Handling a Life without Parole Case

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I. INTRODUCTION

In 1993, Indiana's General Assembly added life without parole (LWOP) as a possible sentencing option in cases in which the state sought the death penalty, and in 1994, they gave prosecutors the authority to seek a penalty of LWOP without requesting the death penalty. This pamphlet addresses only cases in which the state seeks a sentence of LWOP for murder, pursuant to Ind. Code 35-50-2-9. It does not cover Ind. Code 35-50-2-8.5, which allows the state to seek a sentence of LWOP for certain habitual offenders.

If your client is not facing an LWOP request filed pursuant to Ind. Code 35-50-2-9, much of this outline will not apply, (e.g., limited statutory aggravators, jury sentencing). Even if your client is facing a lengthy term of years that is a "functional equivalent" of LWOP, the statutory protections of Ind. Code 35-50-2-9 will not apply. Stewart v. State, 945 N.E. 2d 1277, 1288-89 (Ind. 2011). **However,** the section of this outline on fighting for a lesser sentence can still guide you in developing mitigation evidence for sentencing. This is particularly true if you represent a young client.

By simply grafting LWOP into the state's death penalty statute, the legislature has made the two types of cases procedurally identical, with a separate penalty phase at which the jury is asked to weigh aggravating and mitigating circumstances and recommend whether LWOP should be imposed. See Ind. Code 35-50-2-9. In one of its first LWOP decisions, the Indiana Supreme Court acknowledged that "the statute provides that life without parole is imposed under the same standards [as the death penalty] and is subject to the same requirements." Ajabu v. State, 693 N.E.2d 921, 936 (Ind. 1998). Later cases have likewise made clear that the same principles apply to both death penalty and LWOP cases, at least as to the statutorily mandated sentencing process itself. For instance, death penalty case law restricting consideration of aggravating circumstances to those set out in Ind. Code 35-50-2-9(b) applies to LWOP cases. See, e.g., Ajabu, *supra;* Farber v. State, 703 N.E.2d 151 (Ind. 1998); Warlick v. State, 722 N.E.2d 809 (Ind. 2000); Cooper v. State, 854 N.E.2d 831 (Ind. 2006); Castillo v. State, 974 N.E.2d 458 (Ind. 2012).

However, Indiana case law which has developed in capital cases, but which has no basis in Ind. Code 35-50-2-9, will not necessarily apply. See, e.g., Johnson v. State, 749 N.E.2d 1103(Ind. 2001) (Rule requiring trial court to grant timely request for jury sequestration in capital cases does not apply in LWOP cases. "The rule ... represents a policy decision that acknowledges the extreme finality of the death penalty. Although some may regard the punishment of life imprisonment without the hope of release as equally severe as the death penalty, the fact remains that these two sentences are qualitatively different. It is this difference that compels a conclusion that sequestration is a mandatory requirement upon request in capital cases. However, in non-capital cases jury sequestration is a matter left to the discretion of the trial court.") Id., 749 N.E.2d at 1107.

A list of cites for Indiana death penalty and significant life without parole opinions is available, as is an outline of issues in those cases.

