**The Trial of an Illinois**

**Capital Case**

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**Chicago**

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*Author Notes*

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Carole Chew was the Editor and Project Manager for this QuickGuide.

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 **Introduction**

**[1.1] Perils and Rewards of Capital Practice**

 This QuickGuide is intended to arm Illinois capital attorneys with the knowledge they will need to try a death penalty case properly. But knowing how to try a death penalty case is not all there is to it.

 Capital defense work exacts a toll on the mind and on the body of the defense advocate. This introduction describes how to care for yourself, mentally and physically, while still putting forth your best effort in the battle to save your client’s life. The main focus is on the psychological aspect of capital defense work: How can we, as capital advocates, give each case our best while, at the same time, not driving ourselves crazy?

 A good first step toward capital defense health is to check your own pulse, literally and figuratively. Ask yourself these two questions: First, why I am doing capital work? And second, am I up to it? If you can set your own mind at rest as to these two questions, you will avoid some of the stress of a capital trial.

 All who have ever defended a death penalty case have, at one time or another, asked themselves, “Why me?” “Why I am doing capital work?”

 You need to ask yourself these questions, if only because, in the middle of some sleepless mid-trial night, the answer may tell you whether in fact you want to continue in this line of work.

 Criminal law is a rough game. Death penalty criminal law is criminal law squared. Capital defense work inevitably involves demanding clients, nasty prosecutors, hostile victims, and tyrannical judges. Whatever else it is, it is not easy.

 To illustrate this point for you, here is a thumbnail sketch of a typical capital case:

 In Illinois, all capital cases are cases of alleged first degree murder. One or more people have lost their lives. The prosecution is claiming that your client is responsible for the intentional or knowing killing of another person without legal excuse. These two facts alone make the case extremely serious.

 But, in a capital case, there is more. The prosecution must also show some facts, in addition to murder, that make your client a candidate for the death penalty. The murder of more than one person, the murder of a police officer, or the murder of a witness is an example of murder that could make your client “eligible” for the death penalty. In Illinois, there are currently 21 different kinds of murders for which a client can lose his or her life. In every serious capital case, the facts of the murder alone, even putting aside your client’s background, tend to be very, very heinous.

 Here are some examples from the my own practice:

• A young white male with a long criminal record, who looks quite a bit like Brad Pitt, is accused of attempting to rape one woman and then raping and strangling two others.

• A young man in his twenties, an enforcer in a Chicago street gang, is accused of being an accomplice to the shooting of a rival gang member and to have personally participated in the shooting murder of a second person, an innocent bystander who was apparently mistaken for a rival gang member.

• A former Marine is accused of raping and murdering three women in Illinois, and an additional five women in California, over a ten-year period.

• A young Hispanic male is accused of stabbing a rival gang member 44 times, and then stabbing, strangling, and burning a young woman who was unlucky enough to witness the first murder.

• A young boy of 13 shoots and kills a drug addict who failed to pay his drug debt, is incarcerated for the maximum six years in juvenile detention, and then, three months after his release, shoots and kills an off-duty police officer who stopped the client while the client was looking for a car to steal.

• A young Hispanic male from a good family is accused of participating in the murder of seven people at a fast food restaurant and of personally cutting the throat of one of the owners, a woman.

• A man in his later thirties is accused of raping his 15-year-old stepdaughter. After he is released while the police consider bringing charges, his stepdaughter is found murdered in a bathtub — stabbed numerous times, her wrists cut in an apparent attempt to make the crime look like suicide, and her body filled with a fatal dose of nonprescription cold medicine.

 Unfortunately, these cases are all too typical. The first two defendants were convicted of the crimes charged and twice sentenced to death; they both eventually received clemency from Governor Ryan. The third defendant, the Marine, was convicted of two Illinois murders, received clemency from Governor Ryan, and was convicted and sentenced to death on the third Illinois murder; the California murder cases have yet to be tried. The Hispanic male accused of the stabbing and strangulation murders has not yet been tried. The young man accused of murdering the cop was convicted by a jury, but his life was spared when the jury found that he was not eligible for death. The young Hispanic male in the fast-food case was convicted of the seven murders and found eligible for death; he was spared the death penalty when a single juror held out for a sentence of natural life in prison. The older accused rapist was convicted of murder, found eligible, and sentenced to death.

 So you usually start off with very bad facts. Of course, accusations do not equal guilt; but cases for which you have a reasonable chance of acquittal at trial are far and few between.

 In the case of the young white rapist, the prosecution had witnesses who saw the defendant with the victims shortly before their deaths, signed confessions to both murders, and the surviving victim as a witness to the third attack. In the second case, the prosecution again had signed confessions to both murders and a police officer’s testimony that he saw the client fleeing, armed with a gun, shortly after the crime. In the third case, the prosecution had videotaped confessions to all eight murders. In the fourth case, the prosecution had an eyewitness who saw the stabbing, DNA evidence placing the client inside the car where the murders took place, and witnesses who placed the client with the victims shortly before the murders. In the case of the young man accused of killing the cop, the prosecution had an oral confession from the defendant, damning testimony from his accomplice, the defendant’s DNA on an asthma inhaler found at the scene, and gunshot residue on the defendant’s shirt. In the case of the man accused of the seven fast food murders, the prosecution had a videotaped confession from the defendant, alleged confessions by the defendant to third parties, the defendant’s DNA on chicken found at the scene, and the defendant’s partial palm print on a napkin, also found at the scene. In the last case, the prosecution had, beside the motive evidence, the defendant’s footprint, apparently left in blood at the scene, cell phone records that placed the defendant near the scene at the time of the murder, and other circumstantial evidence of guilt.

 To these bad facts, and to strong evidence of guilt, add two more ingredients — the survivors of the victims and the prosecutors. In the average capital case, the survivors often ask for, usually expect, and sometimes demand, the death penalty. And in some cases of murders occurring within a family unit, the survivors of the victims may be your client’s own family. Sometimes these people will accept a sentence other than death; but just as often, they too will want the death penalty. And in many cases, they are the only people who can provide you with the evidence about the defendant’s background that could save his or her life. If they don’t cooperate, you may be out of luck.

 Even if the survivors do not demand the death penalty, prosecutors are free to seek it nonetheless. In Illinois, the prosecutors are elected officials or the servants of elected officials. No prosecutor has ever been elected, or reelected, on an anti-death-penalty platform. Prosecutors usually have every reason to seek the death penalty and very few reasons to drop it. In any jurisdiction, the death penalty is the ultimate bargaining chip. In return for dropping the death penalty, they usually want something very concrete in return: a plea of guilty from your client and agreement to serve the rest of his or her natural life in prison.

 In Illinois, this consideration is sometimes counterbalanced by the fact that defendants facing the death are eligible to receive additional legal counsel, experts, and other resources from the Capital Litigation Trust Fund. Some prosecutors may be moved to drop death just to deny defendants a level playing field. But the prosecutors also receive additional money to prosecute capital cases. In some cases, particularly in small, rural counties, they may be quite willing to pursue death just to get more money.

 So, you have bad facts, a zealous prosecutor, righteously vengeful survivors. What about your client?

 Capital clients come in all shapes, sizes, colors, and ages. One of the first things you will learn when you begin a capital case is that your relationship with the client usually has nothing to do with his or her background or the charged crime. Clients charged with, and guilty of, the most heinous murders are sometimes the easiest to deal with; clients who are actually innocent often, and for good reason, will give you one giant pain in the rear. Clients who pour urine on jail guards or make shanks can be friendly to their attorneys; clients with perfect jail records can be very, very troublesome.

 Establishing and maintaining a good relationship with any client in any criminal case can be difficult. Maintaining a good relationship when you have been appointed to the case, and the client has not specifically chosen you and paid you, is even more difficult. Maintaining a good relationship with an indigent client who is facing the death penalty is sometimes nearly impossible.

 Most capital clients distrust appointed counsel for good reason: they know that the same entity that is trying to kill them has also given them a lawyer. The specter of death haunts all of their dealings with you, casting a veil of suspicion that may require all of your personal skill to penetrate.

 With all of these difficulties and obstacles, why do capital work?

 I offer three motives for entering the capital field: idealism; money; and fame.

 Many of us have been drawn into capital defense by our desire to abolish the death penalty. Nothing is more noble than idealism in practice. I have often described the mission of his own office as the abolition of the death penalty “one case at a time.” But is this true? Will our efforts to prevent the deaths of our individual clients really lead to the abolition of capital punishment?

 It could be argued that our efforts in our cases simply grease the cogs of the death machine. Particularly in these days of the post-reform death penalty, when states such as Illinois lavish money on capital defense, capital defenders have become — at least in
part — “part of the system.” The competent death penalty attorney replaces the incompetent bumbler, whose lack of care or skill might yield reversal on appeal. It has even been argued that lawyers, like physicians, should on moral grounds decline to take part in a system that is rotten to the core.

 This argument has some force. For death penalty attorneys who are personally opposed to capital punishment, we can hope that our efforts in certain highly publicized cases — the no-death verdicts for Juan Luna, Terry Nichols, Lee Boyd Malvo, and Mohamed Moussawi come to mind — will someday persuade somebody that the pursuit of the death penalty is as pointless as it is wasteful. But that is a hope.

 A passion, or even a rage, against state-sponsored killing can certainly help us work harder for our clients. Indeed, in the veins of even the most calloused, hardened, and cynical of capital defense attorneys must run some drops of abolition blood. And at the very least, abolition sentiment may be needed to fortify us against the assaults of the prosecution. I have never met a prosecutor in a capital case who did not privately, as well as publicly, support capital punishment. Their zeal flows, at least in part, from a feeling that death is right. Thus, our zeal must flow, at least in part, from an equally strong conviction that death is wrong.

 But, in the last analysis, someone who embarks on capital defense in the hope of abolishing the death penalty is likely to conclude after a course of years that he or she would have been better off pursuing that aim in the courts of public opinion and not in courts of law.

 The second reason for doing capital work is that it pays, and in many states and the federal courts, it has begun to pay fairly well. In Illinois, for example, trial attorneys appointed to capital cases are paid, by statute, $148.88 per hour to try capital cases. Attorneys assigned “first chair” capital cases in the Cook County Public Defender’s Office make salaries of over $100,000 per year. But very few people would enter the capital field for the money alone. And money inevitably tends to warp one’s perspective on the work.

 Attorneys paid by the hour to do capital cases have a strong incentive to put time and effort into proper preparation of the case; in this respect, they may have an advantage over the underpaid, and overworked, public defender. But my experience has been that they also have a strong subconscious bias against pleas or plea bargains, particularly when their desire to try a capital case matches their clients’ unrealistic expectations of victory.

 One man currently on Illinois’ death row, for example, was represented by a lawyer who received over $1 million from the Capital Litigation Trust Fund; the investigator appointed to the case earned $0.5 million. The case went to trial, and the defendant was convicted by a jury. The defendant then asked to be sentenced to death by the judge and is now on death row.

 Of course, in a capitalist society or, for that matter, in any society, no one needs to apologize for being paid for work, and if done well, for being paid well. But all of us realize that no amount of money can compensate for the long hours and intense pressures of capital defense work. Anyone who enters capital work for the money will eventually leave and do something else.

 The third reason for doing capital work is that it makes us potentially famous, or at least makes us feel important. Capital cases get more attention than other cases. They put our names in the papers. They feed our good opinion of ourselves.

 There is no harm in seeking glory by trying to save lives. But the “glamour” attached to a capital case is dangerous. It can warp our perspective. It tends to divide team members from each other, as each scrambles to take credit for victory or evade blame for defeat. And in the end, it distracts our attention from the thousands of obscure capital defendants, each one distinguished by nothing more glamorous than the fact that he or she has been accused of a horrible crime, for which the state is seeking their death. The true measure of a good capital attorney is the ability to labor well in obscurity, particularly when obscurity may help save the client’s life.

 A special form of the “glory search” is the search for the innocent capital defendant. These people exist. Some have been executed. But anyone who undertakes capital work must face the fact that, in the vast majority of instances, the evidence against your client is going to be very strong and the chances of acquittal very slim. Anyone who enters the capital field solely in order to free the innocent will inevitably become disappointed and quit.

**[1.2] Self-Assessment**

 So, then, why do capital work?

 Obviously, this is a question everyone must answer for himself or herself. This is my answer:

 I do capital work because I love it. I love the practice of law. I like motions. I like argument. I like cross-examination. I like talking to the client. I like talking to the client’s family and friends. I like reading discovery. I like hashing the case over with my teammates. I like trying the case. I like pleading the case.

 Full-time capital defense work differs from other criminal defense work only in its intensity and longevity. You deal with fewer people, over longer periods of time. Those who like the variety of a diverse criminal practice will probably not be happy doing only capital cases, although they may enjoy doing several capital cases during the course of their career. But anyone who enters the field must possess the zest for combat and the zeal for persuasion, which inform the work of any competent advocate.[[1]](#endnote-2)

 Your own answer to the question “Why do capital work?” may differ from mine. But the point is that you need an answer, and you need that answer before you begin the case.

 The second question is, “Am I up to it, professionally and personally, physically and mentally?”

 If you are a lawyer, you need to assess your own abilities and experience, with rigor and with objectivity. If necessary, ask your friends and colleagues to help you with this assessment. And then write it down on a piece of paper.

 This self-assessment as to skills is particularly important for a defense lawyer in a capital case. Capital defense lawyers, like all defense lawyers, are control freaks. And we are lone wolves. We like to do everything ourselves. We trust no one. We like to think we are good at everything.

 But capital defense work is team work. The best defense is a team defense. In order to figure out where you best fit on the team, you need to rigorously assess what you do best and should be done by you alone and what you are better off delegating to other people. The capital lawyer who tries to do everything ends up doing nothing well. If you can figure out what you do best and stick to it, you will minimize the stresses, strains, and frictions of capital defense work.

 A second part of the self-assessment is particularly important as you consider whether you are up to capital work is that you must, unfortunately, be able to inflict pain, both on yourself and on others.

 A capital trial sears the soul. During the trial, everyone — the defendant’s family, the victim’s family, the witnesses, the onlookers, the attorneys, the jurors — must pass through a vale of tears.

 I wish that I could say that your job as defense counsel is to salve these wounds. Unfortunately, the opposite is true. Your job, if you take it, is to pour salt into them.

 **[1.3] Snapshots from Capital Cases**

 Three snapshots from capital cases illustrate this point:

 a. I am preparing for my first capital trial. I am sitting in an office with my two cocounsel. The defendant, who has been given a new sentencing hearing by the Supreme Court, has been convicted of raping and murdering two young women. One of my cocounsels tells me that she has had a chance meeting with the defendant’s mother in a neighborhood bar. The defendant’s mother has told my cocounsel that she thinks her son should get the death penalty, and she does not want to testify on his behalf.

 I ask what we are going to do about that. My other cocounsel tells me that she will try to speak with defendant’s mother again.

 It is several weeks later. I am sitting in Division Nine at the Cook County jail. I am speaking with my client about calling his mother as a witness. He tells me that if I do that, he will stand up before the jury and say, “Kill me now.”

 My cocounsel never speaks with the client’s mother. We do not call the client’s mother as a witness. The jury sentences my client to death.

 b. It is one year later, my second capital trial. The defendant has previously been convicted of two murders. Like my first client, he has also been given a new trial by the Illinois Supreme Court. My client has three parents: the single mother who raised him until he was taken from her home after he had been savagely beaten by her boyfriend; the grandmother who raised him during his teen years; and the Chicago street gang he joined at age 15. The mother and grandmother, to put it mildly, do not see eye to eye. Neither wants to testify. If the mother testifies, the State is going to put in evidence that she helped the defendant and his fellow gang members purchase guns. If the grandmother testifies, she is going to say that she did the best for the defendant but that his mother, her daughter, is to blame for his problems.

 We decide not to call either the defendant’s mother or his grandmother as witnesses. The jury sentences the defendant to death.

 c. It is two years later. I am sitting in a nicely decorated middle class home in Queens, New York. I am speaking with the defendant’s mother, an immigrant from the Caribbean. Her son, my client, is charged with the murder of his girlfriend’s nine-year-old son. The girlfriend’s son, the girlfriend, and all but three of the residents of the small Illinois county where the crime took place are white. The defendant and his family are black.

 The case is set for trial in two weeks. There is no offer from the State. The case has been pending for only a matter of months. I am the first person from the defense team to have spoken directly with defendant’s mother.

 Near the end of the conversation, I mention to defendant’s mother that she needs to make plans to travel to Illinois to attend her son’s trial. We can decide later whether she will be a witness or a spectator, but she should be one or the other.

 She asks me, “Do I have to?”

 I answer. I tell her that her question could have one of two meanings: If she means: does she have to if we are going to save her son’s life, the answer is yes. And if she means can I make her do it, the answer is also yes. I can get an interstate subpoena, have it served on her, and then have her arrested if she does not show up.

 Using some of the new information I have gathered during my travels to investigate the defendant’s background in New York and Florida, I convince the local attorney I am working with to ask for a continuance. He does.

 One week later, I learn that the State has made an offer that they will drop the death penalty if defendant pleads guilty and agrees to serve a sentence of natural life in prison. And one week after that, the defendant agrees.

 On the day of the plea, I speak with my client. He tells me that there was no way he was going to put his mother and the rest of his family through the agony of a trial. He pleads guilty and is sentenced to serve natural life in prison.

 Obviously, each of these three situations was substantially different from the others. In the first case, there was no offer of natural life, and our only hope was to persuade the jury not to kill our client. The defendant’s mother thought he should get the death penalty. The defendant, a tough young white guy with a long criminal record, said — possibly with some sincerity — that he did not care whether he lived or died. Like many capital defendants, he also had a strong desire to assert some sort of control over his own destiny, and his threat to ask the jury for death flowed in part from that desire. In the second case, there was also no offer, and it was not likely that the defendant would have taken an offer if one had been extended. The defendant would have gone along with having his mother or grandmother testify, but we decided on our own that they would make poor witnesses. In the third case, we received a last-minute offer, but the defendant took it only because he wanted to spare his mother the trauma of a capital trial.

 Despite these differences, there is a common thread. In each case, the defendant’s relationship to his family and his family’s attitude toward the trial were extremely important, not to say critical, to the outcome. And our response, as attorneys, was equally critical. In the first two cases, we took the easy way out rather than confronting the pain and despair that would have led to life.

 In the first case, we should have called the defendant’s mother as a witness, despite her reluctance and despite her stated belief that the defendant should die. Under Illinois law, her personal advocacy of the death penalty for her son would not have been admissible as evidence. But even had she said on the stand that he should die, would her statement have hurt our case? I don’t believe so. The defendant’s rejection by his own mother might have generated sympathy for the defendant and provided a reason to grant him life.

