Opening Statement

Lawyers and Death Cases

by Michael E. Tigar

Chair, Section of Litigation

America's death row population continues to rise. Texas, Georgia, Louisiana, and Florida are among the leaders, but restoration and extension of the death penalty in other states have steadily increased the number of capital cases.

Neither the ABA nor the Section of Litigation has taken a position on the wisdom of, or constitutional basis for, the death penalty. A growing consensus among civilized states rejects capital punishment. Some argue, persuasively to my mind, that from this consensus arises an international customary law norm.

Still, for the time being, a clear majority of the Supreme Court has determined that imposition of the death penalty is not cruel and unusual, at least in certain circumstances. In the 1988 Term, the Court addressed death penalty issues involving minors and the mentally retarded. The Justices expressed a wide variety of views on the Eighth Amendment. I have dealt with some of these questions in a book review in a recent issue of *Columbia Law Review*. There you may find a more "sesquipedalian" look at the jurisprudence of death, and a fuller treatment of legal issues discussed in this column.

All litigators who are or may be counsel in death cases should buy and read the book I reviewed. James Liebman's two-volume treatise, *Federal Habeas Corpus Practice and Procedure*, is a major contribution to the theoretical and practical lore of capital case litigation.

Two major issues confront litigators in death penalty matters. First, the quality of legal representation at capital trials is, despite the stellar efforts of many lawyers, generally lamentably low. Second, the need for postconviction representation continues to outpace the ability of volunteer lawyers and resource centers to deal with it.

To put these issues in context, consider the Supreme Court's death penalty work in the past few years.

The Supreme Court has issued a number of decisions designed to validate death verdicts, and to cut off access to federal review. In *Wainwright v. Sykes*, 433 U.S. 72 (1977), the Court held that the accused will in many cases be foreclosed from raising a federal constitutional claim if his lawyer failed to make a timely objection. This rule binds a defendant to many lawyer decisions without evidence that he even knew of the federal right, much less acquiesced in waiving it. Coupled with the low threshold for competence of counsel—the people who must make the constitutional objections—established by *Strickland v. Washington*, 466 U.S. 668 (1984), *Wainwright* sweeps many meritorious claims out the courthouse door.

Harmless Errors

The Supreme Court also has carved out generous "harmless error" territory within which death sentences may be upheld. For example, in *Darden v. Wainwright*, 477 U.S. 168 (1986), the Court rejected an attack on a prosecutor's jury speech that flagrantly violated the rules of professional responsibility and invited the jury to abandon reason and respect for legal rules.

Finally, the Court has placed many constitutional errors beyond the reach of federal judicial power by fashioning and applying a new test for retroactive application of newly minted principles of fairness.

At the same time, the Court has spoken to other capital case concerns in clear and hopeful terms. In *Penry v. Lynaugh*, 109 S.Ct. 2834 (1989), the Court held that capital sentencing juries must be guided by a jury charge that focuses on the content and worth of a defendant's mitigating evidence. In *Caldwell v. Mississippi*, 472 U.S. 320 (1985), the Court held that a prosecutor may not mislead jurors by telling them

to resolve their doubts in favor of death because a reviewing court will put matters right if they err. In *Batson v. Kentucky*, 476 U.S. 79 (1986), the Court gave defense counsel the right to object to prosecutors' racially discriminatory use of peremptory challenges. And *Ake v. Oklahoma*, 470 U.S. 68 (1985), recognizes a defendant's right to court-paid psychiatric assistance.

Although our members have divergent views about the death penalty itself, hardly anyone questions that all those accused of crimes are entitled to vigorous and competent defense. The ABA, supported by our Section, has adopted rigorous standards for capital case defense counsel. Despite this consensus in the profession, competent defense is not a uniform reality. Careful observers have documented serious defects in the quality of defense assistance in capital cases. These findings have been reported in research papers by, among others, Ronald Tabak and Professor Ira Robbins.

