that no mother had made an unnecessary visit to her family doctor before the battering of her child. Indeed family doctors are unlikely to see more than one case in five years.[61] More characteristic was the long delay between injury and arrival at hospital, a factor also observed in other studies.[11 22]

Conclusion

In terms of morbidity and mortality the battered child is a problem of major concern to society. Child abuse has elicited spasmodic public concern for nearly a century, and yet no child protection service has developed that adequately meets the problem. It almost seems as if the medical profession has abdicated its responsibility to local authorities and voluntary organizations, whose roles in some respects are complementary but in others may not always be harmonious. Both agencies rely heavily upon inexperienced and possibly inadequately trained social workers who are as yet ill-equipped to deal with these difficult cases. The past year has again witnessed a depressing number of children who have been battered to death after decisions by social workers to return the child home. Our findings indicate that such authority should be curtailed. Indeed, there seems to be a strong case for setting up specialized hospital teams to carry out full assessment, giving priority to the safety and healthy development of the child.

We cannot predict which individual child will be battered. Nevertheless, our results[12 15 46] broadly delineate those groups in the community in which child abuse is most likely to occur. Prevention must rely on adequately designed, intensive education in children's needs and development during and after the antenatal stage. The high proportion of abnormalities at birth in our sample stresses the need to persuade these mothers to avail themselves of medical care. Without expert approaches to both these problems nearly all abused children are at risk of phsyical, educational, and social maldevelopment or death.

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Around Europe

School Health Education in Sweden*

G. D. RIPLEY

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Introduction

In the autumn of 1973 I made a study tour in Sweden and Finland as a medical Fellow of the Council of Europe to investigate school health education, with special reference to human relationships and personal responsibility for health. This paper is a personal view of my findings and opinions of school health education in Sweden.

*Based on a report to the Public Health Division of the Council of Europe, 4 December 1973.

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Historical Background

Sweden has a well-established tradition of social commitment with a broad and progressive educational system, and health education forms an integral part of the school curriculum. A study of the development of sex education shows how a relationship between doctors and teachers can influence government and how a continuous assessment of results can modify methods. In the early part of the century some doctors and commentators drew attention to the lack of knowledge about sex in the population,[1] and this lead in 1933 to legislation to provide compulsory sex education in all secondary schools. But it was not until three years later that training was made available to teachers.

Sex education became obligatory in all school grades in 1956; it was accompanied by an official handbook for teachers and a

Evoked Potential Evidence for Right Brain Activity During the Recall of Traumatic Memories

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Auditory probe evoked potential attenuation was measured as an index of hemispheric activity in 10 subjects with a history of childhood trauma and 10 matched subjects without such history while they recalled a neutral memory and then a traumatic memory. There were prominent group differences in degree of cerebral laterality between memory tasks (P = 0.02). The trauma group had a significant left dominant asymmetry during the neutral memory (P = 0.02), which markedly shifted to the right during the unpleasant memory (P = 0.007 for degree of shift). Normal control subjects did not display a significant asymmetry during either task, nor did they show a significant shift between tasks.

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Although there has been a long history of speculation about the mental properties of the right brain,[1] it was not until Sperry's[2] landmark work on postcommissurotomy patients that objective studies on the functions of the right brain accelerated. The right hemisphere, among its properties, has been shown to be involved in the processing of affect. For instance, the right side has been shown to be superior at the perception and recognition of emotion.[3–7] Wechsler[8] and Masters[9] have shown that patients with right-sided lesions have impaired recall of affective memories. Several studies have indicated right-sided involvement in the experience of emotion, particularly unpleasant emotion.[10–16]

The present study represents our first effort to obtain evidence about the functioning of the right hemisphere in subjects with a history of trauma while they affectively recalled unpleasant early memories in a setting resembling a psychotherapy session. This condition was compared with one in which the subjects recalled a recent neutral, work-related situation. The responses of the subjects with a history of trauma were compared to those of a control group without a history of significant trauma.

As a measure of hemispheric activity, we used probe auditory evoked potentials (AEPs) as developed by Papanicolaou and Johnstone.[17] The method entails exposing each subject to repeated auditory clicks and meas-

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uring simultaneously over both hemispheres the amplitude of the averaged evoked potentials in response to the clicks. While exposed to the clicks, the subject is asked to engage in a mental activity. When one hemisphere is more involved than the other in a cognitive activity, then the more involved hemisphere is expected to display a relatively attenuated evoked response to the clicks. Papanicolaou and Johnstone[17] have reviewed the theory, methods, and applications of the probe AEP.

METHODS

Procedures

Twelve paid volunteers who believed they had come from dysfunctional families were recruited for this study; all were right-handed, over the age of 18, and not taking any medication with known psychotropic effects. Twelve similar subjects who believed they did not come from dysfunctional families were also studied. After a full explanation of the procedures, written informed consent was obtained. A psychiatrist then conducted a full psychiatric interview and mental status examination. No subject had to be excluded because of active DSM-III-R Axis I or II disorders. Right-handedness was confirmed by the Edinburgh Handedness Inventory.[18]

Electrodes were applied at C_3 and C_4, using a Lycra cap (Electro Cap), and referenced to linked ear electrodes and to a forehead ground contained in the cap. Gold electrodes (10 mm) were applied lateral to and below the right eye to monitor conjugate eye movements and blinks. All impedances were below 5 kΩ and equal bilaterally to within ± 1 kΩ. The subjects were asked to sit back in a reclining chair, with a rolled towel used as a neck support. The patients fixed and maintained gaze on a mark in front of them throughout each recording period and were closely watched for eye movements.

The subjects were first asked to remember and reflect on a recent ordinary work or school situation. They were asked to start by raising the right hand at the wrist and then to lower it when they were actively remembering the situation. If they were no longer engaged in the activity, they could signal this by raising the right hand again. The recording of AEPs commenced when they lowered their hands.

Evoked potentials were recorded on a QSI-9000 computerized EEG set to produce binaural 86-dB clicks (3 per second) and to record evoked responses for 250 ms after each click. All subjects averaged 300 to 600 epochs. There was no statistical significant difference between groups in the number of epochs recorded or rejected. If it appeared that a readable evoked potential response had not been obtained, the recording was repeated. The low-frequency EEG filter was set at 1 Hz, the high-frequency filter at 30 Hz. Epochs greater than 15.5 μV were automatically rejected as possible artifact.

After the recording, each subject was given several queries taken from the Profile of Mood States (POMS) scale[19] to monitor affect. Specifically, subjects were asked to measure, on a 5-point scale from none to extreme, their levels of tension, anger, sadness, hopelessness, nervousness, panic, and guilt. Subsets from the POMS scale have been used as measures of subjective mood.[20]

A psychiatrist then engaged each subject in an empathic psychiatric interview, lasting about 15 minutes, in which he asked about the subject's early family life. The psychiatrist tried to engage the subject affectively and to get him or her to share, with emotion, a painful childhood memory. When a subject seemed to be affectively reexperiencing such a memory, the psychiatrist asked him or her to try to continue to maintain the memory and mood, but without speech or motion, so that evoked potentials could be measured. After the recording, the abbreviated POMS scale was again used to measure emotional state. The unpleasant memory task was always presented after the neutral memory task because of concern that the lingering effects of the unpleasant memories would interfere with the neutral task. After completion of the study, the psychiatrist worked with each patient to restore the patient's usual mood, and no subject left the laboratory in distress.

The averaged AEP response from each condition was printed, and all recordings were blindly read by an experienced research electroencephalographer to obtain N1 and P2 peaks. N1 was defined as the maximum negative deflection between 70 ms and 130 ms that conformed to expected patterns, and P2 was defined as the peak of the following positive wave.

Data Analysis

For each task, an asymmetry index $(C_3 - C_4)/(C_3 + C_4)$ was calculated from measurements of the N-P amplitudes at C_3 (left auditory cortex) and C_4 (right auditory cortex). Probe AEPs are not localizable within a hemisphere and are most reliable when recorded over the primary auditory cortex because that location reduces the contaminating effects of volume conduction. Group differences were evaluated by use of analysis of covariance (ANCOVA) with right vs. left hemisphere response as a within-subject factor. Covariate procedures were used to provide partial statistical control for group differences in degree of emotional response to the memory conditions. We used *t*- tests to test the null hypothesis that there was no hemispheric asymmetry in the evoked potential response. Data are presented as means ± SD. Probability values were determined by use of two-tailed tests.