 And what if the defendant had stood up in court and asked to be sentenced to death? Again, and in the context of a horrible capital case, the defendant’s threat should have been discounted. In the first place, it was extremely likely that the defendant was bluffing. For him, the threat served two obvious psychological needs — the need to assert some control over his own destiny, andd the need to feed his own ego by making himself into a hero who had saved his mother from the trauma of testifying. Once he saw that he could not control us, he might not have carried out his threat. And even if he had carried out his threat, would it have hurt our chances of saving his life? I don’t think so. In a case in which the prospects of saving the defendant’s life were exceptionally bleak, one or more of the jurors might have used the defendant’s concern for his mother as a reason to save his life, or might simply have taken his statement as a sign of mental illness or remorse.

 In the second case, the defendant’s life had been dominated — and distorted — by the conflict between his mother and his grandmother. The best way to dramatize this conflict was to put both the mother and the grandmother on the witness stand. They would probably have not made good witnesses — but they would have made good exhibits. They would have blamed each other for the defendant’s fate. And from their conflict, the jury might well have concluded that the defendant was not fully responsible for his crimes and should therefore be spared.

 In the third case, I finally did the right thing. By telling the mother that she would be forced to attend her son’s capital trial, I raised the stakes so high that the defendant had every reason to accept the State’s last-minute offer to plead guilty in return for life.

 The second part of the self-assessment is personal. Again, ask yourself a series of hard questions. Can I bear being separated from my family (and you will be separated, even if you are trying the case two blocks from your home) for the four to eight weeks that any serious capital trial will take? Do I have significant others who need my time and attention during this period?

 Do I have potential problems — personal, financial, or legal — that will prevent me from putting forth my best effort? Am I in good enough physical health to withstand the rigors of a capital trial?

 You can be a good capital lawyer without becoming a janissary, a fanatic, or a monk. You can continue to have a personal life. But you need to know that your personal life is sufficiently happy and well-ordered that it can be interrupted for a substantial period of time.

 **[1.4] Lifelines**

 After you have performed your self-assessment, set up some lifelines. A lifeline is some link to some other activity, interest, or person that can sustain you during a capital trial. You don’t have to use your lifeline during the trial itself. It may be that you, like many of us, are so absorbed by the trial that you cannot for that period put forth any effort that is not directly related to the trial itself. But, at the very least, during the long pretrial period, which lasts months at minimum and, more often, years, you must establish a pattern of healthy activity that will sustain you until the end. Obviously, a lifeline will depend on your own habits, beliefs, activities, and interests. But there are some common denominators.

 The most important lifeline is a confidant. A confidant is someone with whom you can share your feelings, even if you cannot ethically disclose to that person such matters as trial strategy or client confidences. Ideally, the confidant should not be your employee or your employer. It should be someone who is close to you, close enough to view you sympathetically but at enough of a distance to be able to give you objective advice. It could be a parent, a spouse, a close friend, another lawyer, or a religious advisor.

 In my own case, I have two major confidants — my wife, who is a criminal lawyer but who does not do capital work, and an older lawyer at my former agency who is not in my chain of command. Between these two, I can always get good feedback.

 The second most important lifeline is some healthy activity or interest. The ideal form of activity, especially if it can be pursued to some extent during each day of the trial, is some kind of physical exercise. You can relieve stress even as you review the events of the trial and plan your next move. If, like me, you suffer from an excess of “healthy animal spirits” (otherwise known as hyperactivity), routine physical exercise can promote a calm, poised courtroom attitude and a persuasive demeanor.

 Of course, there are some of us who agree with Robert Maynard Hutchins’ adage that “whenever I feel the urge to exercise, I lie down and wait for it to go away.” It does not really matter, however, if you physically exercise. Mental exercise — reading, crosswords, chess, or gossip — can provide the same relief.

 **[1.5] Psychological Pitfalls**

 Once you have performed your self-assessment and set up your lifelines, you can also begin to anticipate some of the emotional and psychological pitfalls that await you during the course of a capital case. For those of you who have tried capital cases, some of what I have to say will seem obvious, but all of it may bear some thought.

 The first and most common pitfall and psychological problem of any capital case is that approximately 95 percent of your clients tell you that if they cannot be acquitted, they would rather die. Sometimes, they tell you that they do not want you to work on mitigation. Sometimes, they refuse good plea offers. Sometimes, they tell members of their family not to cooperate with you.

 It may be especially frustrating if you are the attorney assigned to work on mitigation. And it may be especially frustrating if your trial partner or superior shares the same attitude. A common variant on this theme is the idea that the case is so bad that if the client is convicted, any jury in the world is going to give the death penalty. So why work on mitigation?

 And if the judge and the prosecutor are also on the side of death, it may seem that you are the only person who thinks that it is important to save your client’s life, even if he or she is going to be convicted and spend the rest of his or her remaining years in prison. You are alone in the world, urging a position that no one is interested in, advocating a point of view that no one wants to hear.

 This is the true loneliness of the long-distance capital defense runner. The only comfort I can give you on this point is this: If you are patient and stick to your guns, everyone comes around in the end. Ninety-five percent of the 95 percent of capital defendants who say they would rather die than spend their life in prison do not really mean it. The defendant’s family does not really want to spend years of agony, waiting to see whether their loved one will finally be put to death. The prosecutor and/or the family of the victims secretly hope that they will be spared the pain and hard work of a major capital trial. Your partner, who thought the case was winnable at guilt-innocence despite the videotaped confession, fingerprint, and DNA, will suddenly change his or her mind when the guilty verdict comes in.

 In the end, you will be vindicated. I have never had a client yet who complained that I had saved his life, and, with luck, you won’t, either.

 The second psychological pitfall of doing a capital case is panic. Particularly when it happens during trial, panic almost always stems from lack of preparation. There is no such thing as over-preparing for a capital trial. You need to remain flexible, you should never be committed to a script, and you should be prepared to change your strategy in response to mid-trial developments. But there is never any harm in writing out your cross-examination questions, your closing argument, or your jury instructions. Once you have written a script for any phase of the trial, you can always throw the script away and speak from the heart. But if you have rehearsed sufficiently, you will not freeze.

 The third pitfall, which is related to the second, is the adrenaline rush. The excitement of any trial, but particularly a capital trial, naturally produces adrenaline. You feel energized. The joy of combat, with its undertone of fear, changes your personality, for better and for worse. New ideas occur to you. You feel that you are making exciting new discoveries about the evidence as you hear it from the witness stand. You feel that you can read the jurors like a book as they react to the evidence going in.

 The danger of the adrenaline rush is that it also distorts your judgment. You think that you are thinking clearly. But often you are not. The way to avoid the danger of the adrenaline rush, while reaping its benefits, is twofold:

 a. Good pretrial preparation will help you avoid making silly mistakes.

 b. Your trial partner or partners can provide a steadying influence, particularly if they are not so heavily involved in your particular phase of the trial.

 The fourth pitfall, again related to the second and third, is the mid-trial delusion, also known as “defense euphoria.” This pitfall applies only to the guilt-innocence phase. No matter how bad the evidence, nearly every trial features prosecution errors, bad witnesses, or favorable surprises for the defense. And nearly every defense attorney feels, at some point in the trial, that there is a real, even if slim, hope of victory.

 There is nothing wrong with sharing in this delusion. There is nothing wrong with drinking the Kool-Aid. Particularly if you are heavily involved in the guilt-innocence portion of the trial, it energizes you and makes you fight harder and longer. But in the back of your mind, particularly as you prepare for the life-death phase, you need to keep a little shrine of sanity, a little place for the possibility that the jury will convict, so that when the jury comes back with the guilty verdict, you can move on to your real job — saving your client’s life.

 And the last pitfall, of course, is the agony of the death verdict. Those of us who have had this experience can tell you how horrible it is, and we each have our own way of dealing with it. This is mine:

 • I never tell myself that I did my best and made no mistakes. Every death case, in my view, is potentially winnable. I, or someone on my team, made a mistake. I try to identify what the mistake was so that I don’t make it again.

 • I think long and hard about preserving reversible error and what, if any, additional steps I must take to make a good record.

 • I do my best to console myself, my teammates, my client, and my client’s family.

 • I look forward to the day, which I know will come, when neither my client nor anyone else will again be threatened with murder by the State, and when this guide, and the system it describes, will be history.

**2**

 **Pretrial Matters**

**[2.1] Sample Time Line for an Illinois Capital Case**

 The following is a sample time line for a capital case in Illinois:

 **Day 1:** Arrest.

 **Day 2:** Bond hearing. Judge finds proof evident and presumption great and sets no bond. State indicates that it may seek the death penalty but does not file notice of intent to seek. Public Defender is appointed.

 **Day 3:** Public Defender visits client in jail. Public Defender indicates to client that he or she will seek appointment of private counsel.

 **Day 7:** Preliminary hearing.Private Attorney *A* is appointed as lead counsel. Private Attorney *B* is appointed as cocounsel upon recommendation of Attorney *A*. State indicates that case is being superseded by indictment.

 **Day 15:** Defendant is indicted.

 **Day 16:** Defendant is arraigned. Mutual motions for discovery. Case continued by agreement for status.

 **Day 25:** First in camera conference with trial judge. Motions for appointment of mitigator and investigator. Case budget submitted for approval of trial judge and presiding judge.

 **Day 46:** First status date. State tenders first 200 pages of discovery. State indicates to defense counsel that it will consider dropping the death penalty in return for a plea. Defense files motion for gag order on speaking to press. State objects.

 **Day 55:**  Second in camera conference. Motions for appointment of mitigator and investigator granted.

 **Day 56:**  Client signs waivers for release of records; record gathering begins.

 **Day 57:** Guilt-innocence investigation begins.

 **Day 76:**  Second status date. State tenders additional discovery. Motion for gag order denied.

 **Day 106:** Third status date. First case management conference. State indicates that it will decide whether to file a notice of intent to seek death on or before the next status date, **Day 119**.

 **Day 119:** State files notice of intent to seek death. Additional State discovery tendered.

 **Day 149:** Additional State discovery tendered.

 **Day 180:** State files answer to discovery.

 **Day 210:**  Additional State discovery tendered. Defense files motions for additional discovery and to depose.

 **Day 240:**  Third case management conference. State files objections to motions for additional discovery and depositions.

 **Day 270:**  Defense files response to State’s objections to depositions. Set for argument on **Day 300**.

 **Day 300:** Arguments on motions for depositions. Some depositions granted. All depositions to be completed by **Day 360**.

 **Day 330:** Defense files motions claiming that death penalty is unconstitutional on various grounds. State granted until **Day 360** to respond. In camera hearing. Defense asks for appointment of mental health, DNA, and crime scene experts.

 **Day 360:** Because of scheduling problems, not all depositions have been completed. State files responses to constitutional motions. Additional discovery is filed. Motions for appointment of defense experts are granted. State files responses to constitutional motions.

 **Day 390:**  All depositions have been completed. Argument on constitutional motions. All motions are denied. Continued for status on **Day 420**.

 **Day 420:** Defense moves for inspection of state exhibits and crime scene and for testing of certain evidence. State given 30 days to respond.

 **Day 450:**  State agrees to defense requests. Scheduling to be decided between the parties. After examination of defendant, defense moves for fitness hearing. State granted leave to examine defendant using its own expert.

 **Day 480:**  Some examination and testing have been completed, but some is still outstanding.

 **Day 510:**  Fitness reports are returned. Set for fitness hearing.

 **Day 540:**  Fitness hearing. Defendant found fit.

 **Day 580:**  All defense examination and testing have been completed. Set for defense to file evidentiary motions.

 **Day 610:**  Defense files motions to suppress, quash arrest, and suppress identification and for a *Frye* hearing (*Frye v. United States,* 293 F. 1013 (D.C.Cir. 1923).

 **Day 640:** State responds to motion for *Frye* hearing; moves for greater specificity on motion to suppress.

 **Day 670:**  Argument on motion for *Frye* hearing. Motion denied. Defense files amended motions with greater specificity. Set for hearing.

 **Day 710:**  All motions are heard and denied.

 **Day 730:**  State discloses jailhouse informant. Motions for deposition and for reliability hearing granted.

 **Day 740:**  Deposition of informant has been completed. Set for reliability hearing.

 **Day 770:**  Hearing held. Informant found to be reliable.

 **Day 800:**  Defense seeks continuance to file guilt-innocence answer. Continuance granted until **Day 830**.

 **Day 830:**  Defense files guilt-innocence answer.

 **Day 860:**  State files aggravation-mitigation answer.

 **Day 890:** Defense files aggravation-mitigation answer. Depositions granted as to defense experts.

 **Day 920:**  Depositions completed. Case set for trial on **Day 1060**.

 **Day 950:**  State and defense file jury questionnaire and jury instructions.

 **Day 970:** Pretrial jury instruction conference. Case management conference. Agreement on jury selection.

 **Day 1000:**  Both sides file motions in limine.

 **Day 1030:** Motions in limine heard and argued. Some granted, some denied.

 **Day 1060:** Jury selection begins.

 **Day 1074:** Jury selection completed. Trial begins.

 **Day 1088:**  Closing arguments. Defendant found guilty.

 **Day 1089:**  Eligibility. Defendant found eligible.

 **Day 1096:**  Closing arguments. Defendant sentenced to death.

 **Day 1126:**  Post trial motion required by *People v. Szabo*, 94 Ill.2d 327, [447 N.E.2d 193](http://www.iicle.com/smartbooks/content.asp?Search=1&P=1&ID=64231&prod=888&go=%23&SearchText=szabo&Operator=AND&PracticeArea=3&ProductID=0&Sensivitiy=0#Library=IL&Table=case_law&Docname=447%20N.E.2d%20193#Library=IL&Table=case_law&Docname=447%20N.E.2d%20193), 68 Ill.Dec. 935 (1983)filed.

 **Day 1156:**  *Szabo* motion[[2]](#endnote-3) argued and denied. Notice of appeal filed.

**[2.2] Death Penalty Reforms**

 In the fall of 1998, Anthony Porter, a 43-year-old mildly retarded man who had been sentenced to death in 1983, was taken from his jail cell and fitted for the shroud he would be buried in after his scheduled execution, then just 50 hours away. After the execution had been stayed on the grounds that Porter was not competent to be executed, it was proved that Porter was innocent of the crime for which he had wrongly served 15 years in prison. It was a horrible blunder that had very nearly cost Porter his life.

 On March 16, 1999, 35-year-old Andrew Kokoraleis was executed by lethal injection at Tamms Correctional Center in Southern Illinois for the 1982 strangulation murder of Lorraine Borowski. Then Illinois Governor George Ryan had reluctantly rejected his petition for clemency. Kokoraleis was to be the last person executed in Illinois. Nine months later, Governor Ryan imposed a moratorium on executions; and on January 19, 2003, he pardoned or commuted the sentences of every single inmate on Illinois’ death row. The moratorium he imposed continues to the present day.

 These events are the historical crucible out of which the current system of Illinois capital punishment has been forged. In reaction to the widespread public perception that the system was “broken,” “racist,” and, even “corrupt,” the powers that be instituted a wide-ranging series of reforms.

 The legislature acted first. Effective January 1, 2000, the Capital Crimes Litigation Act (CCLA), 725 ILCS 124/1, *et seq.,* instituted a new system for the funding of capital cases and the appointment of private counsel. The Illinois Supreme Court followed with a series of procedural reforms, effective March 1, 2001, and March 1, 2002, which included notice requirements, sentencing discovery, a capital litigation trial bar, capital training, and depositions. See Illinois Supreme Court Rules 411 – 413, 416, 417, 714. Following in the wake of Governor Ryan’s mass commutations, and effective November 19, 2003, the legislature enacted a potpourri of substantive and procedural changes, including new requirements for videotaping confessions, experiments with sequential lineups, reliability hearings for jailhouse informants, new mitigating factors, and new standards for the imposition of the death penalty itself.

 Nor has “tinkering with the machinery of death” ended with the November 19 reforms. The legislature has subsequently amended the Capital Crimes Litigation Act to impose stricter financial controls on the expenditure of capital litigation funds and to expand the power of the Office of the State Appellate Defender to give assistance in trial-level capital cases. And many more reforms, not to mention abolition, are still on the agenda.

 It is not only the substance of each set of reforms, but also the interaction between them, that the trial level capital practitioner needs to understand and to master. The following §§2.x – 2.xx set forth the ABCs of the post-reform Illinois death penalty system.

**[2.3] Certified Counsel Requirement**

 Under the unreformed Illinois death penalty system, any attorney with a law license could represent a defendant in a capital case. This is no longer true. The new system provides for “qualified” or “certified” counsel. Illinois S.Ct. Rule 714. Under S.Ct. Rule 701, as amended, “no person, except the Attorney General or the duly appointed or elected State’s Attorney of the county of venue, may appear as lead or co-counsel for either the State or defense in a capital case unless he or she is a member of the Capital Litigation Trial Bar provided for in Rule 714.”

 Supreme Court Rule 416(d) provides:

**In all cases wherein the State has given notice of its intention to seek the death penalty, or has failed to provide any notice, . . . the trial judge shall appoint an indigent defendant two qualified counsel who have been certified as members of the Capital Litigation Trial Bar pursuant to Rule 714, or appoint the public defender, who shall assign two qualified counsel who have been certified as members of the Capital Litigation Trial Bar. In the event the defendant is represented by private counsel, the trial judge shall likewise insure that counsel is a member of the Capital Litigation Trial Bar.**

 Similarly, §5 of the Capital Crimes Litigation Act, 725 ILCS 124/5, provides:

**If an indigent defendant is charged with an offense for which a sentence of death is authorized, and the State’s Attorney has not, at or before arraignment, filed a certificate indicating he or she will not seek the death penalty or stated on the record in open court that the death penalty will not be sought, the trial court shall immediately appoint the Public Defender, or such other qualified attorney or attorneys as the Illinois Supreme Court shall by rule provide, to represent the defendant as trial counsel. If the Public Defender is appointed, he or she shall immediately assign such attorney or attorneys who are public defenders to represent the defendant. The counsel shall meet the qualifications as the Supreme Court shall by rule provide.**

 The rule and the statute differ, at least slightly, as to when the right to qualified counsel attaches. Under the statute, the defendant has the right to the appointment of qualified counsel or to a qualified public defender if the state’s attorney has not, “at or before arraignment,” indicated that the death penalty will not be sought. *Id.* Under Rule 416(d), the right to qualified counsel attaches where the State has given notice of its positive intent to seek the death penalty (or the 120 notice of intent period (see S.Ct. Rule 416(c) has expired). In the case of a private, retained counsel who is not covered by §5, Rule 416(d) may pose particular problems for defendants, counsel, and trial judges.