Deference to Death Verdicts

The federal courts' refusal to enforce a high constitutional standard for assistance of counsel is compounded by another trend in federal habeas decisions: according substantial deference to verdicts that impose the death penalty. A recent Fifth Circuit decision states that juror "anger" and the desire for "retribution" may play a permissible role in such verdicts. I have discussed this opinion at greater length in the book review mentioned earlier.

The federal courts' deferential approach to death verdicts and counsel appointment problems confronts trial lawyers with a heightened challenge. How can we improve the quality of trial representation in these cases? I believe that jurors do not lightly impose the death penalty. The extraordinary number of death sentences in some states could be stemmed by raising the quality of trial advocacy. What special trial skills are needed?

In a typical death case, the crime is heinous, even savage. The prosecutor's evidence often dwells upon facts that will call out anger and retribution. Defenses come in two basic types: (1) that the accused is not at all involved, for example, because he has an alibi; or (2) that the grade of the offense is not capital murder but some other lesser crime. The latter type of defense admits involvement in the events so graphically presented by the prosecutor. Even the former type of defense may put the defendant's undesirable traits before the jury. In either event, if the defendant is found guilty of capital murder, the separate penalty phase of trial requires the highest skill and dedication from lawyers.

The defense lawyer in these cases confronts a greatly more difficult version of a familiar trial strategy choice: Do I, she asks, stress personal qualities and issues, or do I emphasize juror fidelity to rules and basic principles?

The choice between "person-based" and "rule-based" strategies occurs in civil cases as well. The former strategy dwells upon human consequences, and asks compassion. The latter strategy speaks of "common sense" and the jurors' oath to find facts without sympathy or prejudice.

In a capital case, defense reliance upon compassion for the accused risks fueling a prosecution argument about compassion for the victim. From such compassion, the prosecutor seeks to persuade the jury toward vengeance. Appellate authority is deeply divided on the limits on prosecution appeals to atavism. *Caldwell v. Mississippi* imposes a discrete boundary on one particular type of argument. *Darden v. Wainwright* may signal prosecutors that the risk of impropriety is "worth it," because the standard for harmless error is liberal.

Against this backdrop of practical wisdom and legal rules, how does counsel choose the proper approach?

Several years ago, the Smithsonian Institution asked about 30 trial lawyers to demonstrate their art at an open-air courtroom during the Folklife Festival on the Mall in Washington, D.C. The American Trial Lawyers Association provided financial and logistical support. Several of us did death-phase jury summations. I gained great insight from listening to the work of Penny Cooper, Roy Barrera, and Billy Roy Wilson.

The typical death penalty statute focuses on the severity of the offense and the prospect of future dangerousness. These are two issues on which recent Supreme Court decisions, in the hands of capable advocates, can play an important role.

Offense severity is double-edged. It

(please turn to page 58)

Opening Statement

(continued from page 2)
can be a measure of the defendant's culpable depravity, or it can reflect serious mental disturbance. Counsel must therefore apply for and use the resources the Court has commanded be available to make a clear and documented case of the defendant's condition. Family members, teachers, and co-workers should join with the expert medical witnesses to paint a fuller picture of the defendant's imbalance. A superb example of the lawyer's art in this area is Clarence Darrow's summation in the Leopold and Loeb case. While not trivializing the horror of the crime, Darrow wove together scientific opinion, evidence, and a plea for understanding.

On the second element—dangerousness—the lawyer must look to the teaching of *Caldwell*, which prohibits a prosecutor or judge from trivializing the jurors' sense of responsibility, and *Penry*, which recognizes the court's duty to instruct on mitigating evidence.

The themes for combating a finding of future dangerousness, as I have worked them out with the help of other lawyers, are three:

Who Makes the Choice?

First, emphasize the severity of the defendant's inevitable punishment. Penny Cooper, stressing the life sentence without parole that is the alternative to execution, argues: "This defendant will die in prison. Your verdict has already seen to that. The issue now is *when* he will die, and who determines that time, *you*, or God."