Subjects

Of the 24 subjects studied, 20 had recordings over each hemisphere and during each task that had clearly discernible N1 and P2 peaks. Four subjects had to be eliminated because at least one of their four tracings did not show a clearly defined N1 or P2 peak. It is not unusual in evoked potential research for a percentage of recordings to be uninterpretable. Our data were collected and then later read by our expert reader (A.P.), who was blind to subjects' identities. He found 91 of the 96 evoked potentials recorded to be clearly interpretable. Five recordings were ambiguous, and the 4 subjects (2 from each group) from whom they were taken were therefore eliminated from the study.

Ten subjects (mean age = 32.9 years; 5 male, 5 female) reported at the time of recruitment that they had experienced significant childhood trauma. Another group of 10 subjects (mean age = 33.0 years; 4 male, 6 female) reported at the time of recruitment that they did not have significant childhood trauma. All subjects had completed at least 2 years of college. At the time of the study a psychiatrist interviewed each subject and wrote up a history for each individual. Two other physicians blindly evaluated each history and subjectively rated the degree of each subject's early psychological trauma on a 5-point scale from 0 (no known abuse) to 4 (extreme abuse) for six categories of trauma. For overall trauma, there was a high correlation between the two raters ($r = 0.989$; $P < 0.001$). Table 1 shows the comparisons between the group means and standard deviations for the six categories of trauma. There were significant differences between the two groups for all trauma categories except sexual abuse, which had been reported by only 1 trauma victim. The most significant differences were in psychological abuse and overall trauma.

Within the group of trauma victims, 8 had undergone extensive psychotherapy, and 6 had completed their treatment at least 2 years prior to the study. No subject complained of ongoing psychiatric symptoms at the time of the study, and each was judged, by the interviewing psychiatrist, to have no active DSM-III-R diagnosis on Axis I, II, or III. Each of the 8 subjects who had been in psychotherapy had a history of a DSM-III-R diagnosis, including major depression, dysthymia, and substance abuse, but none had ever manifested psychotic symptoms. No subject in the control group had complained of significant psychological symptoms, and none had been in psychotherapy or had any DSM-III-R diagnosis in the past.

RESULTS

Immediately after completing the neutral task, each subject reported that he or she was able to cooperate in remembering a work or school situation. There was no significant difference between the POMS scores of the two groups during the neutral memories. During the unpleasant memory on the abbreviated POMS scale, 9 of 10 trauma victims and 5 of 10 control subjects reported "quite a bit" or "extreme" response for at least one affect category. Table 2 shows that subjects in both groups had higher mean abbreviated POMS scores after the unpleasant memory than after the neutral memory. However, there were no significant differences between groups in abbreviated POMS response to the two memory conditions. Of the 7 affects measured, the largest change for both groups was for sadness, with trauma victims more

TABLE 1. Childhood trauma ratings for control and trauma victim groups

Group/Statistic	Parental Alcoholism	Parental Arguing	Physical Abuse	Psychological Abuse	Sexual Abuse	Overall Trauma
Control (mean ± SD)	0.00 ± 0.00	0.40 ± 0.74	0.15 ± 0.47	0.90 ± 0.74	0.00 ± 0.00	0.55 ± 0.54
Trauma (mean ± SD)	1.10 ± 1.45	2.30 ± 1.57	1.35 ± 1.38	3.25 ± 0.86	0.50 ± 1.27	3.20 ± 0.92
F (df = 1,18)	5.762	12.033	6.803	43.126	1.552	61.963
P	0.027	0.003	0.018	< 0.001	0.229	< 0.001

TABLE 2. Average abbreviated Profile of Mood States score for 7 affects during the neutral and unpleasant memory tasks for control and trauma victim groups

Group/Statistic	Neutral Memory	Unpleasant Memory	Neutral vs. Unpleasant Paired t (df = 9)	P
Control (mean ± SD)	0.41 ± 0.68	0.90 ± 0.68	−2.393	0.040
Trauma (mean ± SD)	0.31 ± 0.36	1.20 ± 0.36	−9.312	< 0.001
t (df = 18)	0.41	−1.24		
P	0.69	0.23		

affected than control subjects. The only POMS items that were differentially affected by group were sadness (P = 0.043), hopelessness ($P < 0.001$), and mean of the 7 POMS items ($P = 0.011$).

There were significant changes in the asymmetry index as a consequence of the neutral versus unpleasant memory condition ($F = 8.61$, df = 1,18, $P = 0.009$), and there was a significant memory condition by group interaction ($F = 6.32$, df = 1,18, $P = 0.02$). Figure 1 displays representative probe evoked potential tracings from a subject with a trauma history during the neutral and unpleasant memory states, revealing shifts in N1-P2 amplitude over left and right auditory cortex between the two memory tasks. Figure 2 shows the average asymmetry index on each task for the control and victim groups. The trauma group displayed a significant left dominant asymmetry during the neutral memory ($t = 2.96$, df = 9, $P = 0.02$) and relative right dominance during the unpleasant memory ($t = 1.91$, $P < 0.10$). Overall, these subjects displayed a highly significant shift in their asymmetry index between memory conditions ($t = -3.469$, df = 9, $P = 0.007$). During the neutral task, 9 trauma victims had higher amplitudes at C_4 than C_3 (asymmetry index < 0), implying greater relative left-sided cortical activity. During the unpleasant memory task, 7 trauma victims had lower N1-P2 amplitudes at C_4 than C_3 (asymmetry index > 0), implying greater relative right-sided cortical activity.

On the other hand, the control group did not display a significant asymmetry during either the neutral task (t = 0.037, not significant) or the unpleasant memory task ($t = 0.02$, not significant). Nor was there a significant shift in asymmetry index between the two tasks ($t = -0.334$, df = 9, $P = 0.746$). During the neutral task, 60% of control subjects had higher amplitudes at C_4 than C_3, versus 40% during the unpleasant memory task.

Within each group there was no correlation between the severity of overall trauma history and the shift in asymmetry, but for the entire group, the correlation approached significance ($r = 0.407$, $P = 0.075$). Within each group the range of ratings was narrow. Seven trauma victims had overall abuse ratings of "extreme" or "severe," and 3 had "moderate" ratings. In the control

FIGURE 1. **Representative probe auditory evoked potential tracings from a 32-year-old male subject from the trauma victim group during the neutral memory (left) and the unpleasant memory (right) tasks. The evoked potential tracings were shifted up or down along the Y axis to coincide at N1, which was set equal to 0 μV. P2 is the peak of the positive wave following N1. Note that during the neutral task N1-P2 amplitude was markedly attenuated over C_3 compared with C_4. However, during the unpleasant memory task N1-P2 amplitude was greater over C_3 than C_4.**