 During the 120-day period when the State has the right to remain uncommitted as to whether it will seek the death penalty, a defendant has the right to hire and choose his or her own lawyer, a lawyer who might not be a member of the Capital Litigation Trial Bar. The Committee Comments to Rule 416(d) anticipate this problem, telling the trial court as follows:

**When the defendant in a potentially capital case appears with retained counsel, the trial court should immediately determine whether the attorney is a member of the Capital Litigation Trial Bar and whether the attorney is certified as lead counsel or will serve as co-counsel with properly certified lead counsel. If it appears counsel is not a member of the Capital Litigation Trial Bar or does not have the proper certification, the court should explain the Capital Litigation Trial Bar membership requirements to the defendant and (unless the State indicates notice that the death penalty will not be sought will be filed *instanter*) advise the defendant to retain a properly certified member of Capital Litigation Trial Bar.**

 It is not clear whether a defendant can waive his or her right to qualified Capital Litigation Trial Bar counsel in favor of the counsel of his or her own choice. Some trial judges have accepted waivers of the defendant’s right to qualified counsel; others have not. Whether the defendant’s constitutional right to retained counsel of choice will trump the Illinois requirement of qualified counsel is an open question.

 It is also at least open to question whether the trial judge may appoint private counsel only if the public defender has no qualified counsel available, or whether the judge has discretion to appoint private counsel whether or not the public defender is available. In noncapital cases, §113-3(b) of the Illinois Code of Criminal Procedure, 725 ILCS
5/113-3(b), provides that the public defender is to be appointed unless there is no public defender or the “rights of the defendant would be prejudiced” by appointment of the public defender. However, §113-3 was amended at the time of the January 1, 2000, reform to make clear that its provisions do not apply to capital cases “when the compensation and expenses are being provided under the Capital Crimes Litigation Act.” 725 ILCS 5/113-3(f). This must mean that if the judge in a capital case chooses to appoint and pay for private counsel under the CCLA, the §113-3(b) presumption in favor of appointing the public defender does not apply. Similarly, the CCLA, on its face, allows for the judge to appoint either the public defender “or such other qualified attorney or attorneys as the Illinois Supreme Court shall by rule provide.” 725 ILCS 124/5. There is no indication of a presumption in favor of the appointment of the public defender.

 Certain language in the Committee Comments to S.Ct. Rule 416(d) may suggest otherwise. The comments state:

**Appointment of private counsel will be *necessary* in such cases when the public defender’s office does not have qualified counsel available, when the public defender’s office can only provide one qualified attorney for the case and has declined to provide representation in association with private appointed counsel, . . . or when the public defender is otherwise unavailable to provide representation.” [**Emphasis added.**]**

The prosecution in some cases has argued that this language means that there is still a presumption in favor of appointment of the public defender. In most cases, this argument has not been accepted by trial judges.

 The Committee Comments also explicitly condone mixed representation, by public defenders and private counsel working together:

**Rule 416(d) is not intended to prohibit the trial court from appointing a private attorney to serve with an attorney from the public defender’s office if the public defender’s office is able to provide one qualified attorney and both the public defender and private counsel consent.**

**The committee believes that in many cases the public defender will be willing and able to work with private appointed counsel. The advantages of mixed representation include the ability of the public defender’s office to assist private appointed counsel in gaining access to capital case resources and to provide insight regarding local practices. Mixed representation could also provide the opportunity for qualified co-counsel in the public defender’s office to obtain experience in capital cases.**

The Committee Comments note, however, that “the risk of inconsistency and disharmony on the defense team, and potential liability issues for the public defender, suggest that the trial court should never make an appointment involving mixed representation without the express consent of the public defender and the private attorney.”

 The Cook County Public Defender will not agree to work with private counsel on any case, let alone a capital case, because of liability issues and local county rules. In other counties, however, such as Will, Boone, Jo Daviess, and DuPage, public defenders and private counsel have worked together successfully.

 The committee’s sensitivity to the need for harmony on the defense team is also reflected in its sensible approach to the issue of the choice of cocounsel. It is clear that where the defendant is indigent, he or she is entitled to the appointment of two attorneys, one of whom will be lead counsel and one of whom will be cocounsel. Because of “[c]oncerns about potential conflicts between defense counsel . . . [l]ead counsel should be appointed first, and allowed to recommend co-counsel. Lead counsel’s recommendation for co-counsel should be accepted, unless the attorney recommended is not a member of the Capital Litigation Trial Bar.” Committee Comments, Rule 416(d).

 The trickiest issues in this area arise when the defendant hires a privately retained attorney before the State has elected to seek the death penalty. Once the State has elected to seek the death penalty, the privately retained attorney may find it difficult to hire cocounsel, experts, investigators, or mitigation specialists out of the defendant’s fee. Trial judges often have to decide whether to appoint a counsel defendant has previously chosen or remove counsel from the case in favor of the public defender. In many cases, judges have compromised by allowing the first retained attorney to remain on the case and paying for cocounsel or other resources out of the Capital Litigation Trust Fund.

 The requirements for membership in the Capital Litigation Trial Bar are relatively straightforward. For lead or cocounsel, the attorney must (a) be a member in good standing of the Illinois Bar or admitted pro hac vice; (b) be an “experienced and active trial practitioner”; (c) have substantial familiarity with the ethics, practice, procedure, and rules of the trial and reviewing courts of the State of Illinois; and (d) must either have (1) completed at least 12 hours of training in the preparation and trial of capital cases in a course approved by the Illinois Supreme Court within two years prior to making application for admission, or (b) substantial familiarity with and extensive experience in the use of expert witnesses and forensic and medical evidence including, but not limited to, mental health, pathology, and DNA profiling evidence. S.Ct. Rule 714(b). In addition, lead counsel status requires “prior experience as lead or co-counsel in no fewer than eight felony jury trials which were tried to completion, at least two of which were murder prosecutions,” and five years of “criminal litigation experience.” *Id.* Cocounsel status, on the other hand, requires prior experience as lead or counsel in no fewer than five felony trials that were tried to completion, none of which need be murder prosecutions, and three years of criminal litigation experience.[[3]](#endnote-4) S.Ct. Rule 714(b). Waivers of these requirements may be obtained for attorneys who by reason of “extensive criminal or civil litigation, appellate or post-conviction experience or other exceptional qualifications” are deemed capable of providing effective representation in capital cases. S.Ct. Rule 714(d).

 By an amendment effective January 1, 2005, the Supreme Court added a requirement of continuing capital legal education; an attorney who fails to complete 12 hours of approved capital training in each two-year period following admission to the Bar can be removed from the Bar and reinstated only by the Supreme Court. S.Ct. Rules 714(g) – 714(i).

**[2.4] Notice of Intent To Seek Death**

 Illinois S.Ct. Rule 416(c) provides that the State must file a notice of intent to seek or decline the death penalty within 120 days of the arraignment. The notice of intent to seek must contain the statutory aggravating factors the State is relying on, and in “no event shall the filing of said notice be later than 120 days after arraignment, unless for good cause shown, the court directs otherwise.” Despite its plain language, the rule raises at least three questions: (a) What happens if the State files after 120 days? (b) What is good cause shown? (c) What happens if the State tries to add aggravating factors after the 120 days have passed?

 No Illinois Supreme Court case yet addresses any of these questions, although at the trial court level, trial judges have occasionally struck notices of intent to seek death.

 The Committee Comments to the rules provide some indication that the Supreme Court did not intend to penalize the State if it filed a notice of intent after 120 days or, in fact, never filed a notice. The Committee Comments state that “[a]ll capital case procedures under Rule 416 take effect upon the earlier of: (1) notice that the State intends to seek the death penalty; or (2) expiration of the time for notice under paragraph (c) without notice of the State’s intent to seek or not seek the death penalty.” Moreover, a “case is presumed to be capital in the event the State does not provide notice in the time allowed by paragraph (c) in order to prevent unreasonable delay in the application of capital case procedures.” It could be argued that the statement in the rule that a case is “presumed” to be capital means that the State can still seek the death penalty even after the 120 days have passed. On the other hand, the rule itself states that in “no event” shall the notice be filed more 120 days after arraignment, unless there is “good cause shown.” This statement would have little meaning if, more than 120 days after arraignment, the State could still seek the death penalty.

 In other states with similar notice requirements, the courts have given varying answers to similar questions, but the most recent tendency is to enforce the notice requirements against the prosecution and preclude the death penalty. For example, in *Miller v. Eighteenth Judicial District Court,* 337 Mont. 488, 162 P.3d 121 (2007), the Montana Supreme Court held that a notice provision requiring the prosecution to file a notice of intent 60 days after arraignment would be enforced. In *Miller,* the prosecution let the 60-day period pass without filing a notice, the defense moved to bar the death penalty, and the prosecution responded by filing a notice 2 months after the 60-day period had passed. The court held that the 60-day notice requirement would be enforced even though the defense conceded that they had actual notice that the State would seek the death penalty before the 60 days had elapsed and even though there was no showing that the defense had been prejudiced by the late notice. It should be noted, however, that in *Miller* the notice provision had no provision for late filing for good cause shown.

 New Mexico’s notice requirement, unlike Montana’s, included an exception to its notice requirement of 90 days for good cause shown. In *State v. Smallwood,* 141 N.M. 178, 152 P.3d 821 (2007), the State filed a notice of intent to seek death 8 days after the 90 days had expired, failed to list any aggravating factor, and, by mistake, listed instead a mitigating factor.

 The court held that its rule allowed the State to file a motion for leave to file a late notice of intent to seek the death penalty, but that such a motion is not timely if filed after the defense has moved to strike the notice. Since the State had moved for permission to file only after the defense had moved to strike, it was precluded from seeking the death penalty. The court also amended its rule to provide that in future the State was required to either file or ask for an extension within the 90-day period. Finally, the court indicated that the trial court’s rulings on issues of good cause shown for extensions of the filing period would be reviewed under an abuse of discretion standard.

 The “in no event” language of Rule 416(c) suggests that the State cannot file after the 120 days without applying for some sort of extension before the expiration of the period, or at least providing some sort of cogent explanation for late filing. Despite the loose language of the comments, it is likely that Illinois will apply at least as strict an interpretation of “good cause” as did the New Mexico Supreme Court in *Smallwood, supra*. The “good cause” language also suggests that it will be the State’s burden to explain a request for an extension or a late filing and that the defendant will not have a burden to show that extension or late filing will cause prejudice.

 An equally unresolved question is whether the State can add notice of additional statutory aggravating factors after the 120-day period has passed. It is likely that the courts will apply a prejudice standard to amendments of the notice of intent since the listing of any aggravating factor puts the defendant on notice to gear up for a capital trial.

 In actual practice, defendants often agree to extensions of the 120-day period, particularly when the State indicates privately that it needs more time to consider whether to seek the death penalty. In some instances, prosecutors have given the defense time to gather mitigation material and to proffer it so as to persuade the prosecution either to agree to a plea bargain or to drop the death penalty without an agreement. Obviously, in these instances, it may well be to the defendant’s benefit not to insist on strict compliance with the rule.

**[2.5] The Case Management Conference**

 Illinois S.Ct. Rule 416(f) provides for a “case management conference.” The conference is to be held no later than 120 days after the defendant has been arraigned or within 60 days of the time when the State gives notice of intent to seek the death penalty, whichever occurs earlier. After an initial case management conference, the trial court has discretion to schedule any further case management conferences which it “deems advisable.” S.Ct. Rule 416(f)(vii). There are no reported cases interpreting the meaning or scope of the case management conference requirement. Theoretically, a defendant could move to bar the death penalty if the conference is not held within the prescribed time period.

 At the case management conference, the court is required to make sure that (a) all counsel are certified members of the Capital Litigation Trial Bar in good standing (Rule 416(f)(i)); (b) the State and defense have or are going to make all the required discovery disclosures under Rules 412 (state disclosure), 413(defense disclosure), and 417 (DNA disclosure) (Rules 416(f)(ii), 416(f)(iii), 416(f)(v)); (c) the State has or will disclose all the statutory aggravating factors that it intends to rely on at the sentencing hearing (Rule 416(iv)). In addition, the court has the power to “[e]nter any other orders and undertake any other steps necessary to implement this rule.” S.Ct. Rule 416(vi).

 The Committee Comments indicate that the case management conference was intended to be, among other things, an “important tool for management of the discovery process.” There is no set procedure for the conference, and it is not clear whether the defendant has a right to be present. The Committee Comments note that the rule does not “limit the trial court’s discretion with respect to procedures for case management conferences, and permits the trial court to expand the scope of the conferences as the circumstances require.” The rule is intended to be “flexible,” and the court may hold conferences in an “informal setting,” with the results of the informal conference later reflected in a written order. However, the comments add a caveat: “in the context of a criminal proceeding the use of informal case management conference procedures must be approached with caution, and the need for a record should always be considered.”

 Actual practice under the Rule 416(f) has varied widely among trial court judges. Case management conferences have been held in open court with defendant and counsel present; in chambers with counsel, defendant, and a court reporter; in chambers with a court reporter but no defendant; in chambers with defendant but no court reporter; and in chambers with only judge and counsel but no defendant or court reporter. Some judges hold case management conferences on every court date, and some hold only one or two. As the Committee Comments indicate, it is probably a good idea to at least reflect the substance of an informal conference in a written order. From defense counsel’s point of view, a case management conference may open new fields for legitimate advocacy in your client’s interest. It could be argued, for example, that the trial judge’s case management power to “[e]nter any other orders and undertake any other steps necessary to implement this rule” includes the power to determine that the State cannot prove the defendant eligible and is not seeking the death penalty in good faith. The practice of some defense counsel, under the pre-reform death penalty system, of approaching a judge ex parte to determine if the judge will impose the death penalty (*see, e.g., People v. Montgomery,* 192 Ill.2d 642, 736 N.E.2d 1025, 1038, 249 Ill.Dec. 587 (2000)), may be replaced by informal discussions during case management of whether, and to what extent, a case in which the prosecution chooses to seek death should be considered a “real” death penalty case.

**[2.6] Appointment and Payment of Defense Experts**

 The most striking difference between the old and the new Illinois death penalty systems lies in the provision of money. Under the old Illinois death penalty system, an indigent defendant on trial for his or her life was typically represented by an overworked, underpaid local public defender. Only the largest public defender offices — those in Cook, Lake, and St. Clair counties — had sufficient funds to pay for experts, investigators, and “mitigation specialists.” In most other counties, the defendant was forced to seek additional money from the local trial judge, and, in most cases, little or no money was granted. At best, the defendant might get funds for an investigator.

 The Capital Litigation Crimes Act, 725 ILCS 124/1, *et seq.,* revolutionized Illinois death penalty practice by providing, for the first time, state-wide funding for indigent public defense. The Act also provides state-wide funding for the death penalty prosecution. It truly levels the playing field. During the first several years of the reform regime, there was reporting about, and investigation of, possible misuse of the Capital Litigation Trust Fund. In addition, some defense counsel expressed a concern that the statute did not provide sufficient confidentiality for defense funding requests. In response to both concerns, the legislature passed P.A. 94-664, effective January 1, 2006.

 P.A. 94-664 addressed these concerns by providing for both tighter financial controls and for ex parte, in camera consideration of defense funding requests. Under the reformed statute, appointed counsel is first required to submit a “proposed estimated litigation budget,” for review and approval by the trial judge. 725 ILCS 124/10(a-5)(1). In order to protect the defendant’s right to “effective assistance of counsel,” his or her “right not to incriminate him or herself,” as well as “all applicable privileges,” the budget should be “submitted ex parte and filed and maintained under seal.” *Id.* The case budget is to be reviewed and approved by the judge trying the case. Strong consideration is to be given to holding an ex parte conference to review and approve the budget at the “earliest opportunity.” 725 ILCS 124/10(a-5)(2).

 The approved case budget must include the hourly rates at which counsel and private investigators will be compensated, as well as the “best preliminary estimate” that can be made of all services, “including, but not limited to, counsel, expert, and investigative services, “that are likely to be needed through the guilt and penalty phases of the trial.” 725 ILCS 124/10(a-5)(3)(C). The court has discretion to require separate budgets for shorter periods of time.

 Once the budget is approved and in place, the presiding judge plays a role in approving specific requests for compensation, as well as any modifications to the budget itself. Petitions for certification of both “expenses for reasonable and necessary capital litigation expenses including, but not limited to, investigatory and other assistance, expert, forensic, and other witnesses, and mitigation specialists” (725 ILCS 124/10(c)), and for counsel fees and expenses “shall be filed under seal and considered ex parte but with a court reporter present for all ex parte conferences. *Id.*  If the requests are submitted after services have been rendered, the requests shall be supported by an invoice describing the services rendered, the dates the services were performed and the amount of time spent. These petitions shall be reviewed by both the trial judge and the presiding judge of the circuit court or the presiding judge’s designee. The petitions and orders shall be kept under seal and shall be exempt from Freedom of Information requests until the conclusion of the trial, even if the prosecution chooses not to pursue the death penalty prior to trial or sentencing. If an ex parte hearing is requested by defense counsel or deemed necessary by the trial judge, the hearing shall be before the presiding judge or the presiding judge’s designee. *Id.*

 These provisions are intended to safeguard the defendant’s interest in keeping his or her strategy and expenditures secret from the prosecution while also insuring judicial oversight as to the reasonableness and necessity of any individual request.

**Capital Discovery**

 **[2.7] Application of Preexisting Discovery Rules to Capital Sentencing**

 One of the most striking changes of the post-reform era, is the application of the discovery rules to the capital sentencing hearing. Under Illinois S.Ct. Rule 411, as amended effective March 1, 2001, the discovery rules now apply to “the separate [capital] sentencing hearing” required in a case where the prosecution is seeking the death penalty.

 Most defense attorneys would agree that this is a change that helps the prosecution more than it helps the defense. Under the old death penalty regime, the prosecution was still required by the United States Constitution to disclose exculpatory sentencing material — any evidence it possessed that would tend to suggest that the defendant should not receive the death penalty. And while the prosecution did not have to disclose sentencing material that was inculpatory in that it suggested the defendant should get death, inculpatory sentencing evidence usually consisted of material, such as other bad acts or misconduct in jail, recorded in documents that the defense could obtain by subpoena. Defense mitigation evidence, on the other hand, often consisted of private information gathered from family members, or expert evaluations, not readily available to the prosecution. Nostalgia for the old regime, however, is no substitute for developing an intelligent response to the challenge of state sentencing discovery.

