

## Defending a Capital Defendant in an Aggravated Case

*I*f this isn't a death penalty case, we might as well repeal the death penalty statute."<sup>1</sup> When defending an aggravated capital case, a defense attorney will often have to respond to this kind of argument. When a capital defendant has been shown to have been responsible for the apparently senseless killing of several innocent victims or to have engaged in exceptionally sadistic behavior in murdering one or more people, persuading the jury to impose a sentence other than death is difficult. In such cases, the prosecutor can plausibly argue that, given the aggravated nature of the defendant's crime, the death penalty is the only appropriate punishment.

When defending such a case, the defense attorney's goal is to refute the prosecutor's implicit claim that the defendant should be judged solely or primarily on the basis of the crimes he committed. In order to accomplish this goal, the attorney must present an argument for life that will convince the jury that the defendant "is not one of the very few people so completely beyond hope that he can only be punished by death."<sup>2</sup>

How does a capital defense attorney develop an effective argument for life? According to Stephen Bright, the first step is to have a mitigation specialist or other expert conduct a full investigation that will allow the defense team to identify possible mitigating factors.<sup>3</sup> Mitigating factors can include anything about the defendant's life or background that might be a basis for

1. Case Example: Presenting a Theme Throughout the Case 1 (Distributed by the Southern Center for Human Rights) [hereinafter Case Example].

2. *Id.* at 5.

3. *Id.*

imposing a lesser punishment than death.<sup>4</sup> Examples include the defendant's personal characteristics, such as youth or good character; the love that the defendant has for others and the love they have for him; the defendant's mental impairments, disorders or limitations that may help to explain his criminal behavior; and the defendant's capacity for rehabilitation or ability to lead a productive life in prison.<sup>5</sup>

Using the mitigating factors that have been identified, the defense team then develops a theme for life. The nature of the theme will vary depending on the type of mitigating evidence available. In most cases, however, it is important to develop a "case-specific theme" rather than merely arguing that the death penalty should not be imposed. In presenting the theme, moreover, it is important to tell a coherent story. In Bright's words, the defense should explain the defendant's "life to a jury the way one would relate facts to a neighbor or friend."<sup>6</sup>

In some cases, it may be appropriate to have one or more experts tell parts of the defendant's story or to present the theme for life. Studies, however, show that jurors are often skeptical of expert testimony when the expert presents theories that are unsupported by testimony from those who know the defendant well.<sup>7</sup> Whenever possible, the expert's testimony should thus be based on testimony by "lay witnesses, documents and other evidence."<sup>8</sup>

In aggravated cases, presenting a theme for life that resonates with the jury will be especially difficult. Even if the defense is able to present strong mitigating evidence relating to the defendant's character or accomplishments, the prosecutor may be able to persuade the jury that the aggravating circumstances resulting from the defendant's proven criminal conduct dwarf the mitigation. Evidence that the defendant has been a good employee, has many friends, or has artistic or musical talents, for example, might seem trivial in comparison to evidence that he has killed six people. And, even if the mitigating evidence reveals his troubled background—demonstrating parental neglect, abandonment, or extreme abuse—and

4. See *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (holding that, in all but the rarest kind of capital case, the sentencing authority must "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").

5. Case Example, *supra* note 1, at 6–7.

6. *Id.* at 8.

7. See Scott E. Sundby, *The Jury as Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony*, 83 Va. L. Rev. 1109 (1997).

8. Case Example, *supra* note 1, at 10.

thus provides some explanation for his subsequent violent behavior, the prosecutor may be able to diminish the force of this evidence by arguing that many people who came from similarly troubled backgrounds have led productive lives or at least have not committed atrocious capital crimes.

A capital trial's usual order of proof creates another problem for the defense. Even if the defense is able to introduce powerful evidence at the penalty trial, the impact of this evidence on the jury may be weakened by the evidence previously introduced by the government. Before the defense's mitigating evidence is introduced, the jury will have heard testimony relating to the defendant's crimes at the guilt trial and, in most cases, testimony relating to additional aggravating circumstances at the penalty trial. Hearing this evidence may create in the jury an implacable hostility toward the defendant that can make it difficult for it to rationally evaluate evidence relating to the defendant's background or accomplishments. When the jury reaches its penalty decision by weighing the aggravating and mitigating circumstances, the evidence relating to the defendant's criminal conduct may overwhelm the mitigating evidence.

In presenting a strong case for life, the capital defendant's attorney thus needs not only to present mitigating evidence that will provide a reason why the defendant should not be sentenced to death but also to present that evidence at a time and in a way that will maximize its impact on the jury. In order to accomplish this, skilled capital defense attorneys seek to articulate and to offer evidence in support of the defense's theme for life as early and as often as possible.

In nearly all aggravated capital cases, skilled defense attorneys will suggest at least some portion of the defense's theme for life during the jury voir dire in which the prosecutors and defense attorneys select the people who will serve on the jury. During the voir dire, the defense attorney will explain that, in the event the defendant is found guilty of the capital crime, there will be a new trial at which the jury will have to decide whether the defendant will be sentenced to death or a lesser punishment. The attorney will then explain the nature of the sentencing decision, seeking at the same time to elicit the potential jurors' views as to the circumstances under which a death sentence should be imposed. When dealing with an aggravated capital case, the attorney has two primary goals: first, to select jurors who, based on the views they express during the voir dire, appear to be least likely to vote for a death sentence; and, second, to communicate to the jurors who are selected the nature of the defense's theme for life.

In seeking to select jurors who are least likely to vote for the death sen-

tence, David Wymore, the chief deputy public defender in Denver, Colorado, ranks prospective jurors from 1 to 7 based on their attitudes toward capital punishment:<sup>9</sup> those in category 1 will never give the death penalty; those in category 2 are “hesitant about saying they believe in the death penalty” but will state that they are willing to impose it in some cases; those in categories 3 through 5 are pro-death penalty and, as their rating increases, express increasing levels of support for it;<sup>10</sup> those in categories 6 and 7 are very pro-death penalty, but only those in category 7 will state unequivocally that they will automatically vote for a death sentence if the defendant is convicted of the capital crime.<sup>11</sup>

In the course of eliciting prospective jurors’ views on the death penalty, defense counsel will also seek to inform them of at least the basic outline of the defense’s theme for life. In some cases, the attorney may want to spell out this theme in detail, elaborating as to the type of mitigating evidence that will be presented in the event there is a penalty trial. In others, she may want to present a vaguer picture, simply informing the jury that, if there is a penalty trial, they will consider mitigating evidence relating to the defendant’s background and the circumstances of the crime and will be called upon to make a moral decision relating to whether a death sentence should be imposed.

In order to present evidence in support of the defense’s theme for life as early as possible, an attorney representing a defendant in an aggravated capital case will often try to introduce at least some of the defense’s mitigating evidence during the guilt stage of the trial. The attorney may raise a defense relating to the defendant’s mental state—insanity or diminished capacity, for example—at the guilt stage. Even though she may have no realistic hope that the jury will accept this defense, she will raise the defense so as to be able to introduce evidence that is both relevant to the defense (e.g., because it tends to show the defendant was legally insane) and constitutes mitigating evidence relating to the defendant’s background. Through front-loading the mitigating evidence so that the jury hears it before they have adjudicated the defendant guilty of the capital offense, the attorney hopes that jurors will give more serious consideration to this evi-

9. See David D. Wymore, *Death Penalty Voir Dire Outline: The Colorado Method* (1995).

10. Those in category 3, for example, are “sensitive to mitigation and really wish to hear mitigation”; those in category 5, on the other hand, are not generally receptive to mitigating evidence but might be able to “formulate . . . two or three mitigators [he or she] might think are significant.” *Id.* at 5–6.

11. *Id.* at 6.

dence than they would if they had heard it for the first time during the penalty trial.

In many cases, of course, it may be impossible for the defense attorney to introduce significant mitigating evidence during the guilt trial. And whether or not such evidence is introduced, the attorney will almost invariably introduce mitigating evidence at the penalty trial and will make a closing argument that brings together the mitigating evidence so as to make the most powerful case possible for sparing the defendant's life.

To illustrate some of the ways in which capital defendants' attorneys have been able to obtain life sentences in very aggravated capital cases, I will present three cases: the case of Lee Malvo, who was shown to be guilty of the ten killings perpetrated by "the sniper" in the area around Washington, D.C.; the case of William White, who was convicted of two very aggravated killings committed in San Francisco, California; and the case of Martin Gonzalez, who was convicted of three apparently senseless killings in Travis County, Texas. In all three instances, the defendant's attorneys were able to present a theme for life that was strong enough to convince the jury that, despite the aggravated nature of the case, the death penalty should not be imposed. After presenting these cases, I will offer further conclusions about the nature of the techniques employed, the reasons they were successful, and the extent to which they provide models for attorneys defending other aggravated capital cases.

### *Case 1: Lee Malvo*

For a three-week period in October 2002, the "Washington area sniper"<sup>12</sup> created an unparalleled reign of terror. On October 2, 2002, the sniper's "first fatal shot was fired. James D. Martin, 55, . . . was killed in a grocery store parking lot" in Montgomery County, Maryland.<sup>13</sup> Over the next twenty-one days, the sniper became "the most terrifying serial killer in U.S. history."<sup>14</sup> Within the Washington, D.C., area, nine more people were killed and three were injured.<sup>15</sup> Because of their apparently random nature, the killings paralyzed the community, producing significant lifestyle

12. Rick Hampson & Haya El Nasser, *New Kind of Terror Grips D.C., Suburbs, Fear Changes Everything, and Everyone Is a Victim*, USA Today, Oct. 16, 2002, at 1A.

13. Rob Granatstein, *Reign of Terror; Capital Region Suffers 21 Days of Siege*, Toronto Sun, Oct. 24, 2002, News, at B4.