A. Ways in which an LWOP case is like a death penalty case and unlike other criminal cases.

- LWOP is not available if your client is under 16 or is found to have intellectual disability. (Your client would not be eligible for the death penalty if he were under 18)
- The penalty phase is tried before the jury, and will begin immediately after the verdict comes back if your client is convicted. The rules of evidence will generally apply.
- To seek LWOP under Ind. Code 35-50-2-9, the State must allege at least one aggravating circumstance set out at subsection (b) of the statute, and to obtain the LWOP sentence the state must prove the alleged circumstance(s) beyond a reasonable doubt.
- You should begin preparing for the penalty phase from the outset, and must select guilt and penalty phase theories that are consistent with one another in order to avoid arguing to the jury, "He didn't do it, but if he did, here's why."
- To help prepare for the penalty phase, you will need the help of a mitigation specialist, and should petition the court for funds to hire one. Many lawyers forgo mitigation in a life without parole case, but it can truly make a difference. (See Steve Schutte's outline of LWOP cases in which mitigation mattered).
- Aggravating circumstances are limited to those set out in Ind. Code 35-50-2-9(b), while mitigating circumstances include virtually anything that might persuade a juror to impose a lesser sentence. Be aware, however, that your mitigation evidence may open the door to damaging rebuttal evidence that could not otherwise come in.
- You must address the potential LWOP sentence in voir dire, and select jurors who are able to consider your mitigation evidence and to consider imposing a term of years.
- Under Indiana's death penalty and life without parole statute, Ind.Code 35-50-2-9(l), eligibility for the death penalty or life without parole is contingent upon two fact-findings: (1) that at least one aggravating circumstance has been proved beyond a reasonable doubt; and (2), that the aggravating circumstance(s) outweigh any mitigating circumstances.
- In Ring v. Arizona,536 U.S. 584 (2002), the U.S. Supreme Court held that when eligibility for the death penalty is contingent upon certain facts, the 6th Amendment right to trial by jury requires that those facts must be found by a unanimous jury beyond a reasonable doubt. Because the second of the fact-findings set out in Ind. Code 35-50-2-9(l) is not required to be found by a unanimous jury beyond a reasonable doubt, there is an argument that Indiana's death penalty/LWOP statute is unconstitutional on its face. This argument has already been rejected by the Indiana Supreme Court, but more recently in Hurst v. Florida, 136 S.Ct. 616 (2016), the U.S. Supreme Court struck down Florida's death penalty statute which allowed the weighing of aggravators and mitigators and determination of sentence by the court rather than the jury, calling Indiana's statute into question.

B. Ways in which an LWOP case differs from a death penalty case.

Death Penalty cases in Indiana are subject to a special rule, Criminal Rule 24, which requires appointment of co-counsel, compensation at a set hourly rate, limitations on

caseloads, and provision of "adequate funds for investigative, expert and other services necessary" to prepare for both trial and penalty phase, upon an *ex parte* showing of reasonable necessity. Unlike the death penalty, the filing of an LWOP request does not trigger the application of Criminal Rule 24. However, you should still ask for co-counsel, a mitigation specialist, and whatever additional resources you need, and be prepared to support your request with a specific showing of need. IPDC's pamphlet on "Getting Funds for Experts & Investigators" including sample pleadings, is available online, and a motion for appointment of co-counsel, a motion for funds to hire a mitigation specialist, and a non-exhaustive list of cases and counties in which these resources have been given are also available. For more on mitigation investigation, see Section IV, below.

Second, while your client's freedom is at stake, his or her life is not. In truth many LWOP cases involve multiple charges which expose the defendant to a significant term of years, even if LWOP is not imposed. I mention this not to make light of the potential risk of your client's incarceration without any possibility of parole, but to take some pressure off of you and help you maintain your perspective. In a death penalty case, the risk of your client being executed dramatically changes the way you look at every decision. This is not true of an LWOP case. The proceedings will be different from your other trials, with a second jury trial to determine the penalty, but with the help of this outline you should not feel completely at sea.

The following outline sections attempt to provide some very basic observations and suggestions for handling your LWOP case. More thorough information is available in the Council's death penalty defense manual, "Defending a Capital Case," which is available in print as well as on the Council's web-site. Specialized training is also available at the Council's bi-annual Death Penalty/LWOP Defense Seminar. Remember, however, that neither Criminal Rule 24 nor the ABA Guidelines for Appointment and Performance of Defense Counsel in Death Penalty Cases, which are cited liberally throughout the death penalty manual, apply directly to LWOP cases, although they can provide some guidance and support.