 Moreover, there is something to be gained from the extension of the state discovery obligation to the capital sentencing hearing. Under Rule 412, as applied to sentencing, the State is now required to provide (a) the “names and last known addresses of persons whom the State intends to call as [aggravation-mitigation] witnesses, together with their relevant written or recorded statements, memoranda containing substantially verbatim reports of their oral statements, and a list of memoranda reporting or summarizing their oral statements” (Rule 412(a)(i)); (b) (ii) “any written or recorded statements and the substance of any oral statements made by the accused or by a codefendant [to be used at aggravation-mitigation], and a list of witnesses to the making and acknowledgment of such statements” (Rule 412(a)(ii)); (c) grand jury minutes of “persons whom the prosecuting attorney intends to call as witnesses at the [sentencing] hearing” (Rule 412(a)(iii)); (d) “any reports or statements of experts, made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments, or comparisons, and a statement of qualifications of the expert” (Rule 412(a)(iv)); (e) ‘any books, papers, documents, photographs or tangible objects which the prosecuting attorney intends to use in the [sentencing] hearing or trial which were obtained from or belong to the accused (Rule 412(a)(v)); and (f) “any record of prior criminal convictions, which may be used for impeachment, of persons whom the State intends to call as witnesses at the [sentencing] hearing” (Rule 412(a)(vi)).

 It is possible to conceive of at least some material in each of these categories that the State did not have to reveal before the amendment of Rule 412. For example, the State may, through new investigation, learn of unreported prior bad acts of the defendant, and/or statements that the defendant has made to others that show his or her bad character. These must now be revealed. And although it is unlikely the State will call its own experts during a sentencing hearing, it is certainly possible; *e.g.,*  in some cases, the State has begun to experiment with calling its own experts as to prison conditions. The rule almost certainly requires victim impact statements to be revealed before trial.

 The other side of the sentencing discovery coin is defense disclosure to the prosecution under Rule 413. Like the prosecution, the defense must now disclose “reports or statements of experts” Rule 413(c)), “the names and last known addresses of persons the defense intends to call as witnesses, together with their relevant written or recorded statements, including memoranda reporting or summarizing their oral statements, and record of prior criminal convictions known” to the defense (Rule 413(d)(i)), as well as any “books, papers, documents, photographs, or tangible objects” the defense intends to “use as evidence or for impeachment” at the sentencing hearing (Rule 413(d)(ii)).

 Because the defense is now subject to sentencing discovery, defense counsel must be well aware of the constitutional and common-law exceptions to the discovery requirements. The defense is not required to turn over statements of consulting experts (*see People v. Spiezer,* 316 Ill.App.3d 75, 735 N.E.2d 1017, 249 Ill.Dec. 192 (2d Dist. 2000)), potential witnesses he or she does not intend to use, or material covered by work-product or constitutional privilege (see Rule 412(j)).

 The Committee Comments to Rule 411 also acknowledge the possibility that provision of sentencing discovery by the defense may prejudice the defense position at guilt-innocence and allows the trial court to fashion remedies to alleviate that prejudice:

**[**C**]onstitutional and privilege-based limitations on discovery do not preclude the possibility that pretrial disclosure of defense sentencing information could directly or indirectly aid the State’s case on the merits. The extension of discovery procedures to capital sentencing is not intended to provide such an advantage to the State.**

**In the event the defense objects to disclosure of specific sentencing information on the ground that disclosure would harm the defense case on the merits, the trial court should take any action necessary to prevent that harm.**

 The comments go on to say:

**Options available to the trial court include excision of objectionable material pursuant to Rule 415(e) and the use of protective orders to defer disclosure or restrict the use of information disclosed (Rule 415(d)). *In camera* review of a claim of potential harm from disclosure of sentencing information (Rule 415(f)) may be appropriate to prevent disclosure of defense theories or strategy, or where the identity of a defense sentencing witness is unknown to the State.**

 Premature disclosure of defense sentencing information can prejudice the defense in a variety of ways. For example, a defendant who chooses to put the State to its proof and maintain his or her innocence during trial may have made admissions to examining experts or others that relate to mitigation but that would also suggest guilt. Witnesses who reveal family secrets may be essential at sentencing but irrelevant and damaging at trial. A motion for delayed or protected disclosure of sentencing discovery may therefore be in order.

 **[2.8] Depositions**

 The most striking innovation of the March 1, 2001, amendments to the Supreme Court Rules is the provision for discovery depositions in capital cases under Rule 416(e). Under the new rule, either side “may take the discovery deposition upon oral questions of any person disclosed as a witness pursuant to Supreme Court Rules 412 or 413 with leave of court upon a showing of good cause.” S.Ct. Rule 416(e)(i).

 Although other states, such as Iowa, Indiana, and Florida, have depositions in all criminal cases, Illinois is the only state, to my knowledge, that restricts criminal discovery depositions to capital cases and the only state that requires a showing of good cause for discovery depositions. And although good cause is defined in the rule and slightly illuminated by examples given in the Committee Comments, individual trial judges in different parts of the state have granted wildly varying numbers of depositions.

 In general, judges outside Cook County have granted liberal numbers of depositions, often without a great deal of argument or opposition by the State. Within Cook County, and, in some of the collar counties, the prosecution has opposed depositions more strongly, and some trial judges have compromised by allowing the State to provide various forms of structured interviews or other discovery in lieu of depositions. Surprisingly, all of this trial court activity has generated very little appellate caselaw.

 “Good cause,” discussed below, is not the only requirement for depositions. The person sought to be deposed must also be “disclosed as a witness pursuant to Supreme Court Rules 412 or 413.” Does this mean that the deponent must be specifically named on a witness list, or merely disclosed as a potential witness by being included in a discovery document? Can the State or the defense add a person to their own witness list for the purpose of deposing him or her? These questions, and others, have not yet been resolved.

 The rule itself defines “good cause” as being determined by “the consequences to the party if the deposition is not allowed, the complexities of the issues involved, the complexity of the testimony of the witness, and the other opportunities available to the party to discover the information sought by deposition.” S.Ct. Rule 416(e)(i). Apparently mystified by this broad definition, many attorneys and trial judges have instead turned to the Committee Comments, which state:

**The decision to permit a deposition is committed to the sound discretion of the trial court. The rule does not limit the use of depositions to specific categories of witnesses, because the need to depose a potential witness will depend on the facts of each case. The committee found, however, that depositions are more likely to be necessary for certain types of witnesses. For example, complex trial issues are often raised by the testimony of jailhouse informants, witnesses who have criminal charges pending, witnesses who have not completed their sentence in a criminal case, and witnesses who testify for the State by agreement. Trial courts may also find depositions of eyewitnesses, and particularly sole eyewitnesses, are warranted to ensure full disclosure and adequate testing of crucial eyewitness testimony. In addition, the complex nature of expert testimony suggests that depositions of expert witnesses may often be justified.**

**The categories of witnesses mentioned above are illustrative only. Depositions of witnesses falling within these categories are not intended to be automatic. For example, the deposition of a pathologist who will testify regarding cause of death may not be necessary in a case involving the defense of insanity. Conversely, the categories of witnesses suggested above are not exclusive. The trial court’s decision to grant or deny a request to depose must be made on a case-by-case basis, considering the facts and issues of the case and the factors listed in the Rule.**

 For the defense practitioner who wants depositions, here are some suggestions. If the witness is an expert, an eyewitness, or criminally involved, argue that the potential testimony raises the kind of complex issues that the rule contemplates. For any witness, particularly witnesses in law enforcement, seek an informal interview, which, if refused, will demonstrate that the information sought cannot be obtained by other means. If the testimony sought will be helpful to a defense expert, attach an affidavit from the expert to your motion for a deposition stating that he or she needs information from the potential deponent in order to form an opinion.

 Argue to the trial judge that the information made available at depositions will tend to minimize trial error and claims of discovery violations. Resist alternatives, such as structured interviews, on the grounds that these cannot substitute for a sworn deposition where the witness is required to answer questions. If only a structured interview is granted, seek to have it recorded on videotape or by a court reporter.

 Many defense attorneys, particularly those who have never done civil work, are leery of depositions, either because they fear disclosing defense strategy or are simply uncomfortable with an unfamiliar procedure. In the right case, where the defense has more to lose from prosecution depositions of defense witnesses than the defense will gain from deposing the prosecution witnesses, it is certainly a reasonable strategy to forgo depositions altogether. This is particularly true in cases in which the State will be able to depose important defense mitigation witnesses. But depositions are powerful potential weapons and should never be lightly discarded.

 **[2.9] Special Capital Discovery Statutes and Other Pertinent Discovery Rules**

 In addition to depositions and the application of preexisting discovery rules to capital sentencing, the that the capital practitioner needs to take into account. Some of the reforms are applicable to all felony cases, some to homicide cases, and others to capital cases only. These reforms include (a) mandated recording of interrogations in homicide cases (725 ILCS 5/103-2.1), (b) preservation of law enforcement “field notes” in homicide cases (725 ILCS 5/114-13)), (c) special discovery requirements and reliability hearings for jailhouse informants (725 ILCS 5/115-21), (d) specific identification of *Brady* material (S.Ct. Rule 412(c); *Brady v. Maryland,* 373 U.S. 83, 10 L.Ed.2d 215, 83 S.Ct. 1194 (1063)), and (e) special DNA discovery (S.Ct. Rule 417). All of these reforms are too recent to generate any appellate court caselaw but a brief description of each and practice notes may be helpful.

 Section 103-2.1 of the Code of Criminal Procedure now provides that any statement of the accused made as a “result of a custodial interrogation at a police station or other place of detention shall be presumed to be inadmissible as evidence against the accused” in any homicide case unless “(1) an electronic recording is made of the custodial interrogation; and (2) the recording is substantially accurate and not intentionally altered.” 725 ILCS 5/103-2.1(b). The State can rebut the presumption of inadmissibility by showing by a “preponderance of the evidence that the statement was voluntarily given and is reliable, based on the totality of the circumstances.” 725 ILCS 5/103-2.1(f).

 It is not yet clear whether, and to what extent, §103-2.1 will actually result in the exclusion of statements that were previously admissible, since the prosecution always has the constitutional burden of showing by a preponderance of the evidence that a statement is voluntarily given. What may be new is the requirement that the prosecution demonstrate that an unrecorded interrogation is “reliable.” This may mean that a statement otherwise voluntary will be excluded if it does not match the case facts or was produced by suggestive questioning.

 Section 114-13 of the Criminal Code, another product of the 2003 legislative reform, is more straightforward. It provides that “all investigative material, including but not limited to reports, memoranda, and field notes, that have been generated by or have come into the possession of the [law enforcement] investigating agency concerning the homicide offense being investigated,” must be given by the investigating agency to the prosecution, and then tendered to the defense. 725 ILCS 5/114-13. This statute puts an end to the practice of many police officers throughout the state of destroying their handwritten field notes when they generate their written reports.

 Section 115-21 of the Code provides special discovery requirements and a reliability hearing for jail house informants. The section defines an “informant” as “someone who is purporting to testify about admissions made to him or her by the accused while incarcerated in a penal institution contemporaneously” (725 ILCS 5/115-21(a)) and applies to any capital case in which the prosecution seeks to admit the informant’s testimony as to the defendant’s statements (725 ILCS 5/115-21(b)). In such a case, the prosecution must tender to the defense a wide range of discovery on the informant, including such material as the informant’s criminal history; any “deal, promise, inducement, or benefit that the offering party has made or will make in the future to the informant”; the statements of the accused, including the time, place, and date when made; and the informant’s past history as a witness. 725 ILCS 5/115-21(c). Unless the defendant’s statements have been “lawfully recorded,” the State must prove by a preponderance of the evidence at a pretrial hearing that the informant is reliable; otherwise the informant’s testimony will be excluded. 725 ILCS 5/115-21(d),
5/115-21(e).

 S.Ct. Rule 412(c), as amended effective March 1, 2001, puts new teeth in the requirement that the prosecution must disclose exculpatory material to the defense. The new language requires the State to “make a good-faith effort to specifically identify by description or otherwise any material disclosed pursuant to this section based upon the information available to the State at the time the material is disclosed to the defense.” *Id.* On the other hand, “[a]t trial, the defendant may not offer evidence or otherwise communicate to the trier of fact the State’s identification of any material or information as tending to negate the guilt of the accused or reduce his punishment.”

 The specific identification requirement can be a handy tool to force the State to commit to the disclosure of exculpatory material, which may otherwise be buried in the voluminous discovery of a capital case. And while the rule prevents the defense from using this shield as a sword at trial, it may be important to preserve a record of the State’s compliance, or possible noncompliance, with *Brady* for appeal and post conviction.

 Last, Rule 417 imposes on both sides detailed obligations in terms of tender of DNA discovery. It is important for counsel to check the rule and make sure that its provisions, particularly with respect to the electronic data, have been complied with.

**[2.10] Challenges to the Constitutionality of the Death Penalty Statute**

 One of the necessary rituals of an Illinois death penalty case, and often the last step taken before trial, is the filing of various constitutional challenges to the Illinois death penalty. These motions are filed and denied so regularly that you may be tempted to apologize for even bringing them forward. In fact, no apology is required. In the last ten years, the constitutional landscape has been radically transformed. The major agents of the transformation are the United States Supreme Court’s decisions in *Jones v. United States,* 526 U.S. 227, 143 L.Ed.2d 311, 119 S.Ct. 1215 (1999), *Apprendi v. New Jersey,* 530 U.S. 466, 147 L.Ed.2d 435, 120 S.Ct. 2348 (2000), *Ring v. Arizona,* 536 U.S. 584, 153 L.Ed.2d 556, 122 S. Ct. 2428 (2002), *Blakely v. Washington,* 542 U.S. 296, 159 L.Ed.2d 403, 124 S.Ct. 2531 (2004), and *United States v. Booker,* 543U.S. 220, 160 L.Ed.2d 621, 125 S.Ct. 738 (2005). Taken together, these cases suggest at least two distinct challenges to the constitutionality of the Illinois statute, neither of which has been definitively rejected by the Illinois Supreme Court. Moreover, the Illinois Supreme Court’s own decision in *People v. Ballard,* 206 Ill.2d 151, 794 N.E.2d 788, 276 Ill.Dec. 538 (2002), suggests a third novel challenge to the statute. A *Ballard* challenge can only be raised and fully preserved by requesting an evidentiary hearing in the trial court. Finally, the interplay of the new capital statute, the new Supreme Court capital rules, and the United States Supreme Court’s new death penalty jurisprudence, may yield still other constitutional challenges that have yet to be written, let alone raised.

 This change in the legal climate of the death penalty has been matched by an even more dramatic change in the political climate. It is no accident that the three dissenters in *Cousins* (*People* ex rel. *Carey v. Cousins,* 77 Ill.2d 531, 397 N.E.2d 809, 34 Ill.Dec. 137 (1979)) refused to join Justice Seymour Simon in voting to overturn the Illinois death penalty in *People v. Lewis,* 88 Ill.2d 129, 430 N.E.2d 1346, 58 Ill.Dec. 895 (1981); public support for the death in the early 1980s virtually guaranteed that any post-*Cousins* challenge to the statute would be rejected. But in the post-exoneration, post-clemency era, public support for the death penalty, particularly in Illinois, has significantly weakened. The highest court of at least one state, New York, in *People v. LaValle,* 3 N.Y.3d 88, 817 N.E.2d 341, 367 – 368, 783 N.Y.S.2d 485 (2004), has held its death statute unconstitutional on a technical ground. It is not inconceivable that the Illinois Supreme Court will one day do the same.

 The new constitutional challenges include these:

 • The Illinois death penalty statute may be unconstitutional because it makes too high a proportion of first-degree murders death-eligible, and an evidentiary hearing is required to determine whether it is in fact over-inclusive (relying on *People v. Ballard, supra).*

 • The Illinois death penalty statute is unconstitutional because it does not require the prosecution to prove that death is the appropriate sentence beyond a reasonable doubt (relying on *Ring v. Arizona, supra*).

 • The Illinois death penalty statute is unconstitutional as applied in those instances where the prosecution fails to allege the eligibility factors in an indictment or information (relying on *Ring v. Arizona, supra,* and *Jones v. United States, supra*).

 These “big three” challenges should be raised in most, if not all, genuine death penalty cases. Failing to raise the *Ballard* issue at trial will be fatal; after all, *Ballard* himself lost, in part, because he failed to supply the court with “empirical evidence” that the statute was in fact unconstitutional. But even reraising the claims rejected by the Illinois Supreme Court in the 1980s is important. Few of these claims have ever been reviewed by a federal court; and not one has ever reached the U.S. Supreme Court. If the judicial history of the death penalty for the last years has taught us nothing else, it should have taught us that, in this area, the courts are ready to rethink first principles and overrule bad precedents.

 For the “big three” claims raised in a real death penalty case, you should take the following steps:

 a. Raise the issues in writing, with appropriate written motions and memoranda.

 b. Clearly inform the court and opposing counsel that, in your view, these claims are not foreclosed by Illinois Supreme Court precedent and are therefore not being raised “just for the record.”

 c. Ask for a significant amount of time to orally argue each motion, on separate court dates, if necessary.

 Do not discount entirely, remote as it may be, the possibility that you may win. Even in the early 80s, one trial judge — William Cousins — had the courage to declare the penalty unconstitutional. Against a backdrop of declining public support for the death penalty, less courage is needed, and other judges may come forward.

 And in the event you lose your constitutional motion, remember to preserve it properly. A general statement in your posttrial or post-sentencing motion to the effect that the trial judge erred by refusing to declare the statute unconstitutional may not be sufficient to preserve all possible constitutional claims.

**3**

 **Death Penalty**

 **Sentencing Matters**

**Litigating Death Penalty Eligibility**

 **[3.1] Introduction**

 Among states that have a death penalty, Illinois is unique. Following the United States Supreme Court’s decision in *Gregg v. Georgia,* 428 U.S. 153, 177, 49 L.Ed.2d 859, 96 S.Ct. 2909, 2927 (1976), no state can make a defendant eligible for the death penalty merely upon a conviction for murder. A constitutional death penalty requires a state to limit eligibility for death to some smaller subset of murders, and since the United States Supreme Court’s decision in *Ring v. Arizona,* 536 U.S. 584, 153 L.Ed.2d 556, 122 S.Ct. 2428 (2002), all states, not just Illinois, have been required to give defendants the opportunity to have this eligibility determination made by a jury and to have the determination made using the standard of proof beyond a reasonable doubt.

 In some states, however, this winnowing is accomplished by having the jury determine during the guilt-innocence phase whether the defendant is guilty of an offense of “capital murder” or whether certain death penalty “specifications” have been proved beyond a reasonable doubt. In other states, death penalty eligibility is litigated during the penalty phase, when the jury also determines whether the defendant should be sentenced to death.

