

## FOUR      Defending Capital Defendants Who Have Strong Claims of Innocence

*T*he large number of death row defendants who have been exonerated raises the question as to how often innocent defendants are charged with capital offenses. Determining the frequency with which this occurs is impossible because, as I indicated in the last chapter, in most capital cases there is no irrefutable proof relating to the defendant's guilt or innocence. As the exonerations indicate, assessing the frequency of capital defendants' actual guilt or innocence through examining verdicts in capital cases will not yield an accurate estimate.

Defense attorneys who specialize in capital cases agree that a substantial majority of defendants charged with capital offenses are guilty of something, though not necessarily the capital crimes with which they are charged. Beyond that, however, defense attorneys are unwilling to provide estimates. In fact, experienced defense attorneys do not usually try to assess their clients' guilt or innocence. Instead, they consider the information provided to them by the defendant and the defense investigation and seek to determine whether the defendant has a viable defense to the crime charged.

In practice, a defendant charged with a capital offense will often insist to his attorney that he is totally innocent. When the defense team's investigation shows that the defendant's claim is weak or implausible, a skilled defense attorney will generally be able to dissuade the defendant from insisting on that claim or, at least, from asserting it strongly at the capital trial. In some cases, however, the defense investigation will show that the defendant in fact has a strong claim of innocence, one that the attorney

believes has a significant chance of success. When this occurs, the attorney will often have to confront difficult issues in preparing for trial and, in the event the defendant is convicted of the capital offense, deciding what, if any, evidence will be presented at the penalty trial.

When the defendant has a strong claim of innocence, he may believe that his attorney should focus only on presenting the strongest possible defense at the guilt trial so that he will be acquitted at that stage. If the attorney expresses a desire to have the defense also prepare for a possible penalty trial, the defendant may resent the implied suggestion that a penalty trial could be necessary. His response may be, "I told you I was innocent. If you are preparing for the penalty trial, that means you don't believe I am innocent. If you don't trust me when I tell you I am innocent, I don't trust you to represent me when my life is at stake."<sup>1</sup>

A defense attorney's response to her client in this scenario is likely to vary depending on the extent of her experience with capital cases. Criminal defense attorneys lacking experience in capital cases may dismiss the importance of preparing for the penalty trial because they share their client's view that he will be acquitted of the capital offense. Michael Burt, a Federal Death Penalty Resource Counselor who frequently advises attorneys representing capital defendants,<sup>2</sup> says that lawyers with experience in ordinary criminal cases but not in capital cases often "talk themselves into thinking they don't have to worry about the penalty phase because they have a great shot of winning the case."<sup>3</sup> Part of the problem, according to Burt, is that these attorneys often "grossly underestimate the difficulty in convincing a death-qualified jury that there is a reasonable doubt as to the defendant's guilt."<sup>4</sup> Burt states that "death-qualified juries do not evaluate evidence in the same way as other juries and are thus much more likely than other juries to credit the prosecution's evidence and less likely to acquit the defendant or to find him guilty of a lesser [i.e., noncapital] offense."<sup>5</sup> As a result, even able and experienced criminal defense attorneys who lack expe-

1. E-mail from Michael Millman to author (Nov. 10, 2003) (on file with author).

2. Telephone Interview with Michael Burt, Federal Death Penalty Resource Attorney (Mar. 17, 2003) [hereinafter Burt Interview].

3. *Id.* For a fuller explanation of Burt's view on this point, see Michael N. Burt, *Overview: Effective Capital Representation in the Twenty First Century*, 1 California Death Penalty Defense Manual 7 (1998 ed.).

4. Burt Interview, *supra* note 2.

5. *Id.*

rience in capital cases may fail to prepare for the penalty trial because they are confident that there will be a favorable outcome at the guilt trial.<sup>6</sup>

Burt and other attorneys who specialize in capital cases unequivocally reject this approach. Because they are aware that even defendants with very strong claims of innocence may be convicted of the capital offense, these attorneys insist that a lawyer representing a capital defendant should always prepare for the penalty trial. If the defendant objects to preparing for the penalty trial, Burt says that there are two ways to deal with his objections. If the defendant would agree that a death sentence is a worse alternative than a life sentence, the attorney can emphasize to the client that it is “always necessary to prepare for the worst.”<sup>7</sup> The attorney might tell her client that, even though she is hopeful that the defendant’s trial defense will be successful, she wants to be prepared for every contingency. Therefore, it is essential that the attorney be able to present persuasive mitigating evidence at the penalty trial in the event the defendant is found guilty of the capital offense.

In addition, the defense attorney can truthfully tell her client that investigating the defendant’s background may lead to evidence that will assist the defense at the guilt trial.<sup>8</sup> Witnesses who are familiar with the defendant may be able to testify to his good character, thereby convincing the jury that the defendant is simply not the kind of a person who could have committed the crime.<sup>9</sup> Or if the government is introducing the defendant’s incriminating statements to establish his guilt, evidence relating to the defendant’s mental problems may be presented to cast doubt on the reliability of his statements.<sup>10</sup>

When dealing with a capital defendant who persists in objecting to the

6. For an account of one such case, see Welsh S. White, *A Deadly Dilemma: Choices by Attorneys Representing “Innocent” Capital Defendants*, 102 Mich. L. Rev. 202, 203–08 (2004) [hereinafter White, *A Deadly Dilemma*].

7. Burt Interview, *supra* note 2.

8. Burt Interview, *supra* note 2; Telephone Interview with Gary Taylor, an attorney in Austin, Texas, who specializes in representing capital defendants (Mar. 25, 2003) [hereinafter Taylor Interview].

9. A defendant in a criminal case is allowed to have witnesses testify to his good character for the purpose of showing that, in view of his character traits, he was less likely to have committed the crime charged. Character witnesses often testify to the defendant’s peaceful reputation, for example, for the purpose of showing the defendant was less likely to have attacked the victim.

10. Interview with John Niland, Federal Death Penalty Resource Attorney (Mar. 11, 2003) [hereinafter Niland Interview]. For an analysis of cases in which capital defendants with mental problems were convicted on the basis of police-induced false confessions, see Welsh S. White, *Confessions in Capital Cases*, 2003 U. Ill. L. Rev. 979, 995–1006.

introduction of mitigating evidence at the penalty trial, experienced capital defense attorneys will sometimes exert considerable pressure on the defendant to change his mind. Richard Jaffe, an Alabama defense attorney who has represented dozens of capital defendants, provides an example. Jaffe was appointed to represent Gary Drinkard at his retrial for a capital offense. At his first trial, Drinkard, who consistently maintained his innocence, had been convicted of murder and sentenced to death. During the penalty trial in that case, Drinkard's attorney presented no mitigating evidence because Drinkard had instructed him not to.<sup>11</sup> After Drinkard's conviction and death sentence were reversed,<sup>12</sup> Jaffe and two other attorneys represented him at his second trial.<sup>13</sup>