14. Hampson & Nasser, *supra* note 12.

15. Granatstein, *supra* note 13.

changes. Schools placed “a ban on all outdoor activities”; “online grocery delivery orders” rose sharply; and stores that ordinarily had many customers were virtually empty.<sup>16</sup> The “sniper’s” threatening communications included a letter that stated, “Your children are not safe anywhere at any time.”<sup>17</sup> At the height of the shootings, a *Newsweek* poll indicated that the fear generated by the shootings had spread to the point where 47 percent of Americans polled said they were “concerned about someone in their family being a sniper victim.”<sup>18</sup>

When John Allen Muhammad, forty-one, and John Lee Malvo, seventeen, were arrested for the sniper killings, one of the government’s top priorities was to maximize the possibility of obtaining death sentences for both defendants. Toward this end, Attorney General John Ashcroft decided that the suspects would be tried in two northern Virginia jurisdictions<sup>19</sup> because of “the experience of the local prosecutors in handling capital cases and . . . Virginia’s willingness and experience in invoking the death penalty.”<sup>20</sup> Robert F. Horan Jr., the local prosecutor assigned to prosecute Malvo, was “the longest-serving chief prosecutor in Virginia.”<sup>21</sup> Prior to prosecuting Malvo, Horan had obtained seven death sentences.

By the time Malvo’s case was ready for trial, Horan’s case against the younger of the two defendants seemed strong. In addition to forensic evidence indicating that Malvo was the triggerman in the killing of Linda Franklin, the crime for which he was on trial,<sup>22</sup> the prosecution successfully introduced Malvo’s detailed confession in which he “claim[ed] to be the triggerman in each of the Washington area’s 13 sniper shootings . . . , saying ‘I intended to kill them all.’”<sup>23</sup> In his confession, moreover, Malvo seemed “rather boastful”; he explained that the purpose of the killings was to obtain money and stated that “he and . . . Muhammad were equal members of a ‘sniper team.’”<sup>24</sup>

16. Hampson & Nasser, *supra* note 12.

17. Granatstein, *supra* note 13.

18. Hampson & Nasser, *supra* note 12.

19. Ashcroft had the power to make this decision because the suspects were in federal custody following their arrest. See Paul Bradley, *Va. Gets First Sniper Trials; Prince William Takes Muhammad Cases; Malvo Will Be Tried in Fairfax County*, *Richmond Times Dispatch* (Va.), Nov. 8, 2002, at A1.

20. *Id.*

21. *Id.*

22. Adam Liptak, *Final Arguments at Trial of Sniper Suspect*, *N.Y. Times*, Dec. 17, 2003, at A37.

23. S.A. Miller, *Malvo: ‘I Intended to Kill Them All’; Prosecutors Play Sniper Tape*, *Wash. Times*, Nov. 19, 2003, at A1.

24. Tom Jackman, *Malvo Called ‘Boastful’; Suspect Told Police of ‘Sniper Team,’ Prosecutor Says*, *Wash. Post*, Feb. 26, 2003, at A1.

The strategy of Malvo's defense attorneys, Craig Cooley and Michael Arif, was to convince the jury that Malvo should not be held fully accountable for the sniper killings because he had been brainwashed by Muhammad. During his opening statement, Cooley introduced the defense's theme for life: because of his youth and troubled childhood, Malvo was vulnerable to brainwashing, especially by an individual who could assume the role of his father; over a period of time, Muhammad, a charismatic father figure, was able to exert total control over Malvo and thus to convince him that the sniper killings were being perpetrated to achieve a greater good.

In his opening statement to the jury, Cooley explained the relationship between Muhammad and Malvo: "John Muhammad is his father. . . . John Muhammad is his sole support. John Muhammad is his confidant and military commander. In short, John Muhammad is Lee Malvo's whole world."<sup>25</sup> Based on Muhammad's brainwashing of Malvo, Cooley and Arif argued that Malvo should be acquitted by reason of insanity.

Cooley and Arif knew that establishing an insanity defense for Malvo would be extremely difficult.<sup>26</sup> Under Virginia law, the defendant must establish that, as the result of a mental disease, he either did not know the difference between right and wrong or did not understand the nature and consequences of his acts.<sup>27</sup> Since Malvo had no prior history of mental problems, convincing the jury that he had a mental disease would obviously be difficult. Since the killings had been carefully planned so that they could be committed without the perpetrators being detected, moreover, it would be even more difficult to persuade the jury either that Malvo did not know the killings were wrong or that he did not understand their nature and consequences. The advantage of raising the insanity defense, however, was that it allowed the defense attorneys to front-load the mitigating evidence, enabling them to introduce most of the evidence that would support the defense's theme for life during the guilt trial before the jury had decided whether Malvo was guilty of capital murder.

After the government rested its case at the guilt trial, Malvo's attorneys introduced evidence that supported both the insanity defense and the claim that Malvo's life should be spared. This mitigating evidence was presented

25. Adam Liptak & James Dao, *2nd Sniper Trial Opens, Its Focus on Audiotapes*, N.Y. Times, Nov. 14, 2003, at A1.

26. Much of the following account of the case was based on a telephone interview with Craig Cooley (Feb. 2, 2004) [hereinafter Cooley Interview]. In addition, I examined transcripts of the opening and closing arguments by both the prosecutor and defense counsel in the *Malvo* case.

27. *See, e.g.*, Commonwealth v. Chatman, 538 S.E.2d 304, 308 (Va. 2000).

in three segments: first, Malvo's life until he met Muhammad; second, Muhammad's life until he brought Malvo to the United States and became his adoptive father; and, finally, Malvo and Muhammad's life together in the United States, which culminated in the shootings. After introducing this evidence, which provided the basis for Malvo's insanity defense, the defense called several mental health experts who testified in support of that defense.

Parental abuse and abandonment were the central themes of Malvo's early history. He lived on the island of Jamaica with his mother, Una James, and father, Leslie Malvo, until he was five and a half. Then, Una James moved to another part of the island and didn't allow him to see his father. After that, he saw Leslie Malvo only on rare occasions—once at age seven, another time at age ten—until his trial. Throughout these years, Una James “beat him regularly with her hands and with sticks and belts.”<sup>28</sup> When he was young, he often hid from his mother to avoid her abuse.

When Malvo grew older, James frequently left him with various caretakers in Jamaica while she went to other islands or other parts of Jamaica. In Jamaica, when a parent leaves a child with a caretaker, there is a folk expression that describes the caretaker's authority: “Punish this child. Save the eye.”<sup>29</sup> By thus instructing the caretaker, the parent is “authorizing the caretaker to beat the child on any part of [his] body, as severely as they please, with anything they want to use; just don't kill the child and don't put out [his] eye.”<sup>30</sup> Cooley introduced this phrase at the beginning of the defense case, and several of Malvo's caretakers referred to it in commenting on Una James's approach to child rearing.

Malvo's caretakers were invariably kinder to him than Una James had been. Unfortunately, however, he rarely stayed with the same one for very long. While growing up in Jamaica, he went to ten different schools and had many different caretakers. Several of his caretakers, as well as his teachers and relatives—more than sixty witnesses in all—testified on his behalf at the guilt phase of his trial. These witnesses, who were obviously very committed to Malvo, described him as a gentle, vulnerable youth who was desperate for a father or for a parent of any kind. When his mother left him in a new place, he would have nobody and nothing. Then, “when he started to bond with a man, his mother would come back, rip him out of

28. Tom Jackman, *Malvo Said Confession to Police Was a Lie, Psychologist Tells Court*, Wash. Post, Dec. 9, 2003, at A1.

29. Fax from Craig M. Cooley to author (Feb. 2, 2004) (on file with author).

30. *Id.*

that situation, and take him somewhere else.”<sup>31</sup> As a result, “he had no family, no support system.” When he was fifteen, his mother took him to Antigua and then left him alone there for three months with virtually nothing. “He was living in a shack that had no electricity and no running water. It was an absolute hovel.”<sup>32</sup> At that point, Malvo met Muhammad.

The defense’s evidence relating to Muhammad’s history was designed to show that, when they met, Muhammad would inevitably appear to Malvo as the father figure he had been searching for. Defense witnesses traced Muhammad’s history, showing that he had spent more than ten years in the military and that at various times in his life he had been a good husband to his wife, a good father to his children, and an excellent counselor to his friends. In addition, the defense sought to show that Muhammad was an unusually charismatic individual who had the ability to brainwash a vulnerable youth so that the youth would totally accept his view of the world.

Toward this end, the defense’s most powerful witness was Muhammad’s twenty-one-year-old son, Lindbergh Williams. After Muhammad and his first wife separated, Muhammad took his then eleven-year-old son to Tacoma, Washington. Lindbergh testified that, during their time together, Muhammad began insisting that Lindbergh’s mother had been abusing and neglecting him. Lindbergh said he knew this was not true, but “after awhile I began believing him. If you tell an eleven-year-old something every day, every day, he’s going to start believing it.”<sup>33</sup>

Muhammad finally sent Lindbergh home after his mother took legal action. According to Lindbergh, it took him several months to shake Muhammad’s lies from his head. “My father was manipulative,” Lindbergh testified. “If he sees a weakness he’ll take advantage of it.”<sup>34</sup> Lindbergh added, “[I]f my mother had not been a strong woman, if my mother had not fought for me, then it would have been me rather than Lee Malvo in that car with John Muhammad in October of 2002.”<sup>35</sup> Although prosecutor Horan cross-examined Lindbergh for forty-five minutes, he failed to shake the young man’s story. Malvo’s defense team viewed Lindbergh as perhaps their strongest witness.

Finally, witnesses testified to the way in which Malvo and Muhammad

31. Cooley Interview, *supra* note 26.

32. *Id.*

33. Bill Geroux, *A Twisted Children’s Crusade? The Snipers’ Trail of Death Begins with Two Troubled Lives a Generation Apart*, Richmond Times Dispatch (Virginia), Dec. 21, 2003, at A1.