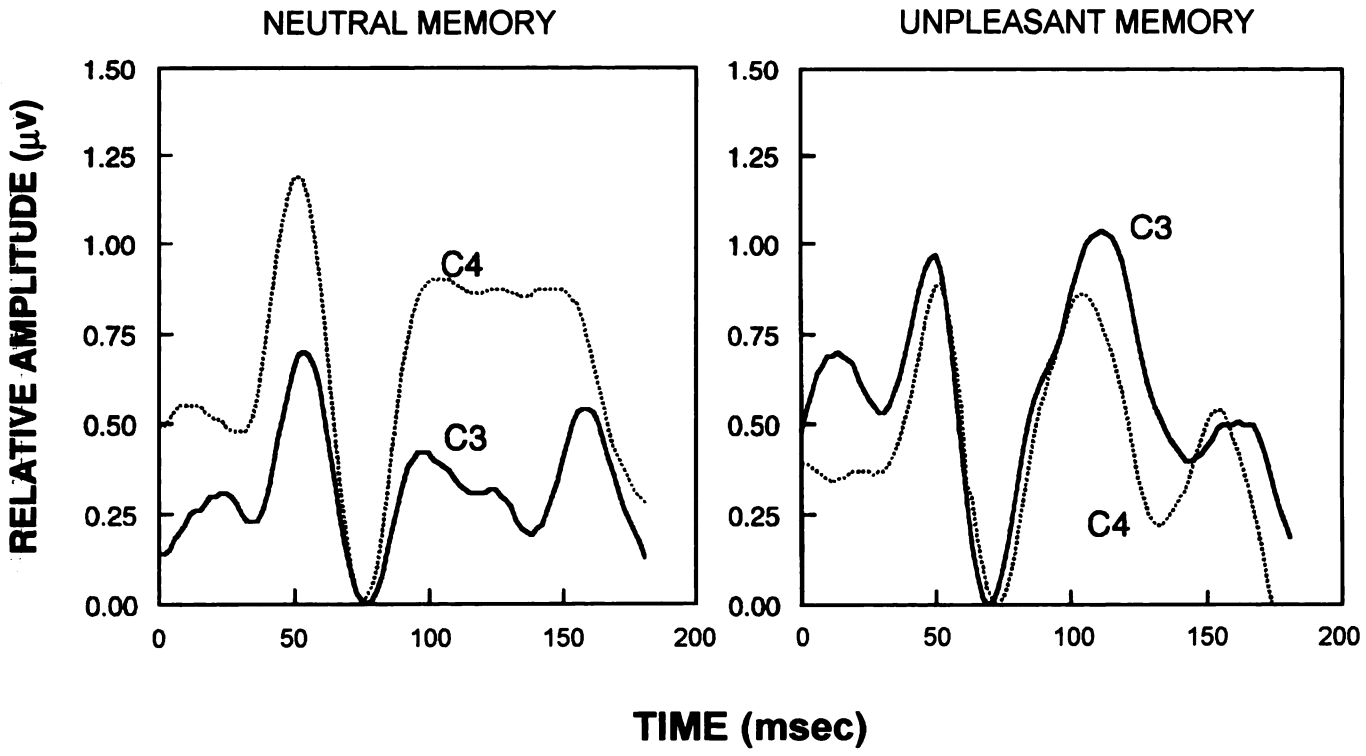
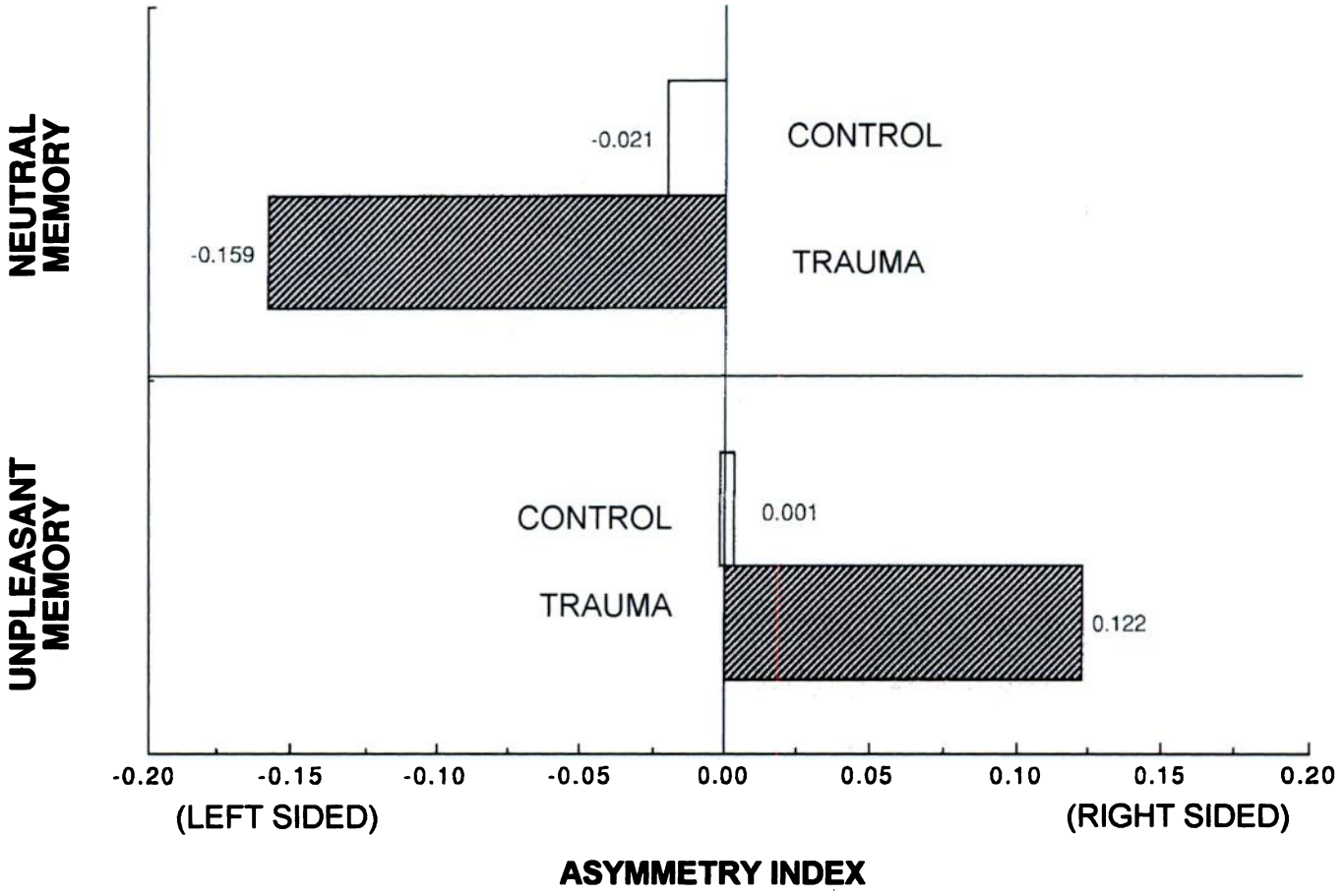


FIGURE 2. **Average asymmetry index measures for the trauma victim and control groups during the neutral and unpleasant memory tasks. The asymmetry index was defined as the difference in N1-P2 amplitude between C_3 and C_4, divided by the sum of the N1-P2 amplitude over C_3 and C_4; i.e., $(C_3 - C_4)/(C_3+C_4)$. Negative values indicate greater right-hemisphere amplitude and left-hemisphere attenuation.**



group, all were rated "mild" or "none."

For the entire group, there were no significant correlations between the degree of shift in asymmetry between tasks and degree of emotional response as reflected in average POMS scores ($r = -0.058$, $P > 0.8$) or in any individual POMS item. Also, within groups there was no significant positive correlation between the average change in the POMS scores and the shift in asymmetry.

Analysis of covariance was used as a partial means of testing whether group difference between control subjects and trauma victims in the degree of asymmetry shift was a consequence of group differences in degree of emotional response to the memories. Statistically significant group differences in degree of shift persisted even when changes in emotional responses were used as covariates (F sadness = 8.02; F hopelessness = 5.39; F mean = 13.51; all df = 1,17; all $P < 0.04$). Hence, differences between groups in degree of asymmetry shift did not appear to be a direct consequence of differences in expressed emotional response.

DISCUSSION

The present study is limited by small sample size, and we agree with Regan[21] that caution should be used in drawing conclusions about cognitive function from evoked potential data. Still, probe AEPs have been found to be reliable in demonstrating cerebral asymmetries in a number of studies.[17,22-25] In one study, for instance, probe AEPs indicated increased right hemispheric activity when subjects were asked to detect the emotional content of speech rather than its phonetic aspects.[23] Probe AEP results have been shown to correlate with measures of

cerebral blood flow.[26] Still, probe AEPs do rely on a few layers of inference, and their precision, like that of all EEG methods of localizing cerebral function, has not been absolutely determined.

Probe AEPs greatly reduce the possible influence of unilateral muscle artifacts, which are known to contaminate the beta spectrum of standard EEGs recorded under emotionally provocative conditions.[27] Auditory probe evoked potentials, which are recorded over the primary cortical auditory centers, are less influenced by volume conduction that complicates the interpretations of alpha EEG data. Electrical measures of brain activity have the advantage of being noninvasive, relatively inexpensive, conveniently applied, and relatively non-interfering with cognitive processes. Electrical measures, however, lack the capacity of PET scans or newer MRI techniques[28] to provide measures reflecting changes in blood volume, blood flow, or cortical metabolism, and such technologies will be needed to validate our findings.

We engaged 20 subjects, 10 with a history of psychological trauma, in a brief psychiatric interview and had them recall distressing early memories. We used a nonstandardized, subjective initial selection criterion, but the statistical analysis of the blind ratings of all subjects indicated that the two groups were distinct with regard to trauma. The measurement of trauma, although apparently reliable, could not be tested for validity. Our trauma group is unique among psychiatric studies in that these trauma victims had no current psychiatric symptoms. The group did have a high prevalence of prior psychiatric illness, in contrast to the nontraumatized sample, and this, in addition to the trauma history, could possibly have contributed to our findings.