While these attorneys were preparing for Drinkard's second trial, Drinkard indicated that, if he was again convicted of the capital offense, he still did not want to have any mitigating evidence introduced at his penalty trial. He stated that he would prefer execution to spending the rest of his life in prison. When Jaffe was informed of this, he met with Drinkard for the first time. He told Drinkard that they had a great defense team and that he thought the investigation and preparation for trial were going very well. He then told Drinkard that he could not continue to be a part of the defense team if Drinkard persisted in his refusal to have mitigating evidence introduced at a possible penalty trial. When Drinkard asked why, Jaffe replied, "I don't defend people who want to die." Drinkard then changed his mind and signed an agreement that stated that he was willing to have his attorneys present mitigating evidence on his behalf in the event that there was a penalty trial. The agreement was ultimately irrelevant, however, because Drinkard was acquitted at his second trial.<sup>14</sup>

When a capital defendant has no objection to presenting mitigating evidence at the penalty trial, the defense attorney's obligation to investigate for the purpose of presenting evidence at the penalty trial would appear to be clear. As the Court observed in *Wiggins*, the American Bar Association (ABA) Guidelines have long provided that a capital defense counsel's investigation should "comprise efforts to discover all reasonably available mitigating evidence."<sup>15</sup> Neither the ABA Guidelines nor any other source suggests that a capital defense attorney's obligation to investigate mitigat-

11. See *Ex Parte* Drinkard, 777 So. 2d 295, 297 (Ala. 2000).

12. See *id.* at 297 (reversing conviction because evidence of prior bad acts was improperly admitted at trial). For a fuller account of the *Drinkard* case, see *supra* Chapter 3.

13. Telephone Interview with Richard Jaffe (Mar. 8, 2003) [hereinafter Jaffe Interview].

14. *Id.*

15. *Wiggins v. Smith*, 123 S. Ct. 2527, 2537 (2003).

ing evidence varies depending on the strength of the capital defendant's defense at the guilt trial.

Some defense attorneys may believe, however, that in certain types of cases there is no need to investigate mitigating evidence because, even if the defendant is convicted of the capital offense, the proper strategy at the penalty trial will be to rely entirely on persuading the jury that they should not sentence the defendant to death because of their lingering doubt as to his guilt. When the government's case is based on weak circumstantial evidence, for example, the defense attorney may assert: first, if the defendant is convicted, a lingering doubt argument should be made to the penalty jury; and, second, since a jury's lingering doubt as to the defendant's guilt is the factor that is most likely to lead the jury to spare the defendant's life,<sup>16</sup> the attorney should not dilute the force of the lingering doubt argument by introducing mitigating evidence relating to the defendant's background.

In order to assess this claim's validity, it is necessary to consider under what circumstances the strategy of relying solely on a claim of lingering doubt at the penalty trial is reasonable. I will thus examine penalty trial strategies adopted by experienced capital defense attorneys in cases in which a capital defendant was convicted despite asserting a strong claim of innocence at the guilt trial.

### *Penalty Trial Strategy*

Experienced capital defense attorneys uniformly reject a strategy that places undue emphasis on convincing the jury that has just convicted a defendant that there is a lingering doubt as to that defendant's guilt. As I have already indicated, jurors on a death-qualified jury are likely to evaluate evidence in a way that is strongly favorable to the prosecution. These jurors are thus significantly less likely than the normal population to perceive a lingering doubt, or any kind of doubt, as to a criminal defendant's guilt. In addition, members of any jury may believe that, once the jury has returned a guilty verdict, that verdict resolves *all* possible doubts against the

16. See, e.g., William Geimer & Jonathan Amsterdam, *Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases*, 15 Am. J. Crim. L. 1, 51-52 (1994) (interviews from jurors in ten Florida cases indicated that jurors' lingering doubt as to the defendant's guilt was the most important factor to jurors who voted for life imprisonment). See generally Scott E. Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty*, 83 Cornell L. Rev. 1557, 1577 n.44 (1998) (summarizing data relating to jurors' views of lingering doubt).

defendant.<sup>17</sup> Indeed, they may feel that a defense attorney's argument that there is still a lingering doubt as to guilt is disrespectful to the jury in the sense that it challenges the legitimacy of their recently returned verdict.<sup>18</sup>

Experienced capital defense attorneys thus conclude that even in cases where a strong claim of innocence has been presented at the guilt trial, sometimes the defense should make no reference to lingering doubt at the penalty trial. Instead, the defense should take the position that the guilt and penalty trials are completely separate proceedings. If one attorney represented the defendant at the guilt trial, it may be helpful to have a new attorney represent him at the penalty trial. That attorney may begin by telling the jury that the defense accepts the jury's verdict. She will then explain that the case has now entered a new stage in which the jury will have to decide whether the defendant will be sentenced to death or life in prison and that, in deciding this question, they will need to "look at who the defendant is."<sup>19</sup> The attorney will then proceed to present mitigating evidence that will explain the defendant's background, including his childhood, his mental health, the difficulties he has encountered, his accomplishments, and other circumstances, including perhaps "the suffering the defendant's family will go through if the defendant is sentenced to death."<sup>20</sup> Although the attorney may hope that some jurors will refuse to vote for the death penalty because they have a lingering doubt as to the defendant's guilt,<sup>21</sup> she may decide not to refer to this possibility during the penalty trial but instead focus entirely on presenting mitigating evidence that will provide the jury with a multilayered picture of the defendant.

As in every capital case, defense attorneys who have presented a claim of innocence at the guilt trial will have to make choices as to the nature of the mitigating evidence to be presented at the penalty trial. In a typical case,

17. See Sundby, *supra* note 16, at 1576–80 (after returning a guilty verdict, penalty jurors frequently fail to perceive a difference between reasonable and residual doubt; rather, they view their verdict as foreclosing any doubt as to the defendant's guilt).

18. *Id.* at 1578 (some jurors feel insulted at the suggestion that they should have lingering doubts; these jurors fervently believe that they "would not have convicted the defendant in the first place had any such doubt existed").

19. Burt Interview, *supra* note 2.

20. See e-mail from Stephen Bright to author (Aug. 31, 2003) (on file with author).

21. According to experienced capital defense attorneys, juries in capital cases sometimes decide during the guilt trial that they will not impose the death sentence. Jurors who have some doubt as to the defendant's guilt may agree to vote for a guilty verdict only on the condition that the jury will not impose the death sentence. Telephone Interview with Stephen Bright (Mar. 6, 2003) [hereinafter Bright Interview]; Telephone Interview with David Bruck, Federal Death Penalty Resource Attorney (Apr. 6, 2003) [hereinafter Bruck Interview].

the investigation of the defendant's social history will yield a wide array of evidence, including evidence relating to the defendant's troubled childhood and impaired mental health, as well as evidence relating to his positive accomplishments. Some of this evidence could be presented at the penalty trial in order to explain why the defendant committed the crime: perhaps his mental problems reduced his ability to control his conduct, or the abuse he was subjected to as a child made him more prone to respond aggressively to stressful situations.<sup>22</sup>

In cases where the defense has presented a strong claim of innocence at the guilt stage, experienced capital defense attorneys state that they will be less likely to introduce mitigating evidence designed to explain why the defendant committed the crime. Their reasoning is that it is essential for the defense to maintain a consistent theory throughout the capital trial.<sup>23</sup> If the defense has maintained during the guilt trial that the defendant did not commit the offense, introducing evidence at the penalty trial that seems to explain why he committed it may lead the jury to view the defense as disingenuous. If the defense's penalty trial evidence provides an explanation for why the defendant is likely to respond to a stressful situation with violence, for example, the jury may feel that the defense attorney should have presented this evidence at the guilt stage rather than asserting a claim of innocence without providing information that would have helped the jury assess that claim.

