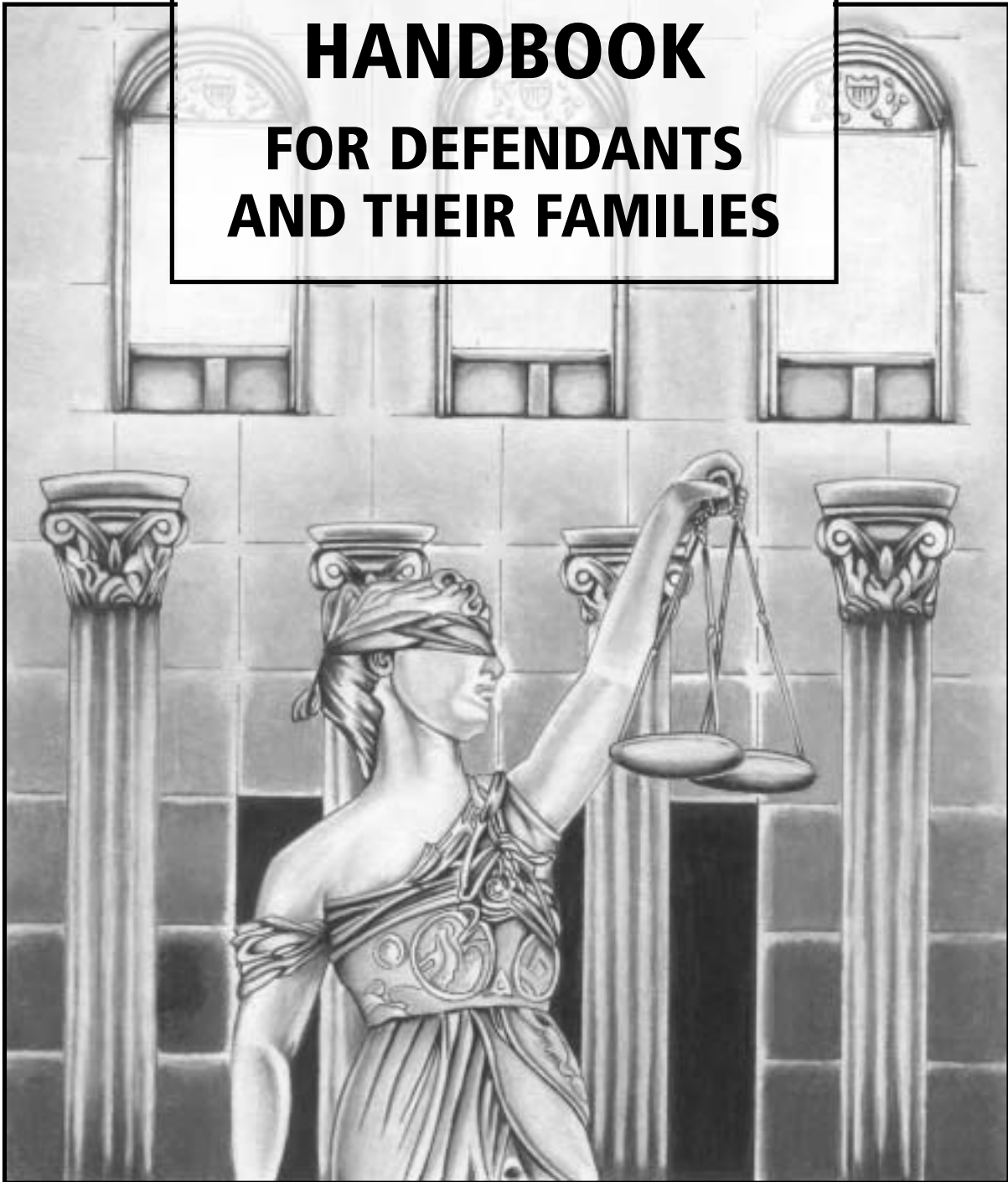


# **CAPITAL DEFENSE HANDBOOK FOR DEFENDANTS AND THEIR FAMILIES**



**BY CLAUDIA WHITMAN AND  
LAWSON STRICKLAND**

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**A JOINT PROJECT** GRASSROOTS INVESTIGATION PROJECT (GRIP)  
OF EQUAL JUSTICE USA/QUIXOTE CENTER  
& NATIONAL DEATH ROW ASSISTANCE NETWORK OF CURE (NDRAN)

## Why use this handbook?

This handbook provides fundamental information about how courts operate, trial procedures, general rules concerning capital murder cases, and the appeals process. It does not cover every rule or procedure concerning capital cases; however it is a place to start. The information provided will prepare you for what to expect.

Being prepared is empowering and often provides options you may not have known existed.

From the day you or your loved one is charged with capital murder, the choices you make impact everything that happens in the process, most importantly conviction and sentencing.

The more you know the more active a role you can take and the better your chances are for a good defense.



## INTRODUCTION

A person is picked up for questioning. This person may or may not know his rights. She is interrogated by the police, perhaps for hours or days. He makes a Statement without a lawyer present. She is charged with murder. His family has never dealt with the criminal justice system and scrambles frantically to get help, obtain legal advice, find a lawyer if they can afford one or wait for one to be appointed by the court. A family member may be subpoenaed to testify before a grand jury and may not know that any testimony given could be used against the defendant in a subsequent trial. The accused is frightened by the environment in which he finds himself and intimidated by his captors. She talks to other inmates at the jail. Family members don't know where to turn or with whom they should be talking. A poor family may end up with an inexperienced and/or overworked lawyer who has been assigned to take the next court appointed case.

### **A nightmare has begun - one that often finds its way to Death Row.**

People facing capital murder litigation often do not know how the system works. As a result they may make mistakes, fail to take action or to establish a confident working relationship with their attorney. The defendant and/or his family may want to be helpful to the Defense but lack skills or think they do. Most capital cases are not fully investigated due to lack of funds, personnel, and time. Important documents are often lost due to lack of orderly filing procedures. People don't know how to maintain confidentiality or how to talk to the media when it is appropriate.

In an effort to help, the Missouri Coalition to Abolish the Death Penalty developed a packet of information for defendants and their families which was presented in a workshop of the National Coalition to Abolish the Death Penalty annual conference in 2002. A discussion of the reasons for developing the packet revealed countless horror stories of families in shock and ignorant of criminal justice procedures, particularly during the crucial weeks immediately after their loved one was arrested.

This handbook expands on the excellent work done by the Missouri Coalition to help people in all 38 capital punishment states to: understand the procedures in their states, access local and national support groups, obtain basic advice, provide tools for working with lawyers and to get help. It is designed to be a first step in building a team that includes the defendant, his or her family, friends, lawyers and investigators, and ensure that all do their part to provide the best and most spirited defense possible.

The handbook is a joint effort on the part of death row prisoners around the country, professors, lawyers, active community members and families of inmates. Much of the research, writing and organization of the booklet was done by Lawson Strickland, formerly a death row prisoner, currently serving a Life sentence at the Louisiana State Penitentiary at Angola.

**This project is coordinated through the  
GrassRoots Investigation Project of  
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My husband, Laird Carlson, formatted as Lawson and I organized our research into a readable document. John Clark, of the Quixote Center, put it all together as a handbook.

Artwork was submitted by prison friends: Lawson Strickland, Zolo Agona Azania, and Christian Snyder, though we ultimately decided to use only Lawson's work.

But, without question, it is Lawson Strickland who made the project come together through his dogged research and attention to detail. He has lived the experience of going to death row with no knowledge of the system. Over the years Lawson has educated himself in the law and because of his firsthand understanding of all the pitfalls that accompany ignorance, he was able to identify and focus on many of the issues that might be missed by a free world person.

**Claudia Whitman**

**CAPITAL DEFENSE HANDBOOK**  
**FOR DEFENDANTS AND THEIR FAMILIES**

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## A BRIEF HISTORY OF THE DEATH PENALTY

Capital punishment has a long history in the United States. Prior to 1972, states permitted the use of the death penalty for murder and lesser crimes including rape and kidnapping, although rules varied greatly from state to state. The death penalty could also be imposed by the Federal government for various crimes.

In 1972, the U.S. Supreme Court granted *certiorari* (review) of three petitions, two from Georgia and one from Texas. The cases from Georgia concerned two men who had been sentenced to death; one convicted of murder and the other of rape. The Texas case concerned a man sentenced to death for rape. In the Supreme Court review of these cases, the majority of the justices held that application of the death penalty constituted cruel and unusual punishment, violating the 8th and 14th Amendments.

The Supreme Court's reasoning was laid out in an opinion in one of the Georgia cases, in what is now widely referred to as *Furman*. (Furman v Georgia) In *Furman*, the court did not say that the death penalty signified cruel and unusual punishment in and of itself, but that it was being applied in a manner which denied defendants the right to due process and equal protection guaranteed by the 14th Amendment. Previously, the U.S. Supreme Court had established that due process, meaning fairness and equal protection under the law, was inherent within the meaning of the 8th Amendment (protection from cruel and unusual punishment).

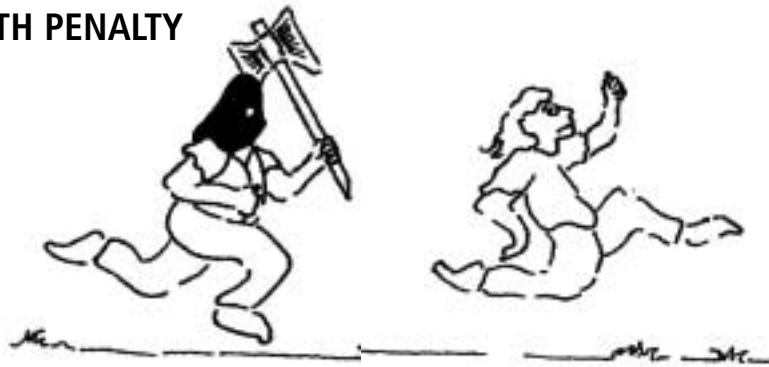
Prior to *Furman*, each state was free to apply the death penalty under state constitutions, as long as State practices fell within the standards of the 14th Amendment to the U.S. Constitution. In *Furman* the Supreme Court found that states carrying out executions had violated the 14th Amendment and therefore, were in violation of the 8th Amendment as well. As a result of this ruling, the death penalty was essentially put on hold. Prisoners awaiting the executioner around the country found their sentences changed to Life sentences.

In *Furman* the court found that the death penalty was being applied in an arbitrary and discriminatory manner. District attorneys, judges, and juries had too much discretion and the death penalty could be imposed for crimes less than murder. Evidence demonstrated that minorities received death sentences for crimes more often than whites who were convicted of lesser charges or given lesser penalties for the same crimes. Disparity also existed across racial lines, when the defendant was poor.

Over the next four years, State legislatures crafted new laws and procedures allowing them to revive the death penalty and meet constitutional requirements necessary to pass U.S. Supreme Court review.

New statutes limited the types and numbers of crimes punishable by death and new systems and procedures were developed to guarantee that the death penalty was imposed in an equal and fair manner. Less discretion was given to district attorneys and juries and the judge would determine the fate of a defendant. Rules were formulated to define clearly the aggravating circumstances that must exist in a death penalty case and the mitigating circumstances that could be considered by the jury to counter the aggravating circumstances. Efforts were made to ensure that the poor received effective assistance of counsel. State and Federal government funding for indigent defender organizations was increased and private attorneys were guaranteed more pay for representing defendants facing capital charges. It was established that Capital defendants required two attorneys to handle the complexities of a capital trial. In some States capital Post-Conviction organizations, funded by Federal dollars, were formed in order to handle the appeals of the convicted who could not afford to hire an appellant (appeals) attorney. These changes were intended to level the playing field.

Capital trials were divided into two phases: a guilt/innocence phase and a penalty phase. In the first phase, the jury is responsible for determining the guilt/innocence of



the defendant. If the defendant is found guilty, the same jury is then responsible for weighing the aggravating and mitigating circumstances to determine the sentence. Such protection is intended to ensure application of the death penalty in a fair manner, with punishment equal to the crime, regardless of the race or socio-economic status of the defendant.

In 1977, after four years with no executions, the death penalty was carried out in the state of Utah, officially resuming the practice of execution in the United States. A condemned man, Gary Gilmore, voluntarily gave up his remaining appeals and was executed by firing squad. Since then, the death penalty and the debate around it have continued to evolve. Substantial evidence suggests that despite the rules formulated by states after 1972, the death penalty is still carried out in an arbitrary and discriminatory manner. A defendant can no longer be sentenced to death for a crime less than first degree murder, yet in most instances, the poor, minorities, mentally impaired, and under-educated people are more likely to receive a death sentence than those who can afford a good defense. Studies repeatedly show that the death penalty is applied more frequently in cases where the victim was white, compared to similar cases where the victim was a person of color. Evidence also shows a gender bias, with men being sentenced to death more frequently than women for similar crimes.

The U.S. death penalty is once again under attack on all of these fronts – the courts, the media, and even in the policy arena. The strongest claims against the death penalty are the more than 100 people who have been released from death rows since 1977 after truth of their innocence was established. No legal system can guarantee 100% accuracy and fairness at all times, no matter what safeguards are instituted. This raises the specter that an innocent person will almost certainly be executed, if it has not already happened.

For these reasons, the majority of the world's nations have already abandoned capital punishment.

## THE PARALLEL SYSTEM

The legal system in the United States consists of two parts; the individual State courts and the Federal courts. This is commonly referred to as a parallel system and each court system generally mirrors the other. While each state has its own courts which are responsible for criminal, civil, and appeal issues, there are also Federal courts assigned to different regions of the country which are responsible for those same issues.

State courts are generally made up of elected officials. In some states, the governor may be responsible for appointing judges with appointments subject to review by the legislature. More commonly, State judges are elected for fixed terms by popular election.

The popular election of judges has long been a point of contention. Many see flaws in the system of judicial election, particularly around the issues of campaign financing. Getting elected necessarily implies having constituents, raising questions of fairness and neutrality.

In contrast, Federal judges are appointed for life. Appointments are reviewed by Congress. This process also contains some bias as judges selected for appointment are invariably individuals whose legal philosophy reflects that of the administration in power. Appointed judges with life tenure do not have to run campaigns or raise money and are potentially free from public pressure and special interests. They do not have to be concerned about how a ruling could affect future chances for re-election.

State courts are responsible for interpreting and enforcing statutes (laws) enacted by the State legislature. State courts must also be aware of Federal law and previous Federal court rulings on the issues which come before them. Federal courts are responsible for: interpreting and enforcing the U.S. Constitution which includes laws enacted by Congress, reviewing State court decisions which reach them on appeal, and settling disputes between citizens of different states or the states themselves.

The U.S. Constitution provides the basis of law and individual rights for our country and the Federal system often acts in a supervisory role over State courts concerning constitutional issues. State constitutions and State laws must agree with the Federal constitution and laws or provide greater protections. State court decisions which do not meet that threshold are subject to reversal by the Federal courts.

However, while Federal courts, culminating in the U.S. Supreme Court, have supervisory power they generally intervene only in instances where a State court's ruling or a state's enacted laws are contradicted by previous Federal precedent (rulings) or the Constitution. Where there is no contradictory precedent, a State court's decision is given deference if it clearly rests on "**adequate and independent State ground**". This is the principle of "**comity**" between the State and Federal courts. A State court decision can only be challenged if there is a substantial question of constitutional rights. The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) severely limits the timeline and method for Federal appeals in capital cases.





# APPEAL TRIAL

## PRE-TRIAL

### THE TRIAL

The period of time after a suspect's arrest can be divided into three areas:

- A. Pre-Trial (Investigation)
- B. Trial (Adversarial)
- C. Post-Trial (Appeal)

These three areas are similar in all states although specifics regarding procedures and time limitations may vary.

#### A. PRE-TRIAL (INVESTIGATION)

The time between arrest and the start of a trial is a critical period for the defendant. In this period, the State and Defense attorneys go through a series of procedures to bring the charge to the proper court and prepare it for trial. Discovery, the process of obtaining evidence and information about the case, begins for both sides. Each side prepares its case to be heard by the jury. Proper investigation, family history and anything else that can be used in mitigation must be built into the case from the start. Communication between the legal team and the defendant must be developed to build a strong defense strategy. In some states rules for mutual discovery (prosecution and defense) are in place.

#### THE PRE-TRIAL PERIOD CONSISTS OF THESE STEPS:

1. ARREST
2. INDICTMENT
3. ARRAIGNMENT
4. NOTICE OF INTENT
5. DISCOVERY
6. HEARINGS
7. PLEA AGREEMENTS

This process can take months - to a year or more.

#### 1. ARREST:

Once a suspect is taken into custody, a hearing will usually be held before a judge within 48 to 72 hours. The judge reads the arrest warrant and signs it, if a warrant was not issued before arrest. If applicable, a preliminary bond may be set. The availability of bond (an amount of money set for bail) for people charged with first degree murder varies from state to state but is rare in capital cases. The defendant may be questioned concerning his/her financial ability to secure a lawyer. If the person is indigent (can't afford a lawyer) the judge refers the case to the Public Defender's office. A lawyer will be appointed if there is no public defender. The case is set into motion and turned over to the District Attorney's office so that formal charges can be filed with the court.