Although both groups demonstrated a shift in laterality toward the right during the interview, only the trauma group demonstrated a significant leftward asymmetry during the neutral memory and a significant shift to the right during the unpleasant memory.

The major finding seems to be that of asymmetry regardless of task. We did not anticipate the group differences that we observed in the neutral state, and this observation merits further study.

Although the interviewing psychiatrist had the impression that both groups had similar types of memories, differing mostly in intensity, it is quite possible that the content and character of the memories were distinct for the two groups in subtle ways. For example, one group may have had relatively more concrete rather than abstract memories.

The correlation between the magnitude of the left-right shift and the estimated severity of the subject's early abuse almost achieved statistical significance. Within groups, however, there was no correlation between the level of abuse and AEP shift. The lack of correlation within each group may be a consequence of the restricted range of ratings as well as the fact that our measure of the degree of trauma could not take into account the individual's constitution, supports, or development, or the personal meaning of the traumatic events.

The victim group had a significantly stronger average emotional response to the unpleasant memories than control subjects on a few POMS items, but within groups, and for all subjects, there was no positive correlation between the degree of emotional response to the unpleasant memory and degree of shift in laterality. Analysis of covariance suggested that the observed differences between groups were not an artifact of group differences in emotional response.

Previous reports have suggested that early abuse may be associated with enduring neurobiological effects.[29–33] Our findings seem consistent with a recent study by Ito et al.,[29] which demonstrated that early childhood abuse was associated with lateralized electrophysiological and neuropsychological abnormalities. We agree with Muller's[34] hypothesis that early trauma may lead to a lack of integration of left-right hemisphere function, and we further speculate that traumatic memories may be preferentially stored in the right hemisphere. This hypothesis of deficient hemispheric integration and preferential right-sided storage of traumatic memories provides an interesting theoretical explanation for the fact that memory recollection following trauma can be both deficient (constricted or amnestic) and intrusive.[35]

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Hippocampal volume in women victimized by childhood sexual abuse

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ABSTRACT

Background. Several prior studies have found reduced hippocampal volume in victims of psychological trauma with post-traumatic stress disorder (PTSD). We were interested to determine if this finding was evident in women who were victimized by severe sexual abuse in childhood.

Methods. In this study, hippocampal volume was measured using quantitative magnetic resonance imaging (MRI) in 21 women who reported being severely sexually abused in childhood and 21 sociodemographically similar women without abuse histories.

Results. Women who reported sexual victimization in childhood had significantly reduced (5% smaller) left-sided hippocampal volume compared to the non-victimized women. Hippocampal volume was also smaller on the right side, but this failed to reach statistical significance. Left-sided hippocampal volume correlated highly ($r_s = -0{\cdot}73$) with dissociative symptom severity, but not with indices of explicit memory functioning.

Conclusions. These findings, which are generally consistent with prior reports of reduced hippocampal volume in combat veterans with PTSD, suggest that diminished hippocampal size may be either a consequence of trauma exposure or a risk factor for the development of psychiatric complications following trauma exposure. The observed relationship between symptom severity and hippocampal volume suggests that mesial temporal lobe dysfunction may directly mediate certain aspects of PTSD and dissociative disorder symptomatology.

INTRODUCTION

Numerous studies have determined that exposure to child or adolescent sexual abuse (CSA) is a risk factor for the subsequent development of adult psychopathology (Herman *et al.* 1986; Burnam *et al.* 1988; Saunders *et al.* 1992; Mullen *et al.* 1993; Romans *et al.* 1995). Although CSA seems to be broadly associated with elevated risk for many psychiatric disorders including bulimia (Welch & Fairburn, 1993; Garfinkel *et al.* 1995), anxiety disorders (David *et al.* 1995; Mancini *et al.* 1995; Stein *et al.* 1996) and substance abuse (Triffleman *et al.* 1995), CSA is believed to be a dominant aetiological factor in the development of dissociative disorders (Spiegel & Cardeña, 1991; Nash *et al.* 1993; Irwin, 1994; Spiegel, 1994) and many forms of post-traumatic stress disorder (PTSD) (Bremner *et al.* 1993*b*; Wolfe *et al.* 1994; Zlotnick *et al.* 1996).

Although research is now being conducted into sociocultural and psychological factors that may influence vulnerability to (and resilience from) the negative psychiatric outcomes of criminal victimization in women (Norris, 1992; Rothbaum *et al.* 1992; Astin *et al.* 1993), little research has been conducted into neurobiological factors that may be of importance. In fact, it is only in the past several years that investigators have considered the possibility that severe emotional trauma may affect not only the psyche, but also the brain (Friedman *et al.* 1995).

Preclinical research conducted over the past

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decade has shown that experimental stressors (e.g. restraint stress or social stress) can result in functional and morphological changes within the hippocampus in rodents and primates (Sapolsky *et al.* 1985; 1990; Gould *et al.* 1994; Sapolsky, 1994). It is now generally accepted that stress-induced elevations of glucocorticoids augment the extracellular accumulation of excitatory amino acids (EAAs) such as glutamate (Moghaddam *et al.* 1994; Stein-Behrens *et al.* 1994), resulting in hippocampal damage which is evident both at the cytoarchitectural (i.e. reduced cell sprouting and neuronal cell death, particularly in the CA3 region) (Stein-Behrens *et al.* 1994) and functional (i.e. impaired learning and memory) (Luine *et al.* 1994; Alvarez *et al.* 1995; Bodnoff *et al.* 1995) levels.

These findings have led clinical investigators to hypothesize that exposure to traumatic stress might analogously affect hippocampal morphology and functioning in humans. In light of the well-established effects of hippocampal damage on memory systems in humans and other primates (Squire & Zola-Morgan, 1991; Miller *et al.* 1993; Zola-Morgan & Squire, 1993; Zola-Morgan *et al.* 1994; Alvarez *et al.* 1995), recent research efforts have focused on determining whether or not patients with PTSD have memory problems (Sutker *et al.* 1991; Bremner *et al.* 1993*a*, 1995*a*; Gurvits *et al.* 1993; Uddo *et al.* 1993; Sutker *et al.* 1995; Yehuda *et al.* 1995) and, in some studies, on whether or not they manifest radiological evidence of hippocampal damage (Bremmer *et al.* 1995*b*, 1997; Gurvits *et al.* 1996).

Bremner *et al.* (1995*b*) showed that male combat veterans with PTSD had reduced MRI-derived right-sided hippocampal volume compared to control subjects and, moreover, that certain aspects of their memory deficit were correlated with hippocampal volume. The finding of reduced hippocampal volume in male combat veterans with PTSD has recently been replicated by Gurvits and colleagues (1996), who found a bilateral effect. Most recently, Bremner *et al.* (1997) were able to demonstrate a 12% reduction in left-sided hippocampal volume in a mixed sample of men and women who experienced abuse in childhood.

In the present study, we used MRI-based measurements to assess hippocampal volume in women who experienced a common form of psychological trauma – childhood sexual abuse (CSA) (Breslau *et al.* 1991; Anderson *et al.* 1993; Resnick *et al.* 1993; Kessler *et al.* 1995), in comparison to non-victimized control women. We hypothesized that women who experienced CSA would have smaller hippocampi than the non-abused subjects.

In a prior study, Bremner *et al.* (1995*b*) found that right-sided hippocampal volume correlated negatively with certain aspects of short-term memory functioning. However, Gurvitis *et al.* (1996) found no relationship between hippocampal volume and memory functioning. In the present report we also examine the relationship between verbal explicit memory functioning and hippocampal volume to test the hypothesis that these will be negatively correlated in the abused subjects.

METHOD

Subjects

Subjects were 21 adult females who reported having experienced severe childhood sexual abuse (CSA) and 21 adult females who had no history of abuse (nCSA). All subjects gave informed, written consent to participate. Women with CSA and nCSA comparison subjects were recruited for this study using notices posted in waiting rooms in several community women's health care clinics. The notices outlined the nature of our research programme and indicated that we were seeking women with histories of childhood sexual abuse as well as women without abuse histories. An honorarium was offered for participation. Potential subjects were asked to leave their name and phone number on an answering machine, and one of the investigators (C.H.) contacted them by telephone to determine preliminary their eligibility for participation.