Second, how can we know that the defendant will never make a useful contribution? His own maturation or a new insight into his disordered mind could make him a useful prison hospital worker or librarian. Darrow spoke of this prospect in his *Leopold-Loeb* summation. I reminded a jury at the Folklife Festival of how a wise driver goes cautiously on a foggy night: "Don't overdrive your lights. Don't make consequences that go further than you can see."

Third, defense counsel must seek to create an atmosphere of deliberative, reflective, and yet human solemnity. This is more than merely difficult. Roy Barrera of San Antonio has sometimes asked jurors to listen to the victim's voice: "From her home in Heaven, she says, 'Don't kill him. For the love of God, don't do it.'"

I concluded one Smithsonian summation, after marshaling the evidence, like this: "I'm done now. I've said all I can. I'm going to go home tonight and my little girl will ask me, 'Daddy, what did you do today?' And I will tell her, 'Honey, I tried to save the life of one of God's creatures.' Members of the jury, what will you say when you go home?"

Any discussion of trial skills can have value that transcends the kind of trial being considered. Presenting expert testimony or summing up to a jury does not become qualitatively different because the case is about a tort instead of a crime. I hope some of the thoughts here will be useful to every reader.

Beyond that, reflection on the skills required and the stakes involved in capital cases should freshen our perception of the need for quality trial counsel. Every lawyer who reads these words can contribute to filling that need.

We must educate more lawyers in trial skills. We need to invest bar, law school, law firm, and public resources in bringing more lawyers up to the standards voted upon by the ABA. Advocacy training is fine, but the legal profession must commit resources to imparting the skills and commitment necessary to fill serious gaps in availability of legal representation.

At the broadest level of argument, we must demand that, before there are executions, our system be fair, just, reliable and decent enough to dignify an argument that the death penalty may appropriately be imposed. More narrowly, appellate court opinions that point to the inevitability of jury discretion, but that deny the right to effective counsel to confine and direct that discretion along humane avenues, are fatally flawed.

Trial lawyers at all skill levels can volunteer their services. Even those who are not fully death-case "qualified" can participate as second chair lawyers while increasing their skills. The time commitment necessary to prepare effectively and present a capital case can easily overtax the abilities of a single lawyer. Where second chair appointments are not routine, bar groups can work with judges and defender organizations to set them up.

I repeat: If the right to effective counsel were more widely respected, many capital cases would never reach appellate courts. This assertion is simply a particular instance of the trial lawyer's fighting faith.

The Supreme Court has stopped far short of recognizing a constitutional right to counsel for death penalty habeas corpus petitioners. Nonetheless, Congress and most judges join with the ABA in acknowledging the need for representation at this postconviction phase.

There is a special challenge and

commitment in handling such habeas cases. Lawyers are taught in the ordinary case to select the best issues and jettison the rest. In capital cases, things may be different. The risk of inadvertent waiver and the consequences of overlooking even a marginal point lead to an inclusive rather than a selective approach. This observation may be familiar to many. Professor Liebman's excellent treatise provides a much deeper discussion of the provenance and consequences of habeas corpus strategy.

Federal court dockets and death row statistics bear grim, mute witness that the need for appointed and volunteer counsel will not soon abate. Whatever changes are wrought in postconviction procedures will probably not alter this reality. Again, the bar as an interest group and each lawyer individually can make a contribution. Everyone who reads these words can help solve the crisis of representation. Lawyers whose talents and schedules preclude involvement in capital case trials can nonetheless play a vital role. The ABA Section of Litigation staff in Chicago can point you toward the right place to volunteer your assistance.

Time and again in my professional life, lawyers have volunteered their effort and talent when the need was clear. They did this out of a genuine respect for the values that hold our profession together and not because some transitory Supreme Court majority said that the Constitution did or did not confer a right to counsel. Those lawyers raised standards for the entire profession, and heightened the esteem in which lawyers are held. ☐