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National Public Defense Symposium: "Unique Ethical Dilemmas in Capital Representation"

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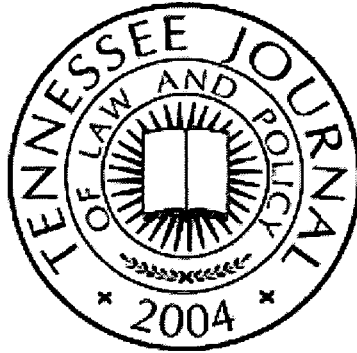
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NATIONAL PUBLIC DEFENSE SYMPOSIUM

***ACHIEVING THE PROMISE OF THE SIXTH AMENDMENT:
NON-CAPITAL AND CAPITAL DEFENSE SERVICES***

**“UNIQUE ETHICAL DILEMMAS IN CAPITAL
REPRESENTATION”**

PANEL THREE

**FRIDAY, MAY 21, 2010
AFTERNOON SESSION**

THE UNIVERSITY OF TENNESSEE COLLEGE OF LAW

PANEL THREE SPEAKERS:

MODERATOR: PROFESSOR PENNY J. WHITE,
Director, Center for Advocacy & Dispute Resolution
Faculty Advisor, Tennessee Journal of Law & Policy

PROFESSOR SEAN O'BRIEN,
University of Missouri-Kansas City School of Law
Kansas City, Missouri

BRADLEY A. MACLEAN
Office of the Post-Conviction Defender
Nashville, Tennessee

MARY ANN GREEN,
Assistant Public Defender
Chattanooga, Tennessee

ANN SHORT-BOWERS,
Attorney, The Bosch Law Firm
Knoxville, Tennessee

PENNY WHITE: The previous sessions have focused on the effects of insufficient resources on the Sixth Amendment's¹ promise. This session is somewhat different as it will focus on other impediments to the delivery of effective assistance of counsel, specifically, impediments to counsel in capital cases that raise not only legal issues but ethical issues.

The panel format will also be different. The panel will discuss hypothetical cases that are strikingly similar to cases that happen every day. These hypotheticals will be posed first to a panel of experienced criminal defense and capital lawyers, and then hopefully we'll have time to open it up for discussion.

Each panelist will speak primarily to one hypothetical, which I will introduce to you, and then we'll have some interaction between the panelists before moving on to the next hypothetical. At the end, we will engage in your discussion, comments or questions.

Let me describe the materials for this session. On the flash drive are three articles that our panelists thought would be helpful to you as you look at these issues in greater depth. They include Larry Fox's article in the *Hofstra Law Review* on capital guidelines;² Sean O'Brien's article in the same, volume 36, of the *Hofstra Law Review* on supplemental guidelines for the mitigation function;³ and Brad MacLean, Bill Redick and Shane Truett's article *Pretend Justice* on death penalty representation in Tennessee, which is in volume 38 of the *Memphis Law*

¹ U.S. CONST. amend. VI.

² Lawrence Fox, *Capital Guidelines and Ethical Duties: Mutually Reinforcing Responsibilities*, 36 HOFSTRA L. REV. 775, (2008).

³ Sean D. O'Brien, *When Life Depends on It: Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 HOFSTRA L. REV. 693 (2008).

*Review.*⁴

All three of those articles are on your flash drive. But to make it a little easier to follow along and participate in this particular session, we also have a handout. The handout includes a copy of the hypotheticals, the PowerPoint slides and then some additional resources that are listed on the slides that are pertinent to the individual hypotheticals. So that's what you will have in front of you. Also, we have copied in total some of the most pertinent provisions from the *ABA Guidelines*⁵ and two ethics opinions from Tennessee.

So as we begin the discussion, we'll hear a lot of our panelists undoubtedly referring to the *ABA Guidelines*⁶ and on the slide, which is in front of you and also in your handout, is the link to those guidelines. The ones that we will be most frequently referring to, 10.5, 10.7, 10.11 and 10.13,⁷ are in your handout, either completely or partially, the relevant parts. And as I mentioned, there are two Tennessee ethics opinions that may be helpful to Tennessee lawyers in your handouts.

Let me then begin by introducing our panelists very briefly because you have the bios of three of our panelists in your biographical material. Our panelists will draw upon their own personal experiences, but also upon excellent, excellent resources that they will make you familiar with and that will be on the slides.

First, we are honored to have with us, in alphabetical order, Mary Ann Green, who is Assistant Public Defender from Hamilton County, which for those of

⁴ William P. Redick, Jr., Bradley A. MacLeanm & M. Shane Truett, *Pretend Justice: Defense Representation in Tennessee Death Penalty Cases*, 38 U. MEM. L. REV. 303 (2008).

⁵ A.B.A. GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEF. COUNSEL IN DEATH PENALTY CASES (2003).

⁶ *Id.*

⁷ *Id.*

you who aren't Tennesseans, is Chattanooga. Second, Bradley A. MacLean, who is with the Office of the Post-Conviction Defender in Nashville, Tennessee. Then we have Sean O'Brien, who is a Professor of Law at the University of Missouri-Kansas City in Kansas City, Missouri. And I have to give special thanks to Ann Short-Bowers, who is a lawyer in Knoxville with the Bosch Law Firm. She is neither Larry Fox, who had an emergency, nor David Dow who had an emergency, but she has graciously agreed to come on less than 24 hours notice and help us out. So please first join me in thanking our panelists.

Our first hypothetical is about formulating trial strategy. The situation is this: The client is charged with capital murder. You, as counsel, discuss with the client your plan to interview the client's mother. The client says, "Absolutely not, you are not to bother my mother about any of this. She has suffered enough. I am directing you not to contact her under any circumstances." The client is competent and does not change his or her mind even after extensive explanation.

And we pose the question to Professor O'Brien, "How do you proceed?"

SEAN O'BRIEN: Thank you. This is the familiar "don't be talking to my momma" hypothetical. It involves ethical rules pertaining lawyer-client relationships and making weighty decisions about life and death. I had a client on death row tell me this story. It is in bad taste, I'll tell you in advance. That's never stopped me before from telling a story. But there were these two guys on death row in Texas, both scheduled to be executed on the same night, and the warden is giving them their final requests.

And so the warden says to the first guy, "I'll give you one request before we execute you." And he says,

“You know, I’d like to hear ‘ACHY BREAKY HEART’⁸ one more time.” And the warden says, “You got it.” He turns to the second guy and says, “Do you have any last requests?” And the guy says, “Yeah, I want to go first.”

The hypothetical makes me think of the second Star Trek movie, the WRATH OF KAHN,⁹ in which you learn that Captain Kirk cheated on the Kobayashi Maru scenario¹⁰ because he doesn’t believe in the no-win scenario. So in order to pass the test, he re-writes the question. And the part of the question here that I would rewrite is the assumption of competence because, in my view, a defendant facing a capital charge is very, very unlikely to be in a position to make a competent decision to forego mitigating evidence or to forego an appeal. So let me talk about that from this point of view.

First of all, we have to talk about theory, right? Because there are so many law professors in the crowd, I feel like we at least need to give some lip service to this. But trust me—those of us who have been doing this for a long time—we’ve got this down in practice. We’ll just never work it out in theory. The standard that the ethical code gives us is that we’re supposed to let the client decide what plea to enter, whether to waive the jury trial, whether to testify, and that sort of thing.

The ethical standards also tell us as lawyers that we have the right to decide what witnesses to call and whether

⁸ BILLY RAY CYRUS, *ACHY BREAKY HEART* (PolyGram/Mercury 1992).

⁹ *STAR TREK II: THE WRATH OF KHAN* (Paramount Pictures 1982).

¹⁰ The Kobayashi Maru scenario was a test at Starfleet Academy involving a simulation in which the cadet, acting as a starship captain, was surrounded by hostile ships while responding to a distress call from the Kobayashi Maru, a stranded freighter. There was no way out; the purpose of the exercise was to determine how the cadet would respond to the no-win scenario. James T. Kirk does not believe in the no-win scenario, so he changed the puzzle. The same strategy works here.

and how to cross-examine those witnesses and what motions to make. All tactical and strategic decisions are the exclusive province of the lawyer after consultation with the client. And so that's the premise from which I begin to work this out in practice.

