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Andrew Lyon  
Law Review  
Articles

# Building Capital Defense Teams and Uncovering the Client's Unique Stories.

## **The DeLong Case**

CYNDY SHORT, TLC '94

How do you represent someone who has killed innocent children, a pregnant woman and her unborn child? How do you overcome your own repulsion of the act so you can represent the perpetrator? How do you learn to understand a life journey that led to such a horrific moment? How do you find the compassion to embrace the killer? If you can embrace him in private can you do it in a hostile courtroom?

It is sometimes hard to recall when this journey began for me or at what points along the way I knew that I could be the best advocate for this killer. It is hard to know when I knew—that despite the horror of the act—the man who had killed, was not, in his heart, a killer.

### STEP BY STEP: THE PATH TO FINDING THE PERSUASIVE STORY

In our death penalty cases, we are often faced with seemingly insurmountable evidence. Our quest is to overcome these obstacles to life and to lead a group of empowered "killers" to spare our client. In Alex Kotlowitz's wonderful article titled IN THE FACE OF DEATH, he explores the most important question for us—What would sway 12 people who believe in capital punishment to spare a life?

In this July, 2003 *New York Times* article, Kotlowitz offers a look inside a capital case in which 12 qualified killers—much to their own surprise—spared the client's life. He cites two factors: the documented decrease in death sentences imposed by juries across this country: 1) the availability of the life without parole (LWOP) option; and 2) "...the development over the last decade of an increasing number of defense attorneys who have become more skilled and resourceful in persuading juries that the lives of their client's are worth saving" The latter is significantly tougher to measure.

So, what are these lawyers doing to prepare their cases? And what are they doing in the courtroom to persuade the jurors that their clients are "worth saving"? In my opinion, we are doing what is not taught in law schools, or at many death penalty seminars and even frowned upon by lawyers who believe in emotional distance from their client and his or her story. The successful death penalty lawyers and their teams are forming bonds with our clients, walking in their shoes, seeing the world through their eyes and bringing these experiences to life in the courtroom.

## BUILDING CAPITAL DEFENSE TEAMS AND UNCOVERING THE CLIENT'S UNIQUE STORIES...

*What is the formula for success?* First, we must form teams that are collaborative in nature and in fact. We must seek a wide array of voices and opinions to challenge our point of view. This process requires both lawyers and non-lawyers. Next, we must meet and discuss our own feelings about the case and client—and because these feelings will be amplified for the jurors. We must seek the right resources to help us know the client and all his complexities. We must find ways to infiltrate his world so we can put his experiences in the proper context. Third, we must tell our story from the first witness who takes the witness stand after voir dire, to the last witness who testifies before the penalty phase closing. We must help the jurors move through the "stages of grief" and make sure they do not make the sentencing decision while in the anger stage. Finally, we must form relationships of trust with our jurors and establish ourselves as the guide, teacher and leader in the courtroom. We must use this relationship with our jurors to co-create a solution—that ends with a sentence of life, not death.

In this article I will use a case I tried to a successful verdict to demonstrate how I have learned to navigate these steps.

### STEP 1: MITIGATION STARTS WITH ME:

*By exploring my emotions and my experiences, I can create space to love and understand others.*

Rick DeLong's case is the most significant case I have handled during my years as a Capital lawyer. Rick and his case taught me more about preparing and trying a Capital case than any case that had come before. They all paled in comparison to what we faced in representing the most culpable of the persons charged with these crimes. The only way we could persuade a jury to give Life was to find the truth about what had happened, about Rick DeLong, and then to find the courage to bring that truth to the courtroom. As a team, we would have to confront our own emotions and obstacles to representation so we could come to know Rick's life, know it deeply, and bring it alive in a courtroom.

### A Horrific Crime: Murder in the Midwest

It was the winter of 1999 when the bodies of Erin and her three children were found strangled in their little home on the wrong side of Springfield, Missouri. They lay in separate rooms in a house that could not be called a home; at least, it should not have been a home to these poor children trying to grow healthy against all the odds. Jimmy was just 10 years old, Christopher was 9 and Darlene was only 7. Their fathers were never a part of their lives. Their mother was only days away from giving birth to her eighth child when her life was taken. She was left hog-tied in her front room with electrical cords wrapped tightly around her neck. Her children only a few feet away in separate rooms laid among the trash in this house, discarded. Each strangled with cords—one bedroom at a time.

The community was shocked by the brutality of the crime. Hundreds of people who had never known this family came together at their funeral, to mourn the loss. In death this poor family seemed to galvanize a community, if only in their resolve to see the killers fry. The death penalty was soon seen as the only just result for the monsters responsible for these horrific acts.

### STEP 2: BUILDING THE DEFENSE TEAM

In the winter of 1999, I was assigned to the Capital Trial unit in Kansas City, Missouri. I had been in this unit since 1994. I became a lead on all our cases and manager of the office in 1996. These roles overlapped and had been mine for just over 2 years when Rick's case arrived on my desk. The job came without instructions. There was no blueprint provided that told me how to assemble a competent and cohesive trial team. Designing a successful Capital trial office with the resources I had available from our Public Defender system became my mission. In fairness, I should admit that, in Missouri, we had been blessed with adequate resources. I did not need to go to court to fight for the funds I needed. Instead I needed to learn what I needed to fund to provide effective representation. I needed to discover how to unearth deep secrets and what to do with the informa-

tion when we found it. I needed to figure out how to build a team that trusted each other and were committed to co-creating a solution to our enormous problem.