34. *Id.*

35. Cooley Interview, *supra* note 26.

met in Antigua and their later life together in the United States. Malvo met Muhammad in an electronics store in Antigua after he observed Muhammad mentoring another boy not much younger than him. Malvo joined in the conversation and “soon felt Muhammad’s fatherly tone extend to him.”<sup>36</sup> After he became acquainted with Malvo, Muhammad helped Malvo’s mother, Una James, enter the United States illegally. Then he returned to Antigua, where Malvo was still living alone in the shack that was no better than a hovel. Muhammad invited Malvo to live with him. After they had spent some time together in Antigua, Muhammad used fake documents to bring Malvo to the United States. Subsequently, Malvo went to live with Muhammad in a homeless shelter in Bellingham, Washington.<sup>37</sup>

Reverend Al Archer, who was the director of that shelter, testified to the relationship between Muhammad and Malvo while they were together at the shelter. Malvo went to school, but when school was over, he would spend the rest of his time with Muhammad. Muhammad would take him to the YMCA where they would train together. On weekends, he would take him outdoors and teach him to shoot. Muhammad kept him on a strict diet and arranged for him and Malvo to sleep separated from the others in a corner of a room in the shelter. Although Archer and others at the shelter “thought a great deal of Lee” and were concerned about him, they were unable to communicate with him because Muhammad would not let them get close to him. Indeed, Lee Malvo would not “speak to anybody unless he got a signal from Muhammad.” Muhammad was thus able to successfully “isolate Lee from others.”<sup>38</sup>

Later, Muhammad began indoctrinating Malvo into believing that killing people would be for a greater good. Dr. Dewey G. Cornell, a psychologist from the University of Virginia who had extensively examined Malvo, testified about the process through which Muhammad was able to manipulate Malvo into believing what might appear to be a bizarre fantasy. Muhammad had Malvo “speak with black people in slums and homeless shelters,” so he could see how badly African Americans were treated. He also told him the “Willie Lynch story,” a probably false narrative concerning a slave owner from the West Indies who told slave owners in America how they could best control their slaves and keep them from revolting. Muhammad used the story to explain to Malvo that white Americans have

36. Geroux, *supra* note 33.

37. *Id.*

38. Cooley Interview, *supra* note 26.

historically sought to turn African Americans against each other in order to control them.<sup>39</sup> As a result of Muhammad's indoctrination, Malvo told Dr. Cornell that "white people are devils."<sup>40</sup>

Muhammad then informed Malvo that the sniper killings would get society's attention and eventually lead to improved conditions for African Americans. As a result of the killings, they would be able to extort a lot of money from the government and would then use this money to buy land in Canada where they would bring seventy boys and seventy girls, who would build things and establish a utopian society.<sup>41</sup>

Why would even a naive, impressionable youth believe such a far-fetched fantasy? As Dr. Cornell explained, one reason was that when Muhammad took Lee Malvo away from his impoverished background, he had made promises to Lee and had kept them all. He had promised he would bring Lee to the United States, for example, and he had. He had promised to put him in a good school where he would learn things, and he had placed him in Bellingham High School, an excellent school with a rich curriculum and compassionate teachers, some of whom testified on Lee's behalf. Lee had thus witnessed Muhammad's ability to deliver on his promises. Because he was totally under Muhammad's control, moreover, he lacked the capacity to evaluate Muhammad's directives. The defense called expert witnesses who testified that children under the age of eighteen lack the capacity for judgment they will develop later in life. As a result, they may easily be trained to be "soldiers" who will automatically follow their superior's orders. As Muhammad's "soldier,"<sup>42</sup> Malvo accepted his orders without question.

Dr. Cornell testified that Malvo had a "dissociative disorder that came

39. "Willie Lynch" supposedly made a speech in 1712 telling his fellow slave owners to keep slaves docile by turning them against each other. The Willie Lynch story has been widely retold; Louis Farrakhan quoted from it during the Million Man March in October 1995. However, neither Willie Lynch's existence nor his speech has ever been authenticated. Many historians, including the prominent slavery and reconstruction scholar Eric Foner, do not believe it is true. See Mike Adams, *In Search of 'Willie' Lynch; Sometimes the Truth Can Be Found in Myth, Fiction—Even a Lie*, Balt. Sun, Feb. 22, 1998, at 1F.

40. Jackman, *supra* note 28.

41. Paul Bradley, *Malvo's Defense Starts Critical Phase/Experts Buttress His Insanity Claim; Horan Calls It "Puff of Smoke"*, Richmond Times Dispatch (Virginia), Dec. 5, 2003, at A1.

42. Neil Boothby from Columbia, South Carolina, testified as an expert witness for the defense. Boothby, a recipient of a humanitarian award from the Red Cross for his work with child soldiers from third world countries, explained how adults train children to be soldiers and why children are especially susceptible to this kind of training. This evidence helped to explain why Muhammad was able to train Malvo to be a "soldier" who would follow his orders. Cooley Interview, *supra* note 26.

from indoctrination.”<sup>43</sup> Malvo’s only preexisting mental problem was that he was unusually susceptible to “indoctrination,” or in lay terms, brainwashing. Through his unusually powerful ability to manipulate, Muhammad was able to alter Malvo’s mind-set so that Malvo believed that his participation in the sniper killings would result in a greater good. Dr. Cornell testified that, under the circumstances, he was unable to determine whether Malvo could distinguish between right and wrong. Two defense psychiatrists, however, testified that Malvo “was unable to tell right from wrong” as the result of his dissociative disorder.<sup>44</sup> On the other hand, two government psychologists testified that Malvo did not suffer from any mental disease.<sup>45</sup>

At the end of the guilt trial, the issues before the jury were whether Malvo should be convicted of the capital crimes, convicted of lesser crimes, acquitted by reason of insanity, or acquitted for lack of evidence. In arguing to the jury, however, both the prosecutor and defense attorney appeared to recognize that the central question for the jury would ultimately be whether it would sentence Malvo to death or impose a lesser punishment.

Defense attorney Michael Arif argued that the jury should find Malvo not guilty by reason of insanity. He told the jury that Muhammad had taken Malvo over so that “[h]e could no more have separated himself from John Muhammad than you can separate yourself from your shadow on a sunny day. . . . Did he know right from wrong? Right was what John Muhammad said it was. Wrong was what John Muhammad said it was.”<sup>46</sup> After making this argument, however, he added that the jury would have to “reach down into [their] consciences” to accept the insanity defense. He then said, “If you can’t reach that conclusion, I ask you to find him guilty of first degree murder” rather than capital murder.<sup>47</sup> Moreover, even though the sole issue before the jury was Malvo’s guilt, Arif also “began and ended his argument by pleading for [Malvo’s] life.”<sup>48</sup> He told the jury that “[a]dding another life to that pile of death does not solve anything.”<sup>49</sup>

43. *Id.*

44. See Paul Bradley & Bill Geroux, *Malvo’s Case Goes to the Jury, His Defense Lawyers Say the Teenager Fell Completely under Muhammad’s Spell*, Richmond Times Dispatch (Virginia), Dec. 17, 2003, at A1.

45. *Id.*

46. *Id.*

47. Adam Liptak, *Final Arguments at Trial of Sniper Suspect*, N.Y. Times, Dec. 17, 2003, at A37.

48. *Id.*

49. *Id.*

Prosecutor Horan sought to counter Arif's argument relating to the death penalty by emphasizing the magnitude of Malvo's crime. In his closing argument, Horan dismissed the claim that Malvo was under Muhammad's domination, saying, "He's as bad as [Muhammad] is. . . . For all intents and purposes, they are peas in a pod. . . . Their willingness to kill and their willingness to do it for money is common to both of them."<sup>50</sup> In dealing with the defense evidence relating to Malvo's background, he argued that it did not support the insanity defense because it did not show that Malvo had a mental disease: "A hard life is not a mental disease. . . . A difficult childhood is not a mental disease. Going to 10 schools by age 15 is not mental disease."<sup>51</sup> In addition to responding to the defense's specific claims, moreover, Horan specifically commented on the heinousness of Malvo's offense: "There's no such thing as a good murder. They don't make them. They're all bad. But some are worse than most, and we submit that this one is as bad as any."<sup>52</sup> Although Horan did not mention the death penalty, emphasizing the "badness" of Malvo's crime communicated to the jury that the death penalty, which is reserved for the worst crimes, should be imposed in this case.

The jury convicted Malvo of capital murder, and Malvo's penalty trial ensued. In contrast to the guilt trial, which lasted seven weeks, the penalty trial was very short. In order to show the magnitude of Malvo's crimes, the prosecution "presented a compelling and condensed two hours of testimony," including "testimony from seven family members of the snipers' victims."<sup>53</sup> The defense presented only three witnesses, including two of Malvo's teachers and Reverend Archer, who had also testified on Malvo's behalf during the guilt trial. These witnesses again emphasized Malvo's positive characteristics, including his intelligence and gentleness, as well as his need for a father figure and his susceptibility to indoctrination.

Malvo's defense attorneys had also been planning to call two expert witnesses who had not testified during the guilt phase of the trial. Because they sensed that the jury wanted to get the case as soon as possible, however, they decided not to present these witnesses, especially since one of the key points they hoped to communicate to the jury—that a person "can be bad when [he's] young and then get better"<sup>54</sup>—had already been brought

50. *Id.*

51. Bradley & Geroux, *supra* note 44.

52. *Id.*

53. Henri E. Cauvin, *Malvo's Age Was the Deciding Factor*, Wash. Post, Dec. 24, 2003, at A1.

54. Cooley Interview, *supra* note 26.

out during their cross-examination of one of the prosecution's mental health experts. By completing their penalty case in only about a day and a half, the defense was able to ensure that the jury would begin to deliberate on the case shortly before Christmas, timing that could only be helpful to Malvo.

In his closing penalty trial argument, Prosecutor Horan told the jury that if there "was ever going to be a case for [the death penalty], this was it."<sup>55</sup> Horan recounted the evidence relating to each of the nine sniper victims conclusively linked to Muhammad and Malvo. He then emphasized that Malvo was just as responsible as Muhammad, stating, "They were an unholy team, a team that was as vicious, as brutal, as uncaring as you could find."<sup>56</sup> The prosecution's position was that Malvo should receive the death penalty because he and Muhammad had committed a series of horrendous crimes.