The other premise though, comes from the Constitution. And the standard in death penalty cases is fully-informed decision making in matters of life and death.¹¹ And that goes not just for the decision of the judge, the decision of the jury, and the decision of the prosecutor about whether to seek the death penalty, but it's also the client's role to make fully-informed decisions about what evidence to present. How can the client know what evidence you might present in mitigation if we have been barred from talking to his or her mother prior to even getting to this stage? So that's the second point.

The other thing the *ABA Guidelines* give us in *Guideline 10.7*,¹² the commentary is particularly important: That we have an obligation not only under the Constitution but under the ethical guidelines, to conduct a thorough and independent investigation as to both guilt and penalty. And that obligation exists regardless of any statement by the client that evidence bearing on penalty is not to be collected or presented.¹³ That's an important provision of the *Ethical Guidelines*.

The other critically important aspect of the *Ethical*

¹¹ “[W]here sentencing discretion is granted, it generally has been agreed that the [sentencer’s] ‘possession of the fullest information possible concerning the defendant’s life and characteristics’ is ‘[h]ighly relevant—if not essential—[to the] selection of an appropriate sentence.’” *Lockett v. Ohio*, 438 U.S. 586, 602-03 (1977) (quoting *Williams v. New York*, 337 U.S. 241, 247 (1949)) (alterations in original).

¹² A.B.A. GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEF. COUNSEL IN DEATH PENALTY CASES 10.7 (2003).

¹³ A.B.A. GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEF. COUNSEL IN DEATH PENALTY CASES 10.7(A) (2003).

Guidelines is our duty as lawyers to make every appropriate effort to establish a relationship of trust. The client telling you that you're not to talk to his or her mother is a sign of distrust. There's a problem in the attorney-client relationship. There's an absence of rapport and likely even a lack of understanding on the client's part about your need to be communicating with members of the client's family. The Guideline recommends very strongly that you see your client within twenty-four hours of appointment and that you engage in a continuing and interactive dialogue with the client.¹⁴

This is very important in the context of today's discussion because the defender system is in financial crisis; attorney-client communication is the first casualty of an overloaded public defender's office. You don't see your client as often as you should. You don't talk to your client as often as you should. And when you finally do get there to talk to your client, what do you talk about? Why haven't you been here to talk to me? And that creates a barrier in that relationship. And so this is incredibly important that we keep that thought in mind.

Ethical Consideration, 7-8.¹⁵ A lawyer should exert his best efforts to ensure decisions of the client are made only after the client has been informed of relevant considerations. Again, how can you fulfill your ethical obligation to your client if you haven't interviewed the client's entire family?

The other aspect of our obligation as lawyers regarding mitigation and guilt/innocence investigation is that we have to understand, the client is not the only person who has a stake in the outcome. Generally, as a society we have things in place to stop people from committing

¹⁴ A.B.A. GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEF. COUNSEL IN DEATH PENALTY CASES 10.5 (2003).

¹⁵ A.B.A. GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEF. COUNSEL IN DEATH PENALTY CASES 7-8 (2003).

suicide. If you're the guy standing there on the ledge next to the fellow who's thinking about jumping, only in a bad Mel Gibson movie do you say "Go ahead." And if you do, you only do it as a strategy to get him to stop.

The other aspect of this decision has to do with the context of capital litigation. We must understand as capital litigators that these decisions are made in the context of extreme trauma. Not just trauma from the capital crime, the arrest, the incarceration, but also the trauma of the child's past. And quite often when the client tells me that he or she does not want me to talk to certain witnesses or interview momma, that tells me that momma knows something that I need to know. That heightens my desire to go talk to that witness because it is likely that this person is trying to hide trauma from me.¹⁶

What's one of the classic symptoms of trauma? Avoidance. Avoidance of triggers that cause you to re-experience the trauma.¹⁷ And yet, we all know from death penalty litigation, that it is the trauma that the client has suffered that is most likely to evoke sympathy and understanding on the part of the capital decision-maker that will save his or her life.

So we have to proceed from the understanding that there are barriers between us and the mitigation case. And some of those barriers include the shame and embarrassment and humiliation of having been raised in an impoverished, abusive household. They're not proud of that. And they don't want that paraded in front of the jury or a court, especially not if it's a high publicity, high-

¹⁶ A competent mitigation investigation will invade dark, shameful family secrets; it "exposes raw nerves, re-traumatizes, scratches at the scars nearest the client's heart." Russell Stetler, *Mitigation Evidence in Death Penalty Cases*, THE CHAMPION, Jan.-Feb. 1999, at 35-36.

¹⁷ For an excellent discussion of trauma issues in capital cases, see Kathy Wayland, *The Importance of Recognizing Trauma Throughout Capital Mitigation Investigations and Presentations*, 36 HOFSTRA L. REV. 923 (2008).

profile case.¹⁸

There may be concerns about the consequences. Are my other children going to be taken away from me? Maybe they don't understand why it is you want to know this. They don't understand why this is a critical part of his or her life history. There may be some race and class and social barriers. Most of us in the capital defense community who are doing this are white while many of our clients are people of color. And so we have a lot of other kinds of barriers to get over.

But the most significant barrier I have found in these cases is the desire of the client to one day have a normal relationship with the parent, with the abuser—the idealizing of the abuser. There's a really cruel experiment that they did with monkeys sometime ago where they put needles under the fur of a surrogate mother figure and then an artificial breast from which the baby monkey would seek nourishment. And in spite of the fact that it was physically painful for those baby monkeys to snuggle up to their mother while they were eating, they never stopped trying.¹⁹ And those are our clients. Those are our clients in these cases.

And so we have to proceed with the understanding that the things that we're going to investigate will expose these raw nerves and re-traumatize and as Russ Stetler says, "Scratch at the scars that are nearest to the client's heart."²⁰ And the answer is not to avoid it and not to cave in to the client's natural tendency to stay away from those things, but to counsel the client through it by this process of

¹⁸ See John H. Blume & Pamela Blume Leonard, *Capital Cases: Principles of Developing and Presenting Mental Health Evidence in Criminal Cases*, THE CHAMPION, Nov. 2000, at 63-65.

¹⁹ See The Adoption History Project, *Harry Harlow: Monkey Love Experiments*, <http://www.uoregon.edu/~adoption/studies/HarlowMLE.htm>.

²⁰ Russell Stetler, *Mitigation Evidence in Death Penalty Cases*, THE CHAMPION, Feb. 23, 1999, at 5.

constant engagement.

This is the American Medical Association's model of suicide prevention and interventions.²¹ And you could not do a better job of diagramming the stresses that a death penalty defendant is under when facing a capital charge. You look at suicidal behavior, and there are two things that start it.

The first is stressful life event, and I think being a defendant in capital case qualifies. Does anybody disagree with that? The second is a mood or psychiatric disorder. How many of you have ever had a capital client who didn't have that going on? So in the beginning, you have the formula, and then you get the perfect storm here—the suicidal ideation, the thinking about life or death—and we're forced to engage our clients about that thought process. They're going to try to kill you. Huh, let me think about that.

Then we get to the specific factors that feed into suicidal behavior. Impulsivity. Gee, I've never had an impulsive client, how about you? Hopelessness and/or pessimism. How often do you see that as your client is starting to absorb the weight of the state's case and the massive resources that are being devoted to seek to end his or her life? If that doesn't make a normal person hopeless, I don't know what will.

Access to lethal means. Well, these are your tax dollars at work. The whole idea behind capital litigation is to provide the lethal means. And then imitation. Imitation. Who are they imitating? Governors, senators, congressmen, prosecutors, maybe even other people on death row. And then all of those add up to a suicidal act.

Then you look in the blue section on the right, the

²¹ A graphic depiction of the Suicide Risk Assessment Model discussed here is available online at Mark A. Zamorski, *Report of the Canadian Forces Expert Panel on Suicide Prevention*, <http://www.forces.gc.ca/health-sante/ps/dh-sd/spr-rps-eng.asp>.

prevention. Interventions and education awareness programs. Do you have any of those in your county jails? Screening individuals for high risk. How good is the county jail at that? Pharmacological therapy, medication. Most of our clients are not getting the medication they need. Psychotherapy. That never happens in jails, not on a meaningful level—follow-up care for suicide attempts. None of the treatments intended to ameliorate suicidal impulses or behaviors exist on a meaningful level in our client's lives.