When it is possible, the defense will thus try to present only mitigating evidence at the penalty trial that is consistent with the defendant's claim of innocence at the guilt trial. Such evidence, which attorneys refer to as "good guy" evidence, may include evidence relating to the defendant's good character, his good employment record, or the help he has provided to others in various situations.<sup>24</sup> Even if strong evidence of this type is unavailable, the defense might at least be able to present testimony that the defendant is a nonaggressive individual who does not have a prior history of violent behavior.

If significant "good guy" evidence is introduced, it will dovetail with the

22. See Welsh S. White, *Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care*, 1993 U. Ill. L. Rev. 323, 360–65 [hereinafter White, *Effective Assistance*].

23. See Andrea D. Lyon, *Defending the Death Penalty: What Makes Death Different?*, 42 Mercer L. Rev. 695, 708 (1991).

24. In some cases, capital defense attorneys will be able to introduce evidence relating to the defendant's positive contributions in prison. In one case, the defendant's mitigating evidence related to the fact that he had defused a dangerous situation in prison, thereby probably saving another prisoner's life. Jaffe Interview, *supra* note 13.

claim of innocence asserted at the guilt trial. Through presenting this evidence, the defense attorney hopes to revive any doubts that members of the jury may have had as to the defendant's guilt. In the course of explaining who the defendant is, the defense attorney hopes to reinforce the idea that the defendant is *not* the kind of person who would have committed this crime. Some experienced capital defense attorneys can recall cases in which, after they had presented strong "good guy" mitigating evidence, the penalty jury not only declined to impose the death penalty but asked if they could change the guilty verdict they had rendered at the guilt trial,<sup>25</sup> a possibility that is foreclosed by the rule that a jury cannot change its verdict after it has been accepted by the court.<sup>26</sup>

Unfortunately, in some cases in which the defendant has maintained his innocence during the guilt trial, "good guy" evidence that could buttress this claim at the penalty trial will be noticeably lacking. The only potential mitigating evidence will be witnesses who may be able to provide a sympathetic portrait of the defendant but can do so only by testifying to his problems, which may include, for example, "severe mental impairment perhaps resulting from organic brain damage and a profoundly troubled childhood in which the defendant was subjected to horrendous abuse and profound neglect."<sup>27</sup> Evidence of this type is double-edged: on the one hand, by providing jurors with a fuller understanding of the defendant's history, it may cause them to empathize with him; on the other hand, it has the potential for not only eliminating jurors' lingering doubts as to the defendant's guilt, but also strengthening their perception that sparing his life will enhance the danger to society, a consideration that empirical data indicates will weigh heavily in the penalty jury's decision.<sup>28</sup>

25. Telephone Interview with Michael Charlton (Mar. 10, 2003) [hereinafter Charlton Interview]; Niland Interview, *supra* note. 10.

26. In determining the scope of a jury's authority to change its verdict in a capital case, courts have invariably concluded that "the authority of a jury to amend or correct a criminal verdict terminates with the beginning of the next phase of the proceeding." See David J. Marchitelli, Annotation, *Criminal Law: Propriety of Reassembling Jury to Amend, Correct, Clarify, or Otherwise Change Verdict after Jury Has Been Discharged, or Has Reached or Sealed its Verdict and Separated*, 14 A.L.R. 5th 89, 172 (1993).

27. Charlton Interview, *supra* note 25. According to Stephen Bright, it is not at all unusual for a capital defendant to have this kind of background. Bright Interview, *supra* note 21.

28. Results from the Capital Jury Project show that jurors "who believed the defendant would be a future danger [were] more likely to vote for death . . . than [those] who believed otherwise." John H. Blume, Theodore Eisenberg & Stephen P. Garvey, *Lessons from the Capital Jury Project, in Beyond Repair? America's Death Penalty*, 144, 164-65 (Stephen P. Garvey ed., 2003). Such jurors fear that "unless the defendant is executed he will be released from prison too soon." *Id.* at 176. Death, they believe, is "the only real way to guarantee the defendant's incapacitation." *Id.*



The choice of whether to present double-edged mitigating evidence or to present little or no mitigating evidence might seem to present a dilemma for a capital defendant's attorney. When confronted with this choice, however, experienced capital defense attorneys invariably conclude that mitigating evidence must be presented, even if there is some chance that the jury may view it as double-edged. Stephen Bright states that in a capital case defense counsel should always present mitigating evidence that will explain the defendant's background and history to the jury, thereby enabling the jury to gain an understanding of the defendant as a person.<sup>29</sup> As another experienced attorney explains, "[y]ou have to put the jury in the defendant's neighborhood" so that it will be able to "understand where he's been" and "what it was like growing up in the way he did."<sup>30</sup>

### *Arguing Lingering Doubt at the Penalty Trial*

Even though arguing lingering doubt to the penalty jury is often risky, experienced capital defense attorneys believe there are situations in which such arguments should be made. In deciding whether to argue lingering doubt, these attorneys will consider various factors, including the length of the jury's deliberations, the strength and nature of both the government's and the defendant's case, the nature of the defense's possible penalty trial evidence, and the law of the jurisdiction relating to whether evidence or argument relating to lingering doubt may be presented. In most cases, these same factors will also play an important role in determining the content of the attorney's lingering doubt argument, the extent to which the attorney will introduce other mitigating evidence, and the ways in which the attorney will interweave the arguments relating to lingering doubt with those relating to the other evidence. In order to illustrate experienced capital defense attorneys' strategies, I will provide examples of several lingering doubt arguments and then a fuller description of two penalty arguments, which illustrate the context in which lingering doubt arguments are presented and the methods through which skilled capital defense attorneys interweave these arguments with those based on different types of mitigating evidence.

29. Bright Interview, *supra* note 21.

30. Charlton Interview, *supra* note 25.

*Examples of Lingering Doubt Arguments*

In some cases, an experienced capital defense attorney will decide to argue lingering doubt only if the jury's lengthy deliberations at the guilt stage signal that at least some of the jurors had doubts as to the defendant's guilt of the capital offense.<sup>31</sup> When the jury's deliberations indicate the possibility of such doubts, the defense attorney will refer to the deliberations in her closing argument, explaining to the jurors that, if any of them had doubts as to the defendant's guilt for the capital offense, this provides a reason why they should vote against the death penalty.