II. INDIANA'S STATUTORY SCHEME

A. Introduction

Indiana Code 35-50-2-3(a) provides that the sentence for murder ranges from 45 to 65 years, with the advisory sentence being 55 years. However, subsection (b) provides that a person who was at least 16 years old at the time of the charged offense may be sentenced to life without parole, pursuant to Ind. Code 35-50-2-9, unless he is found, in a pre-trial hearing pursuant to Ind. Code 35-36-9, to be a person with intellectual disability. Indiana Code 35-50-2-9 governs the procedures that must be followed, from charging through trial and beyond, whenever the state of Indiana seeks a sentence of life without parole for murder.

In order to seek a sentence of LWOP for murder, pursuant to Ind. Code 35-20-2-9, the state must file its request on a separate page from the rest of the charging information or indictment, and must allege at least one of the eighteen aggravating circumstances set out

in Ind. Code 35-50-2-9(b). Subsection (c) of the statute sets out seven specific mitigating circumstances that may be considered, plus an eighth that includes "any other circumstances appropriate for consideration." As you will see below, what may be presented to the jury for consideration as mitigating in a life without parole case is virtually wide open, and can be anything that might cause even one juror to consider imposing a penalty less than life without parole. You should not let yourself be constrained by the list of mitigating circumstances set out in Ind. Code 35-50-2-9(c) as you investigate and develop mitigation.

B. Role of Jury and Judge

1. Jury Penalty Phase

Indiana Code 35-50-2-9(d) provides that, in the event your client is convicted, the jury will reconvene for a sentencing hearing. The state will be limited to evidence and argument regarding the charged statutory aggravator(s), or rebutting your tendered mitigation. Bivins v. State, You will be allowed to present evidence relevant to the alleged aggravator(s), as well as evidence relevant to any mitigating circumstances. See Section VIII, below, for more on penalty phase evidence. Subsection (d) also requires the trial court to instruct the jury on the full range of penalties available for each charged offense.

Indiana Code 35-50-2-9(e) gives the jury two sentencing options if the state has asked for a maximum penalty of life without parole. The jury may "recommend" for life without parole, or may "recommend" against it, in which case the trial court would elect and impose a term of years. Indiana capital juries used to make a mere recommendation to the trial court regarding the appropriate sentence. In 2002, the General Assembly amended the statute to provide that if the jury reaches a unanimous "recommendation" regarding the appropriate penalty, the trial court "shall sentence the defendant accordingly." Ind. Code 35-50-3-9(e).

2. 6th Amendment Right to Jury Findings

The 2002 amendment was passed in anticipation of the U.S. Supreme Court's decision in Ring v. Arizona, 536 U.S. 584 (2002), in which the Court applied to the death penalty its case law holding that, where the state conditions eligibility for a higher penalty upon any fact, that fact is the functional equivalent of an element and the 6th Amendment requires it to be submitted to a jury and proved beyond a reasonable doubt.

Ind. Code 35-50-2-9(e) provides that the jury may "recommend" the death penalty or life without parole only if it makes the following findings set out in subsection (l):

> (1) that the state has proved beyond a reasonable doubt that at least one of the [alleged] aggravating circumstances ... exists; and

(2) any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances.

Arguably, under the holding in Ring, *supra*, a sentence of death or LWOP is conditioned upon both of the findings set out in Ind. Code 35-50-2-9(l), and so both are facts which must be found by the jury beyond a reasonable doubt. Arguably the statute's failure to require this is a violation of the 6th amendment right to jury trial as set out in Ring. The Indiana Supreme Court has rejected this argument, by a vote of four to one (Rucker, J., dissenting), with the majority writing that the second finding is a weighing process, not a "fact," per se. See, e.g., Ritchie v. State, 809 N.E.2d 258 (2004), Helsley v. State, 809 N.E.2d 292 (2004), and State v. Barker, 809 N.E.2d 312 (2004). However, more recently, in Hurst v. Florida, 136 S.Ct. 616 (2016), the U.S. Supreme Court struck down Florida's death penalty statute, which allowed the court rather than the jury to weigh aggravators and mitigators and determine the sentence. This once again calls Indiana's statute into question. A short sample motion to declare the statute unconstitutional based on this issue is available, and is equally pertinent to an LWOP case.