One thing I learned about investigating suicide is that if there is one suicide attempt in a person's life, one in ten of those people who have had one suicide attempt eventually will succeed in committing suicide. And so how many of our clients have suicide attempts in their past? Virtually all. I reject the basic premise that this is a voluntary, competent decision. This is my definition that I found in the Youth Suicide Prevention Program website: "Suicide is not chosen. It happens when pain exceeds the resources for coping with pain."²² I think that's a significant factor in dealing with all of these decisions. Pain exceeds the resources for coping with pain. And it is our public defender systems in this context that provide the resources for coping with pain. It is our job as capital defense attorneys to keep the client on board and moving forward.

I actually have John McCain on my side. You know, he's an angry guy, and I have discovered it's not just because he's a Republican. I realized this when I read some comments that he made on the Anti-torture legislation. "Solitary confinement is an awful thing. It crushes your spirit, weakens your resistance, more effectively than any other form of mistreatment." This is a

²² Youth Suicide Prevention Program, Resources, YSPP Suicide Prevention Materials, July 26, 2010, <http://www.yspp.org/resources/resources.htm>.

guy who had an arm broken twice and a broken leg during interrogation, and he says the worst was solitary. And that is all of our clients on death row, all of our clients in pre-trial detention. I don't have to tell you we have more people in jail getting mental health treatment than we do in our hospitals getting mental health treatment right now. I won't dwell on it because of the materials on your thumb drive—but the *Hofstra Law Review* has some amazing articles about this very subject and about the mitigation function.

And finally, this is my argument that I'm right about this. This is Joe Amrine. I have had the “don't talk to my momma” discussion with him. In the last year of his appeals, he had no stay of execution along with ten other guys who are backed up behind a particular legal issue. The first Tuesday of every month he watched an inmate parade by his cell in the company of guards taken off to the death watch cell and executed at midnight that night. And there were ten guys waiting a year for their turn.

And after eight, he called me up and said, “I want to go next.” It had nothing to do with ACHY BREAKY HEART,²³ trust me. But he was so damaged emotionally and so ready to get out of there that he would do anything. We eventually succeeded. Rather than getting an execution warrant, he got a briefing schedule. We proved his innocence and this is the day of his release from prison.²⁴ So don't assume guilt from the fact that your client wants to volunteer to be executed, or to avoid mitigating evidence in the penalty stage of the capital trial. So this is my Exhibit One, Joe Amrine. Thank you.

²³ CYRUS, *supra* note 7.

²⁴ See *Amrine v. Roper*, 102 S.W.2d 541 (Mo. 2003) (en banc) (granting Joe Amrine habeas corpus relief and ordering his release from death row based upon a showing of innocence by clear and convincing evidence).

PENNY WHITE: All right. Facilitator's prerogative, Sean. We all know that the courts won't agree with our evaluation of our client's competence. So I'm taking you back to the question. There's been a competency determination and your client is declared competent. Your client says, "Don't talk to momma." Is your short answer "talk to momma" and competency?

SEAN O'BRIEN: My short answer is "talk to momma," because competency doesn't resolve it. There's also knowing and voluntary and intelligent decision-making on the part of the client. And you can be competent but not be making a knowing, voluntary, and intelligent decision. So client engagement is my answer to that.

PENNY WHITE: The caption under this next question is one law professor tries to take on another. Your client knowingly, voluntarily and freely says, "Don't talk to momma." Do you tell the public defenders in the audience "talk to momma?"

SEAN O'BRIEN: You know, it's sort of like—[Telephone rings.]

PENNY WHITE: Momma's calling.

SEAN O'BRIEN: There's momma. There's momma.

PENNY WHITE: She called me. I didn't call her.

SEAN O'BRIEN: You know, hopefully, and—and I'm going to sidestep your question again—

PENNY WHITE: I know that.

SEAN O'BRIEN: Because that's my prerogative, right?

And so, you know, if this happens on day one of your representation, you've got a problem. You've got a barrier to work over, and you'd better work through it with your client. And you're going to have the time to do that. So you've got something to work on.

There is a wonderful book by Xavier Amador called, *I AM NOT SICK*.²⁵ He advocates engagement with somebody who has mental illness or emotional stressors in his life, and he uses the acronym LEAP, which is Listen, Empathize, Agree and Plan. You have to hear out the client. You have to listen to what's going on. You have to show that you empathize with the client's situation. You have to agree on an approach. And you have to develop a plan. And you have to do that together. Because the reality is this: If the client says I don't want you to talk to my mother, and you say, "Screw you, I'm going to see her tonight," you're going to lose that client.

PENNY WHITE: That's right.

SEAN O'BRIEN: And so, you know, what I'm saying is that I don't lightly disobey the client, but I will continually work on the process of engaging the client and engaging the client's family. So that when that conversation does happen, I might even plausibly be able to say to the client, "Hey, I want you to know that I talked to your mother last night."

PENNY WHITE: So you're going to see fairly quickly that our next two hypotheticals are related but they are somewhat different. I'll ask Brad, Mary Ann, and Ann if they have anything they want to say in response to Sean before we move ahead.

²⁵ XAVIER AMADOR, *I AM NOT SICK I DON'T NEED HELP*, (Vida Press 2007).

BRADLEY MACLEAN: Well, I want to make one comment. I want to follow-up on a lot of what Sean said. But the *ABA Guidelines* are very clear. They impose on defense counsel the absolute obligation to conduct a thorough mitigation investigation whatever the client's wishes may be. So if you are going to comply with the guidelines, you conduct the investigation.

PENNY WHITE: You see on the overhead the *Guideline* that Brad's referring to, 10.7,²⁶ that speaks to that. Mary Ann?

MARY ANN GREEN: And I would just reinforce Brad's comments. So as a public defender, who has handled capital cases, absolutely, you talk to the mother.

PENNY WHITE: Ann, anything on this one?

ANN SHORT-BOWERS: [Shakes no.]

PENNY WHITE: So let's go turn then to our second scenario, somewhat related but a bit different. Here the client has been convicted of first-degree murder. The State has rested its case on penalty. You are preparing to begin your case. You've done your homework. You've conducted your investigation. But at the point that you are about to begin your case, the client instructs you to call no witnesses and to offer no evidence in mitigation. Mary Ann, how do you proceed? Not that you've been there and done that.

MARY ANN GREEN: No. I even have the t-shirt and scars to show it. Absolutely it is ineffective assistance of

²⁶ A.B.A. GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEF. COUNSEL IN DEATH PENALTY CASES 10.7 (2003).

counsel at that point to simply agree with your client. Period. There is no question and there is no footnote. It is ineffective assistance at that point. What you can do—and what the Tennessee cases hopefully are teaching us to do even though the law in Tennessee is that your client has the right to direct his own destiny and has the right to forego mitigation, that is the law. However, I would offer some guidance hopefully for someone caught in that position as I was and looking around for what do I do now.

First, ask for a continuance. I agree completely with Sean about the competency issue. Whether the client has been deemed competent by the State's experts, your experts, your co-counsel, whoever, there is a competency issue at that point. And you are asking for the continuance to discuss the matter with the client. But what you're actually doing is asking for some time to muster your resources—to muster your experts to figure out how to address this issue.

Number one, why is the client doing this? You have to determine that. You can't determine that unless you've done all the things that Sean was talking about earlier in terms of establishing that relationship with the client. You cannot determine what's driving the train at that point. And the one thing that you want to know is whether it's because he thinks he's going to be embarrassed. Is it because he doesn't want his relatives involved? Is it because he doesn't want embarrassing facts about his past to come out or about his relative's past? You want to know what's driving the train.

Unfortunately, what drives the train for so many of them seems to be so and so, who has experience because he's a death row inmate, and he came back to the county jail on a post-conviction—he told me I had that right and it seemed like a good idea to me. They have actual delusional ideas about the criminal justice system. One of them is, that if they don't let you present mitigating

evidence then the jury will think that they are more innocent. Or somehow the jury will find that they made a mistake in the first place and they'll go back and take away the guilt finding. That's an actual delusional understanding of the criminal justice system.

