

DEFENDING CAPITAL CASES: THE ULTIMATE CALL TO EXCELLENCE

It is a great honor to be here at McCrae, in this room, among so many fighters, so many warriors, who have come here to hone your skills and share your knowledge. We are warriors in Quest for excellence, in what we do, in what we are. Every capital case is literally a fight for life or death. As warriors we must be consummately prepared in every aspect of our case, for any contingency which may arise. We must be totally focused on our plan of action; the way to defend, the way to attack. We must become knowledgeable of the strengths and weaknesses of our position so we will know how to maneuver. We must know the strengths and weaknesses of not only our opponents but of our selves. The great warrior masters herself before attempting to conquer others.

We must come to know our clients- to understand them- how else can we speak for them and fight for them? We must become disciplined and skilled so that when we execute our strategy we will find the best ways to keep them from being executed.

Like any warrior in a battle, we must be acutely aware of everything going on around us especially on the courtroom, be sensitive to every slight change of energy, any change of perception of the jury or judge. In this battle for life or

at a time. What an awesome responsibility. What a rewarding opportunity. What a calling to heed. Can we afford to be any less than excellent ourselves in and out of the courtroom, for those who depend on us, with whom we have formed a sacred relationship?

No one can dispute that capital punishment is arbitrarily applied and capriciously dispensed. Even the Supreme Court of the United States - not a paradigm of compassion by any stretch - had to concede in McCleskey v. Georgia, it discriminates against minorities, especially African-Americans. In fact a recent study showed that if you are black and kille a white person in Philadelphia, you are 4 times as likely to be sentenced to death. We know it is disproportionately applied to those without sufficient means to mount an adequate defense. We know that studies have shown that an extremely high percentage of death row inmates have serious mental problems and/or organic brain damage. And most importantly, there is documentation of numerous (and one is too many) innocent human beings who have been wrongly executed. Since 1976 when the death penalty was reinstated over 80 people on death row have established their innocence. And as to who lives and who dies, as my good friend David Bruck has said, the administration of the death penalty results in a cruel lottery.

This term the United States Supreme Court is considering whether Florida's electric chair, "Old Sparky", administers cruel and unusual punishment. And the State of Florida takes the position that since 1990, seventeen executions have gone just fine. And since only three have been botched to the point that witnesses were able to see smoke swirling and blood curdling within and without of the mask which covers their gelled, bald head, the eighth amendment is not offended. It is a footnote to Florida's position that no one knows what the person is experiencing in the two minutes elapsing between the first thousands of volts of electricity and technical death, and how much the person suffers while the lungs collapse into asphyxiation, which by all accounts is painful.

Defending a human being offers us a chance to stop the machinery of death, to make a real difference. It also presents the ultimate challenges for us, not only as lawyers but as human beings. To do this kind of work we must be ready to face a system riddled with prosecutors with a win-at-all-cost attitude. What happened to the warnings of the United States Supreme Court in Berger v. United States that prosecutors are to seek justice which entails protecting the innocent as well as convicting the guilty? In the capital forum, we are faced with prosecutors who are willing to knowingly suppress evidence of innocence, and in some cases, fabricate evidence as was

done in the McMillan case before finally exposed through the heroic efforts of Bryan Stephenson in Alabama. We must be prepared to face judges with hearts cold with political agendas, who sometimes blatantly aid the prosecution by knowingly making unfair rulings, or in some states, such as my state, Alabama, continuously override jury verdicts which are overwhelmingly in favor of life. In 1997 we represented Larry Randall Padgett who sat on death row for 4 years until his conviction was overturned as a result of the prosecutors purposeful suppression of crucial DNA testing. And in his case a judge overrode a 10-2 vote for life in sentencing him to death. Some of these judges are the same ones that will appoint attorneys with virtually no experience in the capital arena, to represent indigent defendants, or attorneys who have slept through a trial or drank through a trial, knowing that appellate judges will not overturn the sham trials that resulted in these inevitable convictions .And, of course, we must face a public that believes that any homicide not in self defense merits the death penalty and then we death-qualify jurors from them. Finally, we sometimes must face, and deal with, our own uncooperative clients who don't appreciate us, because they can't appreciate us. Then we must learn to be tolerant and patient and learn to listen to them and earn their trust. For many

no one has listened before. How else can we ever expect them to open up their lives and their souls to us?