This kind of argument can be effective even if the issue that precipitated lengthy jury deliberations related to the defendant's degree of guilt rather than his total innocence. In a case involving William Brooks, a young African American charged with robbing, raping, and intentionally shooting a young white woman to death, for example, Brooks's attorney, Stephen Bright, did not dispute that Brooks had robbed, raped, and shot the young woman, causing her death. The defense did maintain, however, that the shooting was accidental rather than intentional. At the guilt trial, the jury adjudicated Brooks guilty of capital murder, but only after engaging in lengthy deliberations relating to the question of whether the shooting was intentional or accidental.<sup>32</sup>

In his penalty trial argument, Bright referred to the jury's lengthy deliberations as a reason why they should not impose the death penalty:

And we told you about the circumstances of the gun going off and you spent a day agonizing over that and I'm sure discussing it back and forth and you came to the decision you came to. But I'd suggest to you, ladies and gentlemen, that part of that struggle is a reason for voting for a life sentence in this case, the fact that it was a close question, a difficult question, a question that obviously some of you had different views about before you came to an ultimate agreement on it. But if there's some lingering question among any of you as to exactly what happened when all those events were going on out there, that's a reason to consider life and vote for life because that goes to the degree of culpability and blameworthiness in this case.<sup>33</sup>

31. Bright Interview, *supra* note 21.

32. Case Example: Presenting a Theme Throughout the Case (distributed by Southern Center for Human Rights) at 9 (jury in *Brooks* case deliberated for a day before returning a "verdict of guilty of malice murder") [hereinafter Case Example].

33. *Id.* at 23.

Bright's argument was obviously directed to the jurors who had earlier experienced difficulty in concluding that the defendant intentionally shot the victim. While not criticizing those jurors' decisions to join with the majority in returning a verdict of guilty of capital murder, Bright's argument emphasized that each juror should reconsider whether she had any lingering doubt as to the defendant's guilt and, if she had such a doubt, use it as a basis for declining to vote for the death sentence.

When the government's case has obvious weaknesses—a key government witness has been shown to be unreliable, for example—the defense attorney may decide to make a lingering doubt argument in a way that exploits that weakness. In making this argument, the attorney will generally be careful to avoid any express or implied criticism of the jury's verdict. David Bruck, a federal Death Penalty Resource Attorney, observes that, in such cases, he will sometimes begin his argument relating to lingering doubt by telling the jury that, based on the evidence they had to work with and the standard of proof they were required to apply, their verdict was reasonable.<sup>34</sup> After thus making it clear that he respects the jury's verdict, Bruck will explain that the jury should adopt a different perspective in deciding whether the evidence is strong enough to warrant a death sentence.

Bruck's lingering doubt argument on behalf of Paul Mazzell, a South Carolina capital defendant, provides an apt example. At Mazzell's guilt trial, the chief government witness was Danny Hogg, who testified under a grant of immunity that he and another man obeyed Mazzell's orders to bring the victim to Mazzell and that Mazzell alone killed the victim. Hogg's testimony was impeached by his past criminal record, his own admission that he had given false testimony at an earlier trial, and his admission that his grant of immunity would be revoked if the government concluded that he himself had killed the victim.<sup>35</sup> Three witnesses testified that Hogg had in fact killed the victim, and the prosecutor acknowledged to the jury that Hogg was not a believable witness.<sup>36</sup> The jury nevertheless convicted Mazzell of capital murder.

At the penalty trial, Bruck began his lingering doubt argument as follows.

34. Bruck Interview, *supra* note 21.

35. *State v. Merriman*, 337 S.E.2d 218, 227 (S.C. Ct. App. 1985).

36. *Id.*

I want to preface this by saying again that what I'm about to say is not to quarrel with your verdict or say you made a mistake. You took the evidence as it existed in the courtroom during the past week or two; and you, consistent with your oath, applied your good judgment to that evidence, and you found beyond a reasonable doubt that Paul was guilty. And I'm not going to quarrel with that in any way, shape or form.

Bruck then moved to the question of how the jury should approach the evidence in deciding the question before them at the penalty stage.

The evidence presented to you, as it had been pulled together by the State over the last week or two, was guilty; but before you can put this man to death based on that evidence you have to be sure of [another] thing beyond a reasonable doubt, and that is that the evidence that was given to you and that you had to make do with as it had been pulled together and hammered into shape by the time you had to deliberate, that that evidence will never, never change. And you have to be sure of that beyond a reasonable doubt. Y'all know exactly what I'm talking about.

You have to be sure beyond a reasonable doubt that Mr. Hogg won't come up next month, next week, ten years from now, long after Paul has been executed and buried and, for whatever reasons of his own, his interests having changed, he's not going to come along and say: "Well, I'm kind of embarrassed to say this now, but I didn't tell the truth at the trial." You have to be sure of that because, if Paul was still doing his life sentence in prison and Mr. Hogg happened to say that, something can be done about it; but if he's executed, it can't.<sup>37</sup>

The argument that the jury's verdict at the guilt stage may be erroneous will have special resonance with jurors who are aware of cases in which convicted capital defendants have been exonerated. When making a lingering doubt argument, some attorneys directly refer to these cases. David Wymore, the Chief Public Defender for the State of Colorado, will sometimes ask the penalty jury, "How do you think the innocent defendants got onto death row? Was it just the cops? Don't you think there was a jury there? There were 12 decent people. How did they get

37. *Id.*, Record 1993 [hereinafter Merriman Record].

buffaloed?”<sup>38</sup> Other attorneys are less confrontational. The attorney may begin by telling the jury that she respects its verdict but in reaching the judgment that an individual is guilty of a crime, “we are dealing with human institutions that we know are fallible.”<sup>39</sup> The attorney may then refer to cases in which defendants convicted of crimes were later exonerated and state that in those cases the government’s evidence seemed to establish the defendant’s guilt and the juries that convicted those defendants were convinced that their verdicts were correct.<sup>40</sup>

In some cases, the attorney will seek to draw even closer parallels between the present case and prior wrongful convictions. When the prosecution’s case has obvious weaknesses, Bruck will tell the jury that in cases in which convicted defendants were later exonerated there were “always warning signs.”<sup>41</sup> He will then explain some of the types of evidence that constitute warning signs—government witnesses who change their stories, for example, or disputed forensic evidence—and show that those same warning signs are present in the case before them.<sup>42</sup>

In arguing lingering doubt to the penalty jury, an experienced capital defense attorney will often assert that the jury should not impose the death penalty unless they find that the government’s evidence meets a higher standard of proof than the beyond a reasonable doubt standard that governed their deliberations at the guilt stage. Michael Burt states that in California a capital defendant’s attorney will sometimes begin orienting jurors as to the differing standards of proof at the voir dire stage.<sup>43</sup> The attorney may even use one or more diagrams to illustrate the different standards of proof required at different stages of the proceedings, including perhaps reasonable suspicion to detain the defendant, probable cause to arrest him, proof beyond a reasonable doubt to convict him of the capital offense, and proof beyond *any* doubt to sentence him to death.<sup>44</sup> After the defendant has been convicted of the capital offense, the attorney at the penalty trial will then refer to the earlier schematic presentation and remind the jury that they should not impose the death penalty unless the evidence of guilt meets the most stringent standard. In some California cases, this argument