Another one is "if I don't let you put on mitigating evidence, then I will automatically get the death penalty. And if I automatically get the death penalty, I'll wind up with the best attorneys. I'll get the best attorneys. I'll get two attorneys instead of one attorney on my appeal and on my post-conviction and on my federal hab. And not only will I get that, but I'll get services." And in Tennessee, that's the law. They will get services on a death penalty post-conviction case. They will not get services on a non-death post-conviction case. But they think somehow that's going to give them a second bite at the apple of actual innocence and of walking out. But they are proceeding with some very warped ideas about the criminal justice system. The only thing that I can suggest in terms of counterbalancing that is again the relationship that you establish with your client.

Listen more than you talk. Listen to what your client is telling you. Listen to what the client's significant others are telling you. Identify very, very early who the significant others are in your client's life. Is it clergy? Is it wife? Husband? Children? Nieces? Nephews? Mothers? Dads? Little old lady next door? Who is the significant other in your client's life? And establish just as close a relationship with that significant other as you do with the client. And again, listen more than you talk. Listen to what these people are trying to tell you.

When you establish a relationship, a new relationship with someone, like a friend, you would hope that you get to know each other. You get to know their characteristics. You get to know the mutual likes and dislikes and then you determine, hey, this person could be a

friend. I'm not saying you have to be the best buddy of your client, who is accused of a capital offense, but I am saying that if you listen more than you talk, you will get to know your client.

When you get to know you client, there will be an establishment of trust. Trust will be established. And at that point, you can begin to educate your client, educate your client about why certain things need to be done that the client may not have thought of. And if you just went in at the very first meeting and said we're going to be talking to your mother, your daddy, your grandmother, your granddaddy and all your brothers and sisters. And he's going, "Whoa." Well, if you don't establish that relationship, if you don't establish that trust, then you're behind in the game.

The other thing that you want to do is to enlist the help. In this hypothetical, your client's just been found guilty. You're getting ready to start sentencing, and the client says no mitigation. Your experts have evaluated this client on basically an objective basis. They are not there to treat the client. They are there to evaluate the client and to give you assistance in building your case for mitigation.

But your experts are still experts. They're still psychiatrists, psychologists, social workers. They're still experts. Bring in your team. Bring in your team of experts and see if they have ideas about, number one, why he's doing this? Number two, what we can do to combat it? Then ask the court for a competency evaluation. At the very least, it's going to build a record. But don't just go in and say, "Your Honor, my client says he doesn't want mitigation, and he's been sitting there during trial acting like a perfectly nice, good, ordinary citizen. And I'm not sure why he might be not competent, but we need a competency evaluation."

You're not going to get a competency evaluation on that. Go in with your facts and your documents in hand.

Go in prepared to make an offer of proof if nothing else. Go in prepared with the medical records, the mental health records, the mental health reports, and your social history. One thing that I would suggest is that from your very first meeting with your client, begin a behavioral time line.

On day one, even if it is just a few descriptive words, describe your client's demeanor. Describe his attitude. Describe whether he's getting at that point any assistance from mental health professionals in the jail in terms of treatment, medication. Keep up with his treatment and medication throughout the process. I don't know how it is with your jail. But the jail in Hamilton County—unless we have the HIPAA²⁷ release and a really good relationship with the jail, our client may be on all kinds of medication, and we wouldn't know it. So you have to ask for these records.

And it's an ongoing process because they don't really recognize that if they change medications, or if the doctor comes in and changes a diagnosis, that they have to let us know if we got the records two months ago. But keep a behavioral time line, so that when you go in front of the judge and you say we need a competency evaluation, you can show the judge with that behavioral time line how your client's behavior has disintegrated over a period of time.

Also make an offer of proof. Try to present lay witnesses and expert witnesses on the issue of your request for a competency hearing. You've got the witnesses there anyway. They're there to start the mitigation part of this case. The lay witnesses who have been visiting him, whether it be clergy or family or friends—visiting him throughout his incarceration—can testify to those things that are in your behavioral time line.

It corroborates exactly what you're time line is

²⁷ Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 201 (2006).

saying. The expert witnesses can testify as to any underlying mental illness or mental defect that the client has. Recognize that the standard for competency in Tennessee is the *Dusky*²⁸ Standard as adopted by *Mackey*²⁹. Those both say that the defendant must have a rational as well as a factual understanding of the proceedings against him, and that he must be able to understand the nature and object of the proceedings in order to consult with his counsel and to assist in preparing his defense.

Understand also, that when someone is sent for a competency evaluation in Tennessee, the McGarry Instrument is the one most often used. There are thirteen points in the McGarry Instrument. And they were recognized in *State v. Benton*, 759 S.W.2d 427,³⁰ a 1988 case. And in that case, the McGarry thirteen points were set out: Ability to appraise and apprise legal defenses available; level of unmanageable behavior; quality of relating to attorney; ability to plan strategy—that's a novel idea—; ability to appraise the role of various participants in the courtroom proceedings; understanding of courtroom proceedings; appreciation of the charges; appreciation of the range and nature of possible penalties; ability to judge likely outcomes—well, if his idea of the outcome by not putting on mitigation evidence is that he's going to get better lawyers and he's going to get services and therefore, he's going to get off death row, this is not realistic—; capacity to disclose to attorney available pertinent facts surrounding the defense; capacity to challenge prosecution witnesses realistically; capacity to testify relevantly; and manifestation of self-serving versus self-defeating behaviors. That's something that should be in your behavior time line.

If the client continues in his request, and the court

²⁸ *Dusky v. United States*, 362 U.S. 402 (1960).

²⁹ *Mackey v. State*, 537 S.W.2d 704, 707 (Tenn. Crim. App. 1975).

³⁰ *State v. Benton*, 759 S.W.2d 427, 430 (Tenn. Crim. App. 1988).

allows the sentencing hearing to proceed without the competency evaluation, again, go back and request a more thorough examination, on the record, of the client's knowing, intelligent, and voluntary waiver of his right to present mitigating evidence. Let me repeat that. If the court proceeds without a competency evaluation, then go back and request a more thorough examination, on the record, of his knowing, intelligent, and voluntary waiver.

In the *Kiser*³¹ case, which is cited in your material, the colloquy between the judge and the defendant takes up about I think seventeen to eighteen lines.³² That's what it took for this man to say "I don't want any mitigation. I want to get the death penalty." If you enter a plea of guilty on a shoplifting case in Hamilton County, you have to fill out this form, which is five pages long. You have to read it to your defendant. You have to not only read it to the defendant, the defendant has to be able to knowingly answer the judge's questions during the plea. Ladies and gentlemen, it's ridiculous to allow the courts to proceed with a mitigation waiver that takes seventeen or eighteen lines on a death penalty case, when it takes five pages to enter a plea on a shoplifting case. I'm getting the bad looks, so, I'm sorry.

Finally, the last thing that I would suggest—I'm skipping over some of this—but the last thing that I would suggest is at any rate, submit under seal your entire mitigation case. Submit affidavits of your lay witnesses, reports of your expert witnesses, your exhibits, submit under seal the entire case into the court record. So that hopefully—somewhere down the line—someone will be able to look at it.

The one thing I don't want to leave out with regard to the questions that the judges ask, at the bottom of the plea form—this part is all about what the person is charged

³¹ *State v. Kiser*, 284 S.W.3d 227, 241 (Tenn. 2009).

³² *Id.* at 240.

with. “Do you understand that you’re charged with shoplifting, and it carries one day up to eleven months and twenty-nine days?” There should be something like this for the mitigation waiver. The mitigation waiver should say, “Do you understand what the mitigating facts that your attorney would present to the court are—and actually spell out those facts.” Thank you.

PENNY WHITE: So the cases that Mary Ann referred to are *State v. Kiser*³³ and *Zagorski v. State*.³⁴ Their citations are on the PowerPoint slides. I handed Sean a copy of Formal Ethics Opinion 84-F-73,³⁵ which quotes *Zagorski* while Mary Ann was speaking. He took one look at me and said, “This is horrible.” But that’s the law in the State of Tennessee. That’s the part you can edit out when the transcript is prepared if you would like.