A 20–30 min telephone interview determined the presence or absence of severe CSA, which we defined as the report to the investigator of attempted or completed vaginal or anal penetration occurring between a child 14 years of age or younger and a perpetrator who was at least 5 years older than the child. We did not attempt to corroborate the subject's self-report with external evidence of abuse and neglect (e.g. child protective agency records, reports of contemporary informants) owing, in part, to the difficulty in obtaining such data – in the minority

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of cases where such external data are available at all (Finkelhor & Dziuba-Leatherman, 1994). We did, however, decide *a priori* to mitigate the chances of miscategorizing subjects by excluding persons who reported 'recovering' their memories of abuse in the context of psychotherapy (Williams, 1994; Pope & Hudson, 1995; Bremner *et al.* 1996). In actuality, though, none of the subjects reported a sustained period of total amnesia for knowing that they had been sexually abused.

Non-abused controls denied exposure to CSA or other traumata including witnessing a death, being assaulted, being physically abused, or being sexually abused in childhood or adulthood. Non-victimized controls were also required to be free of current Axis I pathology; this resulted in the exclusion of three otherwise-eligible nCSA subjects (one with obsessive–compulsive disorder, one with generalized anxiety disorder and one with major depressive disorder).

Subjects were ruled ineligible to participate if they had a history of head injury requiring any rehabilitation or hospitalization for longer than an overnight stay, or a history of seizures (except for $\leqslant 2$ febrile seizures in childhood) or other neurological disorders. One CSA subject who was completing a 10-day course of oral prednisone for asthma was excluded, in case this might affect her cognitive functioning (Newcomer *et al.* 1994). One grossly obese subject (weight $>$ 300 pounds) was also excluded.

At the time of study, three CSA subjects took psychoactive mediations: one took amitriptyline 75 mg/day; one took haloperidol 1 mg/day; and one took trazadone 100 mg/day and alprazolam 0·5 mg p.r.n. Two nCSA subjects took psychoactive medications at bedtime for sleep: one took amitriptyline 50 mg and one took lorazepam 0·5 mg. Since none of these medications would be expected to influence hippocampal or total brain volume, these subjects were included.

Subjects currently abusing alcohol or other substances were excluded. Prior course of substance (ab)use was documented during the diagnostic interview, and the Michigan Alcohol Screening Test – short version (SMAST; Selzer *et al.* 1975) and Drug Abuse Screen Test (DAST; Skinner, 1982) were administered to reflect the overall severity of lifetime drug and alcohol use. SMAST scores were 7·43 (S.D. 7·12) in the CSA subjects *v.* 0·52 (S.D. 1·40) in the nCSA subjects ($S = 582$, $z = -3{\cdot}68$, $P < 0{\cdot}0002$). DAST scores were 6·57 (S.D. 5·08) in the nCSA subjects *v.* 1·86 (S.D. 2·13) in the nCSA subjects ($S = 583$, $z = -3{\cdot}32$, $P < 0{\cdot}002$).

All subjects were determined by history and, where appropriate, by review of medical records or the administration of ancillary tests, to be free of significant medical illness. Educational level and socio-economic (Hollingshead, A.B. – Four factor index of social status. Unpublished manuscript, 1975, Yale University) were recorded. Two of the 21 CSA subjects and three of the 21 nCSA subjects were left-handed.

Psychiatric assessment

All subjects were evaluated using a version of the Structured Clinical Interview for DSM-IV (SCID; First *et al.* 1995) and a separate interview for DSM-IV Dissociative Disorders (SCID-D; Steinberg *et al.* 1990; Bremner *et al.* 1993*b*). The Clinician-Administered PTSD Scale (CAPS; Blake *et al.* 1995) was used to assess PTSD severity in the abuse victims. The Dissociative Experiences Scale (DES; Bernstein & Putnam, 1986), a widely-used self-report measure of dissociative symptoms, and the Beck Depression Inventory (BDI; Beck *et al.* 1961), a widely-used self-report measure of depressive symptoms, were also administered.

To assess intellectual functioning the subjects were administered five subtests of the Weschler Adult Intelligence Scale–Revised (WAIS-R; Wechsler, 1981): the vocabulary, similarities, picture completion, block design and digit symbol tests. Explicit memory performance was assessed using the California Verbal Learning Test (CVLT; Delis *et al.* 1987). Detailed results will be presented in a separate, future publication; but the relationship of several chief measures of intellectual and memory functioning with hippocampal volume will be examined here.

Magnetic resonance imaging

Magnetic resonance imaging (MRI) scans were conducted by experienced personnel on a Siemens Magnetom SP63 Helicon SE2 at 1.5 Tesla field strength. A T1-weighted coronal localizer scan was used to ensure that the entire hippocampus was being imaged. This

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was followed by a T1-weighted sagittal sequence (BW = 89 Hz, TR = 550 ms, TE = 14 ms, Flip angle = 65°; thickness = 5 mm, FOV = 230 mm, matrix = 256 × 256). The volumetric acquisition used a T2-weighted Turbo Spin Echo (TURBOSE) sequence (TR = 4000 ms, TE = 90 ms, thickness = 4 mm, interslice gap = 0·4 mm, matrix = 335 × 512@0·75 FOV, FOV = 260 mm (195 mm@0·75 FOV), acquisitions = 2, echo train = 12, BW = 130 Hz). The orientation of the volumetric acquisition was in the oblique coronal plane, with slices taken perpendicular to the hippocampus as determined from the parallel sagittal slices as described above. Excellent definition of the hippocampus was made possible by the superb in-plane resolution of these images. Scans were read clinically by a board-certified neuroradiologist (B.M.) to rule out identifiable pathology (e.g. tumour, MS plaques).

Hippocampal volumetric analyses

MR images were transferred to a computerized system (Allegro Software Version 5.1.1., ISG Technologies, Mississauga, ON, Canada) for outlining the volumes of interest (VOIs), reconstructing 3-D images, and computing volume measurements. The oblique coronal slices from the TURBOSE sequence were used to reconstruct the hippocampus. The 'index' slice was that slice demonstrating the mamilliary bodies. One slice posterior to this was used as the first slice to outline L/R hippocampus VOI. Seven slices and corresponding L/R hippocampal VOIs were then examined moving posterior to anterior up to the fornix. All VOIs were traced manually using a mouse-driven cursor, separately for the right and left sides. Computer algorithms were then used to reconstruct right and left hippocampal volumes, in mm^3. For use as a reference factor, a 'standardized' brain volume was computed by producing a total brain VOI from the 'index' slice. This produced a brain slice 4 mm in thickness with the circumference varying from patient to patient. Volumetric analysis were conducted by an experienced research associate (M.G.T.) who was blind to diagnostic status. The manual tracing were conducted twice, on separate occasions (test–retest reliability, intra-class correlation coefficient (ICC) = 0·67 for left hippocampus; ICC = 0·71 for right hippocampus) and the volumes reported here are averages of these measurements.

Statistical analysis

Sociodemographic and symptom comparisons between CSA and nCSA subjects were made using Student's *t* tests or Wilcoxon Rank Sum tests, where appropriate. Given the unidirectional nature of our hypotheses (i.e. that the CSA subjects would have smaller hippocampi than the nCSA subjects) we used one-tailed statistical tests for the analyses involving hippocampal volume. Analysis of variance with repeated measures (ANOVAR) was used: between-groups effects were abuse status (i.e. CSA or nCSA) and the repeated within-subjects effect was side (i.e. left or right). Dunnett's test was applied to test for between-groups differences on a *post hoc* basis when a main or interactional effect was seen at the $P < 0{\cdot}10$ (two-tailed, which would correspond to $P < 0{\cdot}05$ using a one-tailed test) level.

Although the merits of using a standardized brain region as a volumetric reference factor continue to be debated (Arndt *et al.* 1991; Wang & Jernigan, 1994), we also conducted the analyses covarying for the total brain slice VOI (as described above). Symptom severity scores (e.g. DES) were often non-parameterically distributed, so associations with hippocampal volume were tested using the Spearman correlation coefficient (r_s). A total of 15 correlations were tested, so the *P* value for a significant result was reduced to 0·003 (i.e. 0·05/15); only correlations meeting this level of significance are reported. Data are expressed as mean (S.D.).

RESULTS

Characteristics of the subjects

Sociodemographic, body morphometric, and IQ parameters

Women who reported severe sexual abuse during childhood (CSA) were similar to non-abused comparison subjects (nCSA) on all indices of sociodemographic status, body morphometrics, and intellectual functioning (Table 1).