#### 2. INDICTMENT:

There are three methods through which a charge of first degree murder can proceed to trial:

- a. Bill of Information (preliminary hearing)
- b. Grand Jury
- c. Multiple Means (combination of a & b)

In most cases, State law stipulates one form or the other; Bill of Information or Grand Jury. Some states allow either one or require the charge to proceed through both a preliminary hearing (Bill of Information) and then to Grand Jury.

#### a. Bill of Information: (probable cause)

A Bill of Information is the result of a preliminary hearing. In a preliminary hearing, the State is

required to convince the judge that probable cause exists that the defendant committed a crime. Proceedings are open to the public with the defendant and counsel present. A preliminary hearing is not a trial. The evidence required for the State to proceed to trial is less than that required for a conviction at trial. Most Defense attorneys do not present evidence at a preliminary hearing for several reasons.

The State is not required to give disclosure of its evidence to the defendant prior to the hearing. Defense counsel may not know what the State will present, making it difficult to rebut the State's case at this early stage. If the State presents evidence that the defendant committed the offense, most judges feel obligated to send the case to trial even if the defendant has made a compelling case that he or she did not commit the offense. If the State convinces the judge that probable cause exists, the State can then file the Bill of Information with the trial court.

#### b. Grand Jury:

In some states, a preliminary hearing and filing of a Bill of Information are insufficient for the State to proceed to trial in a capital case. In these states, an indictment must be issued by a Grand Jury. The U.S. Grand Jury system has its origins in English law where it was established as a mechanism to protect citizens from malicious prosecution and abuse of power by the government. In most states, the Grand Jury consists of twelve persons with a number of alternates, appointed from the community to serve a term. The purpose of the Grand Jury is to hear evidence of crimes and determine if probable cause exists for the charge to proceed to trial. Grand Jury hearings are closed to the public and exclude the accused and Defense counsel. In some cases, the State seeks an indictment against someone before an arrest is even made. The Grand Jury's finding is not a fact of law, nor can it be used as evidence in a trial. During a Grand Jury hearing, the State can present whatever physical evidence has been collected and subpoena witnesses to testify. (People who are potentially Defense witnesses can take the 5th Amendment and refuse to testify. They should get legal advice because anything they say to the Grand Jury can potentially harm the defendant's case.) If the Grand Jury finds sufficient probable cause, an indictment is returned. This indictment, also known as a True Bill, is the charging document on which the case is tried.

#### c. Multiple Means (combination of a & b):

Some states allow probable cause to be established through either method; a preliminary hearing or a Grand Jury indictment. In such states, preliminary hearings occur more often in rural areas, held in an associate court before an associate judge. Findings are then sent up to the trial court. Grand Jury indictments are usually sought in larger urban areas. A few states require capital charges to proceed through both a preliminary hearing and a Grand Jury. In states where either method is sufficient or where both methods are required, the State is essentially given two opportunities to establish probable cause. If the State is unsuccessful in one venue, it can try again in the other.

#### 3. ARRAIGNMENT:

Once the charge is filed with the trial court, arraignment is held. Arraignment means that the accused is called before the court to answer the charges. At arraignment, the accused can plead guilty, not-guilty, some form of not-guilty due to insanity, diminished mental defect or self defense. If the accused refuses to respond or offers an incorrect response, the court enters a plea of not-guilty on his/her behalf. If the accused pleads guilty to a capital charge, it may not be accepted by the court as an unequal

pled plea (without reservation) in most states. In order for a guilty plea to be accepted, all sides involved must stipulate that the court can only impose a life sentence in prison without benefit of probation or parole (LWOP) or that a jury be impaneled to determine the sentence by means of a sentencing trial - the only options being LWOP or death. If the accused pleads not guilty by reason of mental defect, the accused is in essence admitting to having committed the crime but denying responsibility due to mental incapacity. Each state has statutes governing what constitutes a mental deficiency sufficient to excuse an individual accused of a crime. What must be established is whether or not the accused knew the difference between right and wrong at the time of the crime. The issue is argued by both sides during trial with the burden of proof on the defendant to show sufficient mental incapacity.

#### 4. NOTICE OF INTENT:

After arraignment, law requires the State to give notice of its intent to seek the death penalty. A specific deadline for notification might not be established, but it must occur within a certain period before the trial begins. The notice must include a list of aggravating circumstances which the State will rely on. Aggravating circumstances are alleged facts about the case that the State legislature has determined must be proven for a person to be sentenced to death. These aggravating circumstances elevate a killing to a capital crime, as opposed to second degree or lesser murder. Aggravating circumstances include the following: the killing of a law enforcement officer or prison guard, a killing which occurs while another felony such as rape or robbery is committed, the age or number of victims involved. In most states, statute law can provide up to 20 different aggravating circumstances.

#### 5. DISCOVERY:

After arraignment, the pre-trial period moves into the investigatory phase of discovery. Discovery is the investigation of the case by both sides in preparation for trial. Since the State has already begun building its case, in some instances even before an arrest is made, this time is most important for the Defense.

Under the rules of discovery, each side is entitled to know the general facts of the case which the other side intends to present at trial. The Defense has a right to know what facts the State intends to prove, what witnesses it intends to call and any expert testimony it intends to present. The Defense also has the right to review physical evidence collected by the State and the results of any forensic testing. Defense attorneys begin this process by filing a request for information with the State called a *Motion for Bill of Particulars, Discovery, Inspection, and Production*. This motion compels the State to reveal information the Defense is entitled to see by law, including any exculpatory (beneficial) evidence which tends to exonerate the defendant. In most states, defendants are automatically entitled, under discovery, to copies of the initial police reports of the crime, statements of co-conspirators and the facts of any deals given to others by the State in return for testimony against the defendant. Defendants are also entitled to evidence collected by the State which may point to a person other than the defendant having committed the crime.

Under discovery, the State can request this information of the Defense as well. The State is entitled to know what physical evidence, witnesses or expert testimony the Defense plans to present at trial. The State has the right to know the facts of any alibi the defendant plans to rely on in the Defense. It can also collect physical evidence from the defendant including handwriting samples, blood, saliva, and hair samples for DNA or other testing. Courts have



ruled that the collection of such evidence does not violate the 5th Amendment right, protecting a person from being compelled to testify against oneself.

If the defendant has pled not-guilty by reason of mental defect, the State has the right to have the defendant examined by its own expert, prior to trial. An examination by this expert may be used to rebut testimony from a psychiatrist or psychologist hired by the Defense. Throughout the pre-trial period, counsel for the defendant continues to investigate. It is important that all the facts and circumstances concerning the crime be explored. Even if the defendant is not pleading not-guilty by reason of mental defect, Defense counsel may wish to have the defendant examined by a mental health professional. Defense counsel can take depositions (sworn and transcribed statements) from any person who knows about the case.

Defense counsel will want to learn as much about the history of the defendant as possible. This requires gathering background records, including: records of hospitalizations, mental examinations, treatments, school, military and jail records, employment records, family history; including mental health problems in the family. Counsel needs the assistance of family members in this process. Counsel will want to interview family members, employers, religious advisors, teachers, and friends of the defendant even if those persons have no knowledge of the facts concerning the charge the defendant faces. In a trial, evidence involves far more than the facts of the offense. In a death penalty case, Defense counsel will seek evidence that can be presented to mitigate punishment should the defendant be found guilty of First Degree Murder.

It is important that family and friends of the defendant realize that the collection of mitigation evidence by Defense counsel is not an indication that the attorney believes the defendant is guilty. Counsel is required by law to investigate mitigation evidence prior to trial because it cannot be done in the time period between a conviction in the first phase (guilt/innocence) of the trial and the commencement of the penalty phase. If the defendant is found guilty, the penalty phase of the trial often begins immediately and Defense counsel must be prepared. Mitigation information presented during trial can also make the defendant more human and sympathetic to the jury.

After Defense counsel has given written notice of the witnesses he/she intends to call, the State can also interview the witnesses. If they are endorsed by the Defense, witnesses can agree to be interviewed informally by the State or decline to give an informal interview. Family members or friends of the defendant should keep Defense counsel informed of any requests for interviews about the defendant or the case. They should understand, however, that Defense counsel is NOT their attorney and cannot give them legal advice.

#### **6. HEARINGS:**

Prior to trial, there are likely to be hearings on motions:

- **A Motion of Suppression** – is filed if either side feels that statements or evidence have been collected improperly.
- **A Motion In Limine** – refers to procedures to be followed during a trial.
- **A Motion of Continuance** – is requested by either side if more time is required to prepare for a trial date which has been set.
- **A Motion for Change of Venue** – is a request to move the trial to another county or parish in the event that either side feels the defendant may not receive a fair trial in the area where the crime occurred. For example, if there was high publicity at the time of the crime.
- **A Motion to Compel Evidence** – is filed if either side feels that the other is hiding information that it is entitled to by law.

Motions are decided by the judge sitting on the case. If either side disagrees with a judge's ruling on a motion, Supervisory Writs or Orders can be requested from a higher court. In most cases, writs are directed to a State's intermediate courts of appeal: State Circuit Courts of Appeal. However not all states have a Circuit Court of Appeal system. In those states, a writ is directed to the State Supreme Court or Court of Criminal Appeals. Any court receiving a request for supervisory writs may refuse to accept the writ, deny it and let the trial judge's decision stand, or return it to the trial court with instructions for further proceedings.



#### **7. PLEA AGREEMENTS:**

In some cases, before the trial begins, a plea agreement or plea bargain between the State and the defendant is reached. Such agreements allow the State to make recommendations regarding the charge or sentence in exchange for a guilty plea. In capital cases, an agreement is usually made in which the State agrees not to seek the death penalty if the defendant pleads guilty. In rare instances, the defendant pleads to a lesser charge (Second Degree Murder or Manslaughter) and the length of sentence is determined by the judge. The defendant is then sentenced by the judge, to life in prison without the possibility of probation or parole. Even if the defendant pled not-guilty at arraignment, a plea agreement can still be made, setting the previous plea aside. If the defendant agrees to a plea bargain, a trial is not held. In this case, the judge questions the defendant in open court, under oath, in what is called a Boykin hearing. A Boykin hearing ensures that the defendant is voluntarily and knowingly surrendering his/her rights, including the right to a jury trial and that the plea is not a result of intimidation or duress. If the guilty plea is accepted, the judge can not exceed the sentence of Life in Prison without benefit of probation or parole.

**Family and friends must remember that it takes a great deal of time to investigate and prepare for a capital trial. The more thorough a job Defense counsel does in the pre-trial period, the stronger the defense at trial.** Family and friends can best help during this time by keeping in touch with the defendant, being supportive and cooperating with Defense counsel.

#### **B. TRIAL (ADVERSARIAL)**

A jury trial is an adversarial process. A jury of the defendant's "peers", people from the community, is assembled to weigh facts, evidence, testimony and arguments presented by both the State's representative, the District Attorney, and the defendant's representative - the Defense Counsel. The judge acts as a referee; directing and moving the trial along in an orderly manner, determining what evidence may be presented and ensuring the process remains as fair and free from error as possible.

In non-capital trials, the jury's duty is only to determine guilt or innocence, after which it is dismissed and the judge passes sentence. In capital trials, law requires the jury to decide and impose the sentence. (Judges decided the penalty in some states until a recent U.S. Supreme Court decision.) Capital trials are essentially two trials in one; the guilt/innocence phase and the sentencing phase. This places a larger burden on the jury which decides the ultimate fate of the defendant. The defendant's counsel must prepare in advance for both phases of the trial.



#### **THREE PHASES OF A CAPITAL TRIAL:**

- 1. JURY SELECTION (VOIR DIRE)**
- 2. PROOF - GUILT/INNOCENCE PHASE**
- 3. PENALTY - SENTENCING PHASE**

#### **1. JURY SELECTION:**

Trial begins with the selection of the jury. Capital juries are made up of 12 people with two or more alternates. Jurors are selected from a pool of people who have received notice to report to the court for jury duty. Individuals are selected from the pool by determining who is fit to sit on the jury and who is not. Jury selection can take from one day to over a week, depending on the thoroughness of the attorneys. During jury selection, both the State and the Defense seek as much information as possible about each potential juror in order to determine whether the person is a good juror to sit on the case. The attorneys question jurors about their feelings towards the death penalty. Potential jurors who say they are opposed to capital punishment or would be unable to vote for a death sentence in the event that the defendant is found guilty of First Degree Murder, are removed from the panel of prospective jurors by the judge. In theory, the goal of this "death qualification" is to get a panel of 12 jurors who are not predisposed to either of the punishments; LWOP or Death. Since both punishments constitute the law for First Degree Murder, each juror must be willing to impose either sentence where the facts and circumstances warrant it; an inability to consider one of the punishments makes the juror ineligible to serve. Unfortunately, "death qualification" also has the potential of slanting a jury in favor of capital punishment since all those opposed are automatically dismissed. In "death qualifying" a jury, the State is interested in being certain that every juror is willing to impose the death penalty.

Defense counsel is interested in determining if jurors would automatically vote for death based on a guilty verdict or would be willing to consider the mitigating circumstances surrounding the crime which could warrant the lesser sentence of LWOP. This concern on the part of the Defense attorney does not mean that he/she feels the defendant is guilty. Defense counsel must question potential jurors concerning sentencing in the event that the jury returns a guilty verdict and the trial moves to sentencing phase.

During the "death qualification" period, in which jurors can be removed from the panel, there is also a period of jury questioning referred to as general "voir dire". Potential jurors are questioned about their views on other topics such as police credibility, judging others, familiarity with the crime and if have they have already formed an opinion regarding the defendant's guilt or innocence. They may be asked about personal experiences that could affect their ability to serve, for example: if they have ever been a victim of crime, served on a jury and whether serving on a sequestered jury would cause them substantial hardship.

After questioning, the State and Defense can make what are called "challenges" or "strikes for cause". Each side can request the judge to exclude potential jurors who have indicated an inability to provide a fair hearing of

the case. The judge can accept an attorney's argument against a potential juror and excuse that person, or reject the attorney's argument and qualify the juror. Potential jurors that are excused, are replaced by others from the jury pool.

Both the State and Defense are also given "peremptory strikes" or "peremptory challenges". Depending on the State, both sides can strike 12 to 15 potential jurors who have been questioned and survived challenges from the pool. In addition, each side gets strikes in the selection of alternates, once the full jury has been selected. The purpose of peremptory strikes is to allow attorneys to remove potential jurors who they do not feel comfortable about, even if the individuals are generally qualified. In the past, peremptory strikes have been abused by the State to exclude minorities from juries or from acting as jury forepersons (spokespersons for the jury). Appeals courts have overturned convictions based on this practice, ordering new trials to be held and ruling it unconstitutional to use race as a condition for peremptory strikes. A potential juror can not be eliminated by a peremptory strike by reason of race, religion, or gender. However, this does not mean that an attorney must specify an exact reason for moving to strike a potential juror. An attorney may have a "gut" feeling about a potential juror's fairness. The judge can question the attorney's motives to ensure the strike is not unconstitutional. Peremptory strikes allow both sides to work toward the selection of jurors they want and exclusion of those they do not want. It can be a bit of a chess game, with each side trying to keep the potential jurors it feels are favorable to their side and to exclude those it feels are favorable to their opponent.

Family and friends attending the trial should know that in addition to being questioned during these proceedings, jurors are watching all that goes on. It can be prejudicial to the defendant if jurors see family members or friends of the defendant behaving in a disrespectful manner. They may associate this behavior with the defendant. Under no circumstances should anyone, on either side of the case, ever attempt to communicate with a juror or potential juror about the case. If an observer sees anyone trying to influence or communicate with a juror, the matter should be immediately reported to the court and the attorneys. Tampering with jurors is a crime and those attending a trial should avoid any behavior that might seem improper. Family members and friends of the defendant can be most helpful by staying away from jurors and treating the proceedings with respect in every regard, including dress and demeanor. A strong show of support for the defendant, with friends and family in attendance at the trial, can influence the jury. It is important to be present.

Once the full jury is selected and seated, jurors are given time (in some cases escorted) to return to their homes to gather personal items and clothes they need. In capital cases, jurors are sequestered together in a hotel or motel, separate from all other influences during the trial. The judge instructs the jurors that they are not to discuss the case amongst themselves for any reason, unless authorized to do so after all evidence has been presented and final arguments concluded. Jurors are expected to avoid outside influences such as TV or newspaper reports of the crime or trial. This ensures that jurors are only exposed to and considering evidence presented during the trial.

## 2. PROOF - GUILT/INNOCENCE PHASE:

In early legal history, legal theorists, judges and attorneys stressed that the high goal of the trial system was the pursuit of justice. District Attorneys, the prosecutors of crime serving as representatives of the people, were entrusted with the ideal of searching for the truth, not obtaining convictions. The court was called upon to protect society and the wrongfully accused. The rights of the guilty were also protected. While the trial process was to be adversarial, legal combat between the prosecutor and the Defense attorney, the result of this sparring was to establish truth. Even though the Prosecution and Defense stood apart from each other, with the judge between them, the common goal of all was to seek what was just and right. The innocent would be set free. The person truly guilty of a crime would be convicted, with punishment that was tempered, fair and in equal proportion to the crime. However, given the realities of self-interest, politics and power, these noble ideas began to change over time. In many courts today, the adversarial process has only one goal – to win.