In his closing argument for the defense, Craig Cooley did not dispute that Malvo had committed horrendous crimes. Instead, Cooley began his argument by addressing the concerns of those of us "who are parents or grandparents . . . and those . . . who have been entrusted with school children."<sup>57</sup> He told the jury that "our greatest worries are when they get to be 15, 16, and 17, because that's the point in time when they begin to search for themselves. It's a time that makes them most susceptible to peer pressure and to outside influence. It is a point in time where they are the most vulnerable."<sup>58</sup>

This introduction set the stage for explaining the defense's major argument for life, which was that Malvo's youth and vulnerability made him uniquely susceptible to the influence Muhammad brought to bear on him.

Now, in the course of this trial, I hope that you have been able to see and come to know that Lee was uniquely susceptible to becoming attached to a father figure in the charismatic personage of John Muhammad. Lee's childhood was one of abandonment—ripped from the father that he loved, Leslie Malvo, at age five and a half to be moved and moved and moved again. And by age fourteen, he had

55. Cauvin, *supra* note 53.

56. *Id.*

57. Fax from Craig Cooley to author, Defense's Closing Argument during Penalty Phase of Malvo Trial 2 (Feb. 10, 2004) (on file with author).

58. *Id.*

attended ten schools and had almost an uncountable number of caretakers, and unlike some who have had frequent moves in schools and been moved around, Lee had no parent whatsoever. . . . Lee's mother was abusive, and she was absent, and she returned only to uproot him again and again to move him, to abuse him again, and then leave again. . . . And by the time she abandoned Lee in Antigua, where he had absolutely no family base or support system, he was desperate for a father.<sup>59</sup>

Cooley then focused on Muhammad, explaining that when Malvo came under his influence, Malvo saw him not as “an evil man but a loving parent, a man who was good to other children, a man who went out of his way to do kind things for people.”<sup>60</sup> He went on to recall witnesses who described Muhammad “as a pied piper” who “had an attraction that brought children to him and none more so than Lee.”<sup>61</sup> To show the jury that Muhammad had the ability to indoctrinate a vulnerable child, he reminded them of Lindbergh Williams's testimony that, if his mother had not fought for him, “it would have been me rather than Lee Malvo in that car with John Muhammad in October of 2002.”<sup>62</sup>

Cooley then returned to the theme of youth's vulnerability. He referred to the testimony of Dr. Evan Nelson, a government mental health expert, who had explained that work done at the National Institute of Mental Health showed that “the juvenile brain is different” in that “the portion of the brain that gives us our judgment . . . doesn't fully develop until we're into our early twenties.”<sup>63</sup> Cooley stated that society recognizes a seventeen-year-old is lacking in judgment or maturity. A seventeen-year-old is not allowed to buy a drink, for example. Cooley then pointed out the “terrible incongruity” between prohibiting seventeen-year-olds from doing a “long list of things” but not prohibiting them from being executed.<sup>64</sup>

Cooley also invoked a powerful religious theme. He reminded the jury that a government witness had testified, in effect, that “some children are just born bad . . . . They simply choose to do wrong.”<sup>65</sup> Cooley responded:

59. *Id.* at 3.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* at 7.

Every tenet of my faith and every fiber of my body rejects that concept. Every person, certainly every child, had good within them, and every person has worth and every person is redeemable. If you attend the candlelight service two nights from now on Christmas Eve, if your church is like mine, the last hymn they sing is Silent Night, and you pass the light from one candle to the next, listen to the third verse when you sing it. It contains a phrase, “radiant beams from thy holy face, with the dawn of redeeming grace,” and it will come to Lee, if his life is entitled and allowed to continue.<sup>66</sup>

Cooley went on to state, as he had throughout his closing argument, that Lee Malvo should properly be punished for his participation in the crimes. In his final statement, however, he reminded the jury of Lee’s sad history in which Una James, his mother, handed him from caretaker to caretaker and told the jury that in deciding on his punishment they were “in a very real sense” becoming “the last of the very long line of caretakers.”<sup>67</sup> His final words brought the jury full circle, recalling for them the phrase used in Jamaica when a caretaker is entrusted with the care of a child.

I ask you to exercise your compassion and your mercy: temper the punishment that you choose. And as Una James did with all of the caretakers that she gave this child to, I leave you with a phrase. It’s a phrase that both invites you to mete punishment out but also to temper it, to draw the line short of the ultimate penalty, and I leave you with that phrase. Punish this child, save the eye.<sup>68</sup>

Although most experienced observers believed that the best Malvo’s defense team could hope for would be to “hang the jury” so that their non-unanimous vote for death would result in a life sentence, the jury’s first vote showed that it favored life by a 7–5 vote; and in a fairly short time, the jury returned with a unanimous vote for life.

#### *Case 2: William White*

In 1984, William White, a forty-two-year-old African American homeless ex-convict, was living with two teenagers near Golden Gate Park in San

66. *Id.*

67. *Id.*

68. *Id.* at 7–8.

Francisco, California.<sup>69</sup> White, who viewed himself as a survivalist, was instructing the teenagers about living on their own, using weapons, and other matters relating to survival. At some point, White asked fifteen-year-old Larry Gaines to join their group, but Gaines declined. In May 1984, however, White lured Gaines to their camp and proceeded to torture him to death. Among other things, White and the two teenagers shot Gaines with a BB gun, used a syringe to inject rat poison into his head, sodomized him, stabbed him, beat him with broom handles, and chopped off some of his limbs while he was still alive. Four months later, White, who was bisexual, picked up Ted Gomez, a fifteen-year-old male prostitute, brought him to Golden Gate Park, and then forcibly sodomized him, shot him, cut his throat, and left him to die.

The crimes perpetrated by White remained unsolved for about a year. Then, a Stanford professor was arrested for the sodomy and murder of Gomez. The police investigation determined that the professor, who had a history of driving to San Francisco and picking up male prostitutes, had had sex with Ted Gomez shortly before he was murdered. (In fact, it was later determined that White had picked up Gomez soon after the professor had finished having sex with him.) In addition, the professor had lied about picking up Gomez, and the police found a knife in the professor's house that appeared to match the murder weapon.

While the authorities were deciding whether they had sufficient evidence to bring charges against the Stanford professor, White was arrested for robberies in Oregon. During the interrogation, he told the police that if they were nice to him he would tell them something that would make the robberies he was charged with "look like small potatoes."<sup>70</sup> He then confessed to the two California killings. Later, he not only revealed many of the gruesome details relating to the killings but even reenacted portions of his part in the crimes. White was charged with two capital murders.

White's defense attorneys were Michael Burt and Robert Berman from the San Francisco Public Defender's Office. With the assistance of several experts, including Professor Craig Haney of the University of California at Santa Cruz, one of the nation's leading mitigation specialists, Burt and Berman were able to obtain powerful mitigating evidence relating to the defendant's background. Because of the aggravated nature of the crimes,

69. Much of the following account of the case was based on telephone interviews with Michael Burt (Dec. 15, 2003) [hereinafter Burt Interview] and Craig Haney (Oct. 30, 2003) [hereinafter Haney Interview]. In addition, I have examined portions of the White Penalty Trial Transcript.

70. Burt Interview, *supra* note 69.

however, Burt and Berman believed that they had to confront a critical preliminary problem: “How are we going to get the jury to get beyond the emotion generated by the aggravated nature of Government’s case so that they will be able to listen to the defense’s mitigating evidence?”<sup>71</sup> The attorneys adopted a novel approach. They decided that, during the voir dire when the parties are selecting the death-qualified jurors who will serve on the jury, the defense would lay out in “excruciating detail” the aggravated nature of the government’s case against William White.

Jury selection was conducted through individualized voir dire, which meant that each potential juror was examined alone by attorneys for both the prosecution and the defense. During the voir dire, White’s attorneys informed each potential juror of White’s prior convictions and all of the horrific facts relating to the crimes with which he was charged. Thus, Burt would say, “And then he injected the victim with rat poison. And then he sodomized him.” And he would go on to explain in detail the other acts White committed in the course of perpetrating the two killings. The defense thus made it clear they were “not in any way soft pedaling” the aggravated nature of the government’s case. Instead, they hoped to gain credibility with the jurors by being “absolutely upfront” about the nature of White’s crimes.<sup>72</sup>

Burt also told the potential jurors that the defense had to “be realistic about where you are going to be at the end of the guilt phase of this case.”<sup>73</sup> He told them that the jury would almost certainly convict the defendant of the capital crimes. Therefore, the question they had to answer now was: In view of the facts you are going to hear relating to the crimes committed by this man, “Will you able to consider the defense’s mitigating evidence in the penalty phase of this case? Or will you automatically vote for the death penalty without being able to weigh the mitigating evidence for the purpose of determining whether the defendant will be sentenced to death or life imprisonment?” In response to this question, quite a few of the potential jurors responded that, given the aggravated nature of the prosecution’s case, they would automatically vote for the death penalty. The judge excluded these jurors for cause based on California cases interpreting *Wainwright v. Witt*.<sup>74</sup> The jury voir dire lasted five weeks, and observers

71. *Id.*

72. *Id.*

73. *Id.*

74. Under *Wainwright v. Witt*, 469 U.S. 412 (1985), prospective jurors who are unable to follow the law at the penalty trial should be excluded for cause. Under modern capital sentencing statutes,

concluded that the strategy adopted by the defense during the voir dire played an indispensable part in ultimately sparing the defendant's life.

The purpose of the defense's strategy was twofold. First, explaining the government's case to the potential jurors was designed to reduce the emotion generated by the government's case and thereby enhance the likelihood that the jury would be able to consider the defense's mitigating evidence. To reinforce this message, moreover, the defense's questions made it clear to potential jurors that, if the emotion generated by the aggravated nature would render them unable to consider the defense's mitigating evidence, they should not be on the jury.

Second, the strategy actually resulted in the removal of members of the panel who admitted that their feelings about the aggravated nature of the case would make them unable to consider the defense's mitigating evidence. The effect, of course, was to eliminate some of the most pro-death penalty jurors, thereby reducing the likelihood that the jury would impose the death penalty.

The guilt trial lasted a little over two months. As the defense had expected, White was convicted of two counts of capital murder. In the first part of the penalty trial, the government presented aggravating evidence relating to White's prior convictions. The prosecutor introduced evidence showing that, before he committed the murders for which he was on trial, White had a lengthy criminal record that included violent crimes, such as rape and attempted murder. To inform the jury as to the magnitude of these crimes, moreover, two of White's victims testified to the devastating effect his crimes (in one case rape and in the other attempted murder) had had upon their lives.