At the beginning of my journey, I was assigned to a fully staffed office. There were four lawyers and adequate investigative and support staff. Shortly after I became a lead and the manager, however, I was down to just me, a part time office manager, a secretary and two investigators—one for the guilt phase and one for mitigation. My first efforts at team building, some would say failed—as my vision and the vision of the other 3 lawyers who I started with in this office did not mesh—an explosion occurred blowing up what had been a successful office and leaving me to rebuild. I had an idea of where I wanted to go but no experience in the getting there.

In the fall of 1997, we added a lawyer to our group, and we began. We had cases all over the western part of our state, and we traveled extensively to see some of our clients while others were close by. The new lawyer was a "law" man. He had a wealth of experience writing about and analyzing the law, but he had little experience as a "trial" lawyer. I needed his skills, however, to address the enormous and important legal issues in these cases, which in turn allowed me to settle into discovering who these clients were, where they came from and how they had wandered into the path of a moving train intent on ending their lives.

At the beginning of this phase of my education, we were moving in some ways by instinct to uncover the core truths in each case. We managed to help the clients in some cases find their way home, while in other cases protecting them from death was the best we could do. In this process, we formed a team. We met regularly on the cases and spent energy brainstorming, and in our creative and low budget versions of focus groups. We saw few limitations and we cast our net as far and wide as we could think to throw it. I relied on the input of everyone and we all became invested in the cases, the clients and the outcomes.

In the process, I continued to learn the difficulties of taking humans who were used to acting alone—the lawyers—and

*and Chicago Public Defender's Office*

*of the community galvanizing*

*Team building*

## BUILDING CAPITAL DEFENSE TEAMS AND UNCOVERING THE CLIENT'S UNIQUE STORIES...

convincing them to embrace the idea of team work. It was sometimes hard to get the lawyers to accept the ideas of the non-lawyers. This is a struggle I have lived, observed on other teams, and heard about from many non-lawyers in my travels over the years that I have done capital work.

Why do lawyers have such a hard time playing with a team? Why do some lawyers want the women to do the social work? Why do the lawyers flee to the places that are safe and familiar instead of diving into the dysfunction of chaotic lives? Why do they avoid the victim families and the clients' dark truths? Why is all of this so scary for us?

At the beginning of 2000 we were joined by new team members, two new lawyers and a mitigation specialist. Our new teammates had zero experience in death penalty work. They brought fresh eyes and ideas to the table. Soon they would also be working on the DeLong case. One of the new lawyers jumped in and became a full partner in the experience while the others had smaller, but important roles.

### STEP 3: EVERY COMPETENT TEAM NEEDS A MITIGATION SPECIALIST

Who are the mitigation investigators? What do they do? How should we use them in our cases? How much should the lawyer be involved in this work? Should the lawyer get involved in the social work portion of the case? What do the lawyers expect when they hire a mitigation specialist? Do they want a collaborative partnership or a completed product that they can review before trial?

The mitigation investigator/specialist is an important member of the trial team. Her job is not to replace the lawyer in the exploration of the life story, but to supplement and assist the lawyer in this investigation. There are many different models in the Capital community for the mitigation specialists role, but the model that works best is one in which the mitigation investigator is a collaborator with the trial team—working side by side in the office, and in the field. A lawyer cannot pass the task of excavating the experiences and memories of the client and family to the mitigation specialist, but must partner with this team member to discover the client's life story.

The lawyer **must** become deeply familiar with the client's story, and he/she cannot do that from the bleachers.

In the DeLong case we knew that without substantial and meaningful mitigation, the outcome of this case was a foregone conclusion. I knew we had to see the world through Rick's eyes, and we had to walk in his shoes. I knew the mitigation investigator would be my partner in this journey, but I knew that I had to be the guide and leader of the exploration.

### STEP 4: MEETING RICK DELONG

The mitigation investigator in this case was Kathy Schneider. She traveled the 3 hours to Springfield first to meet our new client. We got into this case quickly, and we began meeting with Rick regularly from the late winter of 1999 to and through his sentencing in July 2001.

*We fought first for privacy.* We wanted to meet Rick in a contact visitation room, without shackles or monitors. This took a court order and special appointments but it was essential to the task we faced.

The first clue we had about who Rick was came from the nearly 300 hundred news articles written about the case. Rick had grown up in Springfield close to where the Vanderhoef family had been murdered. He knew his victims. Some thought he was Erin's boyfriend. The child she carried was his child.

The earliest news articles also revealed that Rick was a man with a record—theft, drugs, and an informant for the police. We knew he had confessed. The reporters revealed to the community that Rick had a girlfriend, Stacy. Stacy was one of 2 co-defendants. The articles, in tabloid fashion, told us Stacy was dying of AIDS. Rick had HIV, the reporters wrote with seeming glee. More importantly, the articles revealed the shock of those who knew Rick. No one could believe Rick could commit such a crime. He was described as a "nice guy" even by those who knew the Vanderhoef family. The outlines of his story were first revealed in these news accounts. A phenomenon that is not uncommon in high profile cases.