38. Telephone Interview with David Wymore, Chief Deputy Public Defender for the State of Colorado (Jan. 21, 2004).

39. Burt Interview, *supra* note 2.

40. Bruck Interview, *supra* note 21; Burt Interview, *supra* note 2.

41. Bruck Interview, *supra* note 21.

42. *Id.*

43. Burt Interview, *supra* note 2.

44. *Id.*

will be especially effective because the trial judge's lingering doubt instructions will reinforce the attorney's argument that the prosecution's evidence of guilt should be required to meet a higher standard of proof at the penalty stage.<sup>45</sup>

Even when they expect no help from the judge's instructions,<sup>46</sup> however, experienced capital defense attorneys will still sometimes argue that the jury should apply a higher standard of proof before imposing a death sentence. In some jurisdictions, the prosecutor may object to this argument on the ground that no higher standard of proof is required. But even if the judge sustains a prosecutor's objection, the defense may benefit. The objection will call the jury's attention to the issue of lingering doubt and perhaps signal to them that the prosecutor does not believe that his case has been proved beyond *any* doubt. The prosecutor's objection, moreover, may give the defense attorney an opportunity to reinforce to the jury the message that it has the ultimate responsibility for deciding whether the death penalty should be imposed.

In the *Mazzell* case, for example, after pointing out to the jury that it was possible that the chief government witness might later change his story, Bruck added that he didn't know whether that would happen. When he next addressed the level of proof the jury should require to sentence the defendant to death, the prosecutor objected.

MR. BRUCK: But before you put a man to death on their testimony, you have to be sure beyond all doubt that it will never happen. And that's ridiculous. Who can be sure of that beyond all doubt?

MR. STONEY: Your honor, I object. The law is not all doubt. It's a reasonable doubt, your Honor.

THE COURT: Reasonable doubt, Mr. Bruck.

MR. BRUCK: Yes, sir. *The amount of doubt that you feel you're willing to tolerate before you put a man to death, of course, is between you and your own conscience.* And I won't go into that anymore.<sup>47</sup>

45. See, e.g., *People v. Cox*, 809 P.2d 351, 386 (Cal. 1990) (holding that a jury instruction on lingering doubt may be required by statute if warranted by the evidence). *But see* *People v. Medina*, 906 P.2d 2, 29 (Cal. 1995) (jury may consider lingering doubts in penalty phase, but there is no federal or state constitutional right to a jury instruction).

46. In most jurisdictions, the judge will not instruct the penalty jury that their lingering doubt as to the defendant's guilt may be considered as a mitigating circumstance. See, e.g., *Franklin v. Lynaugh*, 487 U.S. 164, 172-73 (1988); *Melson v. State*, 775 So. 2d 857, 898 (Ala. Crim. App. 1999). See generally White, *A Deadly Dilemma*, *supra* note 6.

47. Merriman Record, *supra* note 37, at 1993-94 (emphasis added).

Bruck, however, did further refer to the subject of the standard of proof. After talking about mistakes that have been made in the court system, he emphatically stated, “The death penalty is for cases where there can’t have been any kind of mistake, and this is just not such a case.”<sup>48</sup> After explaining why Mazzell’s case was one in which there could have been a mistake, Bruck adverted to the prosecutor’s earlier objection, using it to emphasize the jury’s responsibility for determining whether a death sentence should be imposed.

Mr. Stoney jumps up and objects and says: “Well, it’s not beyond all doubt. It’s just beyond a reasonable doubt.” Well, that’s fine for him to say, and that’s fine for the law to say; but the responsibility for whether Paul Mazzell lives or dies is not on Mr. Stoney. It’s not even on Judge Fields. It’s on each individual one of you.<sup>49</sup>

Through this argument, Bruck effectively communicated to the jury the reasons why it would be appropriate for them to decline to impose the death penalty unless the prosecutor established the defendant’s guilt beyond any doubt.

Excerpts from two penalty trial arguments provide a fuller picture of the strategic choices that skilled defense attorneys make when presenting a lingering doubt argument. In particular, the arguments in these two cases—one from California and one from New York—illustrate the ways in which different attorneys direct the jury’s attention to the issue of lingering doubt, interweave arguments relating to lingering doubt with arguments based on mitigating evidence, and highlight the importance of humanizing the defendant so that the jury will have a reason to spare his life.

### *The Henderson Case*

Philip Henderson was convicted of capital murder in California, a state that allows the fullest consideration of lingering doubt as a mitigating factor. Henderson, represented by Michael Burt and James Pagano, was charged with four counts of first-degree murder and one count of auto theft.<sup>50</sup> Ray and Anita Boggs, their one-year-old child, Ray Jr., and Anita

48. *Id.* at 1995.

49. *Id.* at 1996.

50. *People v. Henderson*, 275 Cal. Rptr. 837, 839 (Cal. Ct. App. 1990).

Boggs's unborn fetus<sup>51</sup> were found dead on or about February 28, 1982, in the area underneath their apartment (which was on stilts) and in the backyard of the apartment building. Ray had been shot to death and Anita had been strangled.<sup>52</sup> The Boggs family had been killed about six weeks earlier, during the second week of January 1982, and items belonging to them had been taken from their apartment at the time of their deaths.<sup>53</sup>

The police investigating the case determined that Philip Henderson and his wife Velma had stayed at the Boggses' apartment in January 1982. When contacted by the police, Henderson told them he and his wife had last seen the Boggses on January 11, the day on which the Hendersons left San Francisco to go to Florida. Henderson did not admit to the police that he had taken the Boggses' property or tell them that he had noticed anything unusual in the apartment before he and his wife left for Florida.

The police then discovered that Henderson and his wife had sold property that belonged to Ray Boggs during their trip to Florida.<sup>54</sup> In addition, witnesses noticed that Henderson had in his possession a .22 caliber long rifle similar to a rifle belonging to Boggs.<sup>55</sup> A criminalist testified that the bullet retrieved from Ray Boggs's brain was fired from a .22 caliber long rifle. While the expert could not positively identify the rifle possessed by Henderson as the one that had fired the bullet, he testified that the identifying characteristics of a bullet fired from that gun were "consistent with the characteristics found on the bullet which killed Ray Boggs."<sup>56</sup>

Henderson testified in his own defense. He denied the murders but admitted that he and his wife stole the Boggses' property on January 11. He testified that Boggs was involved in selling drugs and that on one occasion he had been threatened by two men, including one called "Hawaiian Jimmy," who beat Boggs on the head with a cane. He testified that he and his wife decided to leave for Florida because they were frightened by Boggs's drug business and the violence that accompanied it.