SEAN O'BRIEN: Okay.

PENNY WHITE: And the guidelines that Mary Ann referred to include 10.7³⁶ you've already looked at. It is pretty clear. Counsel's duty to investigate and present mitigating evidence is well established regardless of the desires of the client—regardless of counsel’s belief that the investigation will prove futile. And finally, even more specific is guideline 10.11.³⁷ Counsel at every stage has a continuing duty to investigate the issues bearing upon penalty and to seek information that supports mitigation or

³³ *Id.*

³⁴ *Zagorski v. State*, 983 S.W.2d 654 (Tenn. 1998).

³⁵ Tenn. Bd. Of Prof.’l Responsibility, Formal Ethics Op. 84-F-73(a) (1999).

³⁶ ABA GUIDELINES FOR THE APPOINTMENT & PERFORMANCE OF DEF. COUNSEL IN DEATH PENALTY CASES 10.7 (2003).

³⁷ ABA GUIDELINES FOR THE APPOINTMENT & PERFORMANCE OF DEF. COUNSEL IN DEATH PENALTY CASES 10.11 (2003).

rebutts the prosecution's case. This includes discussing the procedures with the client—maintaining a consistent theme throughout both phases of the case—in determining whether the client will testify and what evidence will be used in the defense case.

So our next hypothetical, carrying along with this same theme, is post-sentencing strategy. Now we're at the appellate level. The status of this case is the post-conviction appeal of the state death-sentenced inmate. The direct appeals have been completed. Counsel is explaining the next steps with regard to post-conviction appeals to the client. And the client—maybe based on some of these conversations Mary Ann so aptly pointed out—says, “This is just not a life worth living. I don't want to live if I can't be free. No more lawyers. No more appeals. I'm ready to die. Don't file anything. If you do, I'll tell the judge you are doing it against my wishes.” So the hard question is what to do when you are asked to abandon appeals. Brad?

BRADLEY MACLEAN: Let me start off by saying that if that is the situation that you're confronted with in post-conviction in Tennessee, you really don't have a serious ethical dilemma because in order to file a post-conviction petition in Tennessee the client has got to sign the petition. It has to be a verified petition. And so the situation that you run up against is a client who refuses to sign the petition.

Once the petition is signed, you do have situations where the client will seek to dismiss or withdraw the petition. And often they do that by simply writing a letter to the judge saying that that's what they want to do. And so once that happens the die is cast, and what you need to do in those circumstances is very clear. It's not an ethical dilemma at all. In those cases, you simply raise the issue of competency and litigate competency. You have no choice but to do that.

I'm going to talk about the more general issue. All of these scenarios fall under the same general rule. In all of these scenarios, what you have is a volunteer. You have a client who is willing to volunteer for execution. The client may not look at it exactly that way. The client at the trial stage who wants to waive mitigation may not see himself or herself as a volunteer. But, in fact, that's what he or she is.

If you successfully waive mitigation, and as a consequence no mitigation evidence is presented at the trial, then under Tennessee law—and I suspect it's true in most other jurisdictions—the death penalty is mandated as long as the prosecution proves its case and produces a finding of the existence of aggravators that qualify the defendant for the death penalty consideration.

I want to, first of all, raise one issue. Death is different and we hear that a lot. And in this context, I want to focus on two ways in which death is different, which is I think fairly startling when you think about it. In Tennessee, life without parole and the death penalty are the only kinds of cases where the jury makes the sentencing decision. If a defendant is allowed to waive mitigation, it is the only kind of case where the defendant is given the choice—the authority to make the sentencing decision because then the sentencing decision is death, if the prosecution proves its case. There is no Constitutional right—there's no right in the law in any other area of the law—for a defendant to choose his sentence. That's the job of the sentencer, typically the judge. But death is different in this respect.

Secondly, in Tennessee, death is different in particular in the case where the defendant seeks to waive mitigation because in all other serious criminal cases in Tennessee, before a judge can sentence a defendant, the law requires that the judge receive a pre-sentencing report. And if you look at the statute in Tennessee as to what must go into a pre-sentencing report, it's basically the same kind of information that a defense lawyer should present at

sentencing in a capital case: something about the client's history, the client's mental status and things of that sort. So ironically, in a death case where the defendant waives mitigation and as a consequence no mitigation is presented—unlike any other serious criminal case in Tennessee—for the sentencing decision is made without any information whatsoever of that type. So death is different in those respects.

I want to talk about the fundamental question. I had a student who recently asked these very same kinds of questions. She asked me these questions because she was writing a paper for her law school class, and I had about five minutes to e-mail her an answer. And yet I think that the answer was as concise as I can put it—exactly how I would respond to all of these hypotheticals. The first response is: I will do everything I can to present a mitigation case and in post-conviction to advocate for a life rather than a death sentence. I will do everything that I can in my power.

The second thing that I will always do is: I will ask certain basic questions. And I've listed those questions—and I'm repeating a lot of what has already been said—but here are the questions that I would ask. The first question, which is of paramount importance, is what is the nature of the relationship between the client and the attorney? And when I'm the attorney, I have to ask myself, what is the nature of my relationship with the client because that relationship will govern the outcome in most cases in my view. The second question I would try to ask is what is the nature of the client's understanding of the proceedings and of his rights and of his position? The third question I would ask is what is the nature of the client's capacity to think rationally, to make a rational decision? What are his thought processes like? The next question I would ask is what is motivating the client?

And interestingly, the two prior questions that I

raised—the client’s understanding or his appreciation of his circumstances, of his legal standing and also his capacity to make a rational choice—those are the two tests that have to be satisfied for a client to be competent under *Rees v. Peyton*³⁸ to waive his post-conviction remedies.

But beyond that, the question of what is motivating a client is not typically a question that the courts ask. But fairly recently, within the last couple of years, the American Bar Association Task Force on Mental Disability and the Death Penalty made a recommendation that an inquiry into the motivation of the client should be an essential element in determining competency in these situations.³⁹

And the next question after that, that I would ask—and this requires a lot of probing—what are the client’s beliefs? And by that I mean this: does the client believe that imposition of the death penalty in his case is fair? Does he think he deserves the death penalty? Does he think—does he believe that he was treated fairly in the process? Does the client believe that life is worth living? Does he want to live?

Those are questions that you can never fully answer through a superficial discussion with the client. Those questions can be answered only after you learn about the client and learn about the client’s background. And typically, in many of those cases, those questions can be ascertained only with the help of professionals, mental health professionals. So you have to get a mental health professional involved, at the beginning.

John Blume, who is well-known in the death penalty community as a death penalty litigator and as a

³⁸ *Rees v. Peyton*, 384 U.S. 312, 314 (1966).

³⁹ Paul M. Igasaki et al., *A.B.A. Task Force on Mental Disability and the Death Penalty, Recommendation and Report on the Death Penalty and Persons with Mental Disabilities*, 30 MENTAL & PHYSICAL DISABILITY L. REP. 668, 674 (2006).

scholar has written prolifically in the death penalty area. He wrote an article about volunteers on death row.⁴⁰ And he did a survey, and he found, based on his survey, that 88 percent of those inmates who have volunteered for execution and have been executed suffer from mental illness or a drug abuse disorder.⁴¹ Some 78 percent suffer from a mental illness. In my experience, every client that I have represented on death row suffers from a mental illness.

There are two basic characteristics of every inmate on death row. Number one, they're indigent. In Tennessee, there's not a single inmate on death row who is not indigent. Everyone is indigent today. Everyone on death row today was indigent at the time of his trial. The second characteristic which is common among death row inmates with very few exceptions is that they are mentally or psychologically impaired. And that's been my experience.

I want to relate to you a couple of cases that have influenced my thinking in this area. The first case is the case of Ron Harries. In 1984, Ron Harries was scheduled to be executed. He was on death watch. He was scheduled to be the first inmate to be executed in Tennessee post *Furman*.⁴² He was a volunteer. He volunteered after his direct appeal before state post-conviction.