Diagnostic assessment

Fifteen of the 21 CSA subjects (71·4%) met DSM-IV criteria for a current diagnosis of PTSD, and 15 of 21 (71·4%) met criteria for a

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Table 1. *Characteristics of CSA and nCSA subjects**

	CSA ($N = 21$)	nCSA ($N = 21$)
Age (years)	32·0 (6·3)	30·2 (6·4)
Education (years)	13·0 (3·0)	13·7 (1·9)
SES (Hollingshead)	34·3 (10·5)	36·9 (9·8)
Height (inches)	65·0 (2·9)	65·9 (2·0)
Weight (lbs)	159 (47)	149 (29)
Body Mass Index (kg/m²)	26·1 (7·0)	24·3 (5·2)
Handedness (% right)	90·5%	85·7%
WAIS-R Vocabulary Subscale	12·0 (2·4)	11·5 (3·1)
WAIS-R Similarities Subscale	10·5 (1·7)	10·5 (1·7)
WAIS-R Picture Completion Subscale	9·1 (2·0)	9·1 (2·5)
WAIS-R Digit-Symbol Substitution Subscale	10·6 (2·5)	11·9 (2·4)

* Values are expressed as mean (S.D.). Student's t test, 2-tailed, all P values NS.

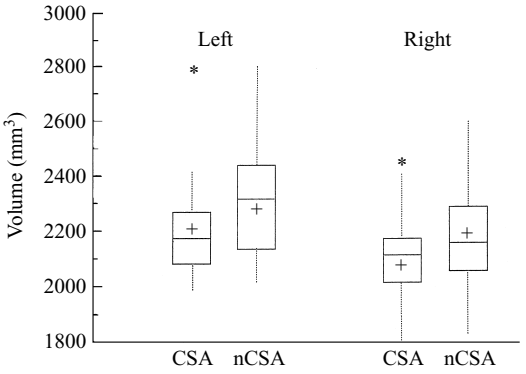

FIG. 1. Boxplots of MRI-derived hippocampal volumes (mm³) in 21 women with severe childhood sexual abuse (CSA) and 21 non-abused women (nCSA). Boxes include the interquartile range (i.e. 25th to 75th percentile) with the horizontal line within the box indicating the group median (+ indicates the group mean). The vertical lines extending from the boxes show the range of the data within twice the interquartile range, and * represents outliers beyond this range.

dissociative disorder (1 met criteria for dissociative amnesia, 5 for dissociative identity disorder, and 9 for dissociative disorder NOS); 13 subjects had both PTSD and a dissociative disorder. Six of 21 CSA subjects (28·6%) met criteria for a current diagnosis of major depression. Other current co-morbid disorders in the CSA subjects were social phobia ($N = 1$) and obsessive-compulsive disorder ($N = 1$).

Psychiatric symptom severity

In the CSA subjects, CAPS subscale scores were as follows: re-experiencing 11·8 (S.D. 10·3), range 0–31; numbing 22·9 (S.D. 15·5), range 0–48; arousal 23·6 (S.D. 11·6), range 6–43. Mean total CAPS score was 58·2 (S.D. 34·8), range 11–122. CAPS scores could not be obtained for the nCSA subjects who, by definition, had not experienced severe trauma.

Dissociative Experience Scale scores were 17·8 (S.D. 13·6), range 4–63 in the CSA subjects *v.* 4·0 (S.D. 3·6), range 0–11 in the nCSA subjects (Wilcoxon Rank Sum (S) = 636·5, $z = -4{\cdot}65$, $P < 0{\cdot}0001$). Three CSA subjects but none of the nCSA subjects had DES scores $\geqslant 30$ – a cut-off score indicative of clinically significant dissociative symptomatology (Carlson *et al.* 1993).

Beck Depression Inventory scores were 16·1 (S.D. 12·9), range 3–46 in the CSA subjects *v.* 6·2 (S.D. 4·6), range 0–17 in the nCSA subjects ($S = 574{\cdot}5$, $z = 3{\cdot}09$, $P < 0{\cdot}002$).

Hippocampal volumes

Right-sided hippocampal volumes were 2097 (S.D. 169) mm³ in the CSA subjects *v.* 2160 (S.D. 210) mm³ in the nCSA subjects (i.e. 2·9% smaller in the CSA subjects). Left-sided hippocampal volumes were 2194 (S.D. 181) mm³ in the CSA subjects *v.* 2307 (S.D. 193) mm³ in the nCSA subjects (i.e. 4·9% smaller in the CSA subjects). ANOVARs revealed a main effect of abuse status ($F_{1,40}$- = 2·94, $P < 0{\cdot}05$, 1-tailed), a significant main effect of side (larger on the left; $F_{1,40} = 19{\cdot}85$, $P < 0{\cdot}0001$), but no significant abuse status × side interaction ($F_{1,40} = 0{\cdot}80$, $P =$ NS). *Post-hoc* testing indicated that CSA and nCSA subjects did not differ significantly in right-sided hippocampal volumes (Dunnett's T test, (T) = 1·69, mean significant difference, (M.S.D.) = 99·0, $P =$ NS, 1-tailed), but that CSA subjects had significantly smaller left-sided hippocampal volumes than nCSA subjects (T = 1·69, M.S.D. = 97·1, $P < 0{\cdot}05$, 1-tailed) (Fig. 1). The finding

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remained significant when either the reference brain slice volume or SMAST score was used as a covariate, or if right-handed subjects only were included.

Relationship to alcohol use history

There were no significant correlations observed between SMAST scores and either total, right-sided, or left-sided hippocampal volume. As a more stringent test of the possibility that hippocampal volume might be related to alcohol abuse, we also compared hippocampal volumes among CSA ($N = 11$) and nCSA ($N = 21$) subjects with SMAST scores $\leqslant 5$; such scores are indicative of the absence of a history of alcohol use problems (Selzer *et al.* 1975). As for the sample as a whole, the two groups exhibited a main effect of diagnosis ($F_{1,30} = 3{\cdot}50$, $P < 0{\cdot}04$, 1-tailed), with *post-hoc* testing revealing significantly smaller hippocampi on the left side ($T = 1{\cdot}70$, $P < 0{\cdot}05$, 1-tailed).

Relationship between hippocampal volume and psychiatric symptom severity

DES scores correlated significantly ($r_s = -0{\cdot}73$, df = 20, $P < 0{\cdot}0002$) with left-sided hippocampal volumes in the CSA subjects. Although modest correlations (i.e. in the range of 0·4–0·5) were noted between several of the CAPS subscales and both total and left-sided hippocampal volumes, these fell below our stringent P level of 0·003 after adjusting for multiple tests. Beck Depression Inventory scores did not correlate significantly with either right, left, or total hippocampal volume in either CSA or nCSA subjects.

Relationship between hippocampal volume and abuse characteristics

There were no significant correlations between hippocampal volume and either age at onset of abuse or duration of abuse in the CSA subjects. As an index of abuse severity, the number of perpetrators was examined in relation to hippocampal volume; no significant correlations emerged.

Relationship between hippocampal volume and memory functioning

Memory test results of the two groups will be presented in detail in a separate, future report. We wish to note here, however, that there were no significant differences between groups on explicit memory functioning and no correlations in either CSA or nCSA subjects between hippocampal volume and any of the measures of learning and memory on the California Verbal Learning Test.

DISCUSSION

In this study of adult women who reported being victims of severe childhood sexual abuse (CSA) we found that hippocampal volumes – most discernibly on the left side – were reduced compared to those of demographically, educationally, and intellectually-comparable women without abuse histories. We also found that within the CSA subjects the severity of dissociative and, to a lesser extent, other post-traumatic stress disorder (PTSD) symptoms correlated significantly with left hippocampal volume. These findings support a possible relationship between hippocampal dysfunction and post-traumatic psychiatric symptoms.

Although our observations of reduced hippocampal volume in female CSA victims are generally consonant with similar findings in three other studies of psychologically traumatized subjects (Bremner *et al.* 1995*b*; 1997; Gurvits *et al.* 1996), several caveats apply. First, it must be recognized that our sample of CSA victims was biased toward including those with self-identified severe sexual abuse; this is reflected in the high rates of PTSD and dissociative disorders diagnosed in our sample. Consequently, our findings are unlikely generalizable to all CSA victims in the community. Secondly, it should be noted that our sample of CSA victims had increased alcohol and drug use severity compared to our control subjects. In our study, prior alcoholism severity did not appear to account for the hippocampal volumetric findings, as smaller left-sided hippocampal volume was evident even in CSA subjects without any significant history of alcohol use problems. Nevertheless, given the evidence that individuals exposed to trauma are at increased risk for alcohol abuse (see Stewart, 1996 for review) and that longstanding alcohol abuse can lead to hippocampal (and other brain) volume loss (Pfefferbaum *et al.* 1988; Di Sclafani *et al.* 1995) it will be important in future studies to carefully control for this factor.