Henderson claimed that on January 11 he and his wife had helped Ray Boggs look for Ray's wife, who was missing. When they returned to the Boggses' apartment that evening, the apartment was in disarray and Ray Boggs's rifle was off the rack and leaning against the wall. The Hendersons

51. See Cal. Penal Code § 187(a) (Deering 2003).

52. *Henderson*, 275 Cal. Rptr. at 840-41.

53. *Id.* at 840-41.

54. *Id.* at 842.

55. *Id.* at 842-43. One of these witnesses also testified that Henderson told him that he and his wife were "on the run." *Id.* at 843.

56. *Id.*



became frightened by the circumstances and decided this would be a good time to leave. Because they had little money, “[t]hey decided to steal the Boggses’ property.”<sup>57</sup> Among other things, they took Ray’s rifle and truck. Later, Henderson sold some of the stolen property. He admitted that he initially lied to the police about his activities because he did not want to be prosecuted for stealing the Boggses’ property.

After five or six days of deliberations, the jury found Henderson guilty of two counts of capital murder and several lesser crimes. Because the defense had presented a strong claim of innocence at the guilt trial, Henderson’s attorneys decided to present evidence and arguments relating to lingering doubt at the penalty trial.

During the penalty trial, the defense introduced evidence relating to the defendant’s innocence that had not been admitted and would not have been admissible during the guilt trial. Most significantly, Rose Marie Hunt was allowed to give her opinion as to the appropriate penalty for Henderson. Hunt was a close friend of the Boggses and the godmother to the Boggses’ one-year-old child; she knew not only the Hendersons and the Boggses, but also the other people who were associated with both families during the period when the murders occurred. She testified that in her opinion Mr. Henderson should be given a life sentence because “there’s other parties involved in this that hasn’t been brought forth.”<sup>58</sup> Asked to explain, she broke down in tears and testified from her wheelchair, “I believe that if he’s executed in the gas chamber he may be executed as an innocent victim. And I believe at that time when the true people have (been) found out, there will be no way to bring him back to life like there is no way to bring my friends back to life. I believe that if he is put to life imprisonment without possibility of parole, that if he is guilty, then he’s punished. If he is not guilty, he has the possibility of coming out and the real people being convicted.”<sup>59</sup> Other witnesses who knew Henderson also testified that in their opinions Henderson was not guilty of the killings that had been committed.<sup>60</sup>

During his closing argument at the penalty trial, the prosecutor specifically addressed the issue of lingering doubt. He first referred to the testimony of the witnesses who expressed the opinion that Henderson was not guilty. He argued that these witnesses lacked the knowledge necessary

57. *Id.* at 844.

58. *People v. Henderson*, *supra* note 50, Record 6955 [hereinafter *Henderson Record*].

59. *Id.* at 6957.

60. Burt Interview, *supra* note 2.

for an informed opinion. He pointed out that some of the witnesses could not assess the defendant's propensities at the time of the crime because they had not seen him for many years.<sup>61</sup> In the case of Ms. Hunt, he emphasized that she had not attended the guilt trial. He then said:

She didn't listen to the evidence. She didn't consider that evidence. That's like someone being a Monday morning quarterback who didn't even watch the game the day before. I object to that. I think that's real inappropriate.<sup>62</sup>

After thus seeking to dismiss the testimony of the defense's lingering doubt witnesses, the prosecutor argued that the jury's verdict at the guilt stage should preclude the defense from establishing lingering doubt as a mitigating factor.

Now, if there is a doubt in your mind, I like to think—I like to think that you'll resolve that in the guilt phase. And I think you did on certain of the offenses. I think you gave the defendant every benefit of every doubt that he was ever able to get. . . . But I submit to you any doubt was resolved in that jury room in the guilt phase. And I'll submit to you that it's rather, it's rather a strong word, and I apologize, but it's rather insulting to get up here and say maybe you were wrong, just maybe you were a tiny bit.<sup>63</sup>

Consistent with the empirical data relating to capital jurors' attitudes, the prosecutor's assertion that defense counsel's lingering doubt argument was "insulting" seemed designed to lead the jury to weigh that argument against the defendant because it represented a refusal on the part of the defense to accept the jury's verdict.

The prosecutor's primary argument, however, was that the jury should view their verdict at the guilt stage as foreclosing any doubts as to the defendant's guilt. After characterizing the lingering doubt argument as insulting, the prosecutor returned to this theme.

61. Henderson Record, *supra* note 58, at 7152 (witnesses were basing their opinions on "someone they knew ten years ago, 15 years ago, 19 years ago in the case of Mr. Comorato [who] knew the defendant when he was ten years old").

62. *Id.* at 7153.

63. *Id.* at 7154.

People have to make decisions. If we never made decisions, we would never move. Some of you in occupations make decisions, life and death decisions on a daily basis. You have to make decisions. You made your decision, let's go with it now. If you are going to return a verdict of life without possibility of parole, I hope you do it for other than lingering doubt. I think that is selling yourself short. That is a cop out.<sup>64</sup>

The prosecutor thus continually sought to reinforce the idea that, through its verdict at the guilt stage, the jury had resolved all doubts against the defendant.

Defense counsel James Pagano, who had not participated in the guilt trial but was the primary attorney during the penalty trial,<sup>65</sup> made the final argument to the penalty jury.<sup>66</sup> Early in the argument, Pagano referred to the jury's lengthy deliberations, observing that it showed they were "serious about [their] job."<sup>67</sup> A little later, he specifically responded to the prosecutor's argument relating to lingering doubt, emphasizing that a higher standard of proof should be required to impose the death penalty.

And in spite of what counsel said, lingering doubt is very valid here especially in the facts and circumstances of this case. . . . You can find somebody guilty beyond a reasonable doubt, we explained that to you in the voir dire. There is that higher area, just that little bit more. And they allow you because this is the death penalty case.<sup>68</sup>

Consistent with David Bruck's approach, Pagano next asked the jury to visualize how the case might look to them in the future.

And you can say yes, I believe I found this is the guy, that did it beyond a reasonable doubt, but would you 5 years from now, 10 years from now, 20 years from now, this is the guy that did it, he really did it.<sup>69</sup>

64. *Id.* at 7154–55.

65. Burt Interview, *supra* note 2.

66. In California, the defense always has the opportunity to make the final penalty trial argument in a capital case. *Id.*

67. Henderson Record, *supra* note 58, at 7171.

68. *Id.* at 7173.

69. *Id.*

Having developed the framework for arguing lingering doubt, Pagano proceeded to argue that specific aspects of the case “cried [out] for lingering doubt.”<sup>70</sup> He argued, for example, that the jury should give weight to Rose Marie Hunt’s opinion:

[N]obody knows the cast of characters that hung out at 753 Webster Street or that other milieu down at Jack In The Box better than Rose Marie Hunt. And the child’s godmother is telling you you may have the wrong person here, better give it some attention.<sup>71</sup>

He also argued that, in view of the circumstantial nature of the government’s case, the jury should give weight to the witnesses who testified as to Henderson’s nonviolent character.