We must face these challenges not only with our brains but with our hearts. At the end of the day at least some jurors in their hearts must know our sincere passion that this life is worth saving, that they do not need to kill this child of G-d in our name.

And in the face of all of those challenges, we become better and stronger lawyers, and wiser and better people for there but for the grace of God go we. Indeed, none of us has always chosen the best course, none of us could have cast that first stone. And most of us had countless advantages that our clients never had.

In 1997, I was part of a team that represented Marvin Leroy Holley, in the sixteenth federal death penalty trial. It lasted nine weeks. The Government calimed he killed an informant and that he was a drug kingpin for dealing in hemp , or ditch weed. It grows wild in certain parts of the Midwest where people would drive beat up old cars, pick it at night and load it in their trunks . He was already serving 2 consecutive life sentences in state court. Federal prosecutors certified in their death application to the Department of Justice that, although they had searched, that they could find "no mitigating evidence" in his life. They certified a complete absence of mitigating

information in spite of the fact that they knew some or all of the following information:

1. Marvin who was in his mid-fifties, could not read or write, and had an intelligence level bordering mental retardation.
2. As a result of his mental deficiencies, he dropped out of elementary school in the second grade.
3. His family was so poor, that they could not provide him with clothes that matched or with shoes without holes in them.
4. He lived his childhood in complete isolation, in the rural woods. Not one childhood friend or companion could be identified.
5. He grew up in a house with dirt floors and no heat. All four kids slept in one room. While their father traveled to Florida to pick oranges, they could hear his mother having sex with multiple partners throughout these nights.
6. The family had a history of mental illness including his sister who was in and out of asylums for the past twenty years.
7. That Marvin turned to hemp only after he lost his job as a truck driver, and his wife died of cancer, leaving him to adopt then raise as a single parent, her two small children from another marriage.
8. And there was much more mitigating evidence than that.

Even more incredulous and appalling, was that the Government's mental health expert, who had only seen clinically a handful of patients in her life, testified that Marvin had a healthy self-esteem and high self-confidence because he learned to plant trees and he had a healthy relationship with his dogs which he had to shoot because his family was too poor to feed them.

Doesn't it make you wonder whether this team of prosecutors, who had been investigating this man and his family for over six years, simply ignored the mitigation or whether they did not understand what mitigating evidence is, and therefor Lockett v. Ohio and Eddings v. Oklahoma were simply meaningless trifles of capital jurisprudence?

There is no question, however, as to the conduct of the prosecutors in the case of State v. Ardragus Ford. He and three other young African-American males were charged with killing a Jefferson County Sheriff's Deputy who was acting as private security. Ardragus was confined to a wheelchair. Before he was charged, we were told he was not involved but who was.

They offered him written immunity if he would simply confirm their beliefs. When he couldn't, they charged him, and 3 others, with capital murder.

Shortly after the grand jury indictments the states main witness admitted she had made the whole story up for reward money. Police and prosecutors then told her that they believed Ardragus was the shooter. She then changed her story and said Ford was the shooter. They tried Ford first . The prosecutors called as their 2nd witness a woman we had never heard of then lied to the court by falsely denying she had given any statements. In Fact one of the prosecutors was present while she gave a taped statement in which she denied knowing any thing until they threatened to take her children from her. Fortunately the jury hung up.

The State then went to trial against Ford's co-defendant, Johnson, on a completely different theory. This time they said Johnson was the shooter. Johnson is now on death row. And then the State tried Ford for the second time, and in court, just before opening statements, suddenly Ford became the shooter again, on a completely new theory. Although acquitted the 2nd trial, this case represents a tragic case of the extremely lengths prosecutors will go to when they personalize a case, or when political pressure blinds their integrity to simply do what's right.