Another inmate and a lawyer in Nashville filed a petition in the federal court, a habeas corpus petition, seeking to stop the execution. They were successful, and then litigation ensued concerning his competency. He was found to be both incompetent and to be acting involuntarily. The finding of lack of voluntariness was based upon the inhumane conditions of the prison. The finding of incompetency was based primarily upon his

⁴⁰ John H. Blume, *Killing the Willing: "Volunteers," Suicide and Competency*, 103 MICH. L. REV. 939, 962 (2005).

⁴¹ *Id.* at 962.

⁴² *Furman v. Georgia*, 408 U.S. 238 (1972).

diagnosis of bipolar.

Bill Redick has been mentioned already earlier today. Bill Redick was a partner of mine. Bill Redick represented Ron Harries at that time. Bill Redick took the position that if this is what Ron Harries wanted to do, this is what he should do. Fortunately, other forces prevailed. The Judge stopped the execution and took Ron Harries off death row. Bill Redick continued to represent Ron Harries, and finally got his death sentence set aside. And then two years ago, settled the case for a life sentence.

In the meantime—over the past many years that this case has been litigated—Ron Harries changed his mind. There were times when he wanted to volunteer, other times when he didn't want to volunteer. I spoke with Bill just the other day about that case. He said he learned a lesson. When he took the position back in 1984—that Ron ought to be allowed to volunteer—he said, “I didn't know about his background. I didn't know about his mental illness. And I would never, ever take that position again.”

What we found—because I had gotten involved in his case later on—and what we found was that Ron Harries did not feel that he was fairly treated at trial. He did not really feel deep in his heart that he wanted—that he deserved to die. Although when he was in a state of depression, he did feel that way. He is very happy today that he's no longer under a sentence of death.

Another case, the Christa Pike case—Christa Pike in post-conviction sought to drop her post-conviction case. She was found to be competent, and having been found competent, the court dismissed her case. It was appealed. In the interim, she was diagnosed with bipolar. She was treated for the first time with the proper medication. Once she was treated, she began to think differently about her case. She did not want to volunteer. And fortunately the Tennessee Supreme Court reversed the lower Court's decision—based upon what had happened in the interim—

and allowed her to proceed with her post-conviction case.

I am today representing Paul Reid. Paul Reid is floridly psychotic. If you ask him the question of why he wants to volunteer—he's in post-conviction—he would say, "Because I don't want to live like this on death row anymore. Because I think I deserve, you know, that the victims deserve this." But then when you probe more deeply, he thinks he's innocent. And he thinks that everything that goes on in his life is scripted by a force, some kind of delusional force that he refers to as scientific technology. He doesn't really believe these things, but he knows how to say these things. And these cases have formed my view that you should never, ever acquiesce in your client's desire to volunteer.

I want to make one final point that is from a more theoretical point of view. The argument for allowing an inmate or a defendant to waive his or her rights and to volunteer for execution is based upon an argument concerning autonomy and dignity. You see, we have to respect the client's autonomy to make his own decision as long as he's competent.

Now, leaving aside the issue of whether he's competent or not, the point that I focus on is that what makes the death penalty truly unique is that it is the one punishment that completely strips away a client's dignity. That is the purpose of the sentence. A death sentence is not about death. A death sentence is a statement to the defendant by society that the defendant is not worthy of membership in the human race.

Dignity is defined as intrinsic worth. So the death penalty is designed to strip away dignity. It is paradoxical to argue that a person should be allowed to volunteer to a process that is designed to strip him of dignity in the name of dignity. Also correspondingly, the whole idea of mitigation is to demonstrate to the jury, to the sentencer, how a defendant's autonomy, capacity of self-

governance—which is the meaning of autonomy—has been impaired.

That's the purpose of mitigation. And to allow a defendant to volunteer for execution in the name of autonomy and thereby take away the opportunity to determine what kind of autonomy the defendant has is contradictory. So as a policy matter, I don't think we can consistently defend against the death penalty and at any point in time acquiesce in the client's desire to volunteer. Thank you.

PENNY WHITE: Brad's words are mirrored in guideline 10.5,⁴³ saying quite bluntly that it is ineffective assistance of counsel to acquiesce in the client's wishes to dismiss appeals.

We're going to change focus. But before we do, Sean, Mary Ann, any closing brief remarks on the issue of foregoing mitigation or abandoning appeals?

SEAN O'BRIEN: I just have one comment. I agree with everything that Brad said. But one thing I would like to see us as a community to get away from is the use of the word "volunteer" because "volunteer" implies voluntary. That's a decision. And these people pure and simple are suicides. It is suicide. And "volunteer" kind of funnels us down a path of analyzing the decision and maybe trying to talk the client out of the decision and counsel him that way. When you evaluate it as a suicide, and you actually research how do suicide hotlines function and how do suicide counselors function, it is totally unlike what lawyers do. And so I would like us as a community to abandon the word "volunteer" and start looking at what are the effective treatment and prevention methods for suicide and bring

⁴³ A.B.A. GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEF. COUNSEL IN DEATH PENALTY CASES 10.5 (2003).

those resources and thought processes and strategies to bear on our client decisions.

BRADLEY MACLEAN: I totally agree. I stand corrected. And I will never use that term again.

PENNY WHITE: Our next scenario is one that Jerry Black and I had a little personal experience with. But basically, the hypothetical is posed in this way: You are the post-conviction lawyer for the death-sentence inmate, and your petition will include allegations of ineffective assistance of counsel. So you contact former counsel, trial counsel, to arrange to interview trial counsel, to secure the file, and to do the things that are necessary to prepare the petition or to amend that petition.

Former counsel tells you, "Wait a minute, I'm now an adverse party. I turned my file over to the Attorney General's Office, and I'm going to do everything I can to rebut your claim that I was ineffective and to clear my good name." Ann Short, how do you proceed?

ANN SHORT-BOWERS: I encountered that scenario quite a few years ago, and I told Penny when she was giving me the hypothetical, I said my short response internally is how you proceed is to tell the attorney "screw you."

Now, let me step back and let's talk on a slightly higher level than that. And let me just get an idea here a minute. How many people in the room have been involved actually in death penalty work at some level? I hope everyone who raised their hand—and for those that didn't—understand that at any level of death penalty work you may get involved with, you'd better have dang thick skin. What makes it tricky also is that you still cannot for one minute lose your compassion or your ability to identify with your client.

But don't ever get involved initially in a death penalty case without understanding on the very front end that this is going to be a long haul for you and that at some point in time, unless your client is found not guilty, you are going to be called ineffective—legally, constitutionally ineffective. Not incompetent. I hate attorneys who say you're calling me incompetent. I'm not. I'm calling you constitutionally ineffective. In any work, in any given circumstance, a lawyer can be constitutionally ineffective.

To bring it back a little bit to my experience and where my reference is—many, many years ago my first experience with death penalty work was actually doing a post-conviction on a death penalty case, before I was ever involved many years later in the trial of a case. And back when I was involved in the post-conviction—back before any standards—I mean forget about any reasonable hourly rates, forget about any funds for experts—dignified begging and even undignified begging was the way you had to go about soliciting people to help you in these cases.

And I was naïve to be sure, but I did not realize that my involvement was going to last some thirteen years in that case. A lot of that time was spent in—and I'll emphasize everything that's been said about the attorney-client relationship—a lot of that time was spent getting to know that client and trying to build trust with that client because I was the second attorney that had stepped in. And so, whatever reservations the client had about how his case was handled the first time, I had to overcome some of those communication barriers to be able to work with the client.

You've got to be careful, and you've always got to feed that relationship. And you've always got to nurture that relationship because I'll tell you what happened to me was—at the end of thirteen years—we had a breakdown in our attorney-client relationship. And I ultimately had to move to withdraw in the case, and I did.

In hindsight, that may have been a distinct

advantage to the client because I was somewhat of an abrasive lightening rod in the case. I wasn't very polite to anyone involved in the court system. And shortly after I got out of the case, the lead assistant prosecutor in the case had gotten very, very sideways with his boss, and he quit. He said, "I'm out of here"—not just off this case—"I am out of this office." And what that left were new faces in that case. And ultimately, I'm happy to say—and it was one of the best days of my life—when I picked up the phone and successor counsel called and said, "We settled this case, and we settled it for a life sentence." And I was absolutely delighted. And in fact the client's name is Kenny Campbell. And as of April of this year, he made parole.