I first met Rick in a small office near the jail's control room. He was in his early

30's but looked older. He had a stocky build, but he was thin when we met. He was short, maybe 5'7", and this surprised me. His emotions were still raw. The anger that had driven the acts remained. His consuming fear for the safety of his girlfriend Stacy was a dominant concern. He felt and expressed deep sorrow and confusion about killing the children. He took full responsibility and swore Stacy was not there when the family was killed and said she knew nothing about the murders until after it was all over. Save her, he pleaded. He was not suicidal. In fact, unlike many clients I had represented he wanted to live and would accept life in prison without parole. At the time this revelation seemed ironic, almost cruel—as I did not see how I could prevent his death at the hands of the state.

I liked Rick from the start. I felt overwhelmed by the magnitude of his acts. There was no blueprint to follow for this case. We would need to do many things we had never done before, nor had anyone we knew. I knew it was vital that we not be limited in our search for the truth. We had to begin with us and an exploration of our feelings about what Rick had done, what feelings might interfere in our representation and then find ways to honor and overcome those feelings. It was equally important, however, that we not forget these raw, visceral reactions because we knew the jurors would feel them too.

We started in a conference room—the whole office and team. We listed our emotions on the board. Anger, disgust, horror, shame were a few that rang out at the beginning. We were in the early phases of the case and like the jurors we were experiencing the "stages of grief". Therefore, at this stage we were in role as jurors. We were exploring the crime and reacting to it. Feeling it and discussing it. We felt grief and sorrow for the children, not only for how they died but for how they had been forced to live. We discovered we needed to know, really know not only Rick and Stacy, but we needed to know and understand Erin. We needed to explore her parenting and the experiences these children had had in the short time they were on earth.

For the first time in my career, I felt fear about representing a client. My fear rose

mitigator specialist

not work on their own

Very smart  
↓ this should be in my presentation

first stages of grief — in my presentation (and maybe paper)

my paper

BUILDING CAPITAL DEFENSE TEAMS AND UNCOVERING THE CLIENT'S UNIQUE STORIES...

from the perceived shame of representing someone who had acted in such a seemingly coldhearted way, taking the lives of these innocent children both born and unborn. I had to address this very real issue and find ways to overcome it. I knew in the end that my shame could cost Rick his life.

I liked Rick, but I could not comprehend how I could stand up in court and embrace him in light of the hatred others felt. More importantly, I could not comprehend how he could have strangled these innocent children, and then literally tossed them in the trash in their rooms. In his confession, his anger was painfully real, and it was directed not only at the mother but, in his words on tape, it was directed at the "fucking brats". How could I sit beside him with my head up as the jury listened to that tape?

STEP 5: CREATING EXTRAORDINARY MOMENTS BY PLAYING OUTSIDE THE BOX

The community anger was so real and so present that we knew one thing we needed was time—and lots of it—between the murders and the trial. We also needed to bring jurors from another venue, and we needed to express Rick's remorse as soon as we could. We needed to show his humanity to the community in which our family and witnesses lived, so that we would have better and more open conversations with the witnesses, and with certain members of his family.

As a team we decided an APOLOGY was needed. As inadequate as that might be or feel for what had occurred in the little house, it was the right thing to do. So at the end of our first real appearance in court with the reporters hanging on every word—we read an apology that we had written with Rick. It read as follows:

*Every day of my life I live with the pain of sorrow and regret for what I did to Erin Vanderhoef and her children. And there is no way in this world to tell them just how ashamed and sorry I am or to beg them to forgive me. I know what I did caused their friends and family and this entire community to suffer more grief and sorrow and pain than anyone can imagine. I am sorry for that. I won't ask any of you to for-*

*give me. I have no right to ask you to. In other ways I have deeply hurt my family—my five children, my mother and sisters, people who could never have expected me to do what I did. I want to tell them I am so sorry for hurting and disappointing them. I cannot expect them to forgive me, but I beg for their forgiveness.*

Within a few months of this APOLOGY, Rick's girlfriend succumbed to her terminal illness and died chained to a hospital bed. Rick had not seen, let alone touched her since the arrest many months before. He wanted to go to the funeral. We went to court and asked the judge to allow him to attend the funeral or visitation. We had no expectation that he would be allowed to go. The reporters were all in their places as we pled for this act of humanity. The judge was actually kind in his response explaining to Rick that the Sheriff's department could not guarantee his safety and so no such trip could be made. Suddenly, it occurred to me that since Stacy would be cremated they could bring her to him at the jail. I asked if we could hold a private service for Rick in the jail. A Baptist minister was visiting him regularly and I was sure he would agree to a prayer service. The State was livid. He does not deserve this, the prosecutor yelled. He may try to smuggle something in the ashes, the prosecutor complained. The judge, however, turned to the jailers and told them he wanted this service to occur.

*As I left court that day, a newspaper reporter asked me to comment. She said—my readers will not believe that a man who had acted in such a coldhearted way could be capable of loving another. I cannot recall my response that day, but this encounter was a great gift to me—it had not occurred to me that I would need to demonstrate my client's capacity for love as part of my case. Rick did love. He loved so deeply that he had killed one woman to save another from torment in her dying days—that was a truth we would discover and take to the jury.*

Another truly extraordinary moment occurred in the mitigation phase of our case when we called Rev. Houston to testify. This southern Baptist minister from John Ashcroft country had never done any prison ministry. But shortly after the

murders, a woman in his congregation asked him to visit with Rick and provide him some comfort in his darkest days. The woman had known Rick several years before when he had married her niece.