A critical question raised by our findings is

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whether reduced hippocampal size can be caused by severe childhood emotional trauma. Although our original rationale for conducting this study was based on the hypothesis that severe psychological trauma would cause hippocampal 'damage' – as is known to occur secondary to stress in several rodent and primate models (Sapolsky *et al.* 1985, 1990; Sapolsky, 1994; Stein-Behrens *et al.* 1994) – it is important to recognize that our data do not directly test this hypothesis, and we remain uniformed about the extent to which it is true. It is indeed possible that abuse experiences constitute a psychological stressor of sufficient magnitude to result in hippocampal 'atrophy'. An alternative hypothesis which deserves serious consideration, though, is that hippocampal differences might have been present prior to the trauma, and that such differences might somehow predispose the individual to the development of psychiatric complications of trauma (e.g. PTSD). Given the information that genetic factors are important in the development of combat-related PTSD (Goldberg *et al.* 1990), we must strongly consider the possibility that a constitutional (perhaps genetic) abnormality in hippocampal development – which could be a risk factor for the development of psychiatric symptoms in the face of exposure to psychological trauma – might be the basis for our findings.

How are we to explain our finding of hippocampal volume reduction in the absence of explicit memory dysfunction? It is possible, given the relatively young age of our subjects, that subtle differences in memory may have been undetectable at present, but might be discernible with more difficult memory tasks or become more apparent as ageing progresses. It is also possible that changes in hippocampal morphometry as detected by MRI may be a relatively insensitive indicator of more meaningful hippocampal functional or metabolic changes. These may be better detected in future studies using techniques such as magnetic resonance spectroscopy (Dager & Steen, 1992; Hennig *et al.* 1992), positron emission tomography (Squire *et al.* 1992; Rauch *et al.* 1996; Schacter *et al.* 1996), or functional magnetic resonance imaging (Breiter *et al.* 1996). We must also consider the possibility that the magnitude of hippocampal volume reduction (5%) found here is so negligible that memory impairment does not result, or, alternatively, that the hippocampal insult may have transpired early enough in life that adequate functional compensation has occurred.

Finally, though, we must seriously entertain the likelihood, on the basis of our data, that some forms of hippocampal dysfunction may not result in explicit in explicit memory dysfunction, *per se*. In this context, we might speculate that the site and/or nature of the hippocampal abnormality seen here spares explicit 'memory' in the conventional sense, but somehow disrupts brain systems responsible for a range of metamemory functions such as the ability to integrate one's own recollections into a cohesive narrative, and the capacity to understand these remembrances in the context of one's 'self'. In other words, the hippocampal abnormality may directly mediate many aspects of the phenomena known as dissociation (Krystal *et al.* 1995). If this was true, then dissociative symptoms such as traumatic amnesia and intrusive recollections might be better conceptualized as dysfunction within systems that monitor memory and regulate access to memory in emotionally-charged contexts. A challenge to progress in this field will be to elucidate the neuroanatomical substrates of these systems and to determine how, and why, they may fail in response to overwhelming psychological trauma.

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NEUROLOGICAL IMPAIRMENT IN MALTREATED CHILDREN

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Abstract—The neurological competency of maltreated children was assessed by comparing physically abused children not known to have sustained serious head trauma, neglected children, and normally raised children from the same socioeconomic milieu. Each child underwent physical and neurological examinations including EEGs, supplemented by perceptual-motor tests devised to detect subtle evidence of neurological dysfunction. Obstetrical and developmental histories, as well as intelligence test protocols, were available. Blind ratings by a pediatric neurologist using all available information revealed significantly more impairment in the maltreated groups with more than 50% of the abused children in the moderate or severely impaired category. The complex relationship between the maltreating environment and neurological disorders in these populations is discussed including the need to routinely search for evidence of subtle neurological impairment when maltreatment is known or suspected.

Résumé—Le fonctionnement du système nerveux central a été évalué chez trois cohortes d'enfants : (1) Des enfants victimes de sévices (à l'exclusion de traumatismes crânio-cérébraux graves); (2) Des enfants victimes de négligence ; (3) Des enfants appartenant au même milieu socioéconomique que (1) et (2) mais élevés normalement. Chaque enfant fut examiné physiquement et neurologiquement; il subit un EEG; it fut soumis à des épreuves sensorielles et motrices destinées à mettre en évidence des dysfonctions subtiles du système nerveux central. En outre, les auteurs avaient à leur disposition l'anamnèse obstétricale et du développement. A l'aide de toutes ces informations réunies, un neuropédiatre se chargea d'établir un score pour chaque enfant, à l'aveugle. Cette évaluation démontra que les enfants victimes de sévices présentaient

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plus de séquelles neurologiques que les autres, plus de la moitié d'entre eux se trouvant dans la catégorie d'enfants avec des signes lésionnels modérés à graves. Les causes de ces séquelles son complexes, et le milieu en soi, socioéconomiquement défavorable, est un facteur aggravant. Pour mieux estimer ce rôle du milieu, il faudrait pouvoir effectuer une étude semblable au sein d'une population moins défavorisée (où les sévices existent aussi). Enfin, les auteurs soulignent également l'intérêt qu'il y a à rechercher des signes de déficits neurologiques, même subtils, quand on soupçonne un cas de sévices.

ALTHOUGH a high incidence of central nervous system dysfunction among abused children has been reported in the literature [1–4], the precise etiology of this impairment has been the subject of considerable controversy. With the exception of cases of severe head trauma resulting in skull fractures with subdural hematomas (as originally described by Kempe et al. [5] in the seminal paper on the "battered child syndrome"), brain damage alone would not appear sufficient to explain CNS impairment. The unpredictable impact of child abuse on neurological development has been noted by Martin et al. [3] who showed that appreciable numbers of abused children with skull fractures and subdural hematomas were neurologically normal, while numerous abused children without head injury exhibited neurological defects. Because most abused children manifest a variety of soft tissue injuries as opposed to major skull trauma, it is important to clarify this issue.

Several hypotheses have been offered to account for neurological impairment observed in children not known to have sustained massive head injuries. Caffey [6] described how vigorous shaking of a child's head could result in petechial hemorrhages in the brain. Neglect [7], malnutrition [8,9] and maternal deprivation [10,11] often accompanying child abuse have all been implicated in adverse neurological development. Whether neurological impairment precipitates abuse, is one of the effects of maltreatment, or merely concomitant remains problematic.

There is considerable evidence that the incidence of premature births among abused children is substantially higher than regional averages [1,3,12]. The prevalence of unrecognized physical handicaps [13] and congenital anomalies [14] has also been noted. Most retrospective studies of abuse victims have detected neurological impairment [3,15,16], mental deficiency [1,3,4,14,16], and language deficits [3,16], which could severely strain the childrearing capacities of abuse-prone parents [17]. Some observers [18,19] postulated that neurological impairment may precede and indirectly provoke abuse by rendering certain children behaviorally deviant and difficult to manage. Several interpretations have been suggested for these findings concerning the role of the child in the abuse process [20]. The most direct causal inference is that abused children may be less responsive and manageable due to a preexisting deviancy which renders them vulnerable to scapegoating. These deficits are tolerated poorly by narcissistic parents who respond abusively when their own threshold is breached. Alternatively, prematurity or difficult infant temperaments may impede the establishment of maternal-infant bonds. Fanaroff et al. [21] found that mothers who later abused or neglected their children visited low birth weight infants less frequently than normal control mothers. Ounsted et al. [13] observed "high risk" mother-infant dyads characterized by puerperal depression among the mothers and colicky, irritable children who cried excessively and were prone to sleeping difficulties.

Unfortunately, the major weakness thus far in studies documenting neurological problems associated with child abuse has been the failure to compare them with nonmaltreated children from otherwise comparable backgrounds. It would be equally important to control for neglect, family disorganization, and emotional deprivation often accompanying physical abuse in disadvantaged populations.