That was also back many, many years ago when the statutory criteria for how long you had to serve before you could make parole was much less than now. But at any rate, as I said, part of the message is, you're going to be in this for the long haul, and you'd better have a thick skin.

And I can tell you because I see a lot of people here from this community, too. I guarantee you—and I know Mark will agree with me also—this community has just finished up the fourth of a series of just horribly gruesome capital defense cases: Channon Christian and Chris Newsom. And I guarantee you, some of the finest attorneys you will find anywhere in this country stepped up to the plate and agreed to represent these people in these cases. And I also guarantee you, every single one of them knows—and they knew going into that case—that at some point along the line, they're going to be sitting in a witness chair. And they're going to be having allegations of ineffective assistance of counsel directed at them. And they all know how they have to respond appropriately under those circumstances.

When I mentioned the "screw you" remark, it was because back when I was working on the case—that I

mentioned took thirteen years—I got to the point where I had been calling the attorney’s office and kept trying to make an appointment, and the secretary kept blowing me off. And finally, I just said okay, you know, I’ve got to get in the car, go up there, sit in the waiting room if I have to until somebody agrees to talk to me.

I went up there. I don’t know, I guess they kept me cooling my heels for maybe an hour in the waiting room. And of course, no one offered me coffee or anything. That’s okay too. When the attorney finally realized that he didn’t have a back door, he was going to have to come out where I was sitting to actually be able to leave the office. I stood up, and I introduced myself. And I told him who I represented. And I explained, “I need some of your time, please. And if it’s not convenient now, can we please schedule a time to sit down and talk?” And he looked at me and he said, “Lady, it’s just a question of when that guy’s going to fry,” and walked out the door.

And that still is totally imprinted in my long-term memory. That attitude just absolutely blew me away. So when I say “screw you,” that’s exactly what I thought to myself when he walked out the door. And I guarantee you, we made the post-conviction hearing as miserable for him as we could. And let me tell you, there was a reason for that. Not just because of his attitude and getting some visceral fun out of it, but because—please understand under *Strickland*⁴⁴—when you’re dealing with ineffective assistance of counsel, *Strickland*⁴⁵ tells you, you have the burden. You’re going to have to try to re-create the circumstances that existed at the time counsel was making certain decisions. You’re going to be confronted with a presumption that what counsel did was reasonable, unless you can show other circumstances.

The more difficult trial counsel makes it for you,

⁴⁴ *Strickland v. Washington*, 466 U.S. 668 (1984).

⁴⁵ *Id.* at 692.

and the more you have to push back, gives you —and it gave us ultimately—some ammunition to be able to argue, “We were trying our damndest to carry our burden of proof. But look what happened.” I mean these attorneys fought us every single stage tooth and nail. We ultimately had to subpoena the file into court. And of course, they wouldn’t cooperate. “May we see your file now?” “Oh, no.” “Oh, no.” They just sat and held it in their lap.

Okay. Fine. “What’s the first piece of paper in your file? Would you please take it out and identify it for the court?” We are only talking about one little accordion file. I mean, that’s a tip off right there. You know, once we were about a quarter of a way into the file, the judge kind of looked at the attorney and said, “Why don’t we come back tomorrow. And in the meantime let post-conviction counsel just photocopy your file please, and let’s see if we can’t move it along,” which we did.

But the point being, we did have to get into that level of difficulty because obviously the attorney did not appreciate the continuing duty that he owed to that client. Having—and again—we’re going to talk about some of those duties, but let me talk a little bit more practically about what you could do confronted with former counsel with that kind of attitude as an initial way to deal with it.

I would suggest, first of all, look around in cases in your community. Bob Ritchie’s no longer with us. I have asked Bob, and Bob has agreed to do this previously for me—not in a death penalty case. Identify that one attorney in the community that seems to have the greatest amount of respect that you can find. Call that attorney and see if you can enlist them. Say, “Would you call so and so, ask them to go to lunch with you. Just would you talk to them about what’s at stake here? You know, maybe they’ll listen to you. They’re not going to listen to me right now.” And see if you can’t get a network going. You don’t have to share any attorney-client privilege or any confidences of your

client to try to enlist somebody in that fashion to see if they can soften up that attorney a little bit. That's one suggestion.

Two is to write a letter to the attorney. And just say, "Look, here is what your ethical obligations are. All I'm wanting you to do is within the framework of those obligations. Please meet with me. I have a waiver from the client, so that you can talk to me; so that you can provide your file to me. But here are your ethical obligations." Now, that may help. It may not.

You get blown off again, personally—and at this point in my career—I would probably sit down and write a letter to the Board of Professional Responsibility. Now, is that going to help? Probably not. Is it going to make the situation any worse? At that point in time, I don't think it's going to make it a bit worse. But who knows. You might get the Board involved. You might somewhere along the way make that attorney have a second thought as to what he or she is doing. But if you get that far, then you probably are going to get to a point where you're dealing with having to subpoena the attorney to court—having subpoenaed the files. And get prepared for it and just do it.

If you find yourself in the situation of where your services and your level of representation have been called into question in a death penalty case, what are your obligations? You know, just as if the client dies, the relationship continues. Just because your services may be questioned, it's not free time for saying "okay, I'm no longer bound. I no longer have any obligations to the client. I can do what I want. I can go talk to the state. I can provide all the material." No, that's not the situation.

Now, post-conviction counsel, if he or she is doing the job correctly, should get a release from the client so that that release can be presented to the attorney to say okay, it is all right for you to provide your work product files to post-conviction counsel. It is all right for you to discuss

my case with post-conviction counsel—attorney-client privileged materials, confidentiality issues, and get that core thing done. That way, the trial attorney should feel that he or she is protected in terms of going forward.

Just because though, that kind of waiver has been obtained, doesn't mean that the client is saying, "Okay, that's fine, you can go talk to anybody you want to." That's not giving you permission to go sit down and talk with the prosecutor that's handling the case. And I would caution, if you are in post-conviction counsel's situation, you need to—when you craft the release for your client—be real careful how you craft it. And you might want to have those caveats in there: "By this I am not consenting that you talk to anyone else. I'm not consenting that you can talk to the state on my behalf." Get those parameters outlined very carefully.

Going into a death penalty case as trial counsel, you have an ethical obligation to keep your files as well documented and as organized as you can. Sometimes I know they get a little messy. I worked for a long time with a gentleman, and that's primarily what I did was clean up his messy work—labeling files and whatnot. But you really should—if you find your files in that situation—take the time. And you know, if you're doing death penalty work, you're not going to get paid for it. Get over it. You weren't compensated fairly the first time. Don't take it out on the client on post-conviction. Spend the time necessary to sit down, organize your files, and find the time to meaningfully discuss the case with post-conviction counsel. And to the extent that the strategy is consistent with what you know the facts to be, you should cooperate with counsel.

What do you do if you get the call from the state, "Hey, we got a post-conviction. We'd like you to come over and talk about it?" I'll tell you personally, in death penalty cases, I say, "You can find out what I've got to say

when I get on the stand. I'm just like any old witness." You know how we've all had them say, "I don't have to talk to you. Don't want to talk to you. Never going to talk to you." It's kind of how I feel about these things. Why should they be entitled, particularly if my client has given me some pretty good parameters as to what I am, and am not, authorized to say? I'm not going to sit down and talk to the State about the case.

I guess to seriously bring it around and wrap it up: just have thick skin. Don't ever, ever take it personally if you're trial counsel in a death penalty case. Don't ever take it personally. Know that going in on the front end. And if that causes you a problem, don't do the case; just don't do it.

PENNY WHITE: Thank you very much, Annie. Just by way of summary, the *Guidelines*⁴⁶ are very specific. There is an obligation to conduct a full examination on the part of post-conviction counsel, an obligation of trial counsel or any member of the defense team to safeguard the interest of the client even after the relationship has ended, and an obligation to cooperate with successor counsel. And the *Guidelines*⁴⁷ specifically refer to maintaining the records in a manner that is conducive to use—as Annie referred to—and to providing the files and all information regarding the representation to successor counsel, as well as sharing potential further areas of legal and factual research and cooperating appropriately.