Rick was not a religious man nor was he Baptist, but from the hundreds of visits that followed this relationship developed into an amazing and beautiful friendship. Rev. Houston brought that love to the courtroom in some of the most powerful testimony I have ever seen.

Rev. Houston couldn't get any special visits so they met with the glass between them for 30 minutes a week. Rev. Houston made no efforts to convert Rick; indeed religion was not even the centerpiece of their visits. Rick worried if we visited on Rev. Houston's day, and he would end our visits to see this man.

One expert was visiting Rick on a Rev. Houston day, and later he reported that mid-way through their session on Rick's years of drug addiction, Rick began to cry. When the expert asked Rick why he was crying—he said he feared he would miss his visit with Rev. Houston who had driven in and waited in line to see him. The expert concluded the session and let Rick see his friend.

We had no role in putting these two men together. We kept in touch with Rev. Houston periodically and thanked him for his visits. We were grateful when Rev. Houston was willing to testify for Rick in spite of congregational pressure not to.

*We knew about this relationship because we knew all about Rick's incarceration by talking to him and by periodically gathering the jail records. It is important to watch all aspects of your client's time waiting for trial so as not to miss opportunities that may show his true character, evidence of mental illness, remorse, mental retardation, etc...*

STEP 6: ASSEMBLING THE DATA ON THE CONTOURS AND CONTEXT OF RICK'S LIFE

As we developed our vision of how to investigate a life we faced many issues.

- Do we hire experts and then gather records?
- Would it be better to gather the

get the religious guy for counsel who can testify

love

pay attention to details of his incarceration

- 1 need time
- 2 change of venue
- 3 get his remorse in the press

presentation

TLC Garry Spence

what is this?

demonstrations of love

BUILDING CAPITAL DEFENSE TEAMS AND UNCOVERING THE CLIENT'S UNIQUE STORIES...

- records and then hire the experts?
- Do we edit the records and give the experts only the best stuff?
- Do we avoid the dark parts of our client's behavior or do we look for why he had the dark spots?
- Who do we need to interview to gather the life details?
- How do we choose the right experts?
- How much time will we spend in the field looking for a witness or convincing folks we need them on the witness stand?
- Where will we invest our energy?

Rick's case began a shift in my worldview. As criminal defense lawyers our lives are so often about hiding our client's warts. *In some cases, this approach might lead to no mitigation being put on at trial not because there was none, but because the lawyer could not see it.* The shift was to find and explore it all, and then dig deeper and to look again. Clients are not born bad actors in the majority of our cases—choices that were not made by them, shaped who they became. Those choices must be unearthed, and the story must be understood in the context of the lives that lived them.

Stories, we learned in our work, are told from the perspective of one person through their prism—how would multiple witnesses tell the same story? We often found they told the stories differently and through the multiple perspectives we gained a more universal understanding of important, life changing moments in our client's history, and importantly we discovered who could tell the stories best.

In one meeting, I recall we decided that we would seek the truth in Rick's life. That's right; we made a conscious choice to seek the whole truth about his life, and to give it to the experts. We sealed our promise by writing on a flip chart—our contract with each other. Please know that we entered this new world with trepidation, but decided to pursue it no matter where it led. We would let the experts and then the jury see the whole person—the good and the bad—the man who left his kids without support, the drug addict, the man with HIV, the snitch, and the man with a terminal illness, a man abused by the system, a child traumatized by a

mentally ill step-dad, a man in love, a father, a good mechanic, a boy from the wrong side of the tracks, a man who helped his neighbors, a man who would not sell drugs to parents with kids, a man driven mad by methamphetamines and Sustiva.

So once the contract was entered we listened and viewed our client—with a new ear and eye focused on understanding him and his choices. We did this in numerous sessions. There were three on our team, including the mitigation investigator, who gathered this living history. We talked and talked to his mother—slowly uncovering the horror of her life. She conceived Rick as a teenager when a man she knew raped her. A man who later would rob, kidnap and kill in Missouri and in Arizona. She then married a mentally ill man who tormented her, and then her son. This man criminalized her young son, turning his crew into a version of Fagan's gang.

We also spent hours and hours with Rick's sister, who stood firmly in his corner and continues to mother his youngest son. We spent any time his other sister would give us—she could not forgive her brother and frankly for several years could only feel contempt for what his acts had done to her. We never gave up on her, and even while the trial went into its 15<sup>th</sup> day, we were negotiating with her to get her to take the stand. In the end, Rick's sister did take the witness stand, and she provided compelling and meaningful testimony for the jury.

We located the ex-wives and the children. The mother's were protective, and despite numerous tries we never did get Rick's second wife or kids to court. The first wife and Rick's first love, visited with us, again and again. She was angry with him and it took over a year to move her enough to visit him. She eventually decided to testify for Rick in the penalty phase. Their teenage daughters decided to testify, a decision we let them make on their own, and one that was a long time in the making. We put them on video—the most compassionate way to allow them a voice in this horrific event.