Once the final jury is selected and seated, the trial proper begins. In the first phase, the proof - guilt/innocence phase, the jury decides if the defendant is guilty of the crime. Through the adversarial process, each side presents physical evidence, results of forensic testing and the testimony of general and expert witnesses. Each side tries to contradict the other's case. In order for a defendant to receive a fair trial, his/her counsel must be prepared to challenge the State's case. In the months prior to trial, the focus of the Defense counsel is to prepare for this challenge.

This does not mean Defense counsel should or will have an answer for every piece of evidence or word of testimony presented by the State. In some instances, the State presents evidence which is unchallengeable. In a rebuttal, a Defense attorney can not lie, ask witnesses to lie, allow knowingly perjured testimony or produce false evidence. However, the Defense attorney should be prepared to cross-examine the State's witnesses and experts in a



meaningful way in order to test fully the facts of their statements and demonstrate how physical evidence or testimony can be viewed in another way. Alternatives to the theory of the crime which the State wants the jury to accept should be put forward. Defense counsel should be prepared to present as much supporting testimony from general and expert witnesses and physical evidence as possible. In an adversarial process, the fate of the defendant depends on a spirited defense before the court and the jury.

After jury selection, the first order of business is the sequestration of the witnesses. It is common for both the State and the Defense to exclude witnesses from the courtroom during trial until they have testified. This is done to prevent witnesses from tailoring their testimony by lis-

tening to witnesses who testify before them. The judge places all witnesses under the **Rule of Sequestration** and instructs them to leave the courtroom until called to testify. During this period, witnesses are prohibited from discussing the case or their testimony with each other. The law makes an exception for exclusion for "victims", which includes the family members of the homicide victim. The victims' family members are allowed to remain in the courtroom during the trial even if they are called to testify.

The guilt/innocence phase of a trial begins with opening statements. The trial then proceeds through a series of steps in which one side presents its case and evidence to the jury, followed by cross-examination by the other side. (Chart 1)

An opening statement is a clear, comprehensive summary of all the evidence an attorney plans to prove to the jurors. Time is allotted to each side for opening Statements. The State always presents first. After opening statements, the State presents its case. The Defense can make its opening statement following the State, or wait until the State presents and rests its case.

The State's case can take days or weeks depending on the complexity of the case and the amount of evidence. The State can call witnesses to testify about knowledge of the crime or the defendant's involvement, including the law enforcement officers who investigated the crime scene, collected evidence and arrested the defendant.

The State can also call "experts", individuals who testify about physical evidence, the results of crime lab tests or other areas in which they have recognized expertise. To qualify and be accepted by the court as an expert, the witness must demonstrate expertise through previous work experience, schooling or training in the area about which the State is calling the expert to testify. The District Attorney questions the prospective witness in order to establish his/her credentials and the Defense can cross-examine. The judge then decides if the witness can be accepted by the court as an expert.

Throughout the State's presentation, the Defense has the opportunity to cross-examine witnesses and view all of the physical evidence, including documents or paperwork presented to the jury. Defense counsel can inform the jury of any deals a witness has made with the State in exchange for testimony against the defendant. The Defense can attack the credibility of an expert witness in cross-examination by asking if they are State employees or if they have been paid by the State to testify. For example, the State

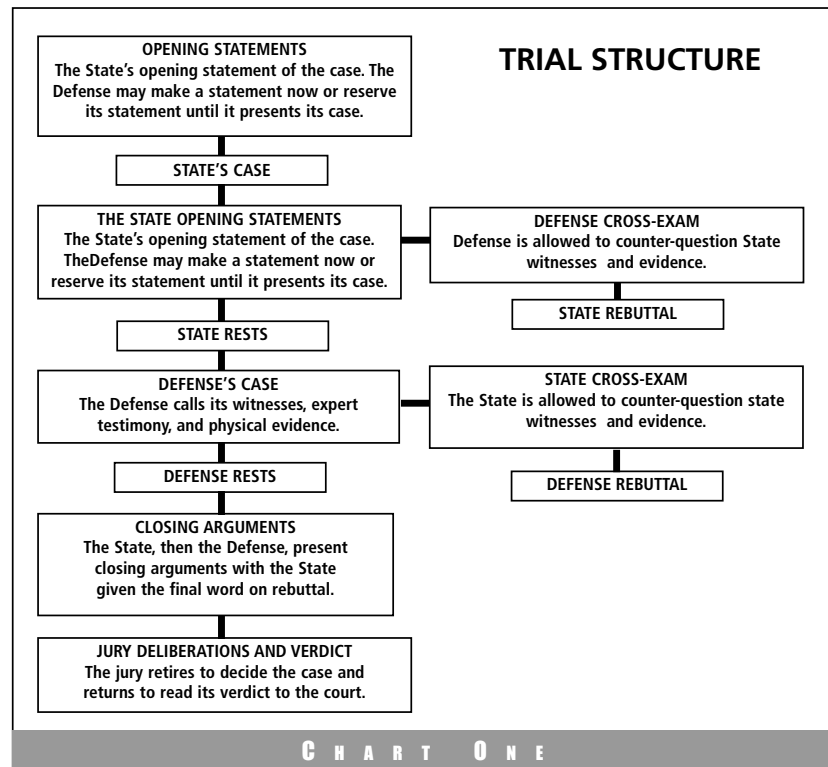


CHART ONE

may have hired a psychiatrist to interview the defendant. After cross-examination, the State can question its witness again on rebuttal.

The State's presentation can seem long and tedious. In addition to calling witnesses and presenting physical evidence, there are many procedures the State is required to follow. The State must prove the identity of the defendant so that the court recognizes that the proper person, accused of the crime is in the courtroom. The State calls law enforcement officers or witnesses who know the defendant and asks them to identify the defendant in the courtroom. The State must also prove that the victim is dead and that death occurred by homicide by calling EMT's, doctors who saw the victim, and the coroner who performed the autopsy to the stand. The coroner's report is submitted as evidence by the State.

The Defense can require the State to show the chain of custody for every piece of evidence collected; demonstrating who has been in custody of it from the minute it was collected, through testing, to the day of the trial. This ensures that evidence has been properly handled and accounted for. Evidence must be relevant and have a legal basis in order to be presented. Objections to verbal testimony or physical evidence can be raised throughout the trial by both sides. Objections may require "bench conferences" where the State and the Defense approach the judge to discuss and argue objections out of the hearing of the jury. The judge decides what evidence and testimony is allowed and what will be excluded.

These proceedings take time and may seem unrelated to the defendant. Family members and friends of the defendant must remember that everything the State does has a purpose, either to build its case to convince the jury or because it is procedurally required by law. When the State completes its presentation, the District Attorney tells the judge that the State has no more evidence to present and rests its case. This signals the Defense to begin.

The timing of the opening statement is a strategy question for the Defense counsel. If the Defense feels it has a strong case, it often waits until this point in the trial to present an opening statement. This enables the Defense to comment directly on the State's presentation and to assure that the jury does not forget important points during the days or weeks of the State's presentation. However, if the Defense case is not strong due to lack of witnesses or physical evidence, it often makes the opening statement in conjunction with the State and attacks the State's case in cross-examination.

Other strategy decisions are made to determine: if the presentation of certain pieces of evidence is beneficial to the defendant, areas of the State's presentation where the Defense has the evidence to attack with strength and areas which should be avoided to due lack of countering evidence. Emphasis is placed on areas of strength rather than weakness. The defendant has the right to testify but cannot be forced to do so. Usually the defendant and counsel make that decision once the trial is well under way. If a defendant does not testify, it can raise doubt in the minds of jury members. If the defendant testifies, he/she is subject to cross-examination and could waiver under forceful examination by the District Attorney, hurting the case.

The presentation of the Defense case proceeds in the same manner as that of the State; the Defense calls witnesses, the State cross-examines and Defense can re-question on rebuttal. The Defense presents physical evidence related to the crime and expert witnesses can be qualified by the court to testify about specific matters including forensics, DNA, handwriting, fingerprints and psychology. Defense witnesses, general and expert, may contradict evidence presented in testimony by State witnesses. If the Defense has given prior notice to the State, it can re-call State witnesses including law enforcement officers. The Defense sometimes calls State witnesses during its own presentation in order to establish points it was not able to address adequately during cross-examination.

The Defense notifies the judge when all evidence has been presented and rests its case. Each side presents a closing argument and the case is then turned over to the jury.



Depending on State procedure, the State and Defense meet with the judge to discuss the preparation of the jury instructions, before or after closing statements. Jury instructions cover the law applicable to the case. Lesser offenses such as Second Degree Murder or Manslaughter can be included for jury consideration if Defense counsel can convince the judge that sufficient evidence was produced at trial to support a conviction for an offense lesser than First Degree Murder.

For example, if Defense counsel convinces the judge that insufficient evidence was produced by the State to establish the aggravating circumstances necessary to convict for First Degree Murder, a jury is warranted in returning a verdict of Second Degree Murder or Manslaughter. Defense counsel attempts to have the judge instruct the jurors on as many lesser offenses as possible; the State tries to limit their inclusion to the extent possible. The judge makes the final determination regarding what is and is not included in the jury instructions.

During closing statements, both sides have an equal amount of time to present final arguments to the jury. The State presents first, followed by the Defense, with the State having the final rebuttal. In judicial theory, the State is always given the last word because it has the burden of proof in establishing guilt. In our country's early history, people tended to live in small, tight knit communities and prosecutors were responsible for a district, hence the title "**District Attorney.**" They traveled from town to town and were considered outsiders, placing an extra burden on the State in persuading members of a community to convict one of their own. Therefore, certain advantages were given to prosecutors in order to level the playing field.

Today the State is in the stronger position. While every person is "innocent until proven guilty", the power of the State with its: officers, investigators, experts and nearly unlimited funding, clearly outweighs the average defendant with limited means and an over-worked, under-funded Defense counsel from the Public Defender's office. Juries today tend to be made up of individuals from larger towns and cities with no close ties to each other or to the defendant. However, the advantage given to the State in earlier history persists to this day.

After closing statements, in which each side summarizes its case and the evidence presented, the case is "given to the jury". The judge reads the instructions to the jury, outlining: the aggravating circumstances that must be found to convict, lesser offenses which have been included, the number of votes necessary for the jury to convict, and what constitutes reasonable doubt. **Reasonable doubt is any doubt the average person could reasonably consider in light of the evidence presented during trial.** It is not ANY doubt a juror may have regardless of the facts of the case.

Some states allow jury members to take a copy of the jury instructions with them into deliberation and to review pieces of evidence, reports, documents, and transcripts of statements during deliberations. Other states permit no materials during deliberation, requiring the jury to reach a verdict from memory alone. In either case, once the jury instructions have been read and the jury retires, deliberation can last from minutes to days.

**Jury deliberations can result in one of these:**

- a. A guilty verdict of First Degree Murder
- b. A guilty verdict for a lesser offense
- c. Acquittal
- d. A mistrial

The requirements for each outcome differ.

**a. Guilty of First Degree Murder:**

For this conviction, all 12 jurors must unanimously agree that the State has proven all of the alleged aggravating circumstances and that the defendant killed the victim or was involved in the killing (in some states).

**b. Guilty of a lesser offense:**

If the jury finds that the aggravating circumstances for First Degree Murder have not been proven, or if the Defense has convinced the jury that the defendant is guilty of a lesser offense, the jury can return a verdict for a lesser offense included in the jury instructions. Some states do not require a unanimous decision for jurors to convict of a lesser offense. In this case, 10 of 12 jurors must agree to a verdict of Second Degree Murder or some form of Manslaughter.

**c. Acquittal:**

To acquit the defendant, all 12 jurors must agree that the defendant is innocent of the crime.

**d. Mistrial:**

If the jury is split without enough votes to convict or acquit, commonly called a "hung jury", or if the jury returns with a "non-responsive verdict", the judge declares a mistrial. A non-responsive verdict is one which is not included in the jury instructions. The court will not accept a non-responsive verdict and will instruct the jury to continue deliberations. If the jury persists with a non-responsive verdict, the judge will order a mistrial.

A mistrial can be declared ANY time during the trial if an impropriety occurs which undermines fairness. For example, jury or witness tampering, violations of the rules of sequestration by jury or witnesses, or flagrant violation of a rule by either side.

If a mistrial is declared, another trial is held before a new jury at a later date. In some cases, the State and Defendant reach a plea agreement before the new trial. The least likely scenario is that the State dismisses the case.

The jury returns to open court to read the verdict. Observers should remember that jurors have arrived at the verdict after consideration of the evidence and the law. If the verdict is not-guilty, the trial is over and the defendant is discharged. If the defendant is found guilty of a lesser offense, the jury is dismissed and a sentencing hearing is scheduled at which time the judge will determine the sentence. If the defendant is found guilty of First Degree Murder, the trial proceeds to the penalty or sentencing phase.

**3. Penalty or Sentencing Phase:**

The penalty phase of a capital trial proceeds in the same manner as the guilt/innocence phase. First the State, followed by the Defense, gives the opening statement and presents evidence. In the penalty phase, the priority for the State is to demonstrate aggravating circumstances based



on evidence presented during the proof (guilt/innocence) phase and other factors such as the criminal history of the defendant and **"victim impact"** evidence. Victim Impact evidence is testimony by the victim's family and friends about the effect the crime has had on them. This can be a very emotional time in the courtroom.

The priority for the Defense is to present mitigating evidence to weigh against the aggravators. The mitigating circumstances admissible in capital trials are listed in each State's statutes and generally include the following: the age and mental State of the defendant at the time of the crime, lack of any significant prior criminal history, proof that the defendant was under extreme duress or substantial domination by another at the time of the crime. Mitigation evidence also includes factors favoring the defendant such as prior good acts or honorable service in the military. Defense counsel may call family members, friends, previous employers and others who have something beneficial to say about the defendant. As in the proof phase of the trial, Defense counsel can call a psychologist or another type of mental health professional to testify. Preparation for this phase of the trial should have begun in the discovery period, before trial. If a capital trial reaches this point, mitigating evidence may be all that can save the defendant from a death sentence.

As in the proof phase, the State and Defense cross-examine each other's witnesses as they testify. At this point, Defense counsel may choose not to question the State's witnesses aggressively as they tend to be family members of the victim and counsel could inflame the jury by appearing to attack these witnesses on cross-examination. In the penalty phase of a capital trial a jury's feeling about a defendant is just as important as the logical weighing of aggravators versus mitigators. In this phase of the trial, rather than attacking the State's presentation, Defense counsel focuses on showing the jurors that despite the conviction, the defendant does not deserve to die.

Following penalty phase presentations, the judge instructs jurors on the law regarding determination of punishment. The only verdicts possible are life in prison without the possibility of probation or parole or death. (If a jury is

unable to reach a verdict, in some states – for example Kentucky, the judge will order the jury to return to deliberations to consider a verdict of Life in prison, or LWOP.) Jury instructions are given before or after the closing statements, depending on procedures where the trial is being held. The State and Defense are allotted equal amounts of time for closing statements, with the State having the final word in most states. Following closing statements, the jury receives instructions and deliberations begin.

The penalty phase of a capital trial can last from a day to a week. Deliberations can last minutes, hours or longer.

**There are three possible outcomes from jury deliberations:**

**A. Verdict for death:**

A unanimous vote of all 12 jurors is necessary to sentence the defendant to death.

**B. Verdict for life without parole (LWOP):**

A unanimous vote of all 12 jurors is necessary for LWOP. *TX just instated LWOP; NM does NOT have it*

**C. Split Jury resulting in LWOP:**

Often the jury is split, with some jurors voting for death and others for a lesser sentence. The jury cannot return with a verdict until all 12 members unanimously agree. If the jury is split, the judge usually orders the jury to return to deliberations in order to work out the differences. If the jury continues at an impasse, the judge can declare the jury deadlocked and impose the lesser sentence of LWOP.

This situation is similar to a hung jury in the proof phase. However, rather than declaring a mistrial, the only option is to sentence the defendant to the lesser punishment since he/she has already **been** convicted of the crime. A death sentence absolutely cannot be imposed without a unanimous verdict by the jury.

After sentencing, the trial is over, the jury is dismissed and the defendant embarks on the long road of the appeals process.

**C. POST – TRIAL APPEALS**

The months following a trial are a technical period in which the Defense attorney and court prepare the case for appeal. The court orders the trial record to be "designated" (preserved) and transcribed by the court reporter's office. Defense counsel files a series of post-trial motions.

Defense counsel is required to file a **"Notice of Intent to Appeal"** within time limitations set by statute law. Often this can be done verbally in court, without having to file written notice. Defense counsel also files a **"Motion for New Trial"**, which in some states is accompanied by an **"Assignment of Errors"**. This motion lists the errors that Defense counsel wants to bring to the attention of the Court. If the errors are found to be valid, the judge would be required to throw out the conviction or sentence and order a new trial. This motion also forms the basis for the appeal. The State can file a brief opposing the Defense counsel's motion. The judge sets a date for hearing all motions.