 Only Illinois, to my knowledge, has a separate “eligibility” hearing, following
guilt-innocence, but prior to final sentencing, where the jury determines only whether the defendant is eligible for death.

 This procedural difference between Illinois and all other states gives Illinois death penalty defense attorneys a unique opportunity. In states where eligibility for the death penalty is determined during guilt-innocence, the jury can be “hung” on the question of capital murder, and the defendant can be retried unless all jurors conclude that the defendant has not been proved guilty beyond a reasonable doubt. And in states where death penalty eligibility is tried together with the ultimate question of whether the defendant should be put to death, the jury deciding eligibility will have been exposed to other damaging information about the defendant, possibly including hearsay.

 At guilt-innocence, Illinois death penalty attorneys, like attorneys in all states, have the benefit of the reasonable doubt standard and the rules of evidence, but must convince 12 jurors in order to win. At the final, aggravation-mitigation phase, Illinois death penalty attorneys must convince only one juror in order to win but lack the reasonable doubt standard and must contend with evidence that is normally inadmissible, such as hearsay or evidence of other crimes. Only in the middle, eligibility phase, do Illinois death penalty attorneys enjoy the best of all possible procedural worlds. All you need to do at eligibility is to convince one juror, a juror who has not yet been exposed to the prosecution’s case in aggravation, that the State has not proved eligibility for the death penalty beyond a reasonable doubt.

 Obviously, in many instances, the prosecution’s case for eligibility is so overwhelming that the chances for beating the death penalty at eligibility are, in fact, minimal. This is particularly true in cases of multiple murders, where the State has in effect proved eligibility, often well beyond a reasonable doubt, during guilt-innocence. But even in those cases, it is sometimes worth litigating eligibility. And this is true for several reasons.

 First, eligibility may be the defense attorney’s first (and possibly last) opportunity to exploit lingering or residual doubt. Current Illinois law appears to prohibit defense attorneys from arguing residual doubt at the final, aggravation-mitigation phase. Nevertheless, many studies have shown, even in states where residual doubt is not a mitigating factor, that lingering or residual doubt is the number one reason why most holdout jurors actually vote for life.

 Even without explicitly urging the jury to reconsider its vote for guilt, it is possible to exploit lingering or residual doubts at the eligibility phase, often quite legitimately. In a case in which the State is relying on the felony murder aggravating factor, has the prosecution really proved, beyond a reasonable doubt, that the defendant was the actual killer or inflicted contemporaneous injury? In an arson case, where the defendant has been convicted of setting a single fire, has the prosecution really proved, beyond a reasonable doubt, that the defendant intended to kill more than one person by that single act? Where the defendant has been convicted of killing a police officer, was the officer really acting in the course of his duty, and did the defendant really know that the victim was a police officer? The prosecution may have proved that the defendant intended a particular killing, but have they really proved, beyond a reasonable doubt, that the defendant acted in a “cold and calculated” manner, and that the defendant had a premeditated plan to kill? It is certainly legitimate to urge the jury to reconsider all of the evidence at trial, in light of these new, and previously unresolved, questions.

 Because of the felony murder and accountability rules, it is often laughably easy for the prosecution to prove first-degree murder at trial. But death penalty eligibility always requires something more. Many eligibility factors require proof of mental states or motives on which the proof may be dubious or lacking. Did the defendant really have a premeditated plan to kill and not just to injure or rob? Was the defendant really trying to eliminate a witness? Did the defendant really know that the off-duty cop, dressed in plain clothes, was a police officer? Evidence on these issues is often circumstantial. And since interrogators commonly persuade defendants to confess by suggesting to them that their motives for killing were relatively benign, the defendant’s statement will often fail to support, and may even contradict, the State’s case for eligibility.

 Second, the eligibility phase is a chance to instruct the jurors in the principle that, after guilt-innocence, each juror is a jury of one. As at aggravation-mitigation, the winning verdict form is nonunanimous. Even when you are certain that the prosecution is going to win on at least one eligibility factor, beating any of the other factors is no Pyrrhic victory. If you have beaten one eligibility factor, you know that there is at least one juror who is willing to stand alone and vote against the prosecution. And, more important, you know that as many as eleven other jurors were willing to go along, to respect that one juror’s opinion, and to affirm that they were not unanimous. If it can happen once, it can happen again — when the defendant’s life is literally on the line.

 And even where the prosecution is bound to prove the defendant eligible on at least one factor, it is important not to give up on the others. There is no rule of law that allows or suggests that jurors in the final phase should weigh the number of aggravating factors against the number of mitigating factors. Indeed, the law is clear that the number of aggravating factors is of no legal consequence. But jurors may in fact consider the number of aggravating factors, particularly those they have agreed exist beyond a reasonable doubt, significant. And certain aggravating factors — such as “cold and calculated” or torture — are inherently damning. If found by all twelve jurors beyond a reasonable doubt, they strongly suggest the defendant should be sentenced to death, no matter what mitigation is presented. If at all possible, you need to persuade at least one juror that these factors do not, in fact, exist.

**[3.2] Litigating Against Eligibility Factors: Procedural Steps**

 When I first look at a capital case, I ask myself, or the attorney who has referred the case to me, this question: Why is the defendant eligible? What are the eligibility factors?

 Over the years, I have been amazed to discover how often this question was not answered, or if answered, was not, on close inspection, all that obvious. Some attorneys used to say to me, “It’s a death penalty case because the crime was exceptionally brutal or heinous.” But in Illinois, an exceptionally brutal or heinous crime does not make the defendant eligible for death unless the victim is under 13, over 60, or disabled. Or they would say that the defendant is eligible because the crime was a felony murder. But a felony murder qualifies the defendant for death only if the killing was knowing or intentional, the defendant was the actual killer or inflicted contemporaneous injuries, and the felony was one of the listed felonies or some other felony deemed “inherently violent.” A close reading of the notice of intent to seek death, and or the indictment, and a comparison of these two with the case facts are critical in establishing whether in fact the defendant is eligible and whether the State can prove it.

 After you figure out just which eligibility factors the State is alleging, three different strategies can be pursued in order to attempt to defeat the State’s eligibility case before trial. See §§3.3 – 2.5 below.

 *[3.3] Motion To Strike Eligibility Factors Based on the State’s Failure To Allege Them in the Indictment*

 This motion, based on *Apprendi v. New Jersey,* 530 U.S. 466, 147 L.Ed.2d 435, 120 S.Ct. 2348 (2000), and the Illinois Constitution, seeks to strike any eligibility factors that have not been submitted to a grand jury and alleged in the indictment, or that have not been made the subject of a preliminary hearing to determine probable cause and reflected in an information. This motion has succeeded in New Jersey and been rejected in a number of other states, often by split votes of the state’s highest court. The Illinois Supreme Court has not yet ruled on it in a case in which the issue was properly preserved at trial. The motion is strongest for factors such as murder of a witness or “cold and calculated,” which will not normally be reflected in the indictment, and weakest for multiple murders, where the multiple murders are generally alleged in the indictment. It can also be argued that the indictment should allege that the defendant is over 18, a prerequisite for all death eligibility.

 *[3.4] Motion for a Bill of Particulars or Greater Specificity in the Notice of Intent*

 Often the State’s notice of intent will simply quote a statutory factor verbatim, without indicating those particular facts the State is alleging as constituting eligibility. For example, the State will quote all of the listed felonies in the course of felony aggravator, without specifying which it is relying on, or it will fail to indicate whether it is alleging the defendant is the actual killer or an inflicter of contemporaneous injury, or it will fail to indicate which of the many forms of murder of a witness is being alleged. A motion to strike the factor as failing for lack of specificity or for a bill of particulars may be helpful in these instances, and such motions have in fact been granted.

 *[3.5] Motion To Preclude or Bar Death or a Specific Aggravating Factor and/or for a Hearing To Determine Whether There Is Probable Cause for the Factor*

 This motion essentially alleges that the State will not be able to prove a factor or factors beyond a reasonable doubt at the eligibility hearing. If the allegation is that the State will not be able to prove the defendant eligible at all, or that the State is lacking probable cause for eligibility, the claim will be that the defendant should not have to go to trial before a death-qualified jury, a jury that is more likely to convict. The subsidiary request is that the defendant should be granted some sort of hearing, on the analogy of a civil motion for summary judgment, where it can be determined if the death penalty is being sought in good faith or on the basis of probable cause. Many states recognize the validity of such a hearing; Illinois law is ambiguous on the point, but over the years, such hearings have been granted by some judges. The motion may be particularly useful under post-reform Illinois death penalty practice because the fuller discovery provided by the notice of intent and by depositions gives the trial judge more information on which to rule.

**[3.6] Litigating Against Eligibility: Jury Selection**

 In the right case, you may want to discuss the eligibility phase with the prospective jurors during jury selection. Most judges will at least let you ask these jurors the *People v. Zehr,* 103 Ill.2d 472, [469 N.E.2d 1062](http://www.iicle.com/smartbooks/content.asp?Search=1&P=1&ID=65445&prod=897&go=%23&SearchText=%22people+v.+zehr%22&Operator=AND&PracticeArea=0&ProductID=0&Sensivitiy=0#Library=IL&Table=case_law&Docname=469%20N.E.2d%201062#Library=IL&Table=case_law&Docname=469%20N.E.2d%201062), 83 Ill.Dec. 128 (1984), questions with respect to death penalty eligibility: Do you hold the State to its burden to prove eligibility? Do you understand that eligibility must be proved beyond a reasonable doubt? Do you understand that the defendant is presumed not to be eligible for the death penalty, and will you hold it against the defendant if he does not testify at the eligibility phase?

 Jury selection is also a good opportunity to familiarize prospective jurors with the “stand alone” and “stand together” principles of a nonunanimous eligibility verdict: they have an obligation not to cave in to the majority if they do not believe a factor has been proved beyond a reasonable doubt and an obligation to respect the judgment of one or more jurors who believe that the defendant is not eligible.

 If you can, it is also a good idea to ask prospective jurors a variation on the standard *Morgan v. Illinois,* 504 U.S. 719, 119 L.Ed.2d 492, 112 S.Ct. 2222 (1992), questions with respect to the actual factors alleged. For example, in one case, in which the victim was a police officer, we sought to be allowed to ask these questions:

 a. Would you vote for the death penalty in all first-degree murder cases in which the victim was a police officer, killed in the course of performing his or her official duties, by a person who wished to prevent him or her from performing those official duties, who knew or should have known that the victim was a police officer?

 2. Would you vote for the death penalty in all first-degree murder cases in which the first-degree murder occurs after or in connection with the commission of a forcible felony?

 While we were not allowed to ask these specific questions, we were allowed to ask the prospective jurors whether they would vote for the death penalty in all cases in which the victim was a police officer.

**[3.7] Litigating Against Eligibility: Evidence, Argument, and Instructions**

 The eligibility hearing itself can be very strange. Often, neither side presents any evidence. Opening statements, arguments, and instructions can occur within minutes. While the trial evidence is very important, counsel needs to be aware that this is not a typical argument.

 The modern tendency in defense training is to emphasize the importance of a “story” and to deemphasize arguments about reasonable doubt, the elements of the offense, or the instructions. This tendency may be appropriate to the trial. But at an eligibility hearing, the defense “story of innocence,” if there was one, has been rejected. All that can be left, if there is anything left, is to argue that the State has not proved those additional “elements” or facts that make up death penalty eligibility beyond a reasonable doubt. Careful attention to the elements and to the instructions and a strong argument on reasonable doubt are all critical.

 Can this work? Can you succeed? The history of the Illinois death penalty during the last eight years demonstrates that you can. Since 2000, at least as many Illinois juries have found a defendant not eligible at the second phase as have found that death is not appropriate at the third.

 Larry Mack, William Buck, John Boyd, James Huff, and Maurice Lagrone, to name just five defendants, were all found not eligible for death. In each case, one or more jurors believed that the State had not proved its case in eligibility.

 Eligibility used to be called the “forgotten phase.” If you want to save your client’s life, you need to remember it.

**[3.8] Jury Selection in an Illinois Capital Case**

 Sections 3.9 – 3.14 below contain suggestions for selecting a jury in an Illinois capital case. Notice that this section is entitled “jury selection” rather than “voir dire.” Voir dire is the process by which judges and lawyers question potential jurors. With the exception of the *Witherspoon* and *Morgan* questions, capital voir dire and noncapital voir dire are basically the same. *See* *Witherspoon v. Illinois,* 391 U.S. 510, 20 L.Ed.2d 776, 88 S.Ct. 1770 (1968); *Morgan v. Illinois,* 504 U.S. 719, 119 L.Ed.2d 492, 112 S.Ct. 2222 (1992). Capital jury selection, however, includes not only voir dire, but also the entire suite of strategies and tactics by which an attorney attempts to seat at least one juror who will vote for life.

 The importance of finding, and seating, that one juror cannot be exaggerated. Nearly every favorable verdict in an Illinois capital case has depended on the life or non-eligibility votes of a small minority of jurors. In retrospect, we often lose sight of the mitigating evidence and arguments that helped to persuade that one juror, or small group of jurors, to hold out for life. Nevertheless, finding a juror who will even listen to an argument for life is the name of the game.

 They are three sets of players in the game — the judge, the prosecutors, and the defense counsel. Each set of players has a different motive. Prosecutors want jurors who will kill. Defense counsel want jurors who won’t kill. And judges want jurors, any jurors, selected and impaneled as quickly as possible.

 A defense counsel who wants to win the game of jury selection needs to gain some advantage over the prosecutor, while at the same time dealing with the judge’s desire to get the process over quickly. There are only two ways of gaining an advantage over the prosecutor. The first is to use your peremptory strikes in a wiser, better informed, or more knowledgeable manner than the prosecutor. And the second is to force the prosecutor to use more of his or her strikes, more quickly.

 To win, you need a game plan. A good game plan for jury selection involves four steps:

 a. Before trial, establish good conditions for voir dire and jury selection. Good conditions mean the following:

 1. jury questionnaires;

 2. attorney voir dire, particularly for the *Witherspoon* and *Morgan* questions;

 3. individual, “sequestered” voir dire;

 4. maximum number of strikes; and

 5. stringent limitations on case discussion by prospective or chosen jurors.

 b. Through the processes of voir dire, or background research, decide which of the following four categories each of the prospective jurors falls into:

 1. *Morgan*-excludable;

 2. *Witherspoon*-excludable;

 3. not *Witherspoon*-excludable, but generally pro-life;

 4. not *Morgan*-excludable, but generally pro-death.

 c. Through further voir dire, attempt to

 1. expose *Morgan*-excludable jurors and excuse them for *Morgan* cause;

 2. rehabilitate *Witherspoon*-excludable jurors, forcing the prosecution either to use strikes, or accept them onto the jury;

 3. challenge pro-death jurors for cause on other legitimate grounds, such as prejudice, inconvenience, or inability to accept and follow other legal principles;

 4. rehabilitate pro-life jurors if they are challenged for cause on other grounds.

 d. Indoctrinate selected jurors by telling them about

 1. the “stand-alone,” and “stand-together” principles;

 2. the particularly bad facts they are going to learn;

 3. the governing legal principles of the death penalty hearing process.

 **[3.9] Establishing Good Conditions for Jury Selection**

 Establishing good conditions for jury selection is important, for two reasons. First, you need to get adequate information about the jurors in order to make wise selections. Second, you need to counteract the tendency of trial judges to indoctrinate and qualify jurors by means of leading questions.

 Luckily, obtaining good conditions for jury selection is much easier than it once was. Outside Cook County, all judges now use jury questionnaires, question jurors individually, and allow liberal attorney voir dire. In Cook County, most judges have acceded to individual questioning but forbid jury questionnaires and tend to limit attorney voir dire.

 Since these conditions are all within the judge’s discretion, you need to make arguments that appeal to the judge’s desire to get jury selection completed as quickly and as efficiently as possible. The best argument for jury questionnaires is that they can speed the selection process by quickly flagging jurors who don’t want to sit and who openly state their prejudices on the questionnaires. If both sides can spot the prejudiced jurors from the questionnaires and agree to dismiss the jurors for cause, the selection process will go faster. Moreover, detailed questionnaires can often short-circuit the kind of boring recitation of personal detail that judges and lawyers both like to elicit.

 Similarly, individual sequestered voir dire can speed up the selection process by preventing jurors who want to avoid service from learning the answers to questions about prejudices or legal principles that will lead to their exclusion. Even attorney voir dire, which most judges regard as a champion time-waster, can be sold as a time-saver if the attorney’s questions are well thought out and carefully worded.

 Two more points need to be made about general conditions. First, some judges, and even some prosecutors, will agree that both sides in a capital case can have 20 strikes, the statutory number, instead of 14, the number provided by Supreme Court Rule. Since crime is unpopular, and most people still favor the death penalty, the defense generally needs more strikes than the prosecution. If you can get more, take more.

 Second, every recent capital jury selection in Illinois has been infected, at one point or another, by potential jurors who ignore the judge’s admonitions not to discuss the case with their friends and relatives, not to read media accounts of the cases, and not to share their experiences with their fellow jurors. In the age of the internet, anyone who wants to find out about the case can find out about the case. Particularly if the defendant has a bad background, you need to sensitize the judge to the need to admonish jurors and to investigate vigorously possible juror misconduct.

 **[3.10] Categorizing Jurors by Their Attitudes Toward the Death Penalty**

 In capital cases, the most important criterion for selecting a juror is his or her attitude toward the death penalty. This may sound obvious, but it also requires some discussion.

 It could be argued that, in some cases, where you have good guilt-innocence or eligibility issues, it is more important to select jurors who will be favorable at either of those two phases. In some cases, this may be true. However, “law and order” jurors who tend to favor the prosecution will usually favor the prosecution at all phases of the trial; not just at guilt-innocence. Conversely, anti-death-penalty jurors will probably be more favorable even during the guilt phase. Moreover, most death penalty cases that go to a death-qualified jury for both phases are not usually good guilt-innocence cases for the defense. All potential jurors can probably be sorted into four categories. A questionnaire that I have used to select jurors for focus groups captures the four categories:

***Q.* Which of these statements most accurately states how you feel about the death penalty?**

 **(A) I am for the death penalty. If I were chosen to sit on a jury, I always would vote for giving the death penalty to anybody who intentionally committed murder.**

 **(B) I am against the death penalty. If I were chosen to sit on a jury, I would never vote to give the death penalty, under any circumstances.**

 **(C) I generally favor the death penalty, but if I were chosen to sit on a jury, I would consider voting for a sentence other than the death penalty in the right case.**

 **(D) I am generally against the death penalty, but if I were chosen to sit on a jury, I would consider voting for the death penalty in the right case.**

 In general, the goal of capital jury selection is to eliminate Group A, the *Morgan* jurors (*see Morgan v. Illinois,* 504 U.S. 719, 119 L.Ed.2d 492, 112 S.Ct. 2222 (1992)), for cause; rehabilitate Group B, the *Witherspoon* jurors (*see* *Witherspoon v. Illinois,* 391 U.S. 510, 20 L.Ed.2d 776, 88 S.Ct. 1770 (1968)), so that the prosecution will have to accept them or strike them; eliminate Group C, either by challenging for cause on another ground or exercising a peremptory; and keeping as many of Group D as possible.