At the same time, we began to gather records as we have been taught at numerous death penalty seminars. Medical

records, school records, work records, prison records, probation records, birth records, sibling records, the children's records, marriage and divorce records, treatment records and on and on. As the records arrive, or as time permitted, the mitigation investigator created a chronology of Rick's life. She used testimony from multiple sources and from the vast number of records collected. She did not edit, but passed her work to the lawyers to review and to create additional lists of information to collect and people to interview.

This living document grew and grew as our knowledge expanded. The chronology, with the actual records, went to each of the experts. The experts loved this document, as do we. We could see the life so much more completely through this time consuming process. As importantly, our themes—the emotional messages in our case, dropped one gift at a time as this document evolved.

STEP 7: WALKING IN HIS SHOES — FINDING WAYS TO SEE THE WORLD THROUGH THE EYES OF YOUR CLIENT AND HIS FAMILY

How does one really get to know and understand the life experience of another human—I mean really know it? What is the value of this connection? Will I be more persuasive if I can know his fears, experiences, joys, and mistakes more deeply?

Ultimately, the lawyer must tell the client's story, not the mitigation specialist, so it is the lawyer who must know the story so intimately that the universality of the experiences can be tapped into in a way that is truthful. The obvious paths to these truths is contained in the paragraphs above, so how do you get more so that you can know and feel his life experience in an honest way? Where are those resources?

Every case has a multitude of issues on which we are novices. For example:

- What is the impact of methamphetamine as it enters your veins and then your brain?
- How has the addict's world been altered by that chemical invasion?
- What is the impact of chaos on the growing brain?

dig

multiple viewpoints presentation

list of who client is presentation

Chronology and list of people to visit experts build the life story

lawyer must know it intimately

questions to ask

video for kid testimony

BUILDING CAPITAL DEFENSE TEAMS AND UNCOVERING THE CLIENT'S UNIQUE STORIES...

	Mary went through DFS and the courts trying to get child support from Howard, but he took off w/ anything was decided. She never received any child support payments from him	
6/00/64	Mary DeLong has exam by Dr. Germent in March. Pregnancy too advanced for exam	Springfield-Greene County Health Dept
8/12/64	Richard Ivan DeLong is born to mother, Mary Ann Rideaoutte, age 17 at East Hanley Memorial City Hospital, Springfield, Mo. Delivery of normal male infant—8 lbs. 6 oz. baby circumcised. Her address at the time of birth is listed as Route 2, Fairgrove, Mo. State of birth is listed as OK. Rick was a single birth. There was an initial birth certificate filed at the time of Rick's birth but did not show the name of the father. This birth certificate is in a sealed file which means a court order for Mo. Vital Records to open the sealed record. The second birth certificate that is on file currently, shows that Earl Buzz DeLong, age 34, is listed as father of Rick DeLong.	Birth Certificate/Mary DeLong; Springfield-Greene County Health Dept.
7/00/64	Mary DeLong examined no abnormal findings—episiotomy healed satisfactorily	Springfield-Greene County Health Dept.
7/10/64	Buzz DeLong divorced Nora Jean DeLong. Buzz fails to appear after sufficient notice by court. Ordered to pay \$150. aty fess and no child support or alimony mentioned	Greene County Circuit Court records review
8/25/64	Buzz has been examined at Wadsworth VA in KS. Date of incompetency rating is 9/11/64. DX is Schizophrenic Reaction, undifferentiated type. DeLong stated he has not done well since his last hospitalization. He has to continue keep from getting nervous by using tranquilizers. DeLong says when he does get nervous he gets to drinking and "goes crazy." For example he was drinking the day before his examination here and while drunk, sold his car for 10.00. Later in the day, DeLong was arrested and taken to jail for "investigation." DeLong had been walking up and down the street with a knife. He was released from jail the morning of the examination and said that he had been in jail five times since last fall for drinking. DeLong says that he continues to have difficulty sleeping and walks the floor continuously at night. He drinks to relax and get some sleep. DeLong has done only odd jobs for the past 8 years. He has not been able to hold down a job for the past 8 years. He has not been able to hold down a regular job because of nervousness. DeLong says he has never drawn a pension from the VA. He related the beginning of these nervous difficulties just after an automobile accident in 1992. He said, he has never been the same since and much difficulty controlling his emotions, his actions, and his behavior.  DeLong said difficulty he was having in Fall was trouble with his wife. She has since divorced him and now he was living with mother and father. He said has been married 3 times, twice to the same woman.  DX: Schizophrenic Reaction	VA Records
8/27/64	Buzz admitted to St. John's Hospital—Impression: Sociopathic Personality	Fulton State Hospital Records Review
9/11/64	VA rating decision document indicates: Rating of 12/5/63 denied pension benefits because permanently had not been established. The above VA examination shows the veteran has not done well since his hospitalization from 9/10/63 to 10/17/63 when he was absent against medical advice. He states that he was nervous, gets to drinking and goes crazy. He has been in jail 5 times since the last call because of his drinking. He has difficulty sleeping and walks the floor continuously at night. He drinks to relax and get some sleep. He has done only odd jobs for the past 8 years. He has not been able to hold down a regular job because of his nervousness. The veteran stated to the examiner that he was sorry that he had signed out of the hospital against medical advice last Fall and says that he realizes now that he needs further hospitalization and will stay until the doctor releases him. The examiner stated that the veteran is in need of hospitalization, and intensive psychiatric treatment. Examiner considers the veteran to be incompetent for VA purposes.  Diagnosis: Schizophrenic Reaction, undifferentiated type.  Incompetent from 9/10/63. The doctor was AJ Brier, M.D.	VA Records

- What is the impact of days and days without sleep?
- What is the impact of crushing depression on your ability to make choices?
- What does it feel like to watch your mother beaten?
- How does it feel to be an outsider?
- What is it like to interrogate someone or to be interrogated?