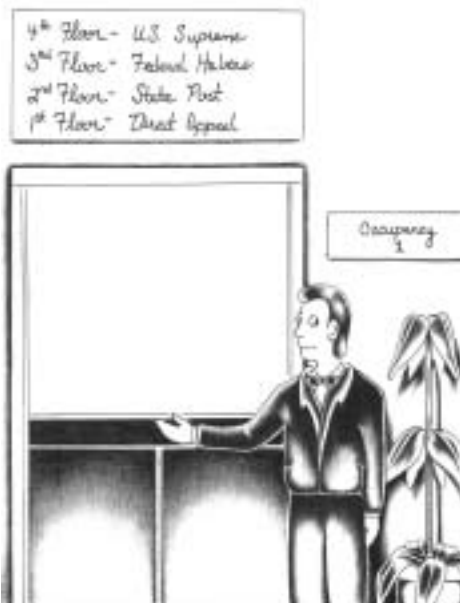
At this stage, success with motions for new trials is rare, granted only if serious misconduct has tainted the fairness of the trial. If the Motion for New Trial is denied, the judge will formally sentence the defendant. The judge is **REQUIRED** to follow the sentence determined by the jury. In some States, judges were able to override the jury recommendations, but a recent U.S. Supreme Court ruling has made this illegal. Formal sentencing occurs two to three months after trial, marking the end of the defendant's involvement with the trial court for the present.

If there is a conviction, at certain phases there may be an execution date set. There can be one at the time of sentencing, one after the Direct Appeal and one after each phase in Post Conviction. **THESE ARE NOT SERIOUS DATES.** A serious date comes after failing to get relief at the Federal level.

**PART THREE**

**THE APPEALS PROCESS**

After a defendant has been convicted and sentenced to death, what follows is a very complex appeals process. Although there are some general rules and procedures common to all states, it would be impossible to provide all the information concerning how appeals proceed through the courts of each individual state. Some attorneys specialize in the appeals process which is one of the most technically complex areas of criminal law.



**It is very important to review the information in this chapter with an attorney.**

**Take along a pen and paper so that you can write down the information the attorney gives you in language you are familiar with, or create a chart you can easily understand and follow. The better you understand the procedures for appeals in your state, the better prepared you will be. Knowing the general timelines for filing appeals and the proper courts for each appeal to be filed in, helps to lessen anxiety you may feel in facing this difficult procedure. Having a decent understanding of what lies ahead, what should be done, and what is to be expected at each stage also allows you to evaluate clearly whether an attorney is performing in a satisfactory manner.**

This does not mean that you should or will know every rule and procedure for appeals; nor should you be expected to know all of this. Attorneys attend law school, often go on to specialize in capital appeals, work in this field every day, and still they must often ask for advice or assistance from other attorneys when facing difficult appeal issues and procedures. Many good attorneys would never consider working on a case without a team of lawyers and other specialists because one person can not have all the information or see all the possibilities. By learning the general procedures for your state, you gain a foundation and know how to ask relevant questions.

The general principles and purposes of the appeals process, from Direct Appeal to State Post-Conviction and finally the Federal courts and Federal habeas corpus review, are outlined here. Information specific to each State is provided in the next chapter. However, an attorney should be consulted to provide a fuller understanding of the process as well as information regarding recent changes in State and Federal rules and procedures for appeals.

The Federal and State governments have made the appeals process progressively more difficult. Technical procedures and timelines reduce the number of appeals filed, the number of appeals a person is eligible to file and shorten the time period between sentencing and execution. Missing a filing deadline by one day, or failure to follow correctly a complex filing procedure can result in an appellant's brief being rejected and losing the appeal.

**The appeals process can be divided into the following steps:**

- A. Who will appeal for the defendant?**
- B. Direct Appeal**
- C. State Post-Conviction**
- D. Federal Habeas Corpus**

**A. WHO WILL APPEAL FOR THE DEFENDANT?**

There are three possibilities:

- 1. The original trial attorney**
- 2. A "Resource Center" attorney**
- 3. A retained (hired) lawyer**

*\*In most cases, the original trial attorney is responsible for filing the initial or Direct Appeal.*

### 1. TRIAL ATTORNEY

The trial attorney files motions for a new trial, hearings and the notice of appeal which is required in order to proceed. The trial attorney is well positioned to file the Direct Appeal since he/she knows the trial, errors which may have occurred and has raised objections to improper or unfair issues. It is more difficult for a new attorney, unfamiliar with the case and working under deadlines, to prepare an appeal. Each state has a timeline for filing motions and/or notices and a deadline for preparing and filing the Direct Appeal.

Direct Appeal is mandatory in most states, guaranteeing a defendant the right to a review of a capital conviction and death sentence. Generally, notice of appeal must be given within five to ten days after formal sentencing and Direct Appeals must be prepared and filed in the proper appellant court within 60 to 90 days. In States with more flexible timelines, a Direct Appeal can take two to three years to be resolved. All filing timelines must be strictly kept in order to avoid delays or jeopardize the process. Given the timelines and complexity of this process, the trial attorney is best suited to prepare the appeal.

A conviction does not mean that the attorney failed to provide effective representation. Honest effort, meeting timelines and willingness to challenge the conviction should be taken into account. However, in cases where the trial attorney has been ineffective in representing the defendant due to minimal effort, being unprepared or inexperienced, the option of acquiring a new attorney should be considered. A new attorney can be secured by contacting the head of the Indigent Defender Office, which appointed the trial attorney. If the trial attorney was retained, a new one can be hired. Another option is to consult attorneys who work for Resource Centers and are dedicated to representing people sentenced to death, and on appeal.

### 2. RESOURCE CENTER ATTORNEY

In the 80's and 90's coalitions of attorneys across the country began to organize "Post Conviction Resource Centers", specializing in representing people sentenced to death. These centers grew out of the need, recognized by the U.S. Supreme Court, for defendants to have adequate professional representation on appeal because of the finality of the sentence. Due to the complexity of capital law and lengthy capital appeals process, general practice attorneys often lack the experience and the resources to take on appeals of people with death sentences. Capital appeals are expensive and require many resources including investigators and paralegals. Most defendants in capital cases have no source of income and can not afford to pay for these services.

To address this problem, dedicated attorneys joined together in many states and obtained funding from the Federal government, the State, and anti-death penalty donors. By the mid 90's, the success of these groups, in defending capital sentenced defendants on appeal, provoked a backlash from District Attorneys, victims' rights groups, State legislatures and Congress.

Initially, Resource Center attorneys assumed representation of a defendant once his or her case reached the State Post-Conviction phase of appeals. However, realizing the importance of the Direct Appeal, it became more common for these attorneys to step in immediately after trial in order to handle the Direct Appeal. Resource Center attorneys also called on private practice attorneys in the community, opposed to the death penalty, to step in even before trial and act as trial counsel pro bono (free of charge). This enabled indigent defendants to get professional, experienced representation before conviction.

As a result, people charged with capital crimes received far better representation at trial, on Direct Appeal and during subsequent State and Federal appeals. Trials and appeals lasted longer, were more expensive and more convictions and death sentences were overturned than executions carried out.

According to some government estimates the cost of prosecuting a capital case, from trial through appeal to execution, rose to \$2- 3,000,000.00 as opposed to the \$500,000 - \$1,000,000 required to house someone for the duration of a Life sentence. (Life Sentence costs are

less in the case of prisoners who work to offset costs of incarceration). In response, State legislatures and Congress passed a number of bills. In 1996, Congress passed the Anti-terrorism and Effective Death Penalty Act (AEDPA) setting limits on the number of times and under what conditions, a petitioner could seek appeal in the Federal courts. Appellants petitioning the Federal courts faced a new, one year deadline for filing appeals and were required to seek a Certificate of Appealability (COA) before proceeding from the lowest Federal court, the U. S. District Court, up through the Circuit Courts of Appeal to the U.S. Supreme Court. In addition, Federal funding for Resource Centers was cut. Many State legislatures followed suit, creating new laws limiting the number of appeals permitted in State courts. Some states have essentially combined the Direct Appeal and State Post Conviction, requiring both to be filed almost simultaneously. Time limits for the introduction of newly discovered evidence on appeal have been reduced in some states. The overall direction on the part of Federal and State governments has been to tighten rules, reduce the number of available appeals, shorten time limits and speed up the process.



As a result of the elimination of Federal funding for Resource Centers, many condemned inmates no longer have representation after Direct Appeal and must file their own appeals for State Post-Conviction and Federal habeas appeals in order to avoid missing filing deadlines. Direct Appeal is the only mandatory appeal in the majority of death penalty states and many states are NOT required to appoint attorneys to indigent condemned inmates after Direct Appeal. In such cases, a condemned inmate must file his/her own appeal and only then, if accepted, may the court appoint an attorney to represent the inmate. If an appellant's Direct Appeal is denied and if he or she does not have an attorney or does not seek further appeal by filing pro se (on his/her own behalf), the person could be executed without further appeal.

However, in many areas former Resource Center attorneys are still working to defend indigent condemned inmates. States have also stepped forward to help keep Resource Centers open. The attorneys themselves fundraise and seek grants, while continuing a private practice with paying clients. Even if there is no Resource Center in your state, it is likely that you can find a network of attorneys that represent defendants charged with capital crimes and on appeal. Finding such attorneys may be your best option for assuring quality representation. The Justice For All Act, passed in 2004, requires more funding for DNA testing and Defense attorneys.

When attorneys take on cases of indigent defendants, they do so at their own expense. The State may reimburse these attorneys for a portion of their work, but most costs are assumed by the attorney. The high cost of representing defendants charged or convicted of capital crimes, makes it impossible for attorneys to take every case. Most private attorneys do not have the resources to take on numerous, expensive, pro bono cases. However, attorneys that do this work and/or oppose the death penalty often do what they can even if they cannot fully take on a case. They offer advice, answer questions, network with other attorneys who may be able to take on a pro bono capital case, or enlist the support of a number of different individuals: attorneys, investigators, paralegals, etc.

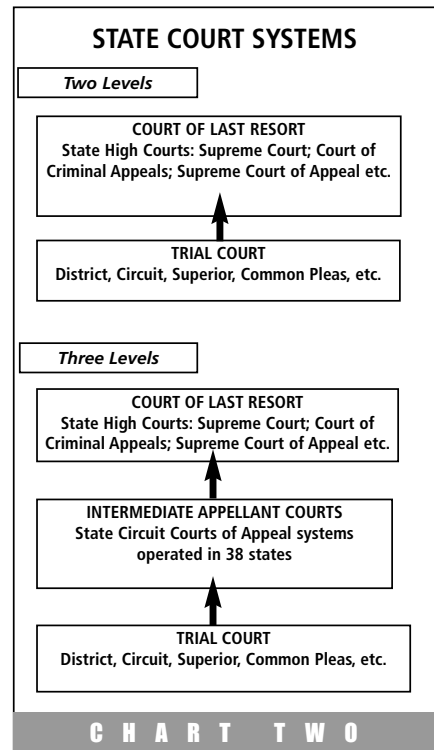
It is important to find such attorneys before trial or conviction by contacting your state's Bar Association, asking the attorney appointed to the case or calling law offices in the phone book and asking for referrals. Ask for the names of attorneys known to represent people on appeal and convicted of capital crimes. Once you have called and talked to a number of people, the same names will keep coming up, guiding you to the right contacts. A list of local contacts for each state is included in this booklet.

Even if these attorneys can not take the case immediately, you have identified contacts that are aware of the case and may be able to step in later. Planning ahead is the most important thing you can do to improve the chances for you or your family.

### 3. RETAINED ATTORNEY

If you are able to hire a trial attorney, it should be established at the time of hire that if the trial ends in a conviction, this attorney will prepare and file the Direct Appeal. After representing a client at trial and on Direct Appeal following conviction, most retained attorneys are no longer obligated to file further appeals, just as appointed attorneys are not. After Direct Appeal, most retained attorneys consider their services to have been fully rendered and require a new fee for representation in the appeals process. You can also hire a new attorney at each stage: for trial and Direct Appeal, State Post-Conviction and another for Federal habeas corpus. This gives you options if you are not satisfied at each stage and allows you to look for an attorney with expertise in each area.

Individuals charged with capital crimes and their families, cannot usually afford to hire high priced attorneys for the entire process. An attorney is usually hired for the trial, which assures representation only through Direct Appeal. It is important to generate other options ahead of time. An attorney hired to represent a defendant at trial may choose to remain with the case through the appeals process into the Federal courts, sometimes at his/her own expense. Attorneys may feel it is unethical to abandon a client who has been sentenced to death. However, you cannot count on this unless it is agreed to at the time the attorney is hired. You should not take anything for granted and always think ahead.



Planning ahead does not mean you are admitting guilt, or that you believe your family member is guilty. Just as the trial attorney must prepare in advance for the possibility that the defendant may be convicted, you must be prepared to appeal to the next court in the appeals process, ahead of time is possible. Many innocent people have been convicted, sentenced to death and sent to death row for years; some being exonerated within hours or minutes of execution. In almost every case, it has been attorneys, investigators, law and journalism students, activists and journalists who have stepped in years after the original conviction, to do the hard work of freeing a wrongly convicted defendant.

In summary, after the initial Direct Appeal from a conviction and sentence of death, the attorney who represented the defendant may no longer be obligated to remain with the case. Attorneys appointed by the court to indigent defendants are rarely able to continue with the case. Retained attorneys sometimes stay with a case to the end, at their own expense; however they are not obligated once the original agreement is met. Often the best chance a defendant has is to contact the networks of anti-death penalty groups. If you are the friend or family member of someone charged with or convicted of a capital crime, you can be their best advocate by anticipating what may happen, being prepared and finding those willing to help. This can mean the difference between life and death.

## B. DIRECT APPEAL

The first appeal following trial is the Direct Appeal. Direct Appeal goes from the trial court to the State's "Court of Last Resort", the highest court in which an appellant can seek relief from a conviction and death sentence. Generally this is the State Supreme Court or in some states, the Court of Criminal Appeals.

In most states, the right to Direct Appeal is mandatory (automatic) for a person convicted of a capital crime and sentenced to death; the Court of Last Resort must accept and review the appeal. In a few states the right to Direct Appeal is up to the discretion of the Court of Last Resort. Whether Direct Appeal is mandatory or discretionary in your State, all death sentences must be reviewed for proportionality. Even in a state such as Arizona, where there is no right to Direct Appeal for a capital conviction, if there is a death sentence the Court of Last Resort will review the proportionality of the sentence.

The proportionality of a sentence refers to whether the sentence is generally equal to all other sentences imposed on defendants for similar crimes. The Court of Last Resort compares the defendant's sentence to the sentences of all other defendants convicted of similar crimes. If a death sentence is common for the type of crime for which the defendant has been convicted, the sentence is considered proportionate. Courts review the proportionality of a death sentence to ensure that equal types of crimes receive equal punishment and to correct an overly harsh sentence if other defendants have received lesser punishments. In some States the appellant counsel is required to prepare a proportionality study, also called a Sentence Review Memorandum, which is filed with the Direct Appeal to assist the court in proportionality review. In other states the Court of Last Resort reviews all previous convictions and death sentences to determine proportionality.

The Direct Appeal is limited to issues that are directly "from the record", meaning from the written or taped records (*transcripts of everything that has occurred in a case from arrest through the end of trial*). This includes: the Grand Jury Indictment, all pre-trial motions filed by both the State and Defense, the transcripts of any pre-trial hearings, the complete transcript of the trial including copies of any exhibits offered into evidence by the State and Defense, all post-trial motions filed, and the transcripts of any post-trial hearings. Together, these records constitute the complete record and any issue raised on appeal must be part of this record.

After trial, post-trial motions, and hearings have been conducted, the trial judge orders the Clerk of the Court to prepare a complete typed transcript of all the records (some states use taped recordings). Copies are filed with the Court of Last Resort, the DA's office and the defendant's appellant counsel. This is referred to as "designating the record."

Appellant counsel must be able to demonstrate where an issue arose in the record and why it is an error. Issues (errors) can include: a trial judge's wrongful ruling over a motion or objection, the jury having been allowed to see or hear some piece of evidence or testimony which should have been prohibited, a prosecutor's use of improper statements to a jury, or anything considered unlawful or unconstitutional which can be demonstrated from the actual record. Issues "outside the record" are errors which did not occur in the courtroom and therefore, there is no proof that they did or did not occur. Errors outside the record can be raised during State Post-Conviction appeal, the second step after Direct Appeal.

To raise issues from the record on appeal, they must first have been **properly preserved** in the record. To be properly preserved, Defense counsel must have objected to the issue at the time it occurred. This is called "contemporaneous objection". Often it is not sufficient for an issue to be demonstrated in the record, it must have been objected to by Defense counsel, verbally or in a written motion, in order to be eligible for review on appeal. In most instances, where an error has not been properly preserved by objection, appellant courts refuse to review the possible error and the issue may be lost on Direct Appeal and all subsequent appeals. If trial counsel did not object to an issue at the time it occurred, failing to preserve it, the defendant may lose the right to have the possible error reviewed by any court throughout the entire appeals process. This underscores the need for counsel to be alert, prepared, and experienced.

An exception to the contemporaneous objection rule is the "plain error" rule. These are errors so plain in their wrongfulness that there is no dispute as to whether they fundamentally denied a defendant a fair trial. "Plain errors" include: failure to follow a statutory or codal procedure (a procedure required by State or Federal law), the State's knowing use of perjured (false) evidence or testimony before the jury which should have been prohibited, any errors so grievous as to corrupt the fundamentals of the law and the interest of justice.

**The plain error rule is very strict.** In most cases, even where an error is clearly shown in the record the Appellant court will refuse to review it as plain error if it has not been properly preserved. Even when an issue has been properly preserved, there is no guarantee that a review will result in the defendant's conviction or sentence being overturned. Furthermore, most errors, even those properly preserved in the record, are subject to the "harmless error" rule.