And then finally, the commentary to *Guideline* 10.13,⁴⁸—the last point that Annie made—says that counsel should share not only papers but strategic thinking. All of

⁴⁶ A.B.A. GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEF. COUNSEL IN DEATH PENALTY CASES (2003).

⁴⁷ *Id.*

⁴⁸ A.B.A. GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEF. COUNSEL IN DEATH PENALTY CASES 10.13 (2003).

this should be routinely and openly presented to the post-conviction counsel. To do otherwise is unethical.

I think—because we have only about twelve minutes left—that rather than do the last hypothetical right now, we will turn to your questions or comments. And then if you don't have many questions or comments, then, we'll talk about the conflict of interest hypothetical. But I'd like to think that there are comments for people who take issue or want to say "Amen, Amen." Again, while they're getting to the first comment, I want to commend our able court reporter from Watts-Boyd who's been working feverishly over here. So bear her in mind and speak loudly when you get the microphone.

BARBARA HURST: I'm very mindful of the fact that you people do this actually on the front lines. I represented three death penalty clients in a direct appeal. The statute was struck down and has never been re-enacted in Rhode Island. So I feel like I'm standing in the position, "easy for me to say."

But I hear a lot of values behind what you're saying that seems to be personal values, about how you view life, how you view life worth living, how you view the relationship between mental health and competent decision-making and maybe some assumptions about certain decisions being the product of a mental illness and not simply a companion to mental illness, as well as the value of life worth living with bipolar diagnosis that cannot always, despite good medication, make for a happy life.

I mean, I wonder the extent to which counsel representing clients in death penalty litigation are inevitably in a conflict of interest position because all of our personal values inform our perspectives about other people's decision-making. I'm not sure it's possible to get away from that. I don't know how you resolve that. But I wonder whether if we were sitting over a drink, my feelings

about life and suicide as a reasonable solution to a set of problems might simply be very different from yours. And how does that affect how we represent clients?

SEAN O'BRIEN: You were looking at me while you were asking that. And obviously, I have strong feelings about it. But I don't think it started out as ideological or my religious values—my faith. It comes from professional values of my role in the system that is, I think, an oppressive system. I really recommend that you read, Wilbert Rideau's book that recently came out, *IN THE PLACE OF JUSTICE*.⁴⁹ Wilbert was the subject of *Rideau v. Louisiana*,⁵⁰ the 1963 change of venue—pre-trial publicity case in the U.S. Supreme Court. I'm halfway through it right now—but he's talking about his life in solitary confinement for a period of time, how the system just really, literally abused and raped these prisoners through the death penalty process. If you stop and you look at the overall context of where the client is—what has happened to the client, what is going to happen to the client—there's nothing that says justice about it. I'm all about justice for the client.

You also have to recognize that a client sitting on death row—or sitting in a county jail, pre-trial—has no idea what the quality of life in a general population of a humanely run penitentiary could be compared to where they've been.

Heath Wilkins is my example. Here's a kid, sixteen-years old, allowed to plead guilty, waive mitigation, and sentenced to death. The Supreme Court in 1989 said that doesn't violate the Constitution.⁵¹ And then

⁴⁹ WILBERT RIDEAU, *IN THE PLACE OF JUSTICE: A STORY OF PUNISHMENT AND DELIVERANCE* (Knopf Publishing Group 2010).

⁵⁰ *Rideau v. Louisiana*, 373 U.S. 723 (1963).

⁵¹ *Stanford v. Kentucky*, 492 U.S. 361, 380 (1989) (*Wilkins v. Missouri*, 492 U.S. 361 (1989) was the companion case to *Stanford*).

subsequently, I was appointed on the case, and he's a volunteer from day one. Old habits die hard, don't they? I'm not criticizing Brad at all, but it's a word I want to get away from. He was a suicide from day one. And we are now getting ready for a parole hearing next summer. Now that he's in the general population, he works for a company called Talking Tapes. He reads books onto cassettes tapes for blind people. The quality of life is so much different from what it had been. That's context to me.

PENNY WHITE: Thank you.

BRADLEY MACLEAN: If I could respond to that too? I struggled with that question, and it's through my experience that my attitude has evolved. I've had several clients who have sought to give up their appeals to the point of filing papers with the court on their own. Several clients. I only have one client, though, who has maintained that position. And that client is clearly delusional—totally out to lunch. Every other client has changed.

And I think that there are two factors. One is as they live, they learn that they can live life where they are. That changes their point of view. But I think also what changes their point of view is when they do develop a relationship with a legal team that's willing to fight for them, they begin to see value in living. And I think that's our job. And it is because I've seen that, and I've never seen a client—who is not totally delusional—who hasn't changed his or her mind. Then you know. That has really affected my point of view with the whole thing.

The other response that I would make is that you read in the cases, and you read Tennessee ethical opinions, that say you've got to allow the client to go forward. They're based on the premise that the Eighth Amendment⁵² is strictly a personal right. And I don't view the Eighth

⁵² U.S. CONST. amend. VIII.

Amendment⁵³ that way. I think the public has an overriding interest in a fair and reliable process where the sentencing decision is made in an appropriate manner. And so, that's from a more philosophical point of view. That's where I come out.

UNIDENTIFIED SPEAKER: I wanted to pose to the panel a dilemma which I actually faced. Number one, the client had had several lawyers—death penalty—had had several lawyers before the case got to me. Those lawyers were excellent, excellent lawyers. Nevertheless, the client broke up with each one of them. I think there were five. Then I was given the case. And I tried to get along with him. And then I wanted to interview his family, especially his father, who he was suspected perhaps of abusing him. But he didn't want to talk about it. He said this, "If you interview my father, we're through. No more cooperation. No helping out. No nothing. It's over. So that's it. I don't want you interviewing my father." Now, I faced the following: five lawyers had, you know, broken up with him—excellent lawyers. And now I was actually getting somewhere, dealing with him, motions filing, and discovery filing. And now he said, "If you do that, it's over and we're through."

BRADLEY MACLEAN: I don't view that as so much of an ethical dilemma as I do a strategic dilemma. You've got a problem in a case like that. How do you proceed in a way that is most effective and that's in your client's interests—and your job—when the client is interfering? And, you know, that to me is not an ethical problem. That to me is a practical problem of how you handle the case. I've got a case now where the client insists on his innocence, and he keeps telling me that you cannot mitigate innocence.

That's his little phrase. And he's saying, "Why are

⁵³ *Id.*

you talking to my family? Because I'm innocent, and you can't mitigate innocence. I don't want to deal with any of those issues." And that has proven to be an obstacle in our representation. No question about that. From an ethical point of view, my view is I do whatever I can. From a practical point of view, I've got to take into considerations what my client may want to do to sabotage his case. Because he can sabotage the case, and I don't want him to do that. So you've got to work through that. It's a problem. No question about it.

SEAN O'BRIEN: Yeah, I agree it's a problem. And the problem sometimes comes with its only solution. It's an opportunity. I look at things like that as an opportunity to ask your client, "What is it? Why? What? Are there certain things that you want me to stay away from with your father? Can you think of things that I could talk about with your father?" I mean, he wants to know about what's happening, and so what am I supposed to do? It's an opportunity to dialogue with your client about that, but you don't argue. You just use it to explore. And eventually, you're going to talk to the father. And eventually, you're going to talk to the father with your client's permission.

UNIDENTIFIED SPEAKER: I dealt with the father. In fact, we put him in a veteran's home, at the client's suggestion. I talked to my client and tried to arrange visits. It was getting into that early background that the client did not want me to do. That's the dilemma.

BOB WEEKS: Thank you. I am Bob Weeks from San Jose, California. In the response to the question, you can't mitigate the innocence argument. One line I had some success with. I hear that from clients as well. You know, under some circumstances, we can put on character evidence to prove your innocence, and there's some

California law that says good character alone is enough to raise a reasonable doubt. So I tried that line with some success. So I suggest that you put that in your arsenal of arguments to use on your clients.

PENNY WHITE: Thank you, Bob. Well, join me please in thanking this wonderful group of panelists. Thank you very much.