The resources are often first hand accounts from witnesses you will encounter who know what these things feel like. Sitting in a group of recovering addicts and listening to the way they talk about the drug and the love/hate relationship they had with it. Reading Department of Justice (DOJ) reports on the impact of major depression on a person, or on the risk factors that contribute to delinquency and criminal behavior in juveniles. Finding books that describe how depression crushes the soul. Watching graphic films on drug addiction. You can attend a police seminar on interrogation techniques or a class with families on the impact of mental illness. *Seek out experiences that broaden your world view so that you can approach witnesses with a truth they know so that they are then more willing to tell this truth to others.*

*researching outside the subject NY PAPER*

The process produces a hundred—ah hah moments, and allows you to tell the client's story through every witness that takes the stand. The goal is to look at every witness from the initial cop to the medical examiner to the homicide detective and ask, how will I advance my story through this witness? The witnesses are not my enemies. They are my storytellers. Therefore, I ask myself what do they know that will help me tell my client's life story. I do not want to wait until I present "my case"—I want everyone telling my client's story from the beginning of the trial.

*older presentation*

This approach affects my interviews, and in Missouri, my depositions of these witnesses. I go into the process intent on learning about the person I am talking to and examining them for experiences that influence or can inform others about my client's story.

The witnesses are often from the client's world or some part of it. So, when the

BUILDING CAPITAL DEFENSE TEAMS AND UNCOVERING THE CLIENT'S UNIQUE STORIES...

State puts on the witness to, for example, describe finding the bodies of her neighbors (and mother substitute), I am prepared to tell a story about the victims and the life they led. I show the photo of the family in life, and I begin to embrace this family through her. This young woman can tell portions of the client's story and I know this because I know her. She knows the heartache of chasing someone in hopes of catching love. She knows what it looks like when someone is your boyfriend because she has had relationships. She can tell the story of the "nice man" who visited a time or two but months and months before the murders.

When the State puts on the snitch who revealed that Rick was the killer and where they could find him—I face a drug addict who can tell many stories about her former friends. She can reveal the inside of addiction. Her testimony about living inside an addiction is powerful, meaningful and very real. When I notice I am angry at her before the trial I sit and write her story in first person. I reverse roles with her and as a result I come to understand her more honestly. When we see each other in court I am friendly, interested in her story, and not afraid of what she has to say about Rick in the hours following the darkest moments in his life.

When the State calls on the medical examiner, I wonder what good can I do here? The murders are obvious to anyone. So, how do I advance any story through

him? I know from my investigation that he has been addicted to pain killers and was disciplined many years before as a result. I know that the autopsy of children must be a horrible job—one that could rob you of any objectivity. I know he has seen the ravaged bodies of AIDS victims, including having performed the autopsy on Stacy after her death. Therefore, I learn that the good doctor can help me educate the jurors about grief, anger and setting those powerful emotions aside to do the job you are assigned. He can talk about addiction and its destructive forces and about redemption. He can talk about the suffering of someone who contracts AIDS, a fate that awaits Rick. Ironically, this compassionate cross inspired this doctor to write me after the trial congratulating me on the outcome, and thanking me for taking him through some tough spots, with compassion.

STEP 8: ORGANIZING AND PRESENTING MEANINGFUL MITIGATION TO THE JURY

A. The Pebble in the Puddle

Late in the case investigation we knew we had a lot of good mitigation to show the jury, but we struggled with how to organize it. In a brainstorming session, we seized on the image of the rings of water that are created when a pebble is tossed into a puddle. The point of entry was the main issue—the murders and each circle out represented a layer of the mitigation

case. The first circle after the entry point equaled the critical factors leading to the murders, and each circle out offered an explanation for the ones within. Therefore, the darkest moment was encircled by the "love triangle that led to the murders". The next circle out was terminal illness, and the drug to treat it, which altered Rick's brain and affected his decision making on the morning of the murders. The next one was addiction and that was encircled by a system that had failed by putting a drug addict on probation on the street as a drug informer. The circles each described some aspect of Rick's history that contributed to the development of the information each encircled. The outer most circle represented the biological link that can make individuals vulnerable to mental illness and addiction.

We first used this image in voir dire to find out how many circles jurors could consider if faced with sentencing Rick to life or death. If they could not consider all the circles we moved to strike them from the panel. We then used the image in opening and with the experts. Finally, we used the image in the closing arguments. The image helped us organize a massive amount of information and make it meaningful to the jurors.