 The best way to find out where jurors fit into each of these four categories: is to ask them the general, open-ended question, “What do you think about the death penalty?” Or, “What is your view of the death penalty?” Other open-ended questions that are also helpful, although not relating directly to the death penalty, include, “What do you view as the most important problem in today’s society?” Or, “What concerns you about society today?” My own experience has taught me that jurors who worry about crime, morality, or juvenile delinquency are dangerous; conversely, jurors who worry about war or the economy are more benign.

 The answers to the open-ended death penalty questions provide the best clues for determining where potential jurors stand on the death penalty. You may find from the juror’s answers that he or she thinks that some murders, like cop killings or baby-killings, are particularly well-suited for the death penalty. Or you may find, as is often the case, that the juror thinks that residual doubt is the best, or the only, reason to vote against death. In addition, my own experience has taught me that jurors who claim to have “no opinion” as to the death penalty are often pro-death. Many people who view the death penalty as simply part of the law believe that having an “opinion” on the death penalty is the equivalent of opposing it. Careful questioning of these jurors often reveals that they are strongly pro-death.

 With few exceptions, categories like race, gender, or class reveal very little about a juror’s ultimate attitude toward the death penalty. Religion is a little more helpful. Catholics, Greek Orthodox, non-Evangelical Protestants, Reform Jews, and Wisconsin Synod Lutherans are often opposed to the death penalty, while Evangelical Protestants, Orthodox Jews, Muslims, and Missouri Synod Lutherans often support it.

 If there is time during jury selection, actual research on a juror’s background, particularly using the Internet, is an option. The advantage of such research is that, unlike voir dire, what you learn does not have to be shared with the prosecution.

 In one recent case, a potential juror gave the following answer to such an open-ended question: “I haven’t really considered it. I don’t oppose it, but I do believe it has to be imposed only with the greatest of care.” The juror, a married male civil engineer, was an active churchgoer and church volunteer. One answer on his questionnaire, about a bumper sticker on his car, showed that he was a creationist.

 Research on this juror also showed that his Lutheran Church was affiliated with the Missouri Synod, a body that is generally pro-death penalty. In a context in which the attorneys were forbidden by the judge to do the *Witherspoon* questioning, I decided that it was best to try to get rid of him. Attorney voir dire on the issues of inconvenience and the health of a child established that he could not give his full attention to the case, and he was excused for cause.

 **[3.11] The Heart of Capital Voir Dire: Saving Pro-Life Jurors and Excluding Pro-Death Jurors**

 The first category of jurors who need to be uncovered and excluded are the *Morgan* jurors — jurors who will always vote for the death penalty if the defendant is convicted of first-degree murder and/or if the defendant is found eligible for death. See *Morgan v. Illinois,* 504 U.S. 719, 119 L.Ed.2d 492, 112 S.Ct. 2222 (1992). The major difficulty with these jurors is that they do not always know themselves that they are *Morgan* jurors. Lacking any definition of first-degree murder or death penalty eligibility, their answers to the standard *Morgan* questions often harbor unspoken mental reservations about voting for life. When many *Morgan* jurors say that they will not “automatically” vote for death, what they really mean is that they will not vote for death if the “murder” was an accident, a case of self-defense, caused by the defendant’s insanity, or subject to some residual doubt of guilt.

 The example in §3.12 below illustrates this principle.

 *[3.12] Uncovering a* Morgan*-Excludable Juror*

 The potential juror in the following example did not indicate any position on the death penalty on her questionnaire.

 Questioning (by the judge) proceeded as follows:

 1. The juror indicated that she understood that death was a possible penalty.

 2. She said that she understood that a finding of guilt against the defendant did not require a sentence of death.

 3. She said that she would not automatically vote to give a death penalty if the defendant was found guilty of murder.

 4. The following colloquy ensued:

*Q.* I take it you don’t have any religious, moral, or philosophical objections to the death penalty; is that correct?

*A.* You mean as far as what?

*Q*. As far as imposing or giving the death penalty?

*A.* Well, I think there’s circumstances that come into effect. I mean a person could kill somebody and it could have been an accident or could have been by provoking them where he goes crazy and stuff, but just cold-blooded murder, I think the person should be executed.

*Q.* Okay.

*A.* Is that what you were asking me?

*Q*. Well, that is a good answer. I was trying to find out if you had any belief that prevented you from voting for the death penalty in the appropriate case under the law and the evidence?

*A.* No.

 5. The juror said that she would not vote automatically for the death penalty in a case in which the victim was a police officer or a forcible felony was involved.

 6. The following colloquy ensued:

*Q.* You made a comment a moment ago about if a person is — if you are convinced that they did the murder you think they ought to get the death penalty; is that what you said?

*A.* I think if a person — I think there’s circumstances that you come to and things that happen. I think if somebody is cold-blooded, you know, somebody just comes up and shoots you that’s what I consider — you know, there’s no — I mean just shot you, killed you.

*Q.* I guess.

*A.* I am having a hard time expressing myself here.

*Q.* No, you are doing a good job, you are doing a good job. Would you be able to follow the law though as I give it to you, if we go to that second stage, would you be able to follow the law and determine if under our system of law if the Defendant is eligible or not, or would you just say well if I believe he — to use your words — were a cold-blooded murderer that he should just get the death penalty without regard to the instructions on the law and evidence the Court might give you?

*A.* If it’s cold-blooded murder I believe my religious upbringing — I believe he should be executed then if it’s cold-blooded murder.

*Q.* Okay. Would your beliefs, you personal beliefs be such that they would override the instructions of law and the burden of proof that the Court would give you? In other words, would they be more controlling in your thinking than the instructions and law the Court gives you?

*A.* I can’t honestly answer that.

 7. Upon further questioning from the judge, the juror said that she could sign a nonunanimous verdict form, that she could consider mitigating evidence, that she could keep an open mind, and that she could follow the law if she found “mitigating factors as to why the defendant should not be sentenced to death.

 The defense moved for cause, and the state objected. The judge then asked the following questions and received the following answers:

 8. The juror said that “when somebody murders somebody and kills them and stuff that in the Bible God says bring him to me meaning he will be doing the judging, bring him, but I also believe there’s circumstances, there’s like accidents that can happen or things that can happen, like an accident or self-defense, that’s not really the same thing as murder; do you understand what I am saying?”

 9. The judge then explained that if the juror found the defendant guilty of
first-degree murder, she would have (by definition) found that the killing was not an accident, not a mistake, and not done in self-defense. He then asked her if knowing all that she would be able to keep an open mind when deciding whether the defendant was eligible for death.

 10. The juror replied: “No, it would be hard.”

 11. The judge then asked if the defendant was found guilty of first-degree murder, would she be able to keep an open mind and listen to mitigation, “or would you say that’s it, I have heard enough, you should get the death penalty?”

 12. The juror replied: “Yes, I am afraid I believe that way.”

 This juror was then excused for cause, without objection by the State.

 Notice that this juror answered the standard *Morgan* questions correctly — she said that she would not vote for the death penalty automatically and realized that a verdict of guilty did not require a death sentence. But it turned out that what she really meant was that she would not vote for the death penalty in cases of accident, mistake, or self-defense.

 For this reason, it is important to ask all jurors a series of “stripping” questions, making clear that if they reach the final death penalty hearing stage, there will be no question of any defense to murder.

 *[3.13] Rehabilitating a* Witherspoon*-Excludable Juror*

 The juror in the following example was a 28-year-old female physicist, single, employed at a government research facility.

 During the first round of questioning, by the judge, the juror gave the following answers:

 1. When asked the open-ended question about the death penalty, she said: “I guess I would always argue against it . . . because it’s morally wrong. I don’t think the government should have the power to execute people who are citizens. . . . I recognize that it is the law, but I don’t think it should be the law.”

 2. The judge then asked if she could vote to give the death penalty taking into account the evidence and the law in the case. She replied: “Perhaps, yes, I suppose. No, no, I don’t think I could . . . I guess I probably — Probably if it was one of those things where I wouldn’t deadlock the jury if everyone else thought it was correct, but I would argue against it, so I would be biased against it.”

 3. After another series of questions, the juror twice answered that she could not vote to impose the death penalty, and was then asked if she could follow the law even if it conflicted with her beliefs. She replied: “Yes, I suppose I could, but would certainly try not to, I would certainly argue strongly against it.”

 4. However, when asked if her opposition to the death penalty would substantially impair her ability to follow the law and consider the death penalty as a possible penalty, she answered: “No.” When asked whether she could vote to give the death penalty, she answered: “Yes, I guess.” When asked whether her personal beliefs would prevent her from committing to giving the death penalty in an appropriate case, she answered: “I suppose I might do it, but I doubt it. I certainly would be prejudiced against it.” When asked whether she could take an oath and follow the law as to the death penalty, she said:

“I think I could do it, yes.”

 After a final round of questioning by the judge, during which the juror agreed to follow various legal principles, the judge told the juror that she would have discretion to give or not give the death penalty.

 5. The judge then asked: “Are your beliefs such that you would automatically vote against the death penalty at that stage regardless of the evidence and the law?”

 6. The juror answered: “I’m not sure. I mean if it did seem that legally — I mean if the law did say it did seem it was required I might vote for it.”

 7. The judge then told the juror that she was not going to get a mathematical formula that would tell her that the death penalty was required.

 8. The juror then said that without a formula, she would “probably vote against it.” Although she would consider the law and the evidence, if she had discretion, “I wouldn’t if it seemed it was not legally required, then I would not want to impose it, no.”

 9. However, when asked whether her beliefs would cause her to vote against the death penalty automatically, she answered: “No.” When asked whether she could vote to give the death penalty, she answered: “It might be possible.”

 The judge was about to ask her under what circumstances “it might be possible” that she would vote for death. The defense objected, and suggested that the judge simply ask her whether she could sign the verdict form that stated that there were no mitigating circumstances sufficient to preclude a death penalty.

 The State objected, saying: “Where we are at with this juror, she is holding out some unknown possibility that if the moon and stars align that she might possibly think about imposing or voting to impose the death penalty in the same way it’s a possibility that a spaceship with little green men is going to land on Lake Michigan. She is saying yeah I will follow the law if it’s given to me in a precise math formula where I have no discretion otherwise she is voting against it.”

 10. The court however, asked her:

*Q.* Could you sign a verdict form that said that there were no mitigating factors sufficient to preclude the death penalty?

*A.* Yes.

*Q.* You could do that?

*A.* Yes.

 11. The judge then asked again whether her opposition to the death penalty would substantially impair her ability to follow the law, and she answered: “No.”

 Some other good “rehabilitating” questions for anti-death-penalty jurors include the following:

 • “Could you suspend your feelings during deliberations and follow the law and the instructions which I will give you?” (This might be called the “lockbox” question.)

 • “Can you imagine any set of circumstances in which you would vote for the death penalty?” (Not all judges will allow you to ask that question).

Note that in the example given above, the juror wanted to be assured that there was some legal formula she could follow, apart from her personal feelings or beliefs, that would allow her to vote for death. When she was provided with the deterministic formula, she answered “Yes,” and was rehabilitated.

 *[3.14] Excusing Pro-Death Penalty Jurors for Cause*

 Obviously, it does not matter how pro-death penalty jurors are excluded, so long as they are removed for cause, and the defense does not have to use a strike. Luckily, many pro-death-penalty jurors are also skeptical about such legal principles as burden of proof, presumption of innocence, and the right of the defendant not to testify. They are also more likely to think that police officers are more believable than civilians and that if a witness is sworn to tell the truth, the witness must be telling the truth. Apart from these legal principles, they are also likely to express sympathy for the victims of crime. Any one of these grounds, in addition to the inconvenience of serving on a lengthy capital trial, can be made into, after a careful and sensitive voir dire, the basis of a challenge for cause.

 **[3.15] Indoctrinating and Inoculating All Jurors**

 The last step in the jury selection process is to convey to the seated jurors, or those who are likely to be seated, the most critical information they will need to become either strong pro-life jurors or, failing that, relatively harmless pro-death jurors.

 The major thing not to do is to attempt to sell your mitigation or innocence case to the jurors during selection. Defense attorneys are often accused of using voir dire for this purpose; my own experience has taught me that this practice is not only objectionable, but it is also largely useless.

 Promising mitigation or defense evidence you may not ultimately be able to deliver is a bad idea. It is better to take the opposite tack — tell the jurors about all the guilt or aggravation evidence they may hear — particularly pieces of evidence like gruesome crime scene or autopsy photos. Tell them that they will hear and see these things and then ask them if they will be able to give the defendant a fair trial. This technique will not only eliminate some pro-death jurors, it will also serve to inoculate all jurors against the shock of the prosecution’s powerful case for death.

 Lastly, you need to fortify the pro-life jurors with the ability to stand up to the pro-death jurors during selection. Conversely, you need to get assurances from the pro-death jurors that they will respect the wishes of the pro-life jurors and sign a nonunanimous jury verdict form, even though they want the defendant to die. Although “stand-alone” questions have sometimes been refused by trial judges, we have had some success in getting judges to give these two questions:

 **In the event you are to consider this question, you would have to unanimously vote for death. This means that each member of the jury would have to sign a verdict form that said that the defendant will be sentenced to death. If one or more members of the jury did not agree that the defendant should be sentenced to death, each member of the jury would have to sign a verdict form that said that you did not unanimously agree that the defendant should be sentenced to death.**

 **1. If you did not believe that the defendant should be sentenced to death, could you follow the law and sign only the verdict form that said that the jury was not unanimous, even if other jurors thought the defendant should be sentenced to death?**

 **2. If you did believe that the defendant should be sentenced to death, but other jurors disagreed, could you follow the law and sign the verdict form that said that the jury was not unanimous?**

 In one jury selection, one of the jurors responded to the first question: “Do you mean would I stand up for my point of view?” This juror, who was empaneled, was one of two who successfully held out, over nine hours of deliberation, in favor of life.

**[3.16] Jury Instructions in Aggravation-Mitigation Phase**

 One of the most important, and most neglected, tools for a death penalty lawyer lies in the jury instructions. Why are they neglected? And why are they important?

 They are neglected because trial lawyers, as a group, tend to shy away from them. We have been trained, and we believe, that to talk effectively with the ordinary men and women on a jury, we need to shed our lawyer personae. We avoid speaking in legalese, the natural language of lawyers. We gravitate to the colorful, the colloquial, and the folksy. We like stories and anecdotes. We seek drama.

 From our perspective as trial lawyers, jury instructions are anathema. They are, by definition, written in legalese. They use big words, like “aggravating” and “mitigating.” They are cold, impersonal, and undramatic. They are boring. But, unfortunately, they are also very important, particularly in a capital case, for at least three reasons:

 **Judges give them.** In Illinois, as in all other jurisdictions, instructions are read to the jury by the judge, the most authoritative person in the courtroom. Judges, especially “nice” judges, the kind who seem fair and reasonable, can easily bond with jurors. Sometimes jurors will hang on their every word. And the most important words that come from a judge’s mouth are the instructions for deciding the case.

 **Prosecutors use them.** Even novice prosecutors know that arguments based on the instructions can be effective. By reading or arguing the instructions, prosecutors align themselves with the judge. They clothe their appeals in the majesty of the law. And particularly in a death case, appeals to the jurors to “just follow the law” will often overcome the jurors’ scruples about putting another human being to death;

 **Jurors use (and abuse) them.** Many studies have shown that jurors spend a substantial portion of their time discussing the law or the application of the law to contested issues. The focus of discussion tends to shift from facts to law over time. Vote changes tend to occur after discussion of the law as opposed to discussion of case facts, and jurors usually reach consensus after a discussion of the instructions, not the facts. See Dennis Devine et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups,* 7 Psychol.Pub. Pol’y & L. 622 (Sept. 2001).

 These critical actors in the courtroom drama live and breathe jury instructions. You, as the death penalty defense attorney, cannot afford to do otherwise. No matter how badly worded, how boring, how obscure, or how biased toward the prosecution, jury instructions matter. In fact, the worse they are — and the Illinois Pattern Instructions are very bad — the more important they become.

 **[3.17] A Jury Instruction Game Plan**

 The first step to learning how to use and argue jury instructions is to take the instructions seriously. Consider the following steps:

 **Tracking instructions.** Soon after you begin the case, prepare a complete set of instructions, in the first instance, just by using the Illinois Pattern Jury Instructions — Criminal (I.P.I. — Criminal) in combination with the State’s charging document. Nowadays, this step is very easy: the Illinois Pattern Jury Instructions book includes a CD of all the instructions, which can be copied onto to your own computer. The act of preparing the instructions will provide you with valuable insights into the State’s strategy and even, in some cases, with ideas about weaknesses in its case.

 **Identify good instructions for the defense.** Using the instructions that you now know the State is likely to tender, as well as the I.P.I. book and a set of non-I.P.I. instructions, identify instructions that favor or can be used by the defense. Possible pro-defense instructions will include instructions that

 a. highlight weaknesses in the State’s case;

 b. address sources of prejudice against the defendant;

 c. introduce affirmative defenses or lesser included offenses;

 d. draw particular attention to defense evidence;

 e. tell the jury about statutory mitigating factors; or

 f. define key terms in the issues instructions.

At the end of this step, you will have a complete set of proposed defense instructions.

 **Develop a strategy for the instruction conference.** No instruction can be used if it is not given. After researching the law and reading the commentary in I.P.I. — Criminal, prepare arguments as to each contested instruction. Keeping in mind that even pro- prosecution judges like to toss the defense the occasional bone, arrange your non-I.P.I. instructions in sets, so that more militant pro-defense instructions on a topic are presented first, and milder ones are presented as alternatives. Note that these plans are best laid before trial. You may need to change up during trial, but you are not likely to be able to hit on a good overall strategy in the heat of battle.

 **Weave the instructions into your argument.** Pro-defense instructions are not likely to be remembered or taken seriously if you, as the attorney, don’t use them in your argument. To avoid having to read the instructions out loud, which can often be very boring and repetitive, consider using blowups of the instructions, so that the jury can read the text of the instruction while you talk about it. Think about good ways of translating the often pompous terminology of the instructions into simpler words or ideas. “Credibility,” for example, is a term used in I.P.I. — Criminal No. 1.02. After referring to the instruction, try using words like “believe,” “trust,” “buy,” or “buy into.” In cases when you think that you need to have the jury understand and remember particular instructions, consider asking that each juror be given his or her own copy of all the instructions.