3. Jury findings regarding the existence of at least one aggravator

If the jury unanimously finds that no aggravating circumstances have been proved beyond a reasonable doubt, their penalty deliberations are complete and the trial court must sentence the defendant to a term of years. If the jury hangs on the issue of whether an aggravating circumstance, a new jury penalty phase is required before a sentence of LWOP can be imposed. See Bostick v. State, 773 N.E. 2d 266 (Ind. 2002); State v. Barker, 768 N.E.2d 425 (Ind. 2002); Kiplinger v. State, 922 N.E. 2d 1261 (Ind. 2010); Lewis v. State, 2016 Ind. LEXIS 691 (Ind. 2016). If the jury unanimously finds an aggravating circumstance beyond a reasonable doubt, they may proceed to determine whether the aggravating circumstance(s) outweighs any mitigating circumstances.

4. If the jury hangs on the penalty determination

Ind. Code 35-50-2-9(f), provides as follows: "if a jury is unable to agree on a sentencing recommendation after reasonable deliberations, the court shall discharge the jury and proceed as if the hearing had been to the court alone." As discussed here, the Indiana Supreme Court has upheld this section, but see the discussion of Hurst v. Florida, 136 S.Ct. 616 (2016), below. In State v. Barker, *supra*, the Court held that subsection (f) was not unconstitutional on its face. Barker did not involve a hung jury, but presented a facial challenge to subsection (f) on Ring grounds. The majority opined that subsection (f) was constitutional and that the trial court could make the final sentencing decision so long as the jury had found at least one alleged aggravator beyond a reasonable doubt, using the verdict forms provided for in subsection (d). If the jury had not been able to agree on whether an aggravator existed, the Court wrote that the trial court should follow the procedure set out in Bostick, *supra*, declaring a mistrial and convening a new penalty phase jury. The Court wrote that even if the subsection was unconstitutional, it could be severed from the rest of the statute.

A few years later, in Wilkes v. State, 917 N.E.2d 675 (Ind. 2009), the Court addressed the validity of a death sentence actually imposed by the trial court after the jury failed to agree on the appropriate penalty. Wilkes was convicted of the murders of a woman and her two daughters, ages 8 and 13. At the end of the penalty phase, the jury returned the aggravating circumstance verdict form provided for in subsection (d), unanimously finding the multiple murder aggravator with respect to each victim, as well as the victim younger than 12 aggravator for the murder of the 8-year-old. The jury also returned a verdict form finding that the aggravators outweighed mitigation, although Ind. Code 35-50-2-9 does not provide for this. Despite these two findings, the jury could not agree unanimously on the appropriate penalty, and they were discharged. The trial court later conducting its sentencing, accepting the jury's findings and independently finding each of the alleged aggravators, and sentencing Wilkes to death for each murder.

The Court reiterated its' holding in Ritchie that the 6th Amendment is satisfied when the jury unanimously finds at least one aggravating circumstance beyond a reasonable doubt. Wilkes challenged the jury's two unanimous verdicts, arguing that they violate the Trial Rule 49 prohibition of "special verdicts," and thus the statutory provision requiring the jury to return a verdict on the aggravating circumstances violates the separation of powers required by Article 3 of the Indiana Constitution. The Court rejected this argument, finding that these verdict forms differ from those contemplated in Trial Rule 49, in that they do not ask the jury preliminary or subsidiary questions, but rather document each of the findings that the jury is required to make to satisfy the death penalty statute and the 6th Amendment. It is both statutorily and constitutionally necessary that the jury unanimously find at least one aggravating circumstance beyond a reasonable doubt before it can sentence a defendant to death or to LWOP, and the aggravating circumstance verdict form documents that finding.