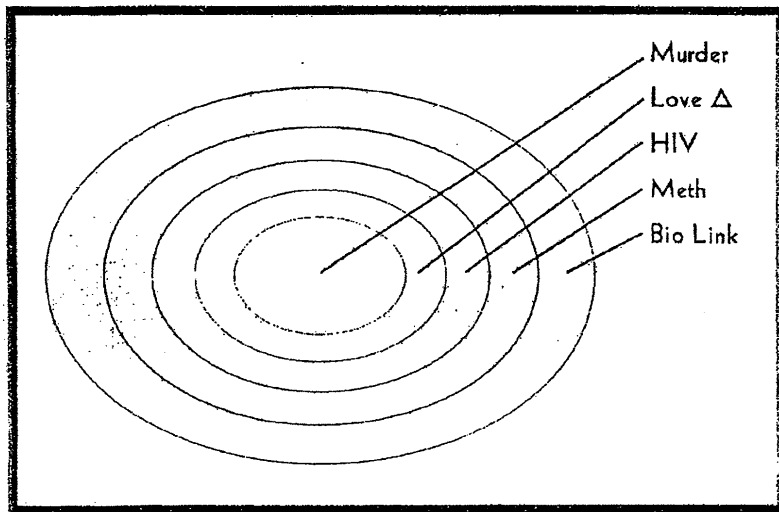
B. The Order of Proof

The reality of a death penalty case is that we share our courtroom duties with another lawyer. This can present prob-

State's witness vs. yours  
 make them yours  
 tell a story off topic from prosecution

use of visual aide would be to tell story

medical examiner



a visual to use in voir dire - expert testimony - organize material for jury - opening and closing

## BUILDING CAPITAL DEFENSE TEAMS AND UNCOVERING THE CLIENT'S UNIQUE STORIES...

lems if we are not all on the same page. Giving up important witnesses to another lawyer is a scary and painful necessity in these cases. In the model of representation I have created, I reject divisions of labor along the premise of "you take the first phase and I will take the penalty phase—good luck—see you at trial". I apologize in advance to anyone I offend by my next statements, but I know this division of labor model is popular, and in my opinion, it hurts our presentation in our Capital cases. I believe it is used because it is easier. Furthermore, I believe it is "old school", but most importantly, I believe, it is ineffective.

do not split attorney duties

The lawyers on my team work both phases, as partners. Therefore, we create a long and comprehensive blueprint for the cross and direct examinations so that we are all on the same page when we construct these examinations in the privacy of our offices or hotel rooms. For those managing the witnesses, they can use the order of proof as a guide to predict when witnesses will be needed to prep, or to call to the courthouse. This is particularly important when you are in trial for weeks or months.

order of proof

In the DeLong case the order of proof was nearly 100 pages long. It went through 15 drafts and it played a significant role in our ability to tell Rick's story with one voice. In the first phase we presented a diminished capacity defense. We then started with the state's case and outlined the stories we wanted to tell through each of the State's witnesses. Two examples from the order of proof are as follows:

### Witness #1: Vanessa Woodruff

#### A. Points of the Story

##### a. Erin was in love with Rick DeLong

- i. Erin's fantasy to marry RD
- ii. What it looked like when someone was a boyfriend—RD not a B/F
- iii. Hiding the pregnancy
- iv. Fear of DFS
- v. Neglect of the children
- vi. Stacy was the "other" woman
- vii. Buzzy

##### b. Condition of the home

- i. Looked this way a long time

- ii. Slept here because my house a mess too
  - iii. Neglect
  - iv. Introduce us to kids
  - v. May 1997 event with kids
- c. Vanessa is like Erin
- i. Erin is a friend, mom figure
  - ii. Overcome drugs too
  - iii. Lost my first baby to DFS too
  - iv. Problems in my relationships
  - v. Friends in jail
  - vi. d/n graduate HS
  - vii. options limited

#### B. Exhibits

- a. Photos of home
- b. Neighbor
- c. Introduce family with photo
- d. Police report—1997

#### C. Witness Assignment: CLS

### Witnesses #10: Cpl. Mark Deeds

#### A. Points of the Story: chapters

##### b. Proactive Investigator

- i. Seek out criminal activity in community
- ii. Tools to develop informants
- iii. Thin line between lawful/unlawful behavior when undercover
- iv. Abuses position and let's CI on probation run loose b/c benefits him and bet only CI would get hurt—lost bet.

##### b. Rick is a "tool" to his success

- i. HX of relationship—control officer to interrogator
- ii. Are you the hero or the villain?
- iii. Interrogation promises in light of the relationship—more powerful
- iv. Promises = abuse of relationship and code of fairness

##### c. Good character of Rick

- i. Not a bad guy
- ii. Working class poor
- iii. Loves Stacy
- iv. Overpowered by the drug—meth
- v. Observations over years led him to believe RD not violent

##### d. Murders are NOT planned

- i. Car parked in front of the house
  - ii. No weapon taken in
  - iii. Daylight
  - iv. Active street
  - v. Neighbors knew RD
  - vi. Took a Mentally ill man
  - vii. No gloves
  - viii. Rd says "no plan"
  - ix. RD = father of unborn child
  - x. RD gives Erin Stacey's debit card to buy donuts
- e. Emotions in the interrogation Room
- i. RD cries
  - ii. RD gets angry
  - iii. Deeds angry
  - iv. RD excited
  - v. RD cusses like a sailor
  - vi. "[f---]king" = common word for RD
  - vii. RD goal-blame me only
  - viii. Responds to plea for closure in room to keep story flowing
  - ix. Trained to suppress emotions
  - x. Enormous moment—watch a man turn his life over to you