**Harmless errors are any errors, even when proven to have occurred, which can be dismissed by the court hearing the appeal.** When a court dismisses an error as harmless, it is saying that the error was not so severe as to infect the case with sufficient unfairness to deny the defendant a fair trial. In the harmless error doctrine the appellant courts, up to the U.S. Supreme Court, have come to the conclusion that the Constitution requires a fair trial, not a perfect one. Therefore, courts can review errors raised on appeal, dismiss those which have not been properly preserved and dismiss those that have been properly preserved as harmless, unless they are found to have substantially violated a defendant's right to a fair trial.

It can be argued that the courts have arrived at the harmless error doctrine to limit the number of convictions and sentences overturned on appeal, requiring new trials. Stated plainly, this means money. Errors occur in almost every trial: the misuse or misapplication of the law, procedural errors, and the State withholding exculpatory (favorable) evidence from the Defense or other violations of a defendant's constitutional rights. If every conviction was overturned based on an error, the majority of cases would have to be retried, tying up the courts in a never ending series of trials and retrials. In theory, the harmless error doctrine gives courts some discretion in determining when to overturn a conviction or sentence due to grievous error, or when to deny relief because an error had such a small impact on the overall case that it was essentially harmless.

However, abuse of this doctrine has occurred. Conservative courts are liable to rule "harmless error" in order to dismiss any and all legitimate issues raised on appeal. In applying the harmless error doctrine, courts review each issue raised on appeal in isolation, one-by-one, unconnect-

ed to other errors which may have occurred, or resulted from a previous error during the preparation and trial of a case. By reviewing each error in isolation, the court could dismiss each as harmless because each error alone may not have been grievous enough to have denied a defendant a fair trial. However, in the last decade this practice has been successfully attacked by appellant attorneys arguing that errors, which are connected or compound each other, must be reviewed for their "cumulative" (total) impact. By requiring appellant courts to review the cumulative impact of errors, the court's ability to deny all issues as harmless has been curtailed to some degree. Nevertheless, the majority of appeals are still denied under this doctrine.

In summary, almost every state grants a defendant the right to have his/her conviction and sentence of death reviewed by the State's Court of Last Resort. Even in states with no automatic right to review, the proportionality of the sentence is reviewed. Direct Appeals are confined to material directly from the record. In order to raise errors on appeal they must have been properly preserved by objection at the time they occurred. The only exceptions to the contemporaneous objection rule are errors so grievous as to qualify as plain error. Some errors, even when properly preserved, will be dismissed as harmless error.

**The Direct Appeal Process consists of a series of steps.**

1. Where to File
2. Filing of Appeal and State's Response
3. Court ruling - The Opinion
4. Petition for Rehearing
5. Petition for Writ of Certiorari

*These steps are common to all subsequent appeals in State and Federal court. The entire process can take from 6 months to one year, or more in some instances.*

### 1. Where to file:

Direct Appeal can take a number of different routes depending on the State court system. All State systems are divided into two or three levels. (Chart 2) A two-level system consists of the lower court of general jurisdiction (trial court) and the State's high Court of Last Resort. A three-level system has an intermediate appellant court (IAC) system that sits between the general jurisdiction courts and the Court of Last Resort. Thirty eight states operate Intermediate Appellant Courts, known as State Circuit Courts of Appeal. In these three-level systems, the IAC's operate as middlemen between the lower courts and the State high court, hearing appeals from the lower courts, most of which are mandatory, some discretionary and reducing the number of cases on appeal that the State's high court must hear.

All Direct Appeals, regardless of whether the right to review is mandatory or discretionary, go to the State's Court of Last Resort. In states which operate a three-level system, capital Direct Appeals by-pass the IAC's going directly to the proper State high court. The difference between two and three-level State systems becomes important later in the appellant process, during State Post-Conviction proceedings. (Chart 3, p.12)

Direct Appeals are filed in the State high court whose jurisdiction it is to hear the appeal. There are three routes that the appeal can follow when filed:

- State Supreme Court
- State Court of Criminal Appeals
- States with no review ((Chart 4, p.13)

#### a. State Supreme Court

The majority of states require automatic review of all convictions and sentences of death by the State Supreme Court. Following designation of the complete record, a time limit is set in which the appellant counsel must file the appeal with the Supreme Court. Time-limits vary from state to state; from 60-90 days - to states with no specified time-limit. Appellant counsel can request a time extension if reasonable need is demonstrated.

## b. State Court of Criminal Appeals

Some states designate a court, just below the State Supreme Court, solely for the purpose of hearing criminal appeals. This court effectively acts as the Court of Last Resort for Direct Appeal.

This limits the number of appeals the State Supreme Court must hear by designating one court to specialize in and hear criminal appeals. States with Courts of Criminal Appeals vary in terms of the defendant's ability to appeal that court's decision to the State Supreme Court. (Chart 5) In some states, such as Ohio, it is mandatory that the Ohio Supreme Court review all decisions by its Court of Criminal Appeal concerning capital cases. In others, such as Tennessee, it is up to the discretion of the Tennessee Supreme Court to accept and review a defendant's Direct Appeal after it has been to the Court of Criminal Appeal. The TN Supreme Court can refuse to review the Court of Criminal Appeals decision, thereby finalizing it. In a few states, such as Texas, there is no right to seek further review by the Texas Supreme Court; the TX Court of Criminal Appeals ruling is final. In most states however, the proportionality of the sentence is automatically reviewed by the State Supreme Court in all cases where a defendant has been sentenced to death.

The procedures for Direct Appeals in a Court of Criminal Appeal are essentially the same as those filed directly with a State Supreme Court. After designation of the record, the State sets a time limit for appellant counsel to file the Direct Appeal with the court. A time extension can be requested if appellant counsel can show legitimate need.

## c. States with no review

In states with no automatic right to Direct Appeal, defendants can petition the proper Court of Last Resort for appeal within guidelines set by State law. It is then up to the discretion of the court to entertain an appeal from the defendant. For example, in the State of Arizona, the Arizona Supreme Court may allow a capital sentenced defendant to file a formal Direct Appeal, or deny the request and review the complete record for proportionality of the sentence and error. If the court refuses to hear a formal Direct Appeal, the defendant can petition the court for a re-hearing, asking the court to reconsider its denial. If the court refuses this request, the Direct Appeal is considered final.

## 2. Filing of appeal

When a Direct Appeal is filed and accepted, appellant counsel sends copies to the court and the District Attorney's office. Depending on the state, appellant counsel may also be required to submit the proportionality study to assist the court hearing the appeal. After filing the appeal, the next steps are the same in all states. (Chart 6)

In the appeal, appellant counsel raises the errors he or she feels require the court to overturn the defendant's conviction or sentence. The State counter-argues that the issues raised in the appeal did not occur, were not violations of constitutional or State law, or do not amount to claims for which relief may be granted. Generally the State has from 60-90 days to file its "Reply Brief" or "Opposition Brief", and a time extension may be granted if need is demonstrated. Once the State has completed its response, copies are filed with the court and sent to appellant counsel.

Depending upon the rules of the court and State law, appellant counsel may be allowed to file another supplemental brief to address the counter-arguments raised by the State in its response. Where such a supplemental brief is permitted, it is limited in length and restricted to direct response to the arguments in the State's response. The purpose is to establish clearly the claims appellant counsel is raising, the State's arguments against those claims, and present them to the court in an organized and understandable fashion.

Once briefs have been filed by both sides, the court sets a date for Oral Arguments to be held. On this day the defendant will not be present but will be represented before the court by appellant counsel. The State will be represented by the DA's office. The purpose of Oral Argument is to give each side the chance to make its argument to the court judges about the issues being raised. Trial courts have one judge, whereas appellate courts are usually made up of 5 to 7 members. These judges listen to each side present its case, on each issue raised in the appeal and often ask

questions of both sides. These judges try to get a clear understanding of the issues raised in the appeal and the circumstances surrounding each one. Appellant counsel tries to persuade the judges that each issue requires the court to reverse the conviction, set the defendant free, order a new trial, or at a minimum, reverse the sentence of death. The State tries to convince the judges that the issues raised in the appeal are without merit and should be dismissed.

Once the court is satisfied that it has adequately investigated each issue, it takes the appeal "under advisement".

## 3. Court ruling: the opinion

Following Oral Argument, each judge considers all of the arguments presented by both sides and comes to a conclusion based on: previous rulings on similar issues, consideration of State and Federal law, and the constitutional issues claimed. When each judge has reached a conclusion, the court releases its "opinion". The opinion is a written report of each issue raised in the appeal and how the court has ruled on each. The opinion gives the reasons the court has come to its conclusions, citing all State and Federal laws it relied upon, and any previous cases from which it sought guidance in arriving at its decision. In

viction or sentence; however, the court may be unable to determine if the claims are grievous enough to warrant a reversal. In such instances, the appellate court orders the case to be sent back to the original trial court for a hearing to produce more evidence.

The evidentiary hearing may be "full" or limited to one issue raised in the appeal; it may concern the conviction or the sentence. The hearing may last from a day to weeks, with the defendant present. The State and the Defense make arguments, present evidence and call witnesses to testify. The hearing is limited by the instructions of the appellate court. In a full evidentiary hearing the Defense is allowed to attack all aspects of the State's case; if it is limited to one (or more) issues raised in Direct Appeal, the trial court only allows argument and evidence concerning the identified issues.

In an evidentiary hearing involving the Proof Phase of the trial, the trial court judge can deny the new arguments, thus affirming the conviction and sentence, or overturn the conviction (which automatically overturns the sentence) freeing the defendant or ordering a new trial. If the hearing involves the Penalty Phase of the trial, the trial court judge can dismiss the Defense arguments, thus affirming the death sentence, or reverse the sentence requiring a new Penalty Phase trial. The defendant could be re-sentenced to Life in prison or death.

Whatever the outcome of an evidentiary hearing, both the State and the Defense have the right to appeal the decision in the appellate court which ordered the hearing. That court can review the findings of the trial court. The appellate court then makes a final decision on the defendant's Direct Appeal.

## c. Reverse the conviction

The appellate court may conclude that issues in the appeal warrant the conviction being overturned because the defendant was denied a fair trial. This could be due to a procedural/technical error which occurred before or during the trial, or based on a constitutional violation such as the State's use of perjured testimony. In rare instances, the defendant is freed; more often, the court orders a new trial requiring the State to re-try the case within a period of time determined by State law.

## d. Reverse the sentence

In some cases the courts find no error regarding the conviction of the defendant and affirms it; however, if it does find error related to the Penalty Phase of the trial it may overturn the sentence. In this case, the court orders a new Penalty Phase trial in which the defendant's guilt has already been established and the jury only determines if the defendant should be re-sentenced to death or get Life in prison, either with or without the possibility of parole.

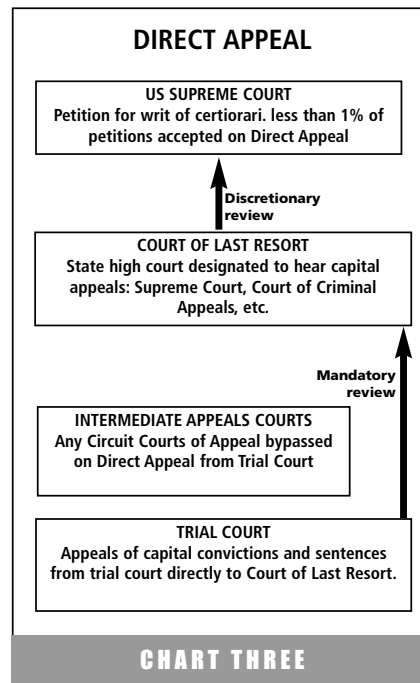


CHART THREE

instances where the judges do not agree, the opinion will contain the reasoning of the majority on each issue, as well as the dissenting opinions of any judges who disagree. However, it is the opinion of the majority of judges hearing the appeal that stands as the court's final ruling.

The court will reach one of the following decisions:

- Affirm the conviction and sentence**
- Order an evidentiary hearing into the conviction or sentence**
- Reverse the conviction**
- Reverse the sentence**

*\*Capital trials are essentially two trials in one: the proof phase and the penalty phase. A court's decision can affect both phases or only one, depending on the ruling.*

## a. Affirm the conviction and sentence:

To "affirm" means to agree with the sentence. If the court finds that no errors occurred, errors were harmless, or were not properly preserved the court affirms the conviction and sentence, agreeing with the findings of the trial court. The issues raised in the appeal are considered "adjudicated", meaning they have been ruled on, and dismissed. The conviction and sentence are considered final.

## b. Order an evidentiary hearing into the conviction or sentence:

Sometimes appellant counsel demonstrates errors from the record that would require the court to reverse the con-

## 4. Petition for rehearing:

Following the appellate court's final ruling, in most instances, both the State and the Defense have the right to petition the court for a rehearing. The side making the request has a time-limit in which it must submit the request and explain why it feels the court's decision was erroneous and requires review. Generally, a defendant is not granted a rehearing based on the issues dismissed in the Direct Appeal. More often, the State is successful in persuading the court to review its decision when the defendant has been granted relief. If the defendant's appeal is dismissed and petition for rehearing is denied, the Direct Appeal is final.

## 5. Petition for writ of certiorari:

This is the final step of the Direct Appeal process. A "writ of cert" is a petition filed by an appellant, asking a higher court to review a case. If the Direct Appeal is denied, appellant counsel can file a writ of certiorari with the U.S. Supreme Court (Chart 3) requesting a review of the State Court of Last Resort's decision. This is not mandatory and less than 1% of cases on Direct Appeal from State courts are accepted for review by the U.S. Supreme Court. This could be because the U.S. Supreme Court knows it will likely see the defendant's appeal during State Post-Conviction or the Federal appeals process. As a result, many appellant attorneys do not seek a "writ of cert" and move directly on to the next stage.

### C. STATE POST-CONVICTION:

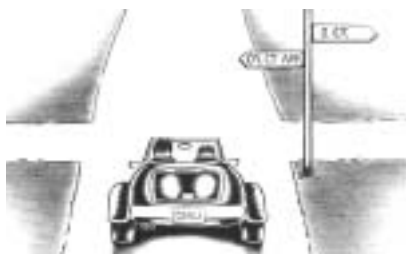
State Post-Conviction Appeal, or State Habeas Corpus, is the second stage of the appellate process, allowing the defendant to raise issues challenging conviction and sentence that are outside of the record. It is common for Post-Conviction appeals to address the original trial counsel's effectiveness in preparing for and conducting the trial defense (**Ineffective Assistance of Counsel**), the State withholding favorable evidence from the Defense (**Brady violations**), issues of juror misconduct, newly discovered evidence, witnesses not known to the Defense at the time of trial, and any DNA testing conducted since the trial.

Two important factors concerning the Post-Conviction stage should be kept in mind. First, the time-limit for filing post conviction appeals is set by State law, generally falling within 2 to 3 years from the date that Direct Appeal was finalized. If the defendant fails to file a Post-Conviction appeal within the set time limit, s/he loses the right to the appeal and will be barred from further appeals in the State courts. Second, Federal appellate courts refuse to review new issues on appeal, which have not been first raised and adjudicated in the State courts. If the defendant fails to file a timely Post-Conviction appeal, s/he may be restricted to raising in Federal court only those issues, which were raised in the Direct Appeal. Just as the trial attorney must preserve issues for Direct Appeal by raising timely objections, appellant counsel must preserve issues during State Direct and Post-Conviction appeals in order to raise them later in the Federal courts. **Filing a Post-Conviction appeal in a timely fashion is crucial for future opportunities to reverse a defendant's conviction or sentence.**

The strongest claims raised on appeal often come from events or facts that occurred outside of the record. Often, new evidence or witnesses are discovered after the Direct Appeal process is over. Post-Conviction is the opportunity to raise these issues and preserve them in the courts. While the Direct Appeal coming shortly after the trial is important, State Post-Conviction may be the most important appeal in the entire appellant process.

It is important to be aware of State law concerning time limits for filing Post-Conviction Appeals. Although most states allow a period of two to three years for the defendant to file an appeal, time limits have been shortened dramatically in some states. In the past decade, states such as Texas have passed laws requiring Post-Conviction appeals to be filed before a ruling has been made concerning the claims raised in the Direct Appeal. In most cases, this does not raise a conflict since the issues raised on Direct Appeal come solely from the record while many issues raised in Post-Conviction Appeal will be outside of the record. The disadvantage is that appellant counsel may have less time to investigate and prepare a Post-Conviction Appeal. Since most issues will come from outside the record or depend on newly discovered evidence or witnesses, the longer appellant counsel has to investigate and build a new claim, the better.

In many cases, new evidence and/or witnesses, which saved death row prisoners, were not discovered until years after the trial. By requiring Post-Conviction Appeals to be filed before the Direct Appeal is finalized, appellant counsel has less time to investigate new evidence or witnesses. Therefore, it is important to know the time limits for filing the Post-Conviction Appeal and to begin preparing as soon as possible. If the defendant does not have an attorney the defendant should file his/her own Post Conviction Appeal to the best of his/her ability. The defendant should support the appeal with all available evidence and get issues preserved in the court. Later, if the court appoints appellant counsel, an extension can be requested to investigate the claims properly and supplement the appeal with additional evidence.