There is no smoking gun here . . . it is circumstantial evidence. Mr. Henderson was on trial. It was reasonable for you to conclude, perhaps, what you did. But now in the penalty phase you’ve got to know a little bit more about Phil Henderson.<sup>72</sup>

During the rest of his argument, Pagano talked primarily about the defense witnesses who had testified on Henderson’s behalf at the penalty trial. Since this testimony could accurately be characterized as “good guy” evidence, Pagano was able to effectively interweave two interrelated arguments: the witnesses’ testimony showed that Henderson’s was “a life worth sparing” and that “[t]here [was] a lingering doubt” as to his guilt.<sup>73</sup>

During the latter part of his argument, Pagano focused primarily on the penalty trial evidence relating to Henderson’s background and character. He talked about Henderson’s life, including the people who cared about him, his nonviolent character, and his kindness to children. Through this argument, Pagano sought to humanize Henderson and to convince the jury that his life was worth sparing. Pagano also referred to testimony that indicated Henderson would not be a threat to anyone if he was incarcerated for life.<sup>74</sup> He ended by urging the jury to accept the alternative of life imprisonment.<sup>75</sup>

70. *Id.* at 7174.

71. *Id.*

72. *Id.* at 7177.

73. *Id.* at 7172–85.

74. *Id.* at 7188.

75. *Id.* at 7194.

In accordance with California law, the judge instructed the jury that, in deciding whether the defendant should be sentenced to death, one of the mitigating factors they could consider was “any lingering doubt you may have about his guilt.”<sup>76</sup> After a relatively short deliberation, the jury imposed a sentence of life without possibility of parole.<sup>77</sup>

### *The McIntosh Case*

The penalty trial of Dalkeith McIntosh, who was convicted of capital murder in New York, is one in which the defense elected to introduce double-edged mitigating evidence at the penalty trial. The defense attorney’s closing argument, moreover, which interwove appeals to “lingering doubt” with a narration of the defendant’s history, provides an unusually powerful example of a closing argument that the defendant should be spared both because there was lingering doubt as to his guilt and because influences beyond his control reduced his capacity to control his conduct.

McIntosh was charged with two murders and felonious assault. The prosecution claimed that he shot his estranged wife, who was a corrections officer, one of her daughters, and her six-year-old grandson. The two women died, but the six-year-old survived and testified against McIntosh. McIntosh had previously been charged with assault in a domestic incident involving his estranged wife; the prosecution’s theory was that McIntosh killed his wife to prevent her from testifying against him in the assault case and then shot the others because they witnessed his murder of his wife.<sup>78</sup> McIntosh also had several other prior convictions, including at least one for assault and battery.<sup>79</sup>

The shootings took place on a secluded street in a sparsely populated area just outside Poughkeepsie, New York. At the time of the shooting, the three victims were in a Volkswagen bug which was stopped in the middle of the street. A motorist driving in the opposite direction arrived just as the shooter, a black male, fled into a wooded area on the large grounds of a closed state psychiatric hospital. Police responded quickly. About a half hour later, an officer on the opposite side of the hospital grounds saw

<sup>76</sup> *Id.* at 7205.

<sup>77</sup> Burt Interview, *supra* note 2.

<sup>78</sup> E-mail from Russell Stetler (July 3, 2003) (on file with author).

<sup>79</sup> Telephone Interview with Russell Stetler, Director of Investigation and Mitigation for the New York State Capital Punishment Defender Organization (June 5, 2003) [hereinafter Stetler Interview].

McIntosh walking toward town through a swamp. When he asked McIntosh to stop, McIntosh ran; the pursuing officer eventually placed him under arrest.

The six-year-old witness identified McIntosh as the shooter. McIntosh's principal trial attorney, William Tendency, argued that this child, who had a long history of mental and emotional disorders, was highly vulnerable to suggestion and that the circumstances under which he identified McIntosh made the identification unreliable. To support the child's identification, the government presented evidence that, more than a year after the crime, an environmental cleanup crew clearing the swamp where McIntosh was seen by the police found a no-longer-operable handgun, and an FBI analyst testified that the bullet lead in this handgun matched the lead in the slugs that killed the victims. Since the swamp had been thoroughly searched at the time of McIntosh's arrest, Tendency vigorously attacked the government's effort to establish a connection between McIntosh and the newly discovered murder weapon. At the conclusion of the guilty trial, McIntosh was convicted of four counts of capital murder.<sup>80</sup>

At the penalty trial, Tendency made both the opening statement and closing argument to the jury. Early in his opening statement, he told the jury he was "going to be honest with" them and "do things some people told me not to do."<sup>81</sup> He then said:

I disagree with your verdict. I have to say that. I know I'm not supposed to. I know it's not something you want to hear, but it's something I'm going to say. I have tried to be as honest with you as I can. I hope you respect that. I know you have been honest with us, especially with me, and I respect that as well. So I accept your verdict. I have to. I'm no use to this man if I don't. I accept it. I understand it, I respect it, but I disagree with it.<sup>82</sup>

After some further comments relating to his disappointment with the jury's verdict, Tendency stated that the purpose of the penalty trial was "to decide if

80. Two involved the intentional murder of his estranged wife and her daughter in the same transaction that involved the intentional murder of the other and two involved the intentional killing of his estranged wife's daughter to prevent her from testifying as a witness to the murder of his estranged wife and the attempted murder of her grandson. *See* N.Y. Penal Law § 400.27(3) (Consol. 2003).

81. *People v. Dalkeith McIntosh*, State of New York, County Court, Dutchess County, Index #1996/4530 Superseding Indictment #146/96, Before County Court Judge George Marlow, Tendency Opening Statement in Penalty Trial 27 [hereinafter Tendency Opening Statement].

82. *Id.* at 28.

this man lives or dies.”<sup>83</sup> In explaining how the jury should approach this decision, he referred to the fact that a juror’s lingering doubt could be a basis for voting against the death penalty.<sup>84</sup> He also told the jury that the defense would present witnesses that would enable them to “learn a little bit about this man.”<sup>85</sup>

Tendy then provided an overview of the defendant’s life story and alluded to the conflict between himself and the defendant with respect to presenting this story to the jury.

It’s a very, very sad story. He doesn’t want it told. This man doesn’t want this story told, he doesn’t want to hear it, and I have taken that decision away from him. There’s some painful memories here. . . . I think . . . that his punishment really began the day that he was born and will continue until the day he dies.<sup>86</sup>

During the penalty trial, the defense presented witnesses who developed the salient details of McIntosh’s sad story, which included an impoverished childhood in Jamaica, horrendous child abuse, and the defendant’s struggles to overcome severe mental and physical problems.

Some of this evidence was certainly double-edged in the sense that it might lead the jury to believe that the defendant’s prolonged exposure to abuse would enhance his propensity toward violence, thereby increasing both the jury’s confidence in its earlier guilty verdict and their sense that, if McIntosh’s life was spared, he might be dangerous in the future. Nevertheless, the defense presented McIntosh’s tragic life story in graphic detail. In his final argument to the jury, moreover, Tendy emphasized some of the most horrendous aspects of McIntosh’s history.