##### f. The Triangle

- i. Stacy—RD loved her
- ii. Erin—a misplaced pursuit of love
- iii. RD—got himself in a hell of a mess with these 2 women

##### g. The goals of the interrogator and RD

- i. Mark wants admission
- ii. Mark wants concrete detail
- iii. Mark does not want mental state info
  1. d/n explore drug use
  2. d/n explore lack of sleep
  3. d/n explore stressors
  4. d/n explore b/c not qualified
- iv. RD wants Stacy home with their son
- v. RD wants cops to leave Stacy alone
- vi. RD wants them to see him as lone actor
- vii. Left evidence at the scene for you to find him

##### b. Value of the Confession

- i. Closure for the community
- ii. Closure for police
- iii. Reduces pressures on investigators



BUILDING CAPITAL DEFENSE TEAMS AND UNCOVERING THE CLIENT'S UNIQUE STORIES...

- iv. Eliminates crime scene concerns
- v. Gives them shot at death penalty
- vi. Value diminished when his statement proves unreliable
- i. **Promise is a Promise**
  - i. Mark promises leniency for confession
  - ii. HX of relationship = pattern of protecting RD
  - iii. Cop code—OK to lie, cheat, if dealing with bad guys
  - iv. What is cost of letting cops make and break promises
  - v. Cost is heavy if statement is unreliable
  - vi. Mark was RD's MASTER
  - vii. Drugs were his other MASTER

justice class and sat in a circle and talked about the death penalty and about our client. We listened to their reactions to our issues. Next, we went to the criminal justice department and did a voir dire exercise to work on our skills and to advocate for our client. In addition, I began talking about Rick's case to anyone who would listen—testing one piece of information and then another. Each time I ventured out to talk about the issues the less I feared that I would feel any shame when we finally stood before a jury. In fact, this was true and when we got to court I was able, literally and figuratively, to embrace Rick. The effect was that the jurors could see we cared for Rick, and this was evidence that he was not evil.

jury, is one comprised of 3, 4, and 5's, and we wanted these people to serve. The self-rating scale was our secret weapon.

**A HAPPY ENDING: THE JURORS CONCLUDE THAT ALTHOUGH RICK HAD KILLED THIS FAMILY, IN HIS HEART HE WAS NOT A KILLER**

In the end, when faced with its life or death decision, our jurors (like the ones in the Kodowitz story) chose life. They came in ready to kill and as admitted supporters of capital punishment, but they voted that the death penalty was not warranted in Rick's case.

A few weeks later, I received a letter from a group of our jurors asking if I would join them for dinner. The letter revealed that the experience had changed them in significant ways and much to their surprise was an important moment in their lives. When we met they had many questions including—had they read the instructions right? Did I tell them the whole truth? Could they write to Rick or even visit him?

*Jurors later wrote him*

**B. The Book**

Six months or more before we went to trial, we tried a new idea. We created a focus group book to mail out to 25 people around the country. The willing participants spent approximately 8 hours examining our case section by section. It included the gruesome photos and the confession video. It began with a questionnaire in which they rated their commitment to the death penalty. After they completed a section, they completed another questionnaire, rating their reaction to the material. They were asked each time to say whether the information moved them closer to or further from a death verdict.

- j. **Altered State or Evil guy?**
  - i. Admit the confession flawed b/c RD not clear on details = dissociation
  - ii. How many new details did he provide v. news accounts
  - iii. d/n ask about drug use b/c do not want to mess up a good murder one nor does he want the tape to reveal his knowledge of RD's use
- k. **Motive**
  - i. Snapped
  - ii. Panic
  - iii. Protect Stacy

In the end, they told me they concluded that although Rick had killed the Vanderhoef family, in his heart, he was not a killer. They saw the power of his redemption through witnesses like Rev. Houston and his children. They felt he was remorseful. After this powerful experience they could not see how anyone would ever get the death penalty.

*hook to 25 participants*

- B. Exhibits
  - a. Confession video
  - b. June 21 video
  - c. CI documents
  - d. Timeline of CI work
  - e. Cooperating Citizen Contract
  - f. Users as informants—SOG

Interesting for me was how predictable the results were based on the first questionnaire. If someone was an automatic death penalty (ADP) juror—or close to it, they viewed all the evidence like a law enforcement officer, and their reactions to the material was very similar and fatal to Rick. If they were in the bell curve we found more variety in their reactions to the evidence, and they tended to more responsive to the mitigation. If they were scrupled, and therefore would never give a death sentence, then they were also predictable, and ineligible for jury service in any Capital case.

**C. Witness Assignment—CLS**  
**STEP 9: GOING PUBLIC—TALKING ABOUT THE ISSUES AND TESTING OUR CASE**

**A Focus Groups and Discussions**

Although Rick's case was not the first in which we had used the poor man's version of the focus group, his was the first time we used a number of public events to get used to being his advocate. We started at the law school with a criminal

When we later submitted a questionnaire we included a 1 to 7 scale for folks to rate themselves on their death penalty views. Once they rated themselves on their death penalty views we knew how they were likely to view our evidence. A fair

Their statement stunned me at first, but the fact is they were right—if the story is told from the heart, and with a deep understanding of the life, then no one who faces a jury from the bell curve (the 3, 4, and 5's) will be put to death. That is our dream. That is our mission. @

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*Could this be a "beginning" questionnaire?*