**Post-Conviction Appeals follow a similar course in all states:**

1. Filing in the original trial court
2. Filing in the intermediate court -State Circuit Court of Appeal
3. Filing in the State Court of Last Resort
4. Petitioning the U.S. Supreme Court for writ of certiorari

#### 1. Filing in the original trial court:

The procedures for filing post conviction appeals are the same as those for Direct Appeal. The Post-Conviction appeals process begins in the original trial court. Appeals counsel prepares and files the appeal within timelines set by State law with a copy provided to the DA's office. The State then files its reply brief. The trial court generally does not hear oral arguments in the Post-Conviction Appeal but relies on the briefs filed by both appellant counsel and the State to arrive at its decision.

The trial court judge can decide to: dismiss the claims in the appeal - denying the defendant relief, order an evidentiary hearing, or overturn the conviction or sentence. Following the trial court's ruling, both Defendant and State have the right to appeal the decision. If the defendant's appeal is denied, the decision can be appealed in the State Circuit Court of Appeal (IAC), or the appellant Court of Last Resort, which heard the Direct Appeal. (This depends on whether the State operates a two or three level system - Chart 2, p.10)



Circuit Court of Appeal that the trial court was wrong in denying the defendant's Post-Conviction Appeal, presenting evidence and facts to support the allegations. The State counter-argues that the trial court was correct and that its ruling should be affirmed. After Oral Arguments, the Circuit Court of Appeal takes the case under advisement and releases its opinion. The court may take the following actions: affirm the trial court's ruling - denying the defendant relief, order an evidentiary hearing, send the case back to trial court for further proceedings, or overturn the conviction or the sentence.

#### 3. Filing in the State Court of Last Resort:

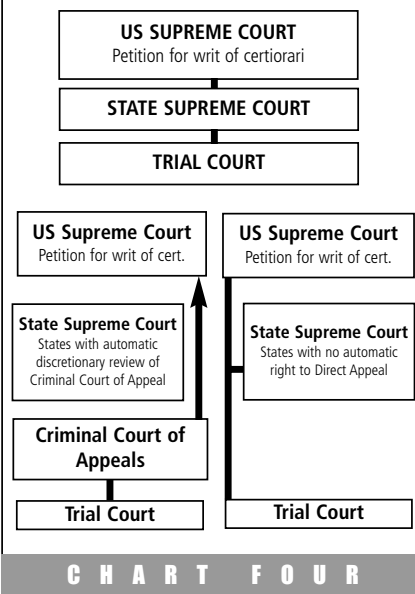
Following denial of the Post-Conviction Appeal and any subsequent appeal and denial, the next step is to petition the Court of Last Resort, which received the Direct Appeal for Post-Conviction relief. In most states this appeal is not automatic but left to the discretion of the high court to grant review of the lower court's decision. In Capital cases, most Post-Conviction Appeals are accepted at this stage.

Appeals filed with the high court are limited to the issues originally raised on appeal. Appellant counsel and the State both file briefs and Oral Arguments are held. Again, Appellant counsel argues that the lower court's reasons for denying the appeal are erroneous while the State counter-argues that the lower courts ruling is correct and that the Post-Conviction Appeal should be dismissed.

In the few states, such as California, which require the Post-Conviction Appeal to be filed concurrently with the Direct Appeal, this may be the first time the appeal is heard. In CA, Post-Conviction Appeals automatically by-pass the trial court and the CA Circuit Court of Appeal (IAC) system, proceeding directly to the CA Supreme Court at the time the Direct Appeal comes before the Supreme Court. (Chart 7, p.15)

Following Oral Argument, the high court releases its opinion: affirming the lower court's ruling, ordering an evidentiary hearing, sending the case back to the trial court for further proceedings, overturning the conviction or the sentence. If the high court affirms the lower court's ruling, the appeal is final.

### THREE ROUTES FOR DIRECT APPEAL



#### 2.Filing in the Intermediate Court-State Circuit Court of Appeal:

In states that operate an IAC system, a Post-Conviction Appeal, which is denied in trial court, goes to the intermediate State Circuit Court of Appeal with jurisdiction for the area where the case was originally tried.

This appeal is limited to the issues raised in the Post Conviction Appeal. Appellant counsel cannot raise new issues for review and is restricted to persuading the Circuit Court of Appeal that the trial court's ruling was erroneous. In most States, appeal for a Post-Conviction ruling is automatic. Both sides can file briefs and Oral Arguments are generally held. Appellant counsel attempts to convince the

#### 4. Petition to the U.S. Supreme Court for writ of certiorari

Just as in Direct Appeal, the defendant can petition the U.S. Supreme Court for a review of the State court's denial of the Post-Conviction Appeal by Occasionally, the U.S Supreme Court grants a writ of cert at this stage, rather than during Direct Appeal. In this case, both sides file briefs and Oral Arguments are held based on issues raised in the original Post-Conviction Appeal. The U.S. Supreme Court can dismiss the issues raised in the appeal, order an evidentiary hearing to produce more evidence, or overturn the conviction or sentence. If the Supreme Court denies a writ of cert, or reviews the appeal but denies relief, the defendant has exhausted all State remedies for appeal and the case moves to the federal courts for further appeal.

**In summary, important points for Post-Conviction Appeal are:**

- Appeals must be filed within established timelines.
- Identify the proper courts for filing the appeal.

**Post-Conviction appeals allow the defendant to raise issues s/he could not raise during Direct Appeal.**

- Some states require the Post-Conviction appeal to be filed with the Direct Appeal or shortly after.
- The Post-Conviction appeal may be the most important stage in the process, allowing the defendant to raise the strongest arguments and determining the issues that can be raised in the federal appellate courts.
- Issues must be properly preserved in the State courts on Direct Appeal and State Post-Conviction in order to be raised in federal courts. If they are NOT preserved, they will be barred forever
- You must prepare in advance for this stage of the process.

**D. FEDERAL HABEAS CORPUS:**

**Federal Habeas Corpus is the final stage of the appeals process.** Defendants who reach this stage have exhausted all available options of appeal at the State court level. The only recourse at this point is for the Federal appeals court to overrule the State courts, granting relief. If weak claims were filed during Direct Appeal and Post-Conviction, or if Post-Conviction appeal was not filed within State deadlines, the defendant's chances in Federal court are very limited. If vigorous appeals were filed throughout the State appeals process and the defendant's issues were properly preserved, there is a better chance that a Federal court will step in to grant relief.

**Federal appeals are limited to issues, which were raised on appeal in the State courts.** However, at this stage, the defendant can also raise claims alleging that the conviction or sentence was obtained in violation of federal constitutional law. During the Federal appeals process, it is important to be aware of the Anti-terrorism and Effective Death Penalty Act (AEDPA) passed by Congress in 1996.

In passing this act, the goal of Congress was to speed up death row appeals and reduce the number of appeals filed. The act mandates that defendants have one year, from the date their Direct Appeal is finalized, to seek Federal appeal. This conflicts with some states, which allow two to three years to file State Post-Conviction appeals. To remedy this, the "federal time clock" freezes when a defendant has an appeal pending in a State court. Federal time begins to run on the date a defendant's Direct Appeal is finalized. On the date the defendant files any Post-Conviction Appeal in State court, Federal time stops ticking until the appeal is finalized, at which point it will start up again. Therefore, the defendant and appeals counsel must be aware of how much time passes between Direct Appeal and the date s/he files a Post-Conviction Appeal with a State court. Failure to keep track of this time can result in the defendant exceeding the one-year time limit for filing a Federal appeal and being barred from the Federal courts. Defendants in states which allow two to three years for filing Post-Conviction Appeals must be especially aware in order to avoid expiration of the one-year period for Federal habeas corpus.

Under the AEDPA, Federal law requires a defendant who loses a Federal appeal in the lowest Federal court, the U.S. District Court, to seek a Certificate of Appealability (COA) from that court before an appeal can be taken up with the next highest Federal court.

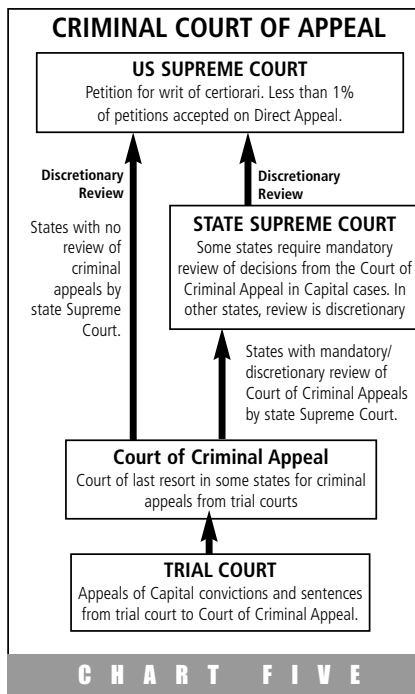
**THE FEDERAL APPEALS PROCESS CONSISTS OF THREE LEVELS: (Chart 8, p.15)**

- 1. U.S. District Court
- 2. U.S. Circuit Court of Appeal
- 3. U.S. Supreme Court

**1. U.S. District Court:**

The U.S. District Court is the lowest Federal court system. Depending on the size of the state, there may be one or several U.S. District Courts. Each court is responsible for all appeals originating within its district. In the parallel system of Federal and State courts, Federal District Courts are the equivalent of the State's general jurisdiction trial courts. Within the federal system, Federal trials are held in the district courts.

Procedures for appeals to this court are essentially the same as for Post-Conviction Appeal to the original trial court. Once the defendant has exhausted all options in the State courts, this appeal is automatic to the U.S. District Court. Both the Defendant and State file briefs and the appeal is limited to issues which were preserved during the State appeals process. The only new issues which can be raised are those concerning a Federal Constitutional right. At this stage, there are no Oral Arguments. The U.S. District Judge arrives at a decision by reviewing the briefs filed by both sides, the case record, previous decisions of the State Appeals courts, and Federal laws related to the issues raised in the appeal. Upon arriving at a decision, the judge can dismiss the appeal, order an evidentiary hearing to produce further evidence, overturn the conviction or sentence.



If an evidentiary hearing is ordered, it will take place in the U.S. District Court, instead of the original trial court. If the conviction or sentence is overturned, the case will be remanded (sent back) to the original trial court for further proceedings. This may require a completely new trial or a new Penalty Phase trial, depending on which part of the defendant's case is overturned.

If the defendant's appeal is dismissed in the U.S. District Court, the defendant must request a Certificate of Appealability (COA). Appellant counsel petitions the court which dismissed the appeal for the right to appeal the court's dismissal with the U.S. Circuit Court of Appeal, the next level of the Federal appeals process. If the request for COA is denied by the Federal District Court Judge, the only option is to request the U.S. Circuit Court of Appeal to grant permission to appeal. This request will be decided by a three-judge panel. If this final request is denied, the defendant's Federal appeal options are over and the appeals process is finished.

**2. U.S. Circuit Court of Appeal**

If a COA is granted by the U.S. District Court or by petitioning the U.S. Circuit Court of Appeal, the defendant can proceed up the Federal appeals system. There are 11 Federal Circuit Courts of Appeal, plus one for the District of Columbia. Each of these courts is responsible for a geographical area of the United States, typically three to five states, from which it will hear appeals. (Appendix B). These

Federal courts are similar to the State IAC's, State Circuit Court of Appeals, in that they act as middlemen between the general jurisdiction federal district courts (trial courts) and the U.S. Supreme Court (Court of Last Resort). Federal and State courts mirror each other and appellant procedures in the Federal system are similar to appeals in the State courts.

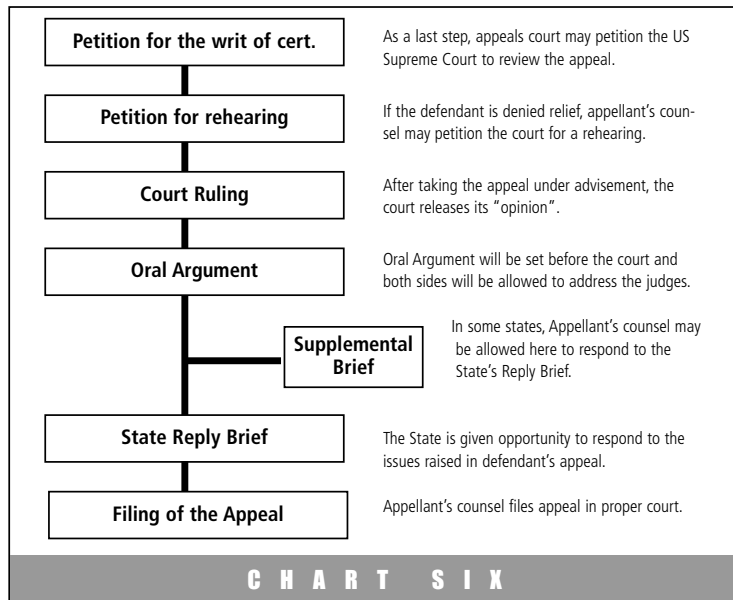
In appealing to the proper Federal Circuit Court, the appellant is limited to those issues raised in the U.S. District Court. New issues can not be raised and the COA can limit the issues that can be raised with the Circuit Court. Both the Defendant and State file briefs and Oral Arguments are held. Following Oral Argument, the court releases its opinion. If an evidentiary hearing is granted, the case returns to the U.S. District Court for proceedings. If the conviction or sentence is overturned, the case returns to State trial court. If the U.S. Circuit Court of Appeal denies relief, dismissing the claims raised in the appeal, the only option for the defendant is to petition the U.S. Supreme Court for a writ of certiorari.

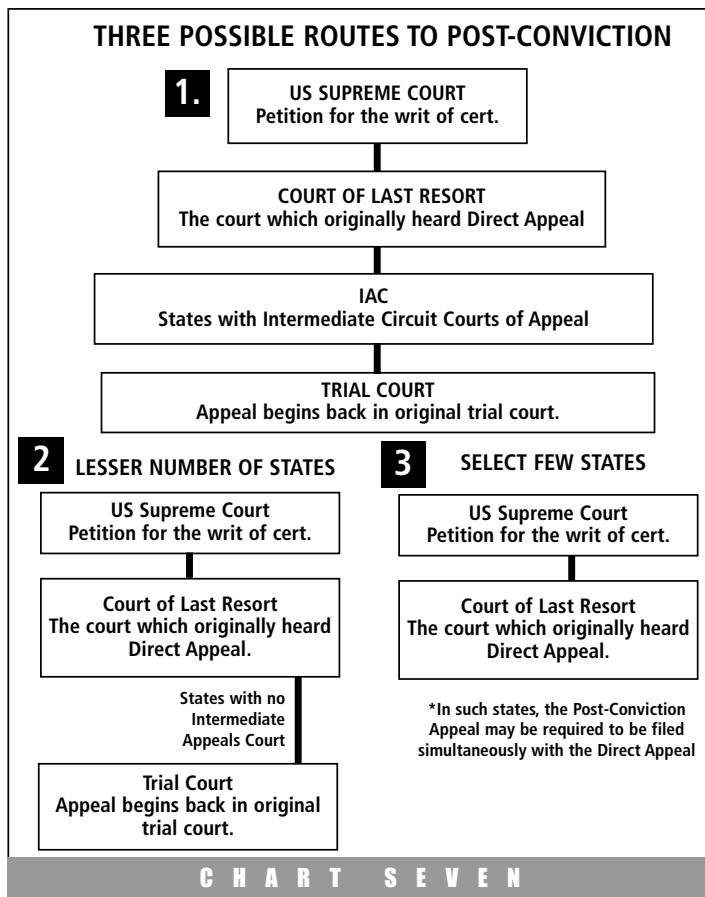
**3. U.S. Supreme Court:**

The U.S. Supreme Court is the Court of Last Resort; there is no higher court in the land. When a defendant reaches this point, often 10 to 15 years after the original trial, it will most likely be the last chance s/he will ever have.

This is not an automatic appeal. The defendant must petition the U.S. Supreme Court to review the U.S. Circuit Court's decision by filing a writ of cert. If the Supreme Court denies the request, the defendant's appeals are over. If the defendant demonstrates considerable need by identifying issues involving substantial Federal questions, the Supreme Court may accept the appeal. If accepted, the process continues with appellant counsel filing the appeal and the State filing its response. The appeal is limited to those issues raised in the Circuit Court, with no new issues allowed and the nine members of the Supreme Court hear arguments from each side. Subsequently, the Court can grant relief, order an evidentiary hearing in the U.S. District Court, or overturn the conviction or sentence, sending the case back to the original trial court. If the Supreme Court denies relief and dismisses all issues raised in the appeal, the defendant's appeals are finished. The only remaining chance for the defendant is the possibility of clemency by the State governor.

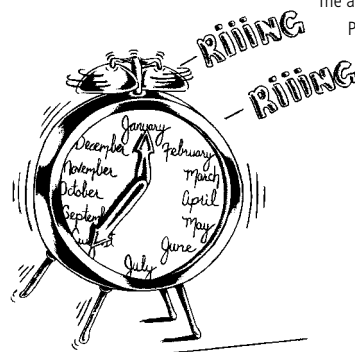
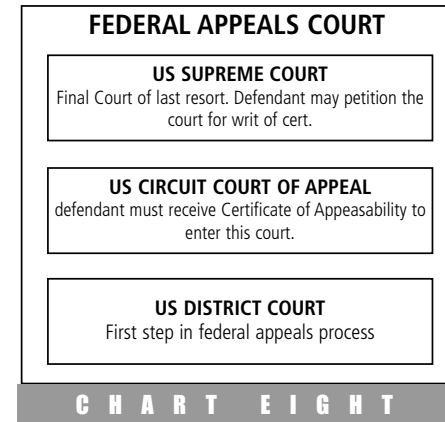
There is an extremely remote possibility that a defendant who loses the Direct Appeal, State Post-Conviction, and Federal habeas corpus, can start again at the State Post-Conviction level. The only way for this to happen is in the event of newly discovered evidence or a change in the law affecting the defendant's conviction or sentence, making either one illegal. This cannot be counted on. In reality, once a defendant's appeal is finalized in the U.S. Supreme Court, the appeals process is over.