In 1997, we defended a man by the name of James Willie Cochran, Jr. Cochran had been on death row for twenty years. It was his third full trial. He had received two death sentences, both of which were overturned. I was

appointed in 1981 to handle the direct appeal which was unsuccessful. After State remedies were exhausted, some heroic lawyers from the Philadelphia law firm of Drinkard, Biddle and Reeth, took on the habeas pro bono. After years of work, the Federal District Judge in Birmingham granted Cochran a new sentencing hearing, finding that his lawyers, like those in Chandler did absolutely nothing at the sentencing phase in spite of the fact that Cochran had been severely physically and emotionally abused by his father, and had an extremely low intelligence range. But these pro bono warriors were insistent. On rehearing they asked the Federal District Judge for not just a new sentencing hearing but for a new trial. We had previously determined from strike sheets that the prosecutor in 1982 had struck fourteen out of fifteen African-Americans from the jury venire, and we had raised the Batson issue while the case was still on direct appeal. The Federal District Judge looked at the corporate pro bono lawyers and said "Does this case really need to be reversed for a new trial? Aren't you wasting a lot of time only to get the same result I'm giving you here?" The lawyers prevailed, and stayed on for the new trial.

But this time, things were different: Morgan v. Illinois supplemented Whitherspoon/ Whitt, Ake v. Oklahoma, had been decided. Batson v. Kentucky was enforced. We were able to obtain experts and money and

investigators, all of which were previously denied. We were able to determine that it wasn't Cochran who had fired the fatal shot to the store manager after the robbery, but instead it was a police officer, who had accidentally fired the fatal shot in a dark, trailer park lot, and then, with other officers, hid the body under a trailer, disposed of the weapon, apparently cut the projectile out of the victims arm, covering up the entire event. Our offer to plead to life was refused. The truth was there in the transcript all along but they never bothered to see it. The jury was out less than an hour and acquitted James Willie Cochran, thereby adopting the defense's theory. One of the lawyers found to be ineffective is currently our Chief Criminal Judge in Jefferson County.

There are so many challenges we face and the opportunities that are afforded us: to change a life, to right a wrong, to make a difference, one life at a time. We must not hesitate to confront our opponents and to rise to this great occasion, to this call to excellence. Atticus Finch heard this call, and Harper Lee captured it so powerfully, so eloquently, in so many ways. After the jury foreman announced the verdict, and Atticus Finch walked down the middle isle of the courtroom, his young daughter Scout who watched from the balcony says, "I followed the top of his head as he made his way to the door. He did not look up. Someone was punching me but I was reluctant to take my

eyes from the people below us and from the image of Atticus' lonely walk down the aisle. "Miss Jean Louise?" I looked around. They were standing. All around us in the balcony on the opposite wall, the Negroes were getting to their feet. Reverend Sykes's voice as distant as judge Taylors: "Miss Jean Louise, stand up. Your father's passin'." In representing your client, you and your trial team, your extended defense family, have agreed to assume these awesome responsibilities: to stand in-between your client and ever impending death and danger.

It is a daunting responsibility but not without its rewards. Not only can we make a difference, we are making a difference every day by attending seminars and retreats like this, by giving of ourselves to our clients and their families as best we can, by being the best we can be to achieve the best result attainable for everyone whose lives rest in our hands.

When I think of what is noble and meaningful in life, what is worthy, I think about the criminal defense lawyer defending the unpopular case, the disadvantaged person accused of a capital offense. I think about entering this sacred battle, knowing we can make a difference when we hear and follow that call to excellence.. And I think of Emily Dickinson who wrote,

"If I could stop one heart from breaking, I shall not live in pain.

If I could ease one heart the aching or cool one pain,

Or help one fainting robin upon his nest again,

I shall not live in vain.”

From the moment you take on the defense of a person accused of a capital offense and do so as a compassionate warrior, your life has meaning and it will not be in vain. I commend you for your efforts and if I can ever be of help to any of you in any way, my door is always open.

Thank you.