Wilkes also challenged the trial court's reliance on the jury's verdicts, arguing that Ind. Code 35-50-2-9(f), which provides that if the jury cannot unanimously agree on the appropriate sentence, the trial court should proceed "as if the hearing had been to the court alone," requires that the trial court take no notice of the jury's verdicts as to the existence or weighing of aggravators. The Court acknowledged that the trial court must make its own findings regarding the existence of at least one aggravator and whether the aggravator(s) outweigh the mitigating circumstances. But citing its holding in Bostick, *supra*, the Court finds that the jury's finding of at least one aggravating circumstance is required by the 6th Amendment and must be taken into account before there can be any further consideration of whether death is an appropriate penalty. Where, as here, the jury makes this requisite finding but cannot agree on the penalty, subsection (f) provides for the trial court to proceed as if the hearing had been to it alone. Subsection (g) governs hearings before the trial court alone, and requires that the trial court make the same subsection (l) findings that a jury must make before it can consider a sentence of death or LWOP. Thus, the Court holds, the trial court properly considered the jury's finding, and then proceeded correctly according to the statute. Wilkes got the benefit of both the 6th Amendment requirement of a jury determination regarding the existence of the aggravating circumstances, and the trial court's independent finding of the aggravating

circumstance, and independent weighing of aggravation against mitigation. The Court also rejected the argument of *amicus curiae* Marion County Public Defender Agency that the meaning of subsection (f) is that the trial court cannot consider the sentences of death or LWOP, because those sentences require jury determinations unless waived by defendant, as well as its argument that the death penalty statute creates a right to jury sentencing in death penalty and LWOP cases, and that a new jury must be convened if the original jury cannot agree unanimously on penalty.

Finally, the Wilkes Court overruled its holdings in Roche v. State, 596 N.E.2d 896 (Ind. 1992), regarding consideration of the jury's failure to reach a unanimous sentencing decision. In Roche, a majority of the Court held that no meaning should be given to the jury's failure to reach an agreement on sentence, and it should not be considered as a mitigating circumstance. This holding was upheld in Burris v. State, 642 N.E.2d 961 (Ind. 1994), and Holmes v. State, 671 N.E.2d 841 (Ind. 1996). However, in light of the "increased emphasis" on the role of the jury in light of Ring v. Arizona and the 2002 amendment to the statute, the majority now agrees with the Roche dissenters that the failure of the jury to reach a sentencing recommendation is appropriate for the trial court to consider. The Court acknowledged that the lack of unanimity does not directly bear on recognized mitigating considerations – aspects of the defendant's character or record or circumstances of the offense that might reduce his moral culpability – but wrote that it was a "relevant consideration." Wilkes, *supra,* 917 N.E.2d at 692. On post-conviction review, the trial court considered not only the lack of unanimity, but the jury's actual vote, which was 11 – 1 against the death penalty. The PCR court vacated Wilkes' death sentence and imposed a sentence of LWOP.

As mentioned above, however, in Hurst v. Florida, 136 S.Ct.616 (2016), the U.S. Supreme Court struck down Florida's death penalty statute because it allowed the court, rather than the jury, to weigh aggravation and mitigation and determine sentence. This calls Indiana's statute and case law into question.

5. After a unanimous jury sentencing "recommendation"

The language of Ind. Code 35-50-2-9(e), providing that if the jury reaches a unanimous sentencing "recommendation," the trial court "shall sentence the defendant accordingly," has also led to confusion as to the trial court's obligations and possible actions. Prior to the 2002 statutory amendment, the jury's decision was a recommendation only, with the actual sentencing decision made by the trial court. The Indiana Supreme Court had set out very clearly what trial courts were supposed to do in making their sentencing decision and drafting their sentencing orders. In Harrison v. State, 644 N.E.2d 1243 (1995), the Court wrote that the trial court's written sentencing findings must (1) identify each mitigating and aggravating circumstance found, (2) include the specific facts and reasons which led the court to find the existence of each such circumstance, (3) articulate that the mitigating and aggravating circumstances have been evaluated and balanced, (4) make clear that the jury's recommendation has been considered, and (5) set forth the trial court's personal conclusion that the sentence imposed is appropriate for this offender and this offense. Id., at 1262 - 63. Before the 2002 amendment, the trial court was the final

sentencer, and such specific written findings were required for meaningful appellate review. Id.