 **Make your record.** To preserve any issues for appeal, you need to

 a. submit copies of your tendered instructions, appropriately labeled as “Defense Instruction No. \_\_\_ ,” etc., and have them marked for the court file as “refused”;

 b. object on the record to State instructions, and have them marked for the court file as “Given Over Defense Objection”;

 c. mention by number each refused defense instruction and contested State instruction in your motion for a new trial, together with citation to the appropriate provisions of the United States and Illinois Constitutions; general statements, such as “The trial court erred in giving and refusing instructions,” do not preserve your issue for appeal. *People v. Pinkney,* 322 Ill.App.3d 707, 750 N.E.2d 673, 679, 255 Ill.Dec. 756 (1st Dist. 2000).

 **[3.18] Jury Instructions Relate to Everything Else in the Case**

 Never view jury instructions in isolation. They relate to every other aspect of your case. Any one issue in your case can be viewed through the lenses of voir dire, evidence, and argument, as well as jury instructions. For example, if the State’s major witness has a problem with drugs or alcohol, the State may want to voir dire on the issue to make sure that jurors, knowing of the problem, will not discount the witness’ testimony. The defense, on the other hand, will want to try to have the jury given an “addicts” instruction, telling the jurors that they could consider the witness’ use of drugs or alcohol when evaluating whether the witness is telling the truth. Whether the instruction will be given, and how much significance the jury gives it, may well depend on how much, and how powerfully, the evidence of addiction comes in at trial. Once the instruction conference is over, the battle will move on to closing argument, where the two sides will argue over whether the witness, given his or her problem, can be believed. The defense is obviously in a better position to argue addiction if the judge will tell the jury that addiction can, in fact, be considered.

 **Classification of Jury Instructions**

 *[3.19] Pattern vs. Non-Pattern*

 In Illinois, jury instructions come in two flavors, pattern and non-pattern. The pattern instructions are now collected in Illinois Pattern Jury Instructions — Criminal 4th, a book you should have on your shelf. A leading collection of non-pattern instructions is Stephen L. Richards (ed.), Non-IPI and Modified IPI Jury Instructions (State Appellate Defender, Jan. 2001) (Non-IPI).

 Despite the special prestige of the pattern instructions in Illinois, the Supreme Court Rules do not, in fact, prohibit judges from giving non-pattern instructions. What the rule says is as follows:

**(a) Use of IPI Criminal Instructions; Requirements of Other Instructions.** **Whenever Illinois Pattern Jury Instructions, Criminal (4th ed. 2000) (IPI Criminal 4th), contains an instruction applicable in a criminal case, giving due consideration to the facts and the governing law, and the court determines that the jury should be instructed on the subject, the IPI Criminal 4th instruction shall be used, unless the court determines that it does not accurately state the law. Whenever IPI Criminal 4th does not contain an instruction on a subject on which the court determines that the jury should be instructed, the instruction given on that subject should be simple, brief, impartial, and free from argument.** Illinois S.Ct. Rule 451(a).

 On the issue of pattern vs. non-pattern, here are two tips:

 **Where possible, modify the pattern instructions.** As the introduction to the I.P.I. indicates, the pattern instructions often need to be modified to take into account situations that the drafters did not anticipate. [[4]](#endnote-5)If, instead of submitting a non-pattern instruction on a particular topic you can figure out a way to modify a pattern instruction to include the language you want, you may be able to persuade your judge to give it. An instruction labeled “IPI No. \_\_\_, Modified” looks better than one labeled “Non-IPI.” For example, I.P.I. — Criminal No. 1.02, the general instruction on credibility of witnesses, can be modified by adding the phrase “use of drugs or alcohol” to the list of credibility factors, and the Committee Note to 1.02 explicitly contemplates that modification.

 **Submit modified pattern instructions and non-pattern instructions in tandem.** To strengthen your position still further, consider submitting “modified IPI” and “non-IPI” instructions on a subject as alternatives. Again, you will look reasonable, and the judge will look reasonable as he or she refuses the non-IPI instruction and gives you the modified one.

 *[3.20] Types of Instructions*

 All jury instructions, pattern and non-pattern, fall into these four general categories, each of which is significant for the defense:

 **General instruction.** These instructions give the jury their overall marching orders as to how to approach the case. Included in this category are all of the instructions in the first two sections of the I.P.I. — Criminal 4th, including

 1.01 (avoiding prejudice, obeying the judge’s rulings, etc.);

 1.02 (general rules about assessing credibility of witnesses);

 2.02 (indictment, information, or complaint);

 2.03, 2.03A, 2.03B (presumption of innocence, reasonable doubt);

 2.04 (failure of defendant to testify).

Non- pattern instructions that can also be classified as “general” include all of those in the Burden of Proof section of Non-IPI including

 I.A (definition of “reasonable doubt”);

 I.B(1) and I.B(2) (failure to preserve evidence);

 I.C (failure to call witnesses);

 I.D (weaker or less satisfactory evidence);

 I.E (search warrant).

 **Comments on specific types of evidence.** These instructions contain comments on specific types of evidence, either to tell the jury that the evidence is significant, or that it is to be treated with caution, or that it is only to be used for a certain purpose. Many of these instructions can be used by the defense. Almost all the pattern instructions along these lines are included in the 3.0 Series of the I.P.I., including

 3.06 – 3.07 (defendant’s statements);

 3.11 (prior inconsistent statements);

 3.12 (impeachment of witness by prior conviction);

 3.15 (circumstances of identification);

 3.17 (accomplice testimony).

 Since the I.P.I. — Criminal 4th is very conservative and contains very few comments on specific types of evidence, it is well worth consulting Non-IPI §II, which includes non-pattern instructions on many topics, including

 II.A(1) – II.A(5) (testimony by abusers of drugs or alcohol);

 II.C (testimony of an immunized witness);

 II.D (testimony of an expert witness);

 II.E (testimony of a police officer);

 II.F (1), II.F(2) (defendant’s statement);

 II.G (motive or bias of a witness — pending charge).

Another obvious subject for an instruction is the jailhouse informant, who may or

may not be an accomplice.

 **Issues and definitions of terms in the issues instructions.** For a capital case, the key issues and definitional instructions are contained in the 7.0 Series of the I.P.I. — Criminal 4th, including the 7B Series (eligibility instructions) and the 7C Series (aggravation-mitigation instructions). However, as of the date of the publication of this manual, the I.P.I. Committee has not yet issued revised 7C instructions that track the language of the new death penalty statute. Therefore, you need to write your own, non-I.P.I. instructions for the aggravation-mitigation phase. In the appropriate case, you also may need to look at the 4.0 Series (definitions of certain words), the 5.0 Series (accountability), and the 24.0 Series (defenses). In Non-IPI, you should look at §III (accountability and mens rea), §V (defenses); and §VI (death penalty).[[5]](#endnote-6)

 **The verdict forms.** The verdict forms are contained in the 26.0 Series of the I.P.I. with the exception of the verdict forms for eligibility and aggravation-mitigation, which are contained in 7B, and 7C, respectively. At each of these phases, one of the verdict forms is the nonunanimous form, by which the jury as a whole tells the court that it cannot find the defendant eligible for death or cannot unanimously determine that death is the appropriate sentence. The pro-death jurors must sign this form, even if they don’t like it. And the pro-life jurors must not sign the death or eligibility verdict forms just to go along with the jurors who are militantly pro-death. Again, since the I.P.I. Committee has not yet issued revised 7C instructions that track the language of the new death penalty statute, you need to write your own, non-I.P.I. verdict forms for the aggravation-mitigation phase. And do not assume the the Committee’s instructions are legally correct – you should feel free to submit your own. [[6]](#endnote-7)

 **[3.21] The Significance of Juror Confusion at the Third Phase and What To Do About It**

 Many studies, particularly the juror studies contained in the Capital Jury Project, available at www.albany.edu/scj/CJPhome.htm (case sensitive), have shown that a significant number of capital jurors do not understand the law governing a capital case. This does not mean that better informed or instructed jurors are going to vote your way. Most jurors come into capital sentencing on a mission to kill. Only a small minority are even going to consider your evidence and arguments. But if the pro-death majority is able to convince the pro-life minority that the law requires them to vote for death, you are sunk. And many of the false legal ideas floating out there will sink you.

 What are some of these ideas? Studies have shown that a significant number of jurors believe the following:

 a. There is a presumption that death is the appropriate punishment. Theodore Eisenberg and Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases,* 79 Cornell L.Rev. 1, 12 (1993).

 b. All jurors have to agree on the existence of a mitigating factor before it can be considered in reaching a decision. John H. Blume, *Twenty-Five Years of Death: A Report of the Cornell Death Penalty Project on the “Modern” Era of the Capital Punishment in South Carolina,* 54 S.C.L.Rev. 285, 316, 316, n.199 (Winter 2002) (belief held by 66 percent of South Carolina jurors).

 c. The defendant is required to prove the existence of a mitigating factor beyond a reasonable doubt. Theodore Eisenberg, *supra,* 79 Cornell L.Rev. at 11(belief held by “about half” of jurors).

 The I.P.I. — Criminal 4th are particularly unhelpful as to these issues. As to the presumption of death, until the recent reform, the I.P.I. tracked the statutory language as to the finding at the third phase by asking the jury whether “there is no mitigating factor sufficient to preclude imposition of a death sentence.” I.P.I. — Criminal No. 7C.08. The legislature changed the statute to have the jury decide whether “after weighing the factors in aggravation and mitigation . . . death is the appropriate sentence.” 720 ILCS 5/9-1(g). This is obviously an improvement. However, the phrase “weighing the factors” may imply to the jury that they are supposed to balance aggravation against mitigation. In a capital case, “weighing” or “balancing” are procedures that will often hurt the defense.

 Moreover, the recent reform does nothing to address the second two juror misconceptions — unanimity as to mitigating factors and the standard of proof for determining whether a fact is mitigating. As the I.P.I. instructions stand at present, the jury has no way of knowing that they need not all agree as to a mitigating factor, a constitutional requirement under *Mills v. Maryland,* 486 U.S. 367, 100 L.Ed.2d 384, 108 S.Ct. 1860, 1865 (1988). [[7]](#endnote-8)What can you do about this?

 Following our jury instruction game plan in §3.17 above, first submit to the court both non-I.P.I. instructions and modified I.P.I. instructions on these two issues. Non-IPI V.I is one example of a modified I.P.I instruction that tells the jury simply, and correctly, that “a juror may consider a mitigating factor even though all or some of the jurors do not believe that the mitigating factor exists.” If the court refuses the instructions, you have a choice. You can either “play for the appeal” by leaving this idea out of your own argument, or argue the principle to the jury yourself. If a State objection is sustained, you are in a good position to make your case on appeal, and if it is overruled or there is no objection, the jury may get the point. Remember that you are playing to one or two jurors, the jurors who need to be empowered to grab on to any reason for life and hold tight.

 **[3.22] Statutory and Nonstatutory Mitigating Factors**

 “Mitigating factor” is a big legal phrase that stands for a very simple thing. Under the United States Constitution, a “mitigating factor” is anything, and that means virtually *anything,* which an individual juror can use to save your client’s life. The instructions tell the jurors that a mitigating factor is “[a]ny . . . reason supported by the evidence why the defendant should not be sentenced to death.” I.P.I. — Criminal No. 7C.06. Even the word “reason” may be slightly misleading: Illinois courts have held that jurors may properly based a sentencing decision on “the mitigating evidence and any feelings of sympathy or mercy it elicited.” *People v. Kirchner,* 194 Ill.2d 502, 743 N.E.2d 94, 117 – 118, 252 Ill.Dec. 520 (2000). Since the instructions also tell the jurors that they are not to be “swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion, or public feeling,” you may need to stress to the jurors that they do not have to squash their emotional reaction to the defense case; they can feel as well as think. 743 N.E.2d at 116; I.P.I. — Criminal Nos. 7B.01A, 7C.01.

 Until the passage of the recent Illinois reform bill, the legislature provided for only a very meager list of statutory mitigating factors:

 • Defendant has no significant history of prior criminal activity.

 • The murder was committed while the defendant was under the influence of an extreme mental or emotional disturbance.

 • The murdered person was a participant in the defendant’s homicidal conduct.

 • The defendant acted under the compulsion of threat or menace of the imminent infliction of death or great bodily harm.

 • The defendant was not personally present during the commission of the act or acts causing death. I.P.I. — Criminal No. 7C.06.

 The list was so meager that the I.P.I. Committee added another, nonstatutory, factor to the list of factors enumerated in the I.P.I:

 • The defendant may be rehabilitated or restored to useful citizenship. I.P.I. — Criminal No. 7C.06.

 The legislature then added a couple of additional statutory mitigating factors:

 • The defendant’s background includes a history of extreme emotional or physical abuse.

 • The defendant suffers from a reduced mental capacity.

 What is the significance of statutory, as opposed to nonstatutory, mitigating factors? Why is the difference between them so important? There are two major reasons:

 First, Illinois is one of the jurisdictions that hold that jurors need not be instructed on nonstatutory mitigating factors. *People v. Spreitzer,* 123 Ill.2d 1, 525 N.E.2d 30,
46 – 47, 121 Ill.Dec. 224 (1988). Although *Spreitzer* also made it clear that nothing “precludes a trial court from instructing on specific examples of nonstatutory mitigation,” most trial judges are going to refuse your requests for nonstatutory mitigating factors. In the absence of instruction, you are going to have to argue very vigorously to persuade the jury to take an unwritten reason to save a life with as much seriousness as a reason that is spelled out in black and white.

 Second, the Illinois courts have long held, and the U.S. Supreme Court agrees, that the prosecution is entitled to treat nonstatutory mitigating factors as a “double-edged sword.” *People v. Ballard,* 206 Ill.2d 151, 794 N.E.2d 788, 813, 276 Ill.Dec. 538 (2002) (drug addiction); *Burger v. Kemp,* 483 U.S. 776, 97 L.Ed.2d 638, 107 S.Ct. 3114, 3126 (1987). In other words, with a nonstatutory factor, such as a troubled childhood, the prosecutor can argue that it makes the defendant more dangerous and therefore more deserving of death. However, in an extremely important 2001 case, the Illinois Supreme Court held that the trial prosecutor was not free to argue that the defendant’s lack of significant criminal history, a statutory mitigator, was a reason to condemn him. *People v. Kuntu,* 196 Ill.2d 105, 752 N.E.2d 380, 401 – 402, 256 Ill.Dec. 500 (2001). Because the legislature had designated lack of a significant criminal history as “inherently mitigating,” the court said, “neither this court nor a trial prosecutor has the authority to change the legislative scheme and convert a fact that the legislature has determined to weigh in favor of not sentencing a defendant to death into a fact that weighs in favor of sentencing a defendant to death.” 752 N.E.2d at 402. Particularly with respect to the two new mitigating factors, you are now in a good position to argue to the jurors that if any one of them finds that any one of the listed statutory mitigating factors exists, he or she must “follow the law” and consider it to be a reason for life, not death. The prosecution should no longer be able to argue that a reduced mental capacity or a history of extreme emotional or physical abuse is a reason to kill.

 **[3.23] Conclusion**

 As John H. Blume wrote, “The take home message to counsel representing death-sentenced inmates is that, if there are legal concepts and principles which are important to the client’s chance of obtaining a life sentence, counsel must educate the jurors by explaining the concepts early and repeatedly.” John H. Blume, *Twenty-Five Years of Death: A Report of the Cornell Death Penalty Project on the “Modern” Era of the Capital Punishment in South Carolina,* 54 S.C.L.Rev. 285, 318, n.209 (Winter 2002).

**4**

 **Appendix**

**[4.1] Sample *Witherspoon* Questions**

 See also §§3.8, 3.10, and 3.13 above for discussion of *Witherspoon* excludable jurors.