### IMPORTANT ISSUES TO KEEP IN MIND CONCERNING FEDERAL HABEAS CORPUS:

- There is a one year timeline for filing the initial appeal in the U.S. District Court.
- The one year filing deadline begins to “toll” once the defendant’s Direct Appeal has been finalized. The 365 day countdown continues as long as the defendant does not have an appeal pending before a State court. Even if a State allows two to three years for filing State Post-Conviction after Direct Appeal, this DOES NOT CHANGE the Federal habeas corpus one year deadline.
- The one year countdown for filing Federal habeas corpus can only be frozen by filing a Post-Conviction Appeal. Failure to act within this timeline can bar a defendant from seeking relief in the Federal courts. **THIS CANNOT BE STRESSED ENOUGH.**
- If the appeal is denied in the District Court, the defendant must request a Certificate of Appealability in order to proceed.



### CONCLUSION

The appeals process is very complex, from the initial Direct Appeal following trial and conviction, through State Post-Conviction and finally, in the Federal courts. It can take years to move up the system from court to court. Each year State legislatures and Congress attempt to shorten the process and limit the number of appeals. Timelines and procedures for filing each appeal must be met. The defendant can be barred from court as a result of missing a filing deadline by one day, or failing to preserve issues during trial and on appeal. A defendant should be represented by competent appellant counsel whenever possible. If a defendant has no attorney, s/he must make every attempt to prepare and file appeals, preserving the issues s/he can. The most important points are: always think ahead, prepare for the possibility that the next step may have to be taken and search for resource people who can help. **Thinking ahead and being prepared can make the difference between life and death.**

## P A R T   F O U R   •   H E L P F U L   H I N T S

### ADVICE FOR PERSONS WITH A FAMILY MEMBER ACCUSED OF A CAPITAL CRIME

Seek advice from a lawyer before agreeing to testify before a grand jury. Your testimony could be used against your family member.

Be extremely cautious about discussing the facts of the case with your family member. Your discussions about the case are not protected from the State. This means that the State could call you as a witness against your loved one. Do not write down your discussions of the case.

If you request an appointment with the attorney, write down the questions or concerns that you have in advance. Then write down the answers so that you have something to refer to later.

Be patient. The Judicial System moves very slowly. There are often unexplained continuances and delays. This is not a reflection on the merits of the case but usually just a matter of scheduling.

Do not ask the attorney what your family member has said about the case. The attorney is not allowed to tell you because of attorney/client privilege.

Do not expect the attorney to share the entire trial strategy with you. The attorney cannot give you information that would damage the case if it became public.

Make a list of people, going as far back as possible, who can testify favorably about your family member, including former coaches, teachers, clergy and neighbors. Write down any awards which your family member received.

Make a list of all previous medical records, school records and hospital records. Write down the names of all doctors who have seen your family member.

At trial, do not expect the attorney to meet with you during breaks. The attorney uses these times to meet with the defendant, discuss the case with other lawyers and prepare for the next witness.

Do not offer your opinion on the progress of the case to the press or other outsiders. Most trial strategy decisions are made well ahead of trial.

Do your best to keep your emotions in check in the courtroom. Your behavior will reflect on the defendant.

Do not discuss the case in the vicinity of other people. You never know who is listening. Only discuss the case when you are well outside the courthouse.

You may be asked to sit outside of the courtroom during testimony. This decision is made by the Judge, not the attorney, in order to prevent your testimony from being tainted by the testimony of other witnesses.

Bring money for snacks and something to do or read during recesses. There are often long, unexplained breaks in the trial.

Trials often extend later than 5:00 p.m. Make travel and child-care arrangements accordingly. Bring a small seat cushion to sit on during the trial, as the wooden benches can be very uncomfortable.

Ask the attorney for information about the appeals process in advance of the trial. In a worst-case scenario, this information can be comforting.





**COURT APPOINTED LAWYER**

**Family Members:**

1. Arrange to meet the lawyer in person.
2. Express your concern about your loved one and your desire to have a productive, working relationship with the lawyer.
3. Ask for a list of ways you could be helpful to the case by providing: background information, alibis, and witnesses.
4. Try to set up a regular time to check in with the lawyer for information regarding progress on the case.
5. Discuss investigation and ways you can help.
6. Ask for a list of deadlines relevant to the case and inquire if it would be possible to check in to make sure appropriate work has been done.
7. Take notes on what the lawyer tells you he/she will be doing on the case so you can refer to them in the future.
8. Discuss "do's and don'ts" with the lawyer regarding talking about the case to outsiders, media, etc.
9. If family members are witnesses, make sure you understand the process and have a good idea how to prepare.
10. Try to be objective in thinking about the case. Even though you love the person who has been charged, facts are extremely important for a good defense.
11. If you have problems with the lawyer, express your issues in writing and then arrange a meeting to discuss the problems.
12. If this doesn't work, seek outside help from support groups that can advise you regarding a next step.
13. Always be courteous and work from a positive point of view with the understanding that the best help for your loved one is a team of people working together for the best possible defense

**Defendant** - In addition to the previous list:

1. If you were at the crime scene, it is important to give facts that can be backed up by alibis, witnesses, etc.
2. Do not discuss your case with others, particularly other prisoners, jail personnel, or the media. There is no confidentiality law except between you, your lawyer and his/her employees.
3. It is important to be straight with your lawyer. You share attorney/client confidentiality and your best defense will be based on total honesty with your lawyer.
4. Take an active role in your defense; no one knows what did or did not happen better than you.
5. Keep in mind that public defenders and court appointed lawyers are often overloaded and cases with life and death deadlines must receive their immediate attention.
6. If you are claiming innocence and there is forensic evidence available that might clear you, make certain that it is part of your defense. Your lawyer can contact the Innocence Network for help in this area.
7. If you are convicted, ask for your transcripts, study them and make notes of errors, discrepancies, any problems you see.
8. Try to make a clear, short summary of your case starting with what you think are your issues. You can add or delete from this as time goes on. Identify what needs to be investigated and discuss this with your lawyer. (See *Model Case Summary*)
9. If you plan to go public with your information, via media interviews or postings on the internet, discuss it first with your lawyer. There may be very good reasons to maintain a low profile.
10. If your lawyer is not answering calls or letters, keep a record of each time you try to communicate and send this information to the lawyer, asking for a time when you can discuss the matter.
11. If your lawyer is not doing his/her job, you can contact other resources for help, but it would be unwise to do so without first demonstrating very strong grounds for doing so. You don't want to have a negative relationship with your lawyer or to lose your case because your lawyer was deficient.
12. Your life is at stake. You must advocate for yourself and stay on top of everything; however, being angry and combative is not the best way to get good results. You have to find a balance.
13. Keep records of everything, including dates and times so that if you do have issues, you can refer to this information and be specific.

**RETAINED (HIRED) LAWYER --**

In addition to the previous list:

1. If your family is hiring a lawyer, work with them to get the best possible lawyer they can afford. This means a person with experience in capital defense or appeals, depending on where you are with your case.
2. You have the right to ask for references and they should be checked. You can check with your State Bar Association to see if the person is in good standing.
3. In each state, people in the movement to abolish the death penalty have information about lawyers who do this kind of work. Call your local abolition groups, the ACLU, Amnesty International or the American Bar Association, and get a list of people known to do good capital defense work. If these people are unavailable, they will be able to suggest others.
4. If your family has limited resources, have them discuss this matter frankly with the lawyers you are considering and try to reach a deal that is manageable for the family. Ask about other costs along the way and whether the lawyer will do the Direct Appeal if necessary.
5. Lawyers usually want a retainer (an up front deposit) and they may want a fixed fee for the entire part of the case they are handling. However, there are usually other costs as well and you need to know the whole picture.
6. If you are hiring a lawyer, presumably he/she doesn't have the same overload as a court appointed attorney, and you should set up a schedule for contact that is reasonable. Find out if there are extra charges for talking to you, etc. If investigation needs to be done (it is rare that it would not be necessary) find out what resources the lawyer has for investigation and what you can expect for your case.
7. At some point, you should discuss the lawyer's strategy for winning the case and you should be in agreement. This should not be discussed with others, including your family, unless they are part of the process and/or the lawyer agrees.
8. If you disagree with the strategy, or have issues you want brought forward and the lawyer feels differently, you must politely insist that the lawyer share with you the reasons for an approach different than yours. A solution must be found that works for both of you.
9. If there is distrust or discord between client and lawyer, it is difficult to have a strong defense. Try to discuss this possibility before you hire the lawyer and establish a means of working out differences to both of your satisfaction.
10. Discuss with your lawyer how he/she feels about advocates and family helping with work on the case, under the lawyer's guidance. There are many tasks that can be done by supporters, other than a lawyer, but confidentiality must be maintained at all times.
11. No matter how distressed you may feel about what is happening on your case, do not discuss it with others at the prison. If necessary, get help from the appropriate advocacy group, but first try to work it out directly with your lawyer.

**PROPOSED GUIDELINES FOR SUPPORT GROUP**



All cases are different. If you give advice contrary to that of the attorney, you run the risk of creating a conflict for the defendant. Listen objectively and if you give an opinion make sure your family member knows it is only your opinion.

Do not discuss the defendant's testimony with him/her. There is a real possibility that the State will ask if the defendant has discussed his/her testimony with anyone and you risk becoming a witness.

Do not offer your opinion regarding the competency of the attorney. Criticism could erode the family's confidence in the attorney and the defendant's confidence as well. If you have doubts and they are shared by the defendant, get help from qualified support groups, including your State Bar Association.

If attending court hearings, follow the rules of courtroom decorum as set out by the Public Defender's Office.

Encourage family members to attend court proceedings. Support for a defendant can influence both judge and jury.

When you meet, have an agenda to follow with specific goals. Have someone take notes.

Always clear actions with the legal team.

If raising money, make sure you present factual information to potential donors and try to find a way to channel donations through a non-profit organization so donors can get tax benefits.

Have a clear, factual summary of the case. (See *Model Case Summary*)

Stay in touch with the defendant and keep tasks separate so you don't duplicate efforts..



**WE OPPOSE THE DEATH PENALTY BECAUSE:**

The death penalty process is fraught with error: Well over 100 innocent men and women have been released from death rows all over the country, exonerated of crimes they did not commit. Some were tortured into confessing, some had incompetent counsel, some were simply targeted because they were easy to prosecute and convict. Inconceivably, almost none of these errors were found through the regular appeals process but through the efforts of independent activists. Ultimately, it does victims no good to convict the innocent.

**The administration of the death penalty is capricious and arbitrary:** Less than two percent of murder cases are prosecuted as capital cases. It is often the attitude of local prosecutors that determines whether the death penalty will be sought rather than any statutory guidelines. This prosecutorial discretion differentiates victims in ways that we find unacceptable. Consistent sentencing with Life Without Parole as one option for the most heinous offenders is far more just and equitable.

**Capital punishment is particularly open to abuse:** The use of coerced confessions, jailhouse snitches, lack of racially diverse juries, and other examples of misconduct within the criminal justice system raise serious questions of credibility. Our criminal justice system should not operate in this manner. We must eliminate this high-stakes game from our society.

**The death penalty does not deter crime:** States without the death penalty have homicide rates below the national average. Canada, which has not had the death penalty since the 1970's and which is demographically most similar to the United States, has much lower crime rates. And, of course, the irony is not lost on us that the death penalty did not prevent the murder of our loved ones. The death penalty is racist in its application: A disproportionate number of people on death rows are people of color. Furthermore, reliable studies show that the race of the victim plays the most statistically significant role in who gets the death penalty.

**The death penalty wastes money:** Life imprisonment is dramatically more cost efficient than executions. The mandatory capital appeals process and the infrastructure necessary to support the nation's death chambers make the death penalty far more expensive to administer, to the amount of millions of dollars per case. Money and resources wasted on capital punishment should be used for effective crime prevention measures and victim services.

**The death penalty does not serve victims' family members:** There is no such thing as "closure," and the death penalty diverts resources that could genuinely help victims. It encourages families to cling to anger and expend precious energy waiting to see the state kill the killers in the belief that the execution, if and when it comes, will somehow make them feel better. The death penalty makes the offender the entire focus of the system, often marginalizing the victims entirely. Furthermore, many victims oppose the death penalty and this can lead to families and friends being deeply divided on the issue and unable to support one another.

**The death penalty traumatizes all who come in contact with it:** It has been shown that those involved with the capital punishment system - jurors, corrections officers, witnesses to the execution, families of the victims, and families of the condemned - are deeply traumatized by it. The deliberate and premeditated act of killing another human being is in complete opposition to the core values of humanity. No healthy person can possibly be unaffected by it.

**Killing is wrong, no matter who does the killing:** Victims' families, above all, know this. Executions create another circle of loss. The politically charged death penalty process sometimes manipulates victims to promote its own goals and ignores them if the wishes of the victims' families do not advance a particular political agenda. Victims deserve our best, and not a response to their tragedy that simply replicates the act that victimized them in the first place.

**The death penalty is internationally recognized as a violation of human rights:** It is in opposition to the United Nations' Universal Declaration of Human Rights. Other nations refuse to extradite prisoners to the United States because they may receive the death penalty for their crimes. The United States, China, and a very few others are pariahs in the world community as they alone continue to use the death penalty.

**Murder Victims' Families for Human Rights (MVFHR) is a non-governmental organization with a national and international mission to abolish the death penalty.** Its members are family members of homicide victims who oppose the death penalty, and family members of the executed and victims of government supported "disappearances." Associate Membership is open to anyone who supports our mission and wishes to work with us or receive information on our activities. MVFHR's members are some of the highest profile activists in the anti-death penalty movement. The MVFHR's Speakers Bureau can provide powerful, thought-provoking speakers for your group and organization.

If you would like more information on why we oppose the death penalty, or would like information on becoming a member or associate member, please contact:

Renny Cushing, Executive Director  
 Murder Victims Families for Human Rights  
 2161 Massachusetts Ave. Cambridge, MA 02140  
 www.murdevictimsfamilies.org (617) 930-5196

APPENDICES

APPENDIX A. TRIAL COURT AND COURT OF DIRECT APPEAL

STATE	TRIAL COURT	DIRECT APPEAL TO
Alabama	Circuit Court	Court of Criminal Appeals
Arizona	Superior Court	Arizona Supreme Court
Arkansas	Circuit Court	Arkansas Supreme Court
California	Superior Court	California Supreme Court
Colorado	District Court	Colorado Supreme Court
Connecticut	Superior Court	Connecticut Supreme Court
Delaware	Superior Court	Delaware Supreme Court
Florida	Circuit Court	Florida Supreme Court
Georgia	Superior Court	Georgia Supreme Court
Idaho	District Court	Idaho Supreme Court
Illinois	District Court	Illinois Supreme Court
Indiana	Trial Court	Indiana Supreme Court
Kansas	District Court	Kansas Supreme Court
Kentucky	Circuit Court	Kentucky Supreme Court
Louisiana	District Court	Louisiana Supreme Court
Maryland	District Court	Maryland Court of Appeals
Mississippi	District Court	Mississippi Supreme Court
Missouri	Circuit Court	Missouri Supreme Court
Montana	District Court	Montana Supreme Court

STATE	TRIAL COURT	DIRECT APPEAL TO
Nebraska	District Court	Nebraska Supreme Court
Nevada	District Court	Nevada Supreme Court
New Hampshire	Superior Court	New Hampshire Supreme Court
New Jersey	Superior Court	New Jersey Supreme Court
New Mexico	District Court	New Mexico Supreme Court
New York	Supreme Court	New York State Court of Appeals
North Carolina	Superior Court	North Carolina Supreme Court
Ohio	Common Pleas	Ohio Supreme Court
Oklahoma	District Court	Oklahoma Court of Criminal Appeals
Oregon	Circuit Court	Oregon Supreme Court
Pennsylvania	District Court	Pennsylvania Supreme Court
South Carolina	District Court	South Carolina Supreme Court
South Dakota	District Court	South Dakota Supreme Court
Tennessee	Circuit Court	Tennessee Court of Criminal Appeals
Texas	District Court	Texas Court of Criminal Appeals
Utah	District Court	Utah Supreme Court
Virginia	District Court	Virginia Supreme Court
Washington	Superior Court	Washington Supreme Court
Wyoming	District Court	Wyoming Supreme Court

**APPENDIX B. FEDERAL CIRCUIT COURTS OF APPEAL**

<b>CIRCUIT</b>	<b>REGION</b>	<b>LOCATION</b>
District of Columbia	District of Columbia	Washington, D.C.
First	Maine, Massachusetts New Hampshire Rhode Island, Puerto Rico	Boston
Second	Connecticut, New York, Vermont	New York City
Third	Delaware, New Jersey Pennsylvania, Virgin Islands	Philadelphia
Fourth	Maryland, North Carolina, South Carolina Virginia, West Virginia	Richmond, Ashville
Fifth	Louisiana, Mississippi, Texas New Orleans, Jackson, Fort Worth	
Sixth	Kentucky, Michigan, Ohio, Tennessee	Cincinnati
Seventh	Illinois, Indiana, Wisconsin	Chicago
Eighth	Arkansas, Iowa, Minnesota, Missouri Nebraska, North Dakota, South Dakota	St. Louis, Kansas City, Omaha. St. Paul
Ninth	Alaska, Arizona, California, Idaho, Montana, Nevada, Oregon, Washington, Hawaii, Guam, North Mariana Islands	Los Angeles, Portland, San Francisco Seattle
Tenth	Colorado, Kansas, New Mexico, Oklahoma, Utah, Wyoming	Denver, Wichita, Oklahoma City
Eleventh	Alabama, Florida, Georgia	Montgomery, Jacksonville Atlanta

**APPENDIX C MODEL CASE: CHART AND SUMMARY**

# JOHN DOE – CASE SUMMARY

**ALLEGATION**

On March 4, 1995, John Doe was sentenced to Life Without Parole by the State of Vermont for the shooting death of Joe Victim. In so doing the State of Vermont failed to ensure Mr. Doe's rights to a fair and impartial trial for the following reasons:

- The use of a police officer who was a relative of the victim to coerce
- eyewitness testimony
- Misconduct by the judge
- Prejudicial comments by the prosecutor in front of the jury
- Failure of the judge to declare a mistrial after he commented on Mr. Doe's lawyer being asleep during proceedings.
- Failure of Mr. Doe's attorney to present mitigating evidence at the trial.