This man was born to a mother who never wanted him and a father who abandoned him. . . . All he ever knew was hatred and cruelty. That’s what he was raised on. He had a stutter so bad that he was afraid to speak, and when he did everybody laughed at him, taunted him, and he became so afraid that finally he shut down, stopped talking as a child. . . . And brutalized beyond anything that I could ever imagine. Whipped until he was cut and bleeding, whipped with sticks

83. *Id.* at 31.

84. *Id.* at 32.

85. *Id.* at 34.

86. *Id.* at 35.

soaked in salt water so when the cuts were there they would burn from the salt. . . . This was a small child. This is mitigation.<sup>87</sup>

Later in his argument, Tendy reiterated that he did not “believe [McIntosh] committed these crimes.”<sup>88</sup> Nevertheless, he also made a powerful statement explaining why McIntosh’s tragic history should be relevant to the jury’s sentencing decision: He told the jury that to make that decision they needed “to walk in this man’s footsteps.”<sup>89</sup> In recounting those footsteps, he focused especially on the significance of the brutal child abuse.

If your mother savagely beat you as a child, took out a whip and whipped you with it until your skin bled, until your skin was cut and salt got into the wound and made it burn, if she took a board and beat you with it, took a pot and hit you with it until your head was bleeding, and she took your head and slammed it against walls, and if she took a wooden board with a nail in it and beat you while your flesh was being cut, telling you she wants you dead, tell me where would you all be right now? You want to talk about a choice?<sup>90</sup>

In this part of the argument, Tendy’s point seemed to be that the abuse McIntosh suffered impaired his capacity to govern his conduct, thus reducing his culpability for any crimes he may have committed. Although this argument—and the vivid description of the abuse that supported it—could have had the potential for undercutting Tendy’s arguments based on lingering doubt, Tendy obviously believed that this was a risk worth taking. In order to humanize McIntosh, Tendy presented the full history of McIntosh’s childhood so that the jury would be able to see not only the man Dalkeith McIntosh but “also that little boy.”<sup>91</sup>

In charging the jury, the judge in the *McIntosh* case said nothing about “lingering doubt” but, in accordance with New York law, told them that they could return a life sentence even if they found that the aggravating circumstances outweighed the mitigating circumstances. After fairly short deliberations, the jury imposed a sentence of life without possibility of parole.<sup>92</sup>

87. Tendy’s Summation in Penalty Trial 28–31 [hereinafter Tendy’s Summation].

88. *Id.* at 36.

89. *Id.* at 39.

90. *Id.* at 42.

91. *Id.* at 52.

92. Stetler Interview, *supra* note 79.



*Further Reflections*

Based on the material in this chapter, several points seem clear: attorneys representing defendants with strong claims of innocence have to make difficult strategic choices; and, in some instances, inexperienced attorneys' choices increase the likelihood that the defendants they represent will be sentenced to death. Experienced capital defense attorneys' strategic choices relating to the introduction of evidence at these defendants' penalty trials, moreover, provide information that is pertinent to assessing the circumstances under which a capital defendant's attorney can make a reasonable strategic choice to curtail investigation for mitigating evidence.

The reason an attorney representing a capital defendant with a strong claim of innocence has to confront difficult strategic choices is that there is a potential conflict between the goals to be achieved at the guilt and penalty trials. If the attorney places her primary emphasis on securing a favorable verdict at one trial, she may jeopardize the defendant's chances at the other one. Most often, inexperienced attorneys place undue emphasis on securing a favorable verdict at the defendant's guilt trial, thereby jeopardizing his chances at the penalty trial.

The defendant's instructions to his attorney, moreover, may exacerbate the problem. The defendant may instruct the attorney to focus primarily or exclusively on asserting his claim of innocence. If the attorney decides to adopt this approach and the defendant is convicted of the capital offense, the defense will then have little or no mitigating evidence to introduce at the defendant's penalty trial.

In such cases, the defense attorney can argue to the penalty jury that it should spare the defendant because of its lingering doubt as to his guilt. If the jury feels there is no doubt as to the defendant's guilt, however, this strategy is likely to be counterproductive. The jury may feel that the defendant's failure to accept responsibility for his actions is a consideration that argues in favor of imposing the death penalty. In addition, the defense's failure to introduce mitigating evidence that will humanize the defendant reduces the likelihood that the jury will obtain the kind of understanding of the defendant that could lead it to spare his life. In these cases, the defense attorney's strategy will increase the defendant's chances of receiving the death sentence. Paradoxically, a capital defendant's strong claim of innocence thus sometimes creates a trap for unwary defense counsel that, if not avoided, will increase the likelihood of the defendant's execution.

The strategy adopted by experienced capital defense attorneys shows

how these attorneys are able to avoid this trap. Regardless of the strength of the capital defendant's claim of innocence, these attorneys conduct a full investigation for mitigating evidence. Whether or not they argue that the jury should spare the defendant on the basis of its lingering doubt as to his guilt, moreover, they introduce significant mitigating evidence relating to the defendant's background at the penalty trial. As William Tendy's strategy in the *McIntosh* case demonstrates, these attorneys will choose to introduce mitigating evidence that is double-edged in the sense that it reveals the defendant was subjected to influences that may increase his propensity toward violence rather than introduce no mitigating evidence at all. Introducing even double-edged mitigating evidence may lead the jury to understand the defendant so that, even if they totally reject his claim of innocence, they will have sufficient empathy for him to spare his life.

The defense strategy in cases like *McIntosh* provides data bearing on the question of when a defense attorney can make a reasonable strategic decision to curtail investigation for mitigating evidence because she believes the mitigating evidence likely to be found would not be helpful. When a capital defendant has a strong claim of innocence, it would be plausible to assume that the defense might want to curtail investigation for mitigating evidence when it appears that the only mitigating evidence likely to be found will be double-edged in the sense that it has some tendency to undermine the defendant's claim of innocence. As Tendy's performance in *McIntosh* demonstrates, however, if it is necessary to introduce double-edged mitigating evidence in order to provide the jury with a full picture of the defendant's background, experienced capital defense attorneys will introduce that evidence despite its possible inconsistency with the defendant's claim of innocence.

If experienced defense counsel will opt for introducing double-edged mitigating evidence for the purpose of explaining the defendant's background in these cases, then clearly they will employ the same approach in capital cases in which the defendant's innocence is not at issue.<sup>93</sup> The lesson to be drawn from the material presented in this chapter is thus that experienced capital defense attorneys will almost never curtail investigation for mitigating evidence at an early stage of the proceedings because of a conclusion that the evidence likely to be found would not be intro-

93. For examples, see *infra* Chapter 5.

duced at the penalty trial. If introducing double-edged mitigating evidence is necessary to explain the defendant to the penalty jury, experienced capital defense counsel will introduce that evidence. Before deciding what strategy will be adopted at the penalty trial, experienced capital defense attorneys will thus nearly always conduct a full investigation for mitigating evidence.