 **1. Can you explain to us here in court what your feelings are about the imposition of the death penalty?**

 **2. Would you, because of your religious, moral, or political feelings, refuse to vote to put a person to death under any circumstances?**

 **3. Do you have any philosophical, religious, conscientious scruples, or convictions that would require you to automatically impose the death penalty if there were a guilty verdict?**

 **4. Would you automatically impose the death penalty without considering evidence in mitigation?**

 **5. If you found someone guilty of first-degree murder, would you automatically find him or her eligible for the death penalty?**

 **6. If you found someone eligible for the death penalty, would you automatically impose the death penalty?**

 **7. If you convicted someone of first-degree murder, would you be able to consider voting for a sentence less than death for that person?**

 **8. Would you vote for the death penalty in all cases of first-degree murder?**

 **9. Would your answer to these questions change if I told you that a person can be convicted of first-degree murder in Illinois if he or she intends to cause death, knows that his or her actions will cause death, or knows of a strong probability that his or her actions will cause death or great bodily harm?**

 **10. Would your answer to these questions change if I told you that a person cannot be convicted of first-degree murder if the killing was an accident?**

 **11. Would your answer to these questions change if I told you that a person cannot be convicted of first-degree murder if he or she killed in self-defense?**

 **12. Would your answer to these questions change if I told you that a person cannot be convicted of first-degree murder if he or she is insane?**

 **13. Would your answer to these questions change if I told you that a person cannot be convicted of first-degree murder if he or she kills while believing, even unreasonably, that he or she was acting in self-defense?**

 **14. Would you vote for the death penalty in all cases of first-degree murder, knowing that**

 **a. the killing was not an accident?**

 **b. the killing was knowing or intentional?**

 **c. the killing was not committed in self-defense?**

 **d. the killing was not committed while the defendant was insane?**

 **e. the killing was not committed while the defendant believed he or she was acting in self-defense?**

 **f. the defendant had been proved beyond a reasonable doubt to be the person who killed the victim?**

 **7. Would you vote for the death penalty in all first-degree murder cases where the victim was a police officer?**

 **8. Would you vote for the death penalty in all first-degree murder cases where the first-degree murder occurs after or in connection with the commission of a forcible felony?**

 **9. Would you vote for the death penalty in all first-degree murder cases where the victim was a police officer killed in the course of performing his or her official duties by a person who wished to prevent him or her from performing his or her official duties, who knew or should have known that the victim was a police officer?**

 **10. Would you vote for the death penalty in all first-degree murder cases where the first-degree murder occurs after or in connection with the commission of a forcible felony, and the victim was a police officer killed in the course of performing his or her official duties by a person who wished to prevent him or her from performing his or her official duties, who knew or should have known that the victim was a police officer?**

 **11. Would you expect to sentence someone to death if he or she was convicted of the crimes described in the indictment?**

 **12. At a hearing held to determine whether an individual should be put to death, would you be able to consider any mitigating factors presented by the defense?**

 **a. Would you be able to consider and give full weight to evidence that the individual suffered from extreme mental or emotional disturbance?**

 **b. Would you be able to consider and give full weight to evidence that the individual’s parents were drug addicts, and that he or she was raised by his or her grandmother, a drug dealer?**

 **13. Do you believe the State will execute the defendant if you vote for death?**

 **14. In the event you are to consider this question, you would have to unanimously vote for death. This means that each member of the jury would have to sign a verdict form that said that the defendant will be sentenced to death. If one or more members of the jury did not agree that the defendant should be sentenced to death, each member of the jury would have to sign a verdict form that said that you did not unanimously agree that the defendant should be sentenced to death.**

 **a. If you did not believe that the defendant should be sentenced to death, could you follow the law and sign only the verdict form that said that the jury was not unanimous, even if other jurors thought the defendant should be sentenced to death?**

 **b. If you did believe that the defendant should be sentenced to death, but other jurors disagreed, could you follow the law and sign the verdict form that said that the jury was not unanimous?**

 **15. What do you think will happen to the defendant if you vote for imprisonment rather than death?**

 **16. Would it be easier for you to vote for the death sentence knowing that the Governor’s moratorium on executions is still in effect?**

 **17. Would it be easier for you to vote for the death sentence knowing that the Governor may commute all death sentences to life imprisonment?**

 **18. What have you heard about the death penalty system in Illinois? In Texas? In the United States?**

 **19. Do you know what the term “mitigating” means?**

 **20. In a death penalty case, a mitigating factor is a reason why the defendant should not be sentenced to death. Could you follow the law and consider as a mitigating factor any reason why the defendant should not be sentenced to death?**

 **21. Who do you think has the final responsibility for whether or not the defendant is sentenced to die?**

**[4.2] Modified IPI Instructions for the Aggravation-Mitigation Phase To Submit to the Jury in a Capital Case Under the Current Law**

**7B.00 – 7C.00. Death Penalty Sentencing Instructions**

**II. Second Stage of Death Penalty Hearing**

**7C.05X. Outcome of Hearing (*For Cases Initiated or Tried After November 13,* *2003*)**

 **Under the law, the defendant shall be sentenced to death if you unanimously find that death is the appropriate sentence.**

 **If you are unable to find unanimously that death is the appropriate sentence, the court will impose a sentence [(other than death) (of natural life imprisonment, and no person serving a sentence of natural life imprisonment can be paroled or released, except through an order by the Governor for executive clemency)].**

**7B.00 – 7C.00. Death Penalty Sentencing Instructions**

**II. Second Stage of Death Penalty Hearing**

**(*For Cases Initiated or Tried After November 13, 2003*)**

**7C.06X. Issues in Aggravation and Mitigation**

 **In deciding whether the defendant should be sentenced to death, you should consider all the aggravating factors supported by the evidence and all the mitigating factors supported by the evidence.**

 **Aggravating factors are reasons why the defendant should be sentenced to death. Mitigating factors are reasons why the defendant should not be sentenced to death.**

**Aggravating factors include:**

 **First: [Insert any statutory aggravating factor or factors found by the jury at the first stage of the death penalty hearing.]**

 **Second:** **[Any other reason supported by the evidence why the defendant should be sentenced to death.]**

 **Where there is evidence of an aggravating factor, the fact that such aggravating factor is not a factor specifically listed in these instructions does not preclude your consideration of the evidence.**

 **Mitigating factors include:**

 **First: [(Any or all of the following) (The following)] if supported by the evidence:**

 **The defendant has no significant history of prior criminal activity.**

 **The murder was committed while the defendant was under the influence of an extreme mental or emotional disturbance, although not such as to constitute a defense to the prosecution.**

 **The murdered person was a participant in the defendant’s homicidal conduct or consented to the homicidal act.**

 **The defendant acted under the compulsion of threat or menace of the imminent infliction of death or great bodily harm.**

 **The defendant was not personally present during the commission of the act or acts causing death.**

 **The defendant’s background includes a history of extreme emotional or physical abuse.**

 **The defendant suffers from a reduced mental capacity. The defendant may be rehabilitated or restored to useful citizenship.**

 **Second: Any other reason supported by the evidence why the defendant should not be sentenced to death.**

 **Where there is evidence of a mitigating factor, the fact that such mitigating factor is not a factor specifically listed in these instructions does not preclude your consideration of the evidence.**

 **If any one of you finds that a mitigating factor listed in this instruction is supported by the evidence, you must treat that mitigating factor as a reason why the defendant should not be sentenced to death. You may not treat that listed mitigating factor as a reason why the defendant should be sentenced to death.**

 **If any one of you believes that a mitigating factor is supported by the evidence, you may consider it in arriving at your decision even though all or some of the other jurors do not believe the mitigating factor is supported by the evidence.**

 **If you, the jury, unanimously find from your consideration of all the evidence that death is the appropriate sentence then you should all sign the verdict requiring the court to sentence the defendant to death.**

 **If one or more jurors cannot find that death is the appropriate sentence, you should all sign the verdict form requiring the court to impose a sentence [(other than death) (of natural life imprisonment)].**

**7B.00– 7C.00. Death Penalty Sentencing Instructions**

**II. Second Stage of Death Penalty Hearing**

**(*For Cases Initiated or Tried After November 13, 2003*)**

**7C.08X. Verdict Form Approving Death Sentence**

 **We, the jury, unanimously find that death is the appropriate sentence.**

 **The court shall sentence the defendant \_\_\_\_\_\_\_ to death.**

**7C.09Y. Verdict Form Rejecting Death Sentence (*For Cases Initiated or Tried After November 13, 2003*)**

 **One or more jurors are unable to find that death is the appropriate sentence.**

 **The court shall not sentence the defendant \_\_\_\_\_\_\_ to death.**

**7B.00 – 7C.00. Death Penalty Sentencing Instructions**

**II. Second Stage of Death Penalty Hearing**

**7C.09X. Verdict Form Rejecting Death Sentence — Natural Life a Mandatory Alternative (*For Cases Initiated or Tried After November 13, 2003*)**

 **One or more jurors are unable to find that death is the appropriate sentence.**

 **The court shall not sentence the defendant \_\_\_\_\_\_\_ to death, but shall sentence defendant to natural life imprisonment.**

**[4.3] Sample Arguments for *Mills* and *Kuntu* Instructions Under the New Statute**

 See also §§3.21 and 3.22 above for further discussion of *Mills* and *Kuntu.*

**[4.5] Non-Unanimity on the Existence or Importance of Mitigating Factors**

 This principle is particularly important because it corrects a problem that may arise from the adoption of verdict forms that conform to the language of the new statute. Taking this suggestion will solve a problem created by a conflict between these forms and a well-settled principle of federal constitutional law, a principle that has in the past led to the reversal of an Illinois death sentence by the Seventh Circuit.

 The problem in essence is this. Under the United States Supreme Court decisions in *Mills v. Maryland,* 486 U.S. 367, 100 L.Ed.2d 384, 108 S.Ct. 1860 (1988), and *McKoy v. North Carolina,* 494 U.S. 433, 108 L.Ed.2d 369, 110 S.Ct. 1227 (1990), jurors in a capital case must be sufficiently informed that they do not have to reach unanimous agreement on the existence of any mitigating factor or factors in order to spare the defendant’s life. In other words, any one juror is entitled to vote against death, based on his or her own determination that a mitigating factor exists, even if all eleven other jurors disagree.

 Under Illinois’ superseded pattern instructions, in order to reach a non-death verdict, all of the jurors had to sign a verdict form that stated that the jury did not unanimously find that there were “no mitigating factors sufficient to preclude imposition of a death sentence.” In *People v. Hope,* 168 Ill.2d 1, 658 N.E.2d 391, 411, 212 Ill.Dec. 909 (1995) the Illinois Supreme Court determined that this verdict form, when combined with defense counsel’s reference to unanimity, sufficiently informed the jurors that they did not have to reach unanimous agreement on the existence of any mitigating factor or factors “sufficient to preclude imposition of a death sentence.” The court therefore held that the trial judge did not err by refusing a defense instruction that explicitly told the jury that “a juror may consider as evidence any mitigating factor even though all of the other jurors do not believe that the mitigating factor exists.” 658 N.E.2d at 410. Similarly, in *People v. Miller,* 173 Ill.2d 167, 670 N.E.2d 721, 736, 219 Ill.Dec. 43 (1996) where essentially the same issue was raised, and defense counsel made the same reference to the unanimity requirement, the court concluded that the trial court “acted within its discretion and did not err” by refusing the defendant’s request for an instruction on the lack of a unanimity requirement in finding mitigating factors. (It could be argued that, even under the old statute, *Hope* and *Miller* were wrongly decided; after all, the jurors were only explicitly informed that they did not have to reach a unanimous decision on the question of whether there were “no mitigating factors sufficient to preclude imposition of a death sentence.” The jurors were not told, explicitly, that they did not have to reach agreement on the question of whether a particular circumstance existed or should be considered a mitigating factor. But it cannot be denied that even if decided correctly, *Hope* and *Miller* rely on the existence of the “no mitigating factors sufficient” verdict form.

 The importance of the “no mitigating factors sufficient” verdict form to the decisions in *Hope* and *Miller* is underlined by the Seventh Circuit’s reversal of a death sentence for violation of *Mills* in *Kubat v. Thieret,* 867 F.2d 351, 373 (7th Cir. 1989). In *Kubat,* the court found that the jury instructions were constitutionally impermissible, and defense counsel was ineffective for failing to object to them. The key errors in the jury instructions consisted of statements telling the jurors that they if they unanimously concluded that there were mitigating factors sufficient to preclude, they should sign the appropriate verdict form and a sentence implying that they had to “agree” on their verdict. 867 F.2d at 369 – 370. The verdict forms properly gave the jurors the choice between saying that they “cannot unanimously conclude” that the death penalty “shall be imposed,” and that they did “unanimously conclude” that “the court shall sentence the defendant to death.” 867 F.2d at 370. The verdict forms, however, contained no reference to “mitigating factors sufficient to preclude.” Under these circumstances, the Seventh Circuit found that the instructions, taken as a whole, failed adequately to inform the jury as to the *Mills* principles, and reversed. 867 F.2d at 374.

 However, under the new statute, the jury is no longer required to find no mitigating factors sufficient to preclude death; instead the jury must either (1) find, unanimously, that death is appropriate, or (2) find that one or more jurors do not find that death is appropriate. This is essentially the equivalent of the inadequate verdict forms reviewed in *Kubat,* which gave the jury a choice between agreeing, or failing to agree, that death “should” be imposed, without mentioned mitigating factors at all. Under these circumstances, a jury verdict form that only reflects the jury’s determination that they are not unanimous in determining that death is appropriate does not sufficiently inform an individual juror that he or she does not have to agree with the other jurors on the existence of any mitigating factor.

 The jury should therefore be instructed as follows:

**If any one of you believes that a mitigating factor is supported by the evidence, you may consider it in arriving at your decision even though all or some of the other jurors do not believe the mitigating factor is supported by the evidence.**

 **[4.6] Proper Consideration of Statutory or “Listed” Mitigating Factors**

 In one of the Illinois Supreme Court’s last decisions in a capital case before Governor Ryan’s grant of mass clemency, the Illinois Supreme Court reversed a defendant’s death sentence because of the prosecution’s argument that a statutory mitigating factor, listed in the jury’s instructions, could be considered aggravating rather than mitigating. *People v. Kuntu,* 196 Ill.2d 105, 752 N.E.2d 380, 400 – 403, 256 Ill.Dec. 500 (2001). The court held, explicitly, that “neither this court nor a trial prosecutor has the authority to change the legislative scheme and convert a fact that the legislature has determined to weigh in favor of not sentencing a defendant to death into a fact that weighs in favor of sentencing a defendant to death.” 752 N.E.2d at 402.

 This principle, which had never been articulated by the court in any previous decision, obviously came too soon before the advent of clemency and death penalty reform to be incorporated into the pattern jury instructions. But if it was important to inform capital juries of this principle under the old statute, it is even more important to inform them under the new statute.

 In *Kuntu,* the defendant had no prior criminal record, and the jury was instructed, consistent with the statute, that it could consider his lack of a significant criminal history as mitigating. See 720 ILCS 5/9-1(c)(1). However, in response to defense counsel’s argument that this lack was a mitigating factor, the prosecutor argued that the factor was aggravating because it showed that the defendant knew the difference between “right and wrong” and between “good and evil.” 752 N.E.2d at 401. The Supreme Court held that these remarks were error and reversed.

 The court’s opinion illustrates the fine line between a permissible and an impermissible argument with respect to a statutory mitigating factor:

 **Thus, the legislature has determined that, if a defendant lacks a criminal history, that is a fact that weighs in favor of a defendant’s not being sentenced to death. This does not mean that, if the factor exists, the defendant should not be sentenced to death. The sentencer is vested with the discretion to determine what weight to assign that fact and may, if it chooses, place little or no weight on that factor. However, neither this court nor a trial prosecutor has the authority to change the legislative scheme and convert a fact that the legislature has determined to weigh in favor of not sentencing a defendant to death into a fact that weighs in favor of sentencing a defendant to death.**

 **This does not mean that other legitimate inferences cannot be drawn from the same fact. We have previously recognized that the State may argue that a defendant’s evidence of a mitigating factor does not fit within the statutory definition of that factor and, therefore, the jury may consider that factor as aggravating rather than mitigating. See *People v. Macri,* 185 Ill.2d 1, 66-67, 235 Ill.Dec. 589, 705 N.E.2d 772 (1998); *People v. McNeal,* 175 Ill.2d 335, 368, 222 Ill.Dec. 307, 677 N.E.2d 841 (1997). Moreover, this court has held that, when the defendant presents nonstatutory mitigating factors, the State need not agree with the defendant’s characterization of the factors as mitigating and may even argue that the factors are aggravating. See *People v. Hudson,* 157 Ill.2d 401, 454, 193 Ill.Dec. 128, 626 N.E.2d 161 (1993); *People v. Page,* 155 Ill.2d 232, 279, 185 Ill.Dec. 475, 614 N.E.2d 1160 (1993). We cannot countenance, however, an argument that admits that the facts meet the statutory definition of a mitigating factor, but argues that, regardless of this legislative determination, the jury should consider the factor to be aggravating.** 752 N.E.2d at 402.

 In *Kuntu* itself, for example, the dissent argued that the prosecutor was simply using the defendant’s lack of prior criminal history as a factor that militated against his assertion that he suffered from a diminished mental capacity, which under the old law was not a statutory mitigating factor. This might have been a permissible argument. The majority concluded, however, that a fair reading of the prosecutor’s argument was that it did not matter if the legislature had designated lack of prior criminal history as a mitigating factor; even though the factor existed, the jury should consider it a reason for death.

 Moreover, the problem identified in *Kuntu* may well be exacerbated by the legislature’s addition of two new statutory mitigating factors. Under the new law, the legislature determined that a “background [which] includes a history of extreme emotional or physical abuse” and a “reduced mental capacity” are statutory mitigators. 720 ILCS 5/9-1(c)(6), 5/9-1(c)(7).

 Prior to the new law, prosecutors were free to argue, and sentencers were free to conclude, that these factors, even if proved by the defense, were aggravating rather than mitigating. *See, e.g., People v. Ballard,* 206 Ill.2d 151, 794 N.E.2d 788, 813, 276 Ill.Dec. 538 (2002) (“troubled childhood”); *People v. Hudson,* 157 Ill.2d 401, 626 N.E.2d 161, 184, 193 Ill.Dec. 128 (1993) (“turbulent family life” and “abused childhood”); *People v. Madej,* 177 Ill.2d 116, 685 N.E.2d 908, 920, 226 Ill.Dec. 453 (1997) (“somewhat troubled childhood” and “neurological impairments”). Under the new statute, prosecutors are no longer free to argue that a history of extreme emotional or physical abuse or a reduced mental capacity, even if proved, are aggravating.

 Instructing the jury that listed or statutory factors, if proved, must be considered as reasons to give life rather than death would prevent the jury from misinterpreting the prosecutor’s legitimate arguments with respect to mitigating factors and would help to prevent reversals on appeal. With proper instructions given to the jury, a prosecutor would remain free to argue either that there was insufficient evidence to support a mitigating factor, or that the mitigating factor, even if proved, did not require the jury to vote for life. With the jurors clearly instructed, defendants could not plausibly argue that these legitimate arguments misled.

 We therefore propose that the jury be instructed on this issue as follows:

**If any one of you finds that a mitigating factor listed in this instruction is supported by the evidence, you must treat that mitigating factor as a reason why the defendant should not be sentenced to death. You may not treat that listed mitigating factor as a reason why the defendant should be sentenced to death.**

This instruction is consistent both with our new statute and with the *Kuntu* principle.

1. QUERIES

 AUTHOR QUERY: Something seems to be missing here. I’m not sure what you intend to say. Please revise. [↑](#endnote-ref-2)
2. AUTHOR QUERY: Is this reference to “*Szabo* motion” (as in *People v. Szabo,* 94 Ill.2d 327, [447 N.E.2d 193](http://www.iicle.com/smartbooks/content.asp?Search=1&P=1&ID=64231&prod=888&go=%23&SearchText=szabo&Operator=AND&PracticeArea=3&ProductID=0&Sensivitiy=0#Library=IL&Table=case_law&Docname=447%20N.E.2d%20193#Library=IL&Table=case_law&Docname=447%20N.E.2d%20193), 68 Ill.Dec. 935 (1983)) and the one above it to a type of motion (like *Frye* hearing, *Miranda* rights, etc.) (in which event we need to add the citation)? Or is *Szabo* a real party in the case this timeline is based on and should be replaced with another word? [↑](#endnote-ref-3)
3. AUTHOR QUERY: This originally read “two years of criminal litigation experience,” but the rule clearly states “three.” [↑](#endnote-ref-4)
4. AUTHOR QUERY: Do you mean “commentary to the IPI instead of to the “Rules”? If not, please add specific S.Ct. Rule citation for which the Comments include this discussion. S.Ct. Rule 451(d) deals with this but the comments to the rule don’t specifically say this. [↑](#endnote-ref-5)
5. AUTHOR QUERY: As 2 years have passed since this was written, please update this passage where/if necessary. [↑](#endnote-ref-6)
6. AUTHOR QUERY: See query 5 above. [↑](#endnote-ref-7)
7. AUTHOR QUERY: In light of the previous 2 queries, is this still accurate? [↑](#endnote-ref-8)