Prior to trial, Burt and Berman had decided that the defense needed to introduce a wealth of mitigating evidence at the penalty trial, including witnesses who could provide significant information relating to every phase of White's life. Through presenting this evidence, the attorneys hoped to

---

the jury must decide whether the death sentence should be imposed by weighing all the aggravating and mitigating circumstances introduced in the case. A prospective juror who states she would automatically vote for the death sentence upon a finding that the defendant was guilty of a particularly aggravated capital murder is thus arguably excludable on the ground that she is not willing to consider whether the defense's mitigating evidence should lead to a life sentence and thus she is unable to comply with the law provided by the state's sentencing statute. For a California case that provides support for this position, see *People v. Cash*, 50 P.3d 332, 340 (Cal. 2002) (reversing death sentence because the trial judge refused to allow defense counsel to ask prospective jurors "whether there were 'any particular crimes' or 'any facts' that would cause a prospective juror 'automatically to vote for the death penalty'").

develop a theme for life that related both to White's past and his future. First, White's background, which included a long pattern of abuse by his father and the various institutions he was sent to, provided an explanation for his violent behavior, culminating in the crimes he had committed. Second, White "deserved to live" because, based on his past history as a prison inmate, he had shown that within the prison he would be a "positive influence" on other prisoners and be able to lead a productive life.

The defense presented White's mitigating evidence in three stages: first, witnesses testified to his early childhood, establishing the horrendous parental abuse he received from his father; then witnesses testified to the institutions that stunted his development, especially when he was incarcerated from the time he was a teenager until he was in his mid-twenties; and, finally, witnesses testified to the positive aspects of White's character, explaining why he would be able to live a productive life in prison. In all, the defense presented fifty-four witnesses, as well as videotapes presenting testimony of several people who were unable to appear in person. The defense believed that, in order to counter the government's powerful aggravating evidence, it was essential to provide the jury with the fullest possible picture of the defendant's mitigating evidence.

The mitigating evidence relating to White's early childhood showed, step-by-step, what his life had been like. He lived in poverty. His father physically and emotionally abused him. William had three sisters. His father would hang all four children from the rafters, beat them with a belt, and then pour salt water in their wounds to increase their pain. In addition, William had to watch his father rape and abuse his three sisters. Despite his horrendous abuse of his three daughters, Mr. White's most sadistic behavior was directed toward William, apparently because he was the darkest skinned of the four children. In addition to physically torturing William, Mr. White also subjected him to various forms of emotional abuse. One particularly heart-wrenching example related to a dog that William had as a pet when he was five or six years old; apparently for no other reason than that he knew William loved his pet, Mr. White had the dog put to death.

In presenting the evidence relating to Mr. White's parental abuse, Burt had two objectives: first, he wanted to bring Mr. White's "violence and abuse alive in the courtroom," providing the jury with a clear vision of the pain inflicted on William and his sisters; in addition, he wanted to help the jury understand the ways in which Mr. White's abuse of William and his sisters would be likely to shape William's life.

In order to accomplish the first objective, the defense presented lay witnesses, including William's most articulate sister, Deanna White, who provided the jury with a full picture of Mr. White's parental abuse. These lay witnesses provided a foundation for expert testimony<sup>75</sup> that would enable the defense to achieve its second objective: by having experts explain the meaning and implications of Mr. White's abuse, the jury would understand the devastating effect that Mr. White's abuse would be likely to have on his children, especially William.

In explicating the meaning of Mr. White's parental abuse, two experts were especially important: Dr. Mindy Rosenberg, a nationally recognized expert in child abuse who had written several books on the subject, testified, "This is the worst child abuse I've ever seen in my entire career."<sup>76</sup> In addition, another child abuse expert who was a specialist in male abusers conducted a "psychological autopsy" of White's father. He concluded that Mr. White, who was by then deceased, had been a "psychopath, anti-social, extremely violent, and dangerous."<sup>77</sup> He added, moreover, that Mr. White's abusive treatment of William would almost inevitably have had profound effects on William's behavior.

In this part of the trial, one of the defense objectives was to place the focus on the defendant's father rather than on the defendant. In order to accomplish this, the defense introduced blown-up mug shots of Mr. White, portraying him as the criminal. By showing the striking parallels between the ways William White tortured one of his victims and the ways in which Mr. White had tortured William when he was a child, the defense reinforced the expert's conclusions relating to the profound effects that Mr. White's abuse would be likely to have, and in fact had had, on William.

The second segment of the defense's mitigating evidence related to "recreating the awful institutions [that William] had been in."<sup>78</sup> William grew up in Philadelphia. By the time he was a teenager, he had begun having minor problems with the police and juvenile authorities. When he was fifteen, the juvenile authorities placed him in Huntingdon, a Philadelphia prison that was then used to incarcerate "defective delinquents."<sup>79</sup> Under the law in effect at that time, the authorities were permitted to place

75. See Sundby, *supra* note 7, at 1180-82 (noting that interviews with jurors in capital cases indicate that such jurors are more likely to be persuaded by expert testimony when the expert's conclusion is based on facts established by lay witnesses' testimony).

76. Burt Interview, *supra* note 69.

77. *Id.*

78. *Id.*

79. *Id.*

teenagers who were either unwanted or had low IQs in this prison. The authorities thus placed African American teenagers in Huntingdon, often for trivial offenses, such as stealing a bicycle. In some cases, the children then stayed in the institution for decades. White, who was luckier than many others, stayed in Huntingdon for seven years, until he was twenty-two.

Huntingdon was a “nineteenth-century dungeon” that had “cell blocks that looked like they came from Dickens.” The defense showed the jury photos of the cell blocks and other parts of the prison. They also established that teenagers incarcerated as “defective delinquents” were in constant danger from older inmates. As a result, White “learned survival skills,” but he also became “profoundly damaged,” as did many of the other boys who were in that institution during that period. To show what White underwent at Huntingdon, the defense team had former Huntingdon prison guards testify to the conditions at Huntingdon during that era. In addition, they found several African American men who had spent decades in the prison and were “shells of people.”<sup>80</sup> These men testified to their prison experiences so that the jury could not only obtain a fuller understanding of White’s experience at Huntingdon, but also a sense of the devastating effect the same experience had had on other prisoners’ lives.

The defense also presented testimony relating to an ACLU lawsuit that eventually resulted in the release of people who had been incarcerated under the “Defective Delinquent Act.”<sup>81</sup> People from the Quaker community who had been involved in helping the ACLU with this suit were “great storytellers” who provided the jury with additional insight into the nature of the institution. Judge Lisa Rochette, who had been involved in the litigation, was also a powerful defense witness. Judge Rochette had written an article entitled “The Throw-away Kids,”<sup>82</sup> which recounted salient details relating to the Defective Delinquent Act. In conjunction with the other defense evidence, Judge Rochette’s testimony showed that the state’s intervention into the teenagers’ lives had gone “horribly wrong,” with the result that nearly all of the incarcerated teenagers had been “irreparably damaged” in one way or another.<sup>83</sup>

The final segment of the defense’s mitigating evidence was designed to

80. Haney Interview, *supra* note 69.

81. *Id.*

82. Burt Interview, *supra* note 69.

83. Haney Interview, *supra* note 69.

show that, during the latter part of his life, White had adjusted to the point where he would be able to make a positive contribution in prison. The defense presented witnesses who had had positive contacts with White while he was in prison. Guards and other inmates testified that he had had a “calming influence” on other prisoners. On many occasions, he had counseled younger prisoners, and once he had “saved a guard from being stabbed.”<sup>84</sup> Based on all this information, a prison warden offered the expert opinion that White would be able to lead a productive life in prison.

The prosecutor, of course, argued that White would be potentially dangerous to other prisoners. Based on the capital crimes for which he had been convicted, the prosecutor argued that White was progressing toward more and more violent conduct and would be a special threat to younger, weaker prisoners.

The defense was able to rebut this argument in two ways. First, because Burt and Berman had engaged in extensive pretrial litigation, White had been in the county jail for six years between his arrest and trial. During that period, his behavior record was excellent. In addition, a psychiatric social nurse, who met with him during that period, testified that he should not be executed because he would continue to exert a positive influence in prison. The nurse’s testimony was particularly effective because she testified that she was generally strongly in favor of the death penalty. When the defense asked her why she was opposed to its application in this case, she testified that she knew all about White’s past history and, nevertheless, had a very favorable view of him, partly because he had been able to improve himself despite dealing with so much adversity. She concluded by testifying that she strongly believed he would have a favorable impact on other prisoners.

In response to the prosecutor’s claim that White might be dangerous to other prisoners, the defense also sought to educate the jury as to the nature of the prison in which White would be incarcerated. A California prison warden testified that if White were sentenced to life he would be sent to a “super maximum security prison.” He explained the protocol in such prisons and the alternatives that are available if an inmate misbehaves. On cross-examination, the prosecutor suggested that White “could be a problem.” The warden responded, “We can grind down any inmate we want.” Through this testimony, the warden emphasized that, if White were sentenced to life, he would be receiving a severe punishment. He also reas-

84. Burt Interview, *supra* note 69.

sured the jury that White would not be a problem because “the system could handle him.”<sup>85</sup>

Craig Haney, the mitigation specialist, was the last witness to testify for the defense. In his testimony, Haney played a number of roles. First, he was “a storyteller,” seeking to provide the jury with a clear picture of White’s history. In addition, he testified to his expert opinion relating to White’s “future adaptability in prison.” Based on his review of all of the prison reports and testimony of people who had known White within the various prisons in which he had been incarcerated, Haney offered the opinion that White would be a positive influence in prison.