The purpose of the current investigation was to assess the neurological competency of physically abused children who were not known to have sustained severe head trauma, and to explore the relationship between the abusive environment and CNS development. Comparison groups of nonmaltreated children and neglected children from the same socioeconomic milieu were similarly evaluated. Data were collected as part of a larger study concerning the psychological functioning of maltreated children and their parents [17,19,22].

METHOD

Subjects

Potential study participants for the abused and neglected samples were obtained from the Bureau of Child Welfare and Family Court of the city of New York. Virtually all of the families lived in Brooklyn and were under supervision or probation by these agencies. Children were eligible for study if they were between 5 and 12 years old and if the maltreatment had been confirmed by an investigation. Only those cases in which maltreatment was ongoing or recurrent were accepted, excluding "one shot" episodes with potentially minimal or undetectable developmental consequences.

Criteria for abuse specified that it be physical, eliminating cases where a finding had been determined on the basis of emotional or sexual abuse. Children whose agency records referred to serious head injuries were excluded because the neurological consequences were felt to be obvious. Criteria for neglect specified failure to provide adequate food, clothing, medical care, and/or supervision on the basis of agency records. Excluded were cases in which a finding of neglect was made on the basis of a child's truancy even though this constitutes maltreatment under New York State Law. Neglect cases with evidence of possible abuse were not accepted because of the potentially confounding effect of two forms of maltreatment sustained by these children on the research design.

Nonmaltreated children were obtained from the pediatric out-patient clinic at Kings County Hospital, excluding those with known acute or serious chronic illness, such as sickle cell anemia. The clinic services a predominantly Medicaid, low income population. Virtually all of the maltreatment families were on public assistance while the controls were marginally better off and received "supplementary welfare." Families exclusively on welfare were not accepted because of possible "involuntary neglect."

The study was explained to all potential subjects as a study in child development, and participation was voluntary. Informed consents were obtained. Families who completed the project were compensated $14.00. Interviews were conducted with maternal caretakers to ascertain whether or not the three groups might be differentiated on the basis of pre- or peri-natal precursors of neurological pathology such as low birthweight. No significant differences emerged.

The composition of the abuse ($N = 60$), neglect ($N = 30$), and adequate care ($N = 30$) samples is shown in Table 1. Most of the families were Black or Hispanic, and proportionate numbers of boys and girls were evaluated at each age level.

Table 1. Descriptive Data for Abused, Neglected, and Adequate Care Samples

Descriptive Data	Sample			
	Abused ($N = 60$)*	Neglected ($N = 30$)**	Adequate Care ($N = 30$)**	Total ($N = 120$)†
Mean Age	8.5	8.6	8.3	8.5
S.D. Age	2.2	2.2	2.3	2.2
Percentage of Blacks	65.0	53.3	66.7	62.5
Percentage of Whites	13.3	16.7	6.7	12.5
Percentage of Hispanics	21.7	30.0	26.6	25.0

*32 males, 28 females
**16 males, 14 females
†64 males, 56 females

Procedure

The assessments took an entire day to complete. First, the child received a preliminary interview with a child psychiatrist and a two-hour battery of psychological tests. A developmental history was obtained from each mother or maternal caretaker. All 120 children were then evaluated by the pediatric neurologist who was naive at the time of the examination as to the history of abuse, the developmental information, and the psychological test results. Physical and neurological examinations were conducted. The child was scrutinized for "dysmorphic features"—high arched palate, abnormal palmar creases, low set ears suggesting first trimester insults or chromosomal abnormalities. The child's behavior was assessed—whether he was hyperkinetic or distractible. The standard neurological examination was conducted, with special attention to subtle asymetric choreoathetoid movements.

Following the neurological examination, a trained research assistant administered the following battery of tests: Sequential and Repetitive Finger Tapping [23,24], the Southern California Sensory Integration Tests [25], the Auditory Sequencing subtest of the Illinois Test of Psycholinguistic Ability [26], and The Human Figure Drawing (scored by Goodenough [27] criteria). EEGs were obtained in over 80% of the children.

Following this battery of evaluation, the developmental history, including birth records in the majority of cases, the psychological test protocols (WISC or WPPSI), the perceptual-motor test battery results, and the EEG data were made available to the pediatric neurologist who remained naive as to whether the child was abused, neglected, or nonmaltreated. On the basis of all available information, the pediatric neurologist assigned a global rating of impairment on an eight-point continuum where 1–2 = No Impairment, 3–4 = Equivocal Functioning, 5–6 = Moderate Impairment, and 7–8 = Severe Impairment.

RESULTS

Sufficient information was available to make ratings on 115 children from the original sample of 120. Means and standard deviations for the Abuse, Neglect, and Adequate Care groups are shown in Table 2. The Abuse sample obtained the highest mean rating of overall neurological impairment, followed by the Neglect and Adequate Care samples. An analysis of variance revealed a significant difference ($F = 5.70$, $df = 2, 112$, $p < .005$). Comparison of the two maltreatment groups with the Adequate Care Group was also significant ($t = 3.17$, $df = 112$, $p < .005$); whereas the contrast between the Abuse and Neglect samples was not. More than half of the abused children were designated "moderately" or "severely impaired," as compared to 37.9% of the neglected children and only 14.3% of those receiving adequate care.

Table 2. Composite Ratings of Neurological Impairment for Abused, Neglected and Adequate Care Children

Group	N*	Mean**	Standard Deviation	Range†
Abuse	58	4.24	1.60	1–8
Neglect	29	4.03	1.45	1–7
Adequate Care	28	3.11	1.20	1–6
Total	115	3.91	1.54	1–8

*Five children did not complete the evaluation and were not rated.
**$F = 5.70$, $df = 2, 112$, $p < .005$
†1–2 = no impairment; 3–4 = equivocal functioning; 5–6 = moderate impairment; 7–8 = severe impairment.

DISCUSSION

As anticipated, the maltreated children showed a higher incidence of neurological impairment than the nonmaltreated children. The abused children, however, were not significantly more damaged than their neglected counterparts; and this was contrary to expectation. Similarities in the nature and prevalence of impairment in the two maltreatment groups in contrast to the relative intactness of the Adequate Care group suggest that the adverse physical and psychological environment associated with maltreatment may be of greater neurological consequence than the actual physical assault. These samples of abused and neglected children were found to have psychological and cognitive disturbances as well in previously reported studies [19,22].

The CNS impairment documented in this study indicated relatively subtle neurological dysfunction, deficits in perception, coordination, and integration of sensory stimuli which could not have been detected by the usual neurological examination alone. They were, however, clearly evident in the series of perceptual-motor tasks. Because of the high incidence of subtle neurological impairment manifested in both the abused and neglected groups, it appears likely that the environmental conditions in which these families are embedded have at least contributed to the children's adverse development, and it is impossible to state with certainty that maltreatment alone was responsible or causal. The combination of behavioral and neurological disability in the maltreated child could result from abnormal childrearing, poor pre-natal and infant care, and abnormal (insufficient or excessive) sensory stimulation. These pathogenic agents are relatively common in maltreating families in poverty areas. Although the Adequate Care children were also chosen from families on public assistance, more of these households were intact with somewhat greater availability of social support systems. The maltreating families appeared to epitomize deprivation and chronic disorganization within their own subculture.

Neurological and developmental sequelae to maltreatment frequently contribute to the child's vulnerability to abuse by rendering him more difficult to manage. A vicious cycle often unfolds, consisting of inadequate or abnormal parenting, neurological and behavioral impairment, physical abuse, and further impairment, etc. One may even regard the CNS abnormalities as initial adaptations to the maltreating environment. Martin et al. [3] suggested that developmental lags in speech and motor development might represent the abused child's inhibitory response to parental admonitions against spontaneous speech and motor expression. Baron et al. [15] described the reversibility of some neurological signs in an abused infant; however, at a given point, the cumulative effect of sequelae to maltreatment is distinctly maladaptive and refractory to change. CNS dysfunction at an early stage of development jeopardizes the acquisition of appropriate developmental abilities at later stages.

The results of this study clearly implicate neglect in the adverse neurological development of maltreated children. In order to isolate the impact of physical abuse independent of deprivation, it would be desirable to conduct a similar study in a middle-class context. In view of these findings, however, it would appear profitable to conceptualize child abuse as a complex group of interrelated variables, rather than a single entity, i.e., the physical trauma stripped of its environmental context. Clearly, research with abused children should include comparison groups of neglected and normally raised children. Because abused and neglected children are particularly susceptible to subtle neurological impairment, neurological examination of these children should routinely be supplemented by tests devised specifically for these manifestations.

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