**THE CRIME**

On February 19, 1994, Joe Victim, a former friend of John Doe, who along with Mr. Doe was involved in drug dealing, was shot while driving, allegedly by a man who waited up the street for the car to approach and then fired one shot into a back window of the car. Two young men, Jack Jones and Jay Johnson, known to both Mr. Victim and Mr. Doe, testified that they were walking down the street when they saw Mr. Doe and a companion, and that one of the men (allegedly either Mr. Doe or his companion) called out to them. They then stated that Mr. Victim drove by them in his car, and that they got in the car with him. They then claim that Mr. Doe shot Mr. Victim. A year later, the uncle of Mr. Jones came forward and said that he was walking up the street at the time of the shooting and that he saw John Doe reach for a gun hidden at his back and shot Mr. Victim.

**SALIENT ISSUES**

John Doe claims he was at home at the time of the shooting and was not in the area of the crime at any time that day. His mother and grandmother corroborated this information, though they were not with him at the exact time of the murder, as he claims to have been in the basement and they were in the kitchen and living room.

Another man, Jim Perp, was seen wearing the outfit that was described by eyewitnesses as being worn by the shooter was picked up soon after the shooting by security guards in the area and questioned. He was asked if he would submit to a polygraph test and gun powder residue test and he agreed to do so but was not tested. He never became an official suspect. Mr. Doe was not seen wearing the identified clothing, and no such clothing found at his home. Other clothing was removed from his home but never used as evidence.

Mr. Jones and Mr. Johnson described the assailant as being at least 3 inches taller than Mr. Doe.

Mr. Jones and Mr. Johnson repeatedly changed their story from the initial incident until the time of the trial. For example, at first they told police that the assailant was wearing a hat, then while at the police station, changed their story to say the assailant had long bushy hair.

Mr. Doe was not offered an official plea bargain.

No gun was found in Mr. Doe's possession, no fingerprints, specific clothing, or other physical evidence linked him to the crime.

The two eyewitnesses in the car refused to talk to police until the uncle of the victim, a Burlington Police officer, visited them unofficially and coerced them into giving a Statement implicating Mr. Doe.

This police officer was subsequently suspended and then fired from the police department for drug use.

The uncle of one of the eyewitnesses only came forward to implicate Mr. Doe a year later, saying he was too scared to talk to police sooner, despite the fact that Mr. Doe was arrested the same day as the shooting.

When Mr. Doe was arrested soon after the shooting, he was asked if he would take a polygraph and submit to gun powder residue testing and he stated he wanted this testing done but the police never went ahead and did the testing.

Misconduct by the prosecutor and the judge and the failure of Mr. Doe's lawyer to refrain from sleeping during the trial prejudiced his case and resulted in his trial being unfair.

**THE TRIAL**

Mr. Doe's case was prejudiced by comments by the prosecutor about a witness who was going to testify and then was never called.

The possibility of lesser charges were not explored and no manslaughter instruction was given to the jury.

The judge allowed misconduct by the prosecutor and in giving a missing witness instruction to the jury, he eroded the presumption of innocence of the defendant.

The judge failed to declare a mistrial after he commented on the fact that Mr. Doe's lawyer was asleep during the trial.

No mitigation evidence was presented by Mr. Doe's lawyer.

**APPEALS**

Mr. Doe has exhausted all of his State and federal appeals. On March 5, 1997 he was denied relief by Vermont (Case number). On March 8, 2000 his federal habeas appeal was denied by Judge Jane Justice. ( Case number).

**CONCLUSION**

John Doe maintains that he is factually innocent. His case has never been fully investigated. Additionally, it is fact that witnesses were coerced by a relative of the victim serving as a police officer, both judge and prosecutor engaged in certain misconduct during the trial, and his own retained attorney was asleep during parts of the trial, as noted in the transcript by the presiding judge. As a result, Mr. Doe's constitutional rights were violated, his trial was unfair, and his resulting sentence of Life Without the possibility of Parole is illegal and unjust.

**For more information contact:  
Diana Doe (the defendant's aunt).**

**APPENDIX C (Continued)**

**JOHN DOE (BURLINGTON, VERMONT)**

Name/DOC#	John Doe H23456
Address	Any prison, any state
Date of Birth	1/1/73
Race	Black
Date of Crime	2/19/94
Age at Time of Crime	21
Date Sentenced	3/4/95
Sentence	Life without parole
Victim	Joe Victim
Race of Victim	Black
Relation To Defendant	Friend
Facts Alleged by State	Murder by gunshot
County of Trial	Suffolk
Factual Summary of Allegations	On 2-19-94, Jack Jones and Jay Johnson along with Jane Jones claim they saw John Doe walk by and shoot and kill Joe Victim as he was driving a car on Main Street in Burlington, Vt. They say the perpetrator was wearing an olive green jacket, a green hooded sweatshirt, a tan hat and jeans.
Trial Judge	David M. Judge
Prosecutor	Robert N. Prosecutor
Defense Attorney	Larry Law, 100 Main St., Burlington, Vt. Phone: 802-555-5555
Plea	Not Guilty
Trial By	Jury
Race of Jurors	2 Black, 1 Asian, 9 white
Convicted of	1st Degree murder; possession of a firearm
Confession?	No
Accomplice Testimony	N/A
Eyewitness Testimony	Three – Jack Jones, Jane Jones, Jay Johnson
Forensic Testimony	Ballistics - no links to defendant
Jailhouse Snitch	No
Defendant Testimony	No
Exculpatory Evidence Offered	John Doe stated that he was at home at the time of the murder with his mother Ma Doe, his grandmother, Granny Doe, his brother Danny Doe, and a family friend Jeff Joe. - No gun found - described clothes not found - no fingerprints or other DNA evidence. No physical evidence linking defendant to the crime. Three alibi witness never called (Jeff Joe, Mary Moe, Pete Poe) Jay Johnson(witness) said the shooter was 5'8 - 5"10 Other witnesses said shooter wore a green coat, beige hat, gray hood -another suspect, Jim Perp, was stopped wearing that attire. Attorney Law fell asleep during the trial. Uncle of victim was a police officer and coerced witnesses. Mr. Doe has requested the uncle's record, which includes drug use and suspensions, because of the probability that he was an unreliable witness.
Additional Punishment Evidence by State	
Mitigating Evidence by Defense	None
Mental illness/mental retardation	No
Criminal History	03/07/94: Murder (2), Possession of firearm (2) 07/24/94: A&B dangerous weapon 03/07/94: A&B dangerous weapon (2) 10/18/93: Assault 08/29/93: Operating after 114B 08/03/93: Poss. to distribute Class D, Conspiracy to violate Cont. Sub. Act 07/06/93: Knowingly rec. stolen prop., larceny of a MV, Destruction of property 06/22/92: Poss. to distribute Class B, Control substance school 06/04/92: Trespassing, Poss. Burglariou tools. Attempt to commit crime 04/27/92: A&B dangerous weapon 03/19/92: Distribute/dispense Class B f2)
State Appellate Attorney(s)	Linda Lawyer and Andy Attorney
Defendant's Appellate Attorney	Larry Law, 100 Main St., Burlington, Vt. 802 555-5555
Date Appellate Brief Filed	May 1, 1997
Grounds Raised	1. Violation of constitutional rights (judge told jury they could consider the fact that a potential witness for the defense, Jeff Joe, was not called. 2. Judge did not give manslaughter instruction. 3. Judge allowed witnesses to recount conversations they had with others outside of court. 4. Prosecutor commented on failure to call witness who was available. 5. Trial judge gave missing witness instructions at the request of prosecutor. 6. In giving missing witness instruction, trial judge eroded the presumption of innocence. 7. Judge erred in not giving charge of voluntary manslaughter where evidence showed it was warranted. 8. Prosecutor violated due process by injecting sympathy, hearsay, and inadmissible evidence during examination of witness and constantly solicited hearsay evidence.
Date of Opinion	3/5/97
Opinion citation	Vt. V Doe etc.
Cert. To St. Court?	Not filed
Writ Attorney	Larry Law, 100 Main St., Burlington, Vt. 802 555-5555 (volunteered)
Grounds Alleged	The missing witness instruction eroded the presumption of innocence, violating federal due process.
Writ Judge	Jane Justice
Date of Decision	3/8/00
Decision	Denied
New Evidence?	None
Current Status	Submitted case to Committee for Public Counsel Services on grounds of ineffective counsel.

# GLOSSARY

**Acquittal** A release or discharge from a charge

**Adjudication** A court's judgment in a case. Issues once raised on appeal, once ruled on by a court are then considered adjudicated

**Affirm** To confirm or agree with a lower court's rulings or decisions by a higher court

**Aggravating Circumstances** Actions committed or circumstances surrounding the commission of a crime which increase its seriousness

**Appeal** Petitioning of a higher court to correct errors made by the lower court

**Appellant** The person or party seeking an appeal

**Appellant Court** A higher court which has jurisdiction to hear appeals and review the decisions of lower courts. Also called Appeals Court

**Appellee** The person or party against whom an appeal is taken. Also known as the respondent

**Arraignment** Procedure by which a defendant is called before a court to be notified of the charges against him/her and to be asked how he/she pleads to those charges

**Bail** Release of a defendant from custody on his/her own assurance, or that of another person (bail bondsman) that the defendant will appear in court at the appointed times to face the charges pending before the court. As a practical matter, bail is rarely ever granted in first degree murder cases

**Bill of Indictment** Written accusation presented to a Grand Jury with the claims the State wishes to prove against a defendant, upon which the Grand Jury may return a "True Bill"

**Bill of Information** Written accusation presented to a Trial Court alleging crimes committed, to bring a defendant into the Court's jurisdiction for trial

**Bill of Particulars** Detailed Statement of charges or other information by one party to notify an opposing party of all the information of which it should be aware. Commonly included as a Motion for Discovery, Inspection, and Bill of Particulars

**Challenge for Cause** Removing, or striking, of a potential juror by the Court at the request of either the State or the Defense, or on the Court's own initiative, for the potential juror's inability to be fair or a Stated inability to impose the death penalty; not to be confused with a peremptory challenge

**Circuit Court of Appeals** Intermediate appeals court (IAC) between the Trial Court level and the State Supreme Court, with the power to hear appeals, usually during habeas corpus (post conviction) proceedings. Thirty eight States operate a Circuit Court. of Appeals

**Cross-examination** Questioning of a witness by an opposing party after direct examination

**Death Qualification** Qualifying of jurors during jury selection to ensure that each person could impose a death sentence where the charges and circumstances may warrant it

**Defendant** Individual against whom charges or accusations are made

**Direct Appeal** First appeal following conviction in the Trial Court to the State's highest court responsible for reviewing all convictions and sentences of death. Mandatory appeal

**Direct Evidence** Evidence from witnesses who testify concerning their actual knowledge of facts concerning a case

**Direct Examination** First questioning of a witness by the party who called him/her to testify

**District Attorney** Attorney either appointed or elected to represent the State or federal government in a specified district

**Documentary Evidence** Evidence which is written or from documents

**Exculpatory Exhibit** Clearing from fault or guilt

Any paper, document, or other physical item introduced as evidence

**Felony** Crime of a more serious nature than a misdemeanor, punishable by imprisonment or death as determined by State or Federal laws

**Foreman/person** Member of a jury appointed to preside over the jury

**Grand Jury** Body of people appointed to hear accusations of crimes, a Bill of Indictment filed by the State, to determine if sufficient probable cause exists for the accused to be prosecuted. The Grand Jury may issue an indictment, a "True Bill", or refuse to indict

**Habeas Corpus** Latin: "you have the body". Writ requiring a person to be brought before a court or judge, whether physically or by appeal brief, to determine if that person has been detained or imprisoned wrongfully. Such writs are directed towards the official who has custody of the defendant. A habeas corpus appeal is frequently referred to as a Post Conviction appeal.

**Hearing** Formal or informal proceeding or examination in court

**Jurisdiction** Authority of a court to hear a case or appeal and enforce judgment

**Impeachment Evidence** Evidence or testimony a party may use to challenge and discredit an opposing party's witness, such as previously contradictory Statements made by the witness

**Indictment** Written accusation, or "true bill", from a Grand Jury against a person accused of committing a crime, allowing further prosecution

**Indirect Evidence** Circumstantial evidence

**Jury** Group of people selected from the community to hear testimony and evidence in a trial and determine the guilt or innocence of the accused. In capital cases, the jury also determines the sentence to be imposed

**Jury Instructions** Directions given to a jury by the judge before it begins deliberation in a trial as to the law concerning how and for what the jury may find a defendant guilty or not guilty. In capital cases, what sentences it may impose

**Legislation** The act of making or enacting laws, or a law or the body of laws already enacted

**Legislature** State body of elected officials with the power to make, amend, or repeal laws

**Misdemeanor** A crime or offense of a nature less serious than a felony as determined by State or Federal law

**Mistrial** Termination of a trial due to some error in the proceedings, or the jury's inability to reach a verdict during deliberations

**Mitigating Circumstances** Circumstances of a crime or of the defendant which tend to lessen the punishment due for the crime

**Motion** Verbal or written request by a party made to the court for a ruling or order in its behalf

**Motion for Discovery** Motion to cause an adversary to produce evidence or information to which the party is entitled by law, commonly called a "motion for discovery, inspection, and Bill of Particulars", usually filed in pre-trial phase

**Opinion** Written reason given by a judge for his/her ruling

**Oral Evidence** Evidence which is spoken; direct evidence

**Peremptory Challenge** Challenge or strike, allotted to both State and Defense, the number of which varies from State to State, during Jury selection. It allows both sides to exclude prospective jurors from sitting on the jury without giving reasons

**Post-Conviction Appeal** Appeal process following the direct appeal, also known as habeas corpus, first at the State level, then at the federal level (Federal habeas corpus)

**Precedent** previous legal decision, ruling or opinion which serves as a guide for similar cases that follow.

**Pro Se** Previous legal decision, ruling, or opinion which serves as a guide for similar cases that follow, On your own behalf; filing your own briefs

**Probable Cause** Sufficient initial evidence for the belief that an individual has committed a crime

**Rebuttal** Re-examination or questioning of a witness after an opposing party has cross-examined him/her.

Second argument allowed to the State in opening and closing arguments to a jury after the Defense has presented its argument

**Rebuttal Evidence** Evidence which either explains or discredits evidence presented by an opposing party

**State's Evidence** Testimony of an accomplice to a crime given on behalf of the State against other participants in the crime, in return for a deal or special treatment

**Statute** Law enacted by a State's legislature or the Federal government

**Stipulation** Matter agreed upon between two parties, the State and Defense, usually to save time

**Subpoena** Writ issued by a court causing a person to appear before it

**Supreme Court** The highest court in a State; the State's court of last resort.

The United States Supreme Court, the highest court in the country

**Testify** Give evidence as a witness

**Transcript** Written copy of any document.

Complete written records of a trial

**True Bill** Indictment issued by a Grand Jury from a Bill of Indictment, submitted to it by the State indicating it has found probable cause for a defendant to be tried for the crime alleged against him/her

**US Court of Appeal** Federal Circuit court of Appeal. There are 11 US Courts of Appeal, plus one for Washington, D.C., each with jurisdiction over a certain area of the U.S., for the purpose of hearing appeals from the States within their jurisdiction

**Voir Dire** Process of jury Selection

**Warrant** 1. Writ issued by a court ordering the arrest of a person. 2. Writ issued by a court allowing officers to search private property

**Writ** Order issued by a court directing an officer, official, or lower

court to do or refrain from doing something in compliance with its direction

**Writ of Certiorari** (writ of cert) Writ directing a lower court to provide a record of proceedings for review to a higher court. The essence of a writ of cert is usually an appellant appealing to the US Supreme Court to review for error the decision a State's highest court has made in his/her Direct or Post-Conviction Appeal