Most important, however, Haney sought to help the jurors understand why the evidence presented by the defense was mitigating and why it should be relevant to its sentencing decision. Haney explained to the jury that there is now a “staggering amount of research” that shows that certain risk factors lead to violent criminal behavior. These risk factors include poverty, parental abuse, and time spent in juvenile institutions, all of which were present to a remarkable degree in White’s case. Haney thus explained to the jury that “the life path of a person” with White’s risk factors is “damaged so profoundly that the odds significantly increase that his life is going to involve violent criminal conduct.”<sup>86</sup>

The prosecutor addressed Haney’s “risk factors” argument by pointing out that many other kids who experience parental abuse, poverty, neglect, and other risk factors don’t end up committing horrendous capital crimes. In response, Haney presented a medical analogy. There are risk factors for early heart attack—for example, smoking, lack of exercise, or eating the wrong foods. Yet we all know somebody who had all of these risk factors and still lived to be eighty-five. The point is that the presence of multiple risk factors decreases the individual’s chances. White, who not only had multiple risk factors but exceptionally severe ones, was just unable to overcome the odds.

In his closing argument to the jury, Burt emphasized both themes of the defense’s argument for life. He elaborated as to the significance of the risk factors explained by Haney, emphasizing that we are all a “reflection . . . of the way we were raised and the things we came into contact with as youths.”<sup>87</sup> He told the jury that he hoped the defense’s mitigating evidence would enable the jury to understand “how Mr. White got to the point

85. *Id.*

86. Haney Interview, *supra* note 69.

87. See White Penalty Trial Transcript, *supra* note 69.

where these two killings [as well as his earlier crimes] took place.”<sup>88</sup> He then went on to argue that despite his horrendous acts, “Mr. White is a mixture of both good and bad,”<sup>89</sup> and, therefore, his life was worth saving.

Most important, Burt explained that White would be a positive influence in prison.

As he has gotten older, he has become an asset in the prison system. He has saved other people’s lives. He has run counseling groups. He has disarmed very violent situations. He has taken weapons or pointed to weapons and saved lives in that way. He has done the kinds of things that are very important in a prison system, which is a very dangerous place to be. And he is exceptional in that regard.<sup>90</sup>

After meticulously delineating the evidence relating to aggravating and mitigating circumstances, Burt argued to the jury that, despite the magnitude of his crimes, White was “not the worst of the worst.”<sup>91</sup> He then ended his argument by reading from the testimony of White’s sister Deanna, which emphasized both the difficulties that had shaped White and that she still viewed him as a person whose life had value.

But I love William. . . . William has been crying for help for a long time. . . . I don’t know why things happen. But they happen. But the onliest thing I am asking you for my sake is to please let my brother live. I know it won’t make up to the family. I feel very sad for them. And I wish there was some way that I could tell them, you know, or something that I can do to make their grief easy. But there is no way you can make that happen when your child is taken from you. I don’t know the reason. And maybe William doesn’t know the reason. But God knows the reason. And the onliest thing is I am saying I love my brother.<sup>92</sup>

The jury deliberated for seven days. During that time, the jury took several votes; the results fluctuated between 8–4 in favor of life and 8–4 in favor of death. The jurors who insisted on life emphasized that White had

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

been indelibly shaped by his horrific childhood and the years he had spent in the institution for youthful offenders; those who voted for death maintained that, given the viciousness of his crimes, death was the only appropriate punishment. On the sixth day of deliberations, the jury sent the judge a note stating they would be unable to reach a decision. In response, the judge instructed them that they must continue to deliberate and that, if they failed to agree, the lengthy jury trial would ultimately end in failure. On the seventh day, the jury finally reached a unanimous decision for life.

*Case 3: Martin Gonzalez*

Martin Gonzalez, a Mexican citizen, had been convicted of murder in Mexico.<sup>93</sup> Later, he moved to the United States, and his wife, Sylvia, soon followed him there. Within about a year, Gonzalez murdered his wife and two other women. In each case, he was in a “possessive, controlling, . . . physically abusive” relationship with the woman, which he ended by bashing in her head.

The killings occurred in Travis County, Texas. Since Texas has had far more executions than any other state, the Travis County prosecutor had a strong basis for believing that Gonzalez would be sentenced to death. In addition to the evidence relating to the murders, the prosecutor had evidence relating to significant criminal conduct perpetrated by Gonzalez both before and after he committed the brutal crimes for which he was on trial. Most significant, while in prison awaiting his capital trial, Gonzalez had obtained a fifty-foot rope, which he admitted he had been planning to use for the purpose of escaping; he had stated, moreover, that if his escape had been successful he planned to kill the daughter of his most recent victim before fleeing to Mexico. This evidence could be used not only to establish defendant’s lack of remorse for his murders but also to show that, even if he were sent to prison, he would be likely to commit future violent acts and would thus constitute a “continuing threat to society,”<sup>94</sup> a critical factor in determining whether he would be eligible for the death sentence under Texas law.<sup>95</sup>

93. Much of the following account of the case is based on a telephone interview with Carlos Garcia (May 7, 2004) [hereinafter Garcia Interview]. In addition, I have examined the Gonzalez Penalty Trial Transcript, especially the opening and closing arguments.

94. Tex. Crim. Proc. Code Ann. § 37.071, 2(b)(1) (Vernon 2004).

95. When a defendant is convicted of capital murder in Texas, he receives either a death sentence or life imprisonment. The jury decides the sentence at the penalty trial through its answers to two

Gonzalez was represented by Carlos Garcia, a criminal defense attorney in Travis County. Gonzalez was his first capital defendant. The judge provided Garcia with funds that allowed a full investigation for mitigating evidence, and Garcia conducted such an investigation. Because the defendant's conduct was so aberrational, he hoped to be able to present a mental health expert who would provide an explanation for his behavior: the expert would testify that Gonzalez had brain damage, perhaps, or severe psychological problems that affected his ability to control his conduct. At Garcia's request, the court appointed a respected neuropsychologist to assist the defense. When this expert examined Gonzalez, however, his conclusions were not helpful.

The defense investigation relating to Gonzalez's family background did uncover significant mitigating evidence. Gonzalez came from a very poor background. His family lived in mud huts in the middle of the desert on an "ejido," a parcel of land given to them by the Mexican government. Until he was twenty-five, he had had no behavior problems. Then, he had a bad motorcycle accident in which he "busted his head open."<sup>96</sup> After the motorcycle accident, Gonzalez's mother and brothers reported that he periodically had seizures, during which he would become violent. He would chase people with a machete. In order to restrain him, his brothers would tie him up with a rope in the middle of a corral. His family took him to a doctor, but the doctor could not find anything wrong with him.

Garcia decided he would use this evidence to show that Gonzalez's violent behavior had in fact occurred due "to forces beyond his control." Even if experts were unable to pinpoint the relationship between Gonzalez's head injury and his violent behavior, the fact that the behavior occurred only after the injury seemed to establish that there was in fact a connection. In addition, Garcia was prepared to challenge the government's claim that Gonzalez would be a "future danger" by introducing his own expert testimony on the extent to which the defendant would be a danger in prison.

Garcia's principal strategy, however, was to rely on the same jury selec-

---

special questions: (1) "Do you find from the evidence beyond a reasonable doubt that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society?" If the jury answers "Yes" to this question, it proceeds to question (2): "Do you find from the evidence . . . that there is a sufficient mitigating circumstance . . . that a sentence of life imprisonment rather than a death sentence be imposed?" See 43 George E. Dix & Robert O. Dawson, *Texas Practice, Criminal Practice and Procedure* § 31.92 (2d ed. 2001); 8 Michael J. McCormick et al., *Texas Practice, Criminal Forms and Trial Manual* § 98.19 (10th ed. 1995).

96. Garcia Interview, *supra* note 93.

tion method used by David Wymore, the Denver public defender. In selecting jurors, the defense placed its prime emphasis on choosing individuals who had the lowest possible scores on the Wymore scale. Thus, if the defense had the choice between selecting two potential jurors who were evaluated, respectively, as a 3 and a 4 on the Wymore scale, the defense would automatically opt for the 3, regardless of whether the one evaluated as a 4 might appear to be a more pro-defense juror in other respects. In accordance with the Wymore method, the defense attorneys also emphasized to the jurors selected that they “should respect each other’s views, but also that they should stand firm if they have a view in favor of life.” Garcia adhered to this strategy because he was confident that the jurors’ attitude toward capital punishment would be the critical issue in determining whether the defendant would receive the death sentence. He also believed that the more the jury was opposed to capital punishment, the more sympathetic it would be to the themes presented in his closing penalty argument. In accordance with the Wymore method, moreover, he wanted to ensure that if there were any jurors who felt the defendant’s life should be spared, they would be able to resist being badgered into changing their minds by others.

Since jury selection was conducted through individualized voir dire, Garcia had an opportunity to ask different questions to different potential jurors. When he found a person he thought would eventually be on the jury, he would invariably ask a question that referred to the conditions under which a capital defendant might serve a sentence of life imprisonment. In particular, he would refer to the fact that the punishment could include “being locked up for 23 hours a day for the rest of his life.”<sup>97</sup> This question was permitted even though it was not clear that Gonzalez would in fact be locked up for twenty-three hours a day if he was sentenced to life imprisonment.

The jury convicted Gonzalez of capital murder. At the penalty trial, the jury would have had to conclude that the defendant would be a “continuing threat to society” in order to impose the death sentence. If it found that he would pose such a threat, they were then required to consider whether the defense had established the presence of mitigating factors and, if so, whether the presence of those mitigating factors warranted the imposition of a life sentence rather than a death sentence.<sup>98</sup>

The entire penalty trial took two days: one day for each side. Through-

<sup>97</sup> *Id.*

<sup>98</sup> Tex. Crim. Proc. Code Ann. § 37.071, 2(b)–(g) (Vernon 2004).

out the penalty trial, the prosecutor emphasized that if he were not executed, Gonzalez would be a “future danger” and thus constitute a “continuing threat to society.” On behalf of the government, an FBI analyst testified that Gonzalez fit “the profile of a serial killer” who would be a “future danger” wherever he was; a psychiatrist testified that he was a sociopath who would be a “future danger” to others; and an expert in the Texas prison system testified that he would be a “danger to other prisoners” no matter what prison he was sent to.

The defense presented five witnesses, including three members of Gonzalez’s family. The defense theme for life, which Garcia had developed from the jury voir dire on, was, “First, there is a presumption in favor of life; and second, there are reasons in this case why you should choose life over death.”<sup>99</sup> In developing this theme, Gonzalez’s family members testified to Gonzalez’s history, focusing on the way in which Gonzalez’s behavior changed after his motorcycle accident. Gonzalez’s mother and two brothers testified that until he was twenty-five, Gonzalez had been normal. He had never done anything violent or misbehaved in any serious way. After the motorcycle accident, however, Gonzalez’s behavior became extremely violent. Garcia was able to present vivid images illustrating the change. In particular, the defense introduced photographs of the dusty corral in which Gonzalez had been tied up after he became violent. One of Gonzalez’s brothers showed the jury how they had tied Gonzalez up and where he was placed. Through presenting this kind of evidence, the defense’s goal was to bring the defendant’s history “to life,”<sup>100</sup> to actually make the jurors feel that they were looking at a dusty corral in a Mexican desert.

In addition, the defense sought to counter the government’s claim that Gonzalez would be a future danger. Using the defendant’s prison record, which had been introduced by the prosecutor for the purpose of showing Gonzalez’s attempted escape, Garcia was able to show that, aside from Gonzalez’s botched escape plan, his prison record was good. He had never been violent in prison. Moreover, the warden of a Texas prison testified as a defense expert in correctional institutions. He explained the structure of the Texas prison system, the different levels of prisons, the prisoners’ living conditions, and the security measures that are taken to protect guards and other prisoners. Most important, he explained the procedures in a maximum security prison where Gonzalez would be sent if he were sentenced to life imprisonment. Throughout his testimony, the warden was very objec-

99. Garcia Interview, *supra* note 93.

100. *Id.*

tive. He did not offer an opinion as to whether Gonzalez would be a future danger in prison. He simply explained how the prison personnel seek to ensure security in various prison settings. From his testimony, however, the jury could infer that prisoners in a maximum security prison are locked up most of the time and have little opportunity to do anything disruptive.

In his closing argument, the prosecutor addressed the question whether Gonzalez would commit future acts of violence that would constitute a “continuing threat to society.” After referring to Gonzalez’s “rich history” of violence, he reminded the jury that the government experts had testified that a “defendant’s prior behavior” is the most “reliable indicator” of whether a person will be a “continuing threat to society.”<sup>101</sup> Based on the defendant’s record, he then argued there was no “doubt that the evidence proves the probability of [the defendant] committing criminal acts of violence that would constitute a continuing threat to society.”<sup>102</sup>

After briefly discussing (and dismissing) the defense’s evidence of mitigation, the prosecutor focused on the magnitude of the defendant’s crimes: “There are some people that do such bad things that they forfeit the right to live in our society.”<sup>103</sup> Because Gonzalez had killed at least four people and committed other serious crimes, he “has forfeited that right to live in our society.”<sup>104</sup>

Garcia began his argument by commending the jury for their verdict at the guilt stage: “You did the right thing. You accomplished a thing that needed to happen. You got him off the streets forever.”<sup>105</sup> He then defined the issue confronting the jury at the penalty trial: “But the only issue left is this: Is this individual going to die at the hand of his creator or by yours?” Throughout his argument, Garcia continued to echo this theme, reminding the jury not only that it had to make a life or death decision but also that it should draw from religious principles in making that decision.

Garcia specifically addressed the issues raised by the prosecutor: whether Gonzalez would be a “continuing threat to society” and whether there was mitigation. As to the first question, he focused on the defendant’s record while in prison awaiting trial, pointing out the absence of any violent conduct.

101. See Gonzalez Penalty Trial Transcript, *supra* note 93.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

But with the exception of a desperate preparation of an escape over a year ago, has the State brought you . . . any single human being, whether civilian or not, in the past close to two years that can say that man hurt me?<sup>106</sup>

He also pointed out that the defendant was forty-seven years old and not in robust health. Far from being a threat to others, Garcia concluded that Gonzalez's record showed that when he "is under authority, structure, he is a coward."<sup>107</sup>

As to mitigation, Garcia reminded the jury that Gonzalez's behavior changed after he received the head injury. He then briefly explained the significance of the Gonzalez family's evidence.

You got a guy who is described by his own brothers as having to be tied up, thrown on the ground, who foams at the mouth, brays like an animal and chases people up houses. That is what is called mitigation.<sup>108</sup>

In the remainder of his speech, Garcia did not focus on the facts of Gonzalez's case but presented a powerful argument in favor of life: "But the most important thing about this case and any other capital case is this: There is always a presumption of life. Life is presumed."<sup>109</sup> He supported this claim by pointing to specific aspects of Texas law, such as the fact that the government has the "burden of proving that there is future danger."<sup>110</sup>

His predominant argument for presuming life, however, was based on religious principles. He told the jury about a man who had killed over a hundred people. Then he moved to a discussion of the human species.

But what defines us as a species, as a race, is how we handle our own. It seems to me that the purpose, then, of our existence is very simple, and this is not an original idea. But our very purpose in being born and living is to love one another and forgive one another, whether it is Christianity or any other religion, that is the point of human existence. If we do that, we will be okay. If we do that, we are okay.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

The thing is, the thing that I noticed is that every person in the whole of human existence who has ever done anything to improve our race, our human race, has always chosen life. Whenever human beings have done something to improve our condition, they choose life.<sup>iii</sup>

He went on to talk about how specific religious leaders, such as Gandhi, Martin Luther King, and Jesus Christ, would choose life in this case. He told the jury that the man who had killed a hundred people was “Saul from Tarsus” and that he went on to be redeemed and “became Saint Paul, the greatest disciple that Christianity has ever known,”<sup>ii2</sup> adding that if a man who killed so many “can be redeemed, then so can we, however long it may take.”<sup>ii3</sup>

He ended with an urgent appeal to the jury.

Today you have the chance to do something that most of us will never get the chance to do. But you have the chance today to prepare for the day when you die when you meet your maker, and when the question is asked of you, what did you do, you can answer and say, Lord, one of your creatures was in front of me that day, flawed as he was, he was still your creature, and I chose life, because that is what I learned from you.<sup>ii4</sup>

When the jury went out to deliberate, the first thing they asked was to see a copy of Garcia’s closing argument. The judge told them they could not have the argument because it was “not evidence.” Later, the jury told the judge they were “stuck on future dangerousness.” They asked what they should do if they were unable to resolve that question. The judge told them they should “continue deliberating.” In about four and a half hours from the time they started deliberations, the jury returned with a unanimous life verdict.<sup>ii5</sup>

About two weeks after the verdict, the prosecutor told Garcia that a member of the jury had told him that eleven of the twelve jurors were originally for the death penalty but a woman on the jury told them she would not “vote for death no matter what.” According to the prosecutor, the juror

iii. *Id.*

ii2. *Id.*

ii3. *Id.*

ii4. *Id.*

ii5. Garcia Interview, *supra* note 93.

explained that the eleven who favored death soon capitulated because they did not want to have a hung jury.<sup>116</sup>

### *Reflections on the Cases*

Despite their differences, the three cases illustrate some general strategies that are important in defending aggravated capital cases. These include: jury selection, introducing the defense's theme for life at an early stage of the case, presenting mitigating evidence that will resonate with the jury, and presenting a powerful closing argument.

#### JURY SELECTION

When dealing with an aggravated capital case, a skilled defense counsel will invariably employ a strategy that is designed to minimize the extent to which the jurors selected are predisposed toward imposing a death sentence. The Wymore method is calculated to achieve this end. In cases in which the defendant's guilt is not seriously contested, Michael Burt's strategy of challenging potential jurors who would not be able to consider imposing a life sentence if particular aggravated facts are established can also sometimes be used to remove jurors who are predisposed toward imposing a death sentence.

The *Gonzalez* case illustrates the value of the Wymore method. One of the goals of the Wymore method is to obtain at least one juror who will not only vote against death in the defendant's case but adhere to that position in the face of opposition from other jurors. The defense in the *Gonzalez* case apparently achieved this goal. Based on the prosecutor's account of what jurors told him, it appears that one female juror made it clear she would not vote for a death sentence. This one juror, moreover, was not only strong enough to adhere to her position but was able to convince the other jurors that seeking to persuade her to change her position would be futile. In a relatively short time, the other jurors accepted her position in order to avoid what they thought would be a hung jury.

The speed with which the eleven other jurors in the *Gonzalez* case switched their position perhaps also attests to the efficacy of the Wymore method. Carlos Garcia maintains that, if those jurors had felt strongly that the defendant should be sentenced to death, they would have continued to vote for that sentence for more than four and a half hours. By excluding

<sup>116</sup> *Id.*

potential jurors who are most inclined to vote for a death sentence, the Wymore method is designed to eliminate jurors who are most likely to feel strongly that a death sentence should be imposed in the defendant's case. Through employing the Wymore method, Garcia believes he was able to reduce the likelihood that some of the majority jurors who favored the death penalty would feel strongly enough about their position to persist in seeking that sentence.

The strategy employed by Burt in the *White* case can be employed in some capital cases. In order to follow the law applicable to capital sentencing, a potential juror must be willing to at least consider the possibility that the defendant should not be sentenced to death because of mitigating evidence relating to the defendant's background or the circumstances of the crime.<sup>117</sup> In an aggravated capital case, Burt's strategy can be particularly effective because, when confronted with a case involving the commission of particularly horrendous capital crimes, potential jurors who believe in capital punishment will be more inclined to feel that the circumstances of the crime will trump any possible mitigating evidence and thus to state that in such a case they could not consider imposing a sentence other than death. Although employing this strategy has some risks,<sup>118</sup> it does have the potential for reducing the extent to which the jurors selected will be inclined to impose a death sentence.

#### INTRODUCING THE DEFENSE'S THEME FOR LIFE AT AN EARLY STAGE

In all three cases, the defense introduced at least some part of the defense's theme for life at an early stage of the case. The *Malvo* case is a classic example of one in which the defense was able to front-load the mitigating evidence by introducing it in support of the defendant's insanity defense during the guilt trial. Even though Malvo's insanity defense was unlikely to succeed, this strategy was undoubtedly sound because the evidence relating to Malvo's background was so compelling. Presenting this evidence at the earliest possible stage was valuable, moreover, because it allowed the defense to make Malvo's story a significant part of the trial narrative,

117. See *supra* note 4.

118. The main risk is that, by asking the potential jurors whether they would be willing to consider a sentence other than death if specific aggravating facts are established, the defense is suggesting to the jury that the prosecution will in fact be able to establish those aggravating facts. In *White's* case, however, Burt did not view this as a risk because he was certain that the prosecutor would be able to establish the aggravated facts recounted by the defense during voir dire.

thereby enabling the jury to gain an early view of Malvo's vulnerabilities so that their empathy for him could begin to develop prior to the penalty stage.

In the other two cases, the defense was not able to front-load the mitigating evidence. In both cases, however, the defense did introduce important aspects of the defense's theme for life during the jury voir dire. In White's case, the defense meticulously explained the nature of the defendant's aggravated crimes and informed the potential jurors of the nature of the decision they would have to make at the penalty trial. Through this approach, the defense to some degree defused the impact of the government's evidence relating to the defendant's crimes and oriented the jurors so that they would be likely to give fuller consideration to the mitigating evidence presented at the penalty stage. In Gonzalez's case, Garcia's use of the Wymore method focused potential jurors' attention on the nature of the decision they would be required to make at the penalty stage. And his reference to the conditions under which capital defendants serve life sentences suggested to jurors that their primary responsibility would be to decide between one of two harsh punishments for the defendant.

#### MITIGATING EVIDENCE

In each of the three cases, the defense's introduction of mitigating evidence was vitally important. The choices made by the defense in presenting that evidence in the three cases, moreover, provide insight into the ways in which skilled defense attorneys present mitigating evidence that will resonate with the jury.

In all three cases, the defense's mitigating evidence was designed to provide the jury with a vivid narrative relating to the defendant's history. In the *Malvo* and *White* cases, the defense was able to make the defendant's story vivid by presenting many witnesses who provided a detailed account of the defendant's entire history. Through relating accounts of dramatic episodes in the defendant's life, the witnesses in both cases provided the jury with a multilayered view of the influences that had shaped the defendant.

In Gonzalez's case, the defense did not have nearly as much mitigating evidence to introduce. Nevertheless, the defense took pains to ensure that the mitigating evidence presented was vivid to the jury. The testimony of Gonzalez's family describing the difference between Gonzalez's behavior before and after his head injury provided a clear and striking contrast: before the injury, Gonzalez behaved like a normal human being; afterward, he behaved like a wild animal. The testimony of Gonzalez's brothers

describing how they tied Gonzalez up after he went on a rampage, moreover, presented a strong visual image to the jury, which Garcia was able to magnify by introducing photographs of the dusty corral in which the defendant was tied up. The defense thus introduced vivid mitigating evidence showing the extent to which the defendant's head injury had rendered him unable to control his conduct.

In all three cases, moreover, the defense relied primarily on lay witnesses to present the mitigating evidence to the jury. In the *Gonzalez* case, the story of the defendant's life was presented entirely through lay witnesses. In the *Malvo* and *White* cases, expert witnesses participated in presenting the defendant's life story, but lay witnesses testified to the events that provided the core of the defendant's history. The cases thus show that in aggravated capital cases the defense can effectively use lay witnesses to present the story of the defendant's life to the jury.

In all three cases, the defense also presented expert witnesses. These experts served various functions. In the *Malvo* case, mental health experts testified to their opinions of Malvo's mental state at the time he committed the crimes, thus providing the jury with insight into an issue that would be relevant to both guilt and sentencing. In the *White* and *Gonzalez* cases, prison experts explained to the jury the nature of a life sentence in a maximum security prison, thus providing the jury with information that would be relevant to assessing the defendant's risk to others if he were sentenced to life imprisonment.

In the *Malvo* and *White* cases, moreover, experts interpreted data introduced by lay witnesses. In this regard, Craig Haney's testimony in William White's case relating to the defendant's risk factors is especially significant. Through explaining that the confluence of various factors in White's background dramatically increased the risk that he would engage in violent criminal conduct, Haney educated the jury as to the significance of the defense's mitigating evidence. If the jury accepted Haney's testimony, they would understand that White's life was one "that had been misshapen and misdirected from the outset." As a result, White had to face "a series of barriers that he wasn't able to overcome"<sup>119</sup> and that most other people would not be able to overcome.

Haney, who has been one of the leading mitigation experts in capital cases for more than two decades, states that, because of the empirical data

119. Haney Interview, *supra* note 69.

relating to risk factors,<sup>120</sup> he believes he is much more effective in explaining the significance of mitigating evidence to a jury today than he was two decades ago. When serving as a mitigation expert during the 1980s, Haney was often able to help the defense introduce a wealth of information relating to the defendant's troubled childhood, his problems in institutions, and other circumstances similar to the background information introduced in White's case.<sup>121</sup> While the jury might be very moved by the defense evidence presented in these cases, they would sometimes be unsure as to whether "things that happened to the defendant could be mitigating circumstances"<sup>122</sup> or, if it was mitigating evidence, exactly what bearing it should have on their sentencing decision. Through explaining mitigating evidence in part by drawing upon empirical data relating to risk factors, Haney believes he has been able to provide juries with a better understanding of why defense evidence relating to a defendant's troubled history is relevant to its sentencing decision.<sup>123</sup>

#### CLOSING ARGUMENTS

In all three cases, the defense counsel made a powerful closing argument to the jury. The themes presented in the three arguments, however, were quite different. In the *Malvo* and *White* cases, the attorneys' arguments were based almost entirely on the circumstances relating to the defendant's personal history that had been introduced into evidence during either the guilt or penalty phase of the trial. In the *Gonzalez* case, on the other hand, at least two-thirds of the attorney's argument did not present a case-specific theme for life but was rather an argument against imposing the death penalty in any case.

Craig Cooley's eloquent appeal for Lee Malvo's life is a classic illustration of an argument in which the attorney draws almost entirely from evidence presented during the trial to develop a case-specific argument for life. In arguing for Malvo's life, Cooley emphasized the vulnerability of youth. In addition, he reminded the jury of the salient aspects of Malvo's

120. For an article in which Haney explains the empirical data relating to "risk factors," see Craig Haney, *The Social Content of Capital Murder: Social Histories and the Logic of Mitigation*, 35 Santa Clara L. Rev. 547 (1995).

121. For an account of one such case, see Welsh S. White, *The Death Penalty in the Nineties: an Examination of the Modern System of Capital Punishment 80-91* (1991).

122. *Id.* at 85.

123. Haney Interview, *supra* note 69.

history, emphasizing both Malvo's vulnerabilities and the seductive appeal that John Muhammad would present to a youth with those vulnerabilities.

Although Cooley articulated some broader themes toward the end of his argument, he took pains to demonstrate the relevance of those themes to the specific question of whether Lee Malvo should be sentenced to death. In responding to the prosecutor's assertion that some people are "born bad," he adverted to the religious principle that every individual has the possibility of redemption. In developing this point, he emphasized the "good within . . . every child," thus focusing the jury's attention on the youthful defendant before them. In his final appeal in which he asked the jury to exercise compassion and mercy in choosing its punishment, moreover, he was able to recall for the jury one of the most poignant aspects of Lee Malvo's history. Alluding to Malvo's mother's practice of leaving him with caretakers during his childhood, he explained that the jury was to be the last in a "long line of [Lee's] caretakers." He then reminded the jury of the phrase used in Jamaica when a caretaker is entrusted with the care of a child. Given the mitigating evidence presented in the case, Cooley's invocation of the Jamaican phrase "Punish this child, save the eye" reminded the jury of the tragic circumstances of Malvo's history while at the same time appealing to them to exercise mercy in choosing his punishment.

Michael Burt's closing argument on behalf of William White also presented a case-specific theme for life. During his argument, Burt focused almost entirely on the mitigating evidence introduced by the defense, explaining that this evidence showed not only the influences that brought the defendant to the point where he committed the capital crimes but also that he would be able to make a positive contribution if confined for life in a maximum security prison. Burt did advert to the fact that White was "not the worst of the worst," thus suggesting to the jury the criterion they should apply in deciding whether the death penalty should be imposed. He concluded his argument by reading a letter from White's sister that alluded again to White's tragic history and reminded the jury that White's life had had and could continue to have a positive impact on those who came in contact with him.

Carlos Garcia's argument in the *Gonzalez* case was not primarily directed toward the facts of the defendant's case. Garcia did provide the jury with specific reasons why Gonzalez should not be sentenced to death: he reminded the jury of the evidence relating to the defendant's life history, emphasizing that the change in Gonzalez's behavior following his head injury constituted "mitigation." He also argued that the defendant would

not be a continuing threat to society if he were incarcerated in a maximum security prison, adverting to the evidence showing that the defendant lacked the inclination or the capacity to be a threat to other prisoners. The predominant theme of his argument, however, was that a jury deciding whether a capital defendant should be sentenced to death or life imprisonment should always opt for the life sentence. Garcia's obvious sincerity, his eloquence, and his ability to draw from religious principles made his argument extraordinarily powerful.

Despite the success of his argument in Gonzalez's case, however, Garcia agrees with the view that a penalty trial closing argument that presents a case-specific theme for life is generally preferable. Garcia, who has been remarkably successful in avoiding death sentences when defending capital defendants,<sup>124</sup> states that the *Gonzalez* case was somewhat aberrational in that there was relatively little mitigating evidence to introduce at the penalty trial. In a typical penalty trial, Garcia states he would want to be able to present at least "20 different witnesses who can each tell something different about the defendant."<sup>125</sup> When making a closing argument in that kind of case, Garcia would present a case-specific theme that would make reference to the significance of all of the mitigating evidence. When the mitigating evidence is relatively scant, however, it is essential for the defense attorney to present a closing argument that articulates an argument against imposing the death sentence in general. Garcia's argument in Gonzalez's case provides an excellent example of such an argument.

124. As of June 1, 2004, Garcia had defended eight capital defendants. Three of the cases went to trial. Two of those defendants were sentenced to life imprisonment and one was acquitted. Garcia Interview, *supra* note 93.

125. *Id.*