In the first group of cases reviewing and interpreting the 2002 amendments to the death penalty/life without parole statute, the Indiana Supreme Court reviewed the amendments from a variety of perspectives. Reviewing a claim that the amendment was an *ex post facto* law because it took away from the defendant a second chance at a lesser sentence in the form of a judge overriding the jury's recommendation, the Court acknowledged that "[u]nder the new statute, however, there is only one sentencing determination, which is made by the jury, and the judge must apply the jury's determination." Stroud v. State, 809 N.E.2d 274, 287 (2004) (citing Ind. Code 35-50-2-9(e). The Stroud Court then went on to say that the effect of the amendment was to "shift the role of determining a defendant's final sentence form the judge to the jury." Id., 809 N.E.2d at 289. The Court vacated Stroud's death sentence because the trial court had initially instructed the jury that its verdict would only be a recommendation.

In Helsley v. State, 809 N.E.2d 292 (2004), handed down the same day as Stroud and other similar cases, a defendant against whom the state had sought a maximum punishment of life without parole began trial before the effective date of the amendment, and was sentenced after the effective date. Just before the judge sentencing hearing was to begin, the defense was informed that the court would treat the jury's determination only as a recommendation, and then was denied a continuance to prepare additional evidence to present to the trial court. The majority wrote that this denial of a continuance did not harm the defendant, because in fact the trial court was required to follow the jury's recommendation regardless of any additional information he might have presented. Justices Boehm and Rucker wrote separately to concur in result, opining that they read "sentence accordingly" to encompass "the need to set aside a recommendation if it is not supported by evidence and the power to decline to impose death if, after consideration of all aggravating and mitigating factors, including those in the sentencing report, and giving due deference to the jury's recommendation, the judge concludes that death is inappropriate." Id., 809 N.E.2d at 307.

In State v. Barker, 809 N.E.2d 312 (2004), reviewing a trial court's pre-trial dismissal of the state's death penalty request on grounds that Ind. Code 35-50-2-9, as amended, violates the 6th Amendment right to jury trial as set out in Ring, the Court opined that the amendment prohibited a trial court from imposing a sentence of death or life without parole if the jury unanimously recommended against it. The majority noted that Barker did not challenge the trial court's authority to impose a sentence less than the jury recommended, and thus the Court declined to address that issue. Id., 809 N.E.2d 218, n.5.

Finally, in Pittman v. State, 885 N.E.2d 1246, 1253-54 (2008), reviewing a challenge to the adequacy of a trial court's sentencing order, the Court wrote the following:

> If the jury makes a recommendation, the extent to which the judge is bound by that recommendation has not been fully resolved. See Kubsch v. State, 866 N.E.2d 726, 739 (Ind. 2007). We believe that the statutory

> directive to "sentence the defendant accordingly" is intended to direct the trial court to impose the sentence recommended by the jury except where the traditional allocation of functions between judge and jury authorize or require the judge to set aside the jury's findings. The trial court is obligated to follow the jury's recommendation unless (1) the recommendation is based on a statutory aggravator that is not supported by sufficient evidence; (2) there is error in the course of the trial that requires grant of a Motion to Correct Error or Motion for New Trial; or (3) the trial court exercises its role as the "thirteenth juror" to set aside the sentence and order a new sentencing phase.

As to the level of detail required in a post-amendment sentencing order, the Court wrote that if the trial court made the sentencing decision without a jury recommendation, as in the case of a guilty plea or a hung jury at the penalty phase, its sentencing order must comply with the requirements set out in Harrison v. State, *supra,* 644 N.E.2d at 1262-63 (1995). When the trial court sentences in accordance with a jury's recommendation, the Court wrote,

> . . . [a] Harrison-style sentencing order would be out of place. Juries are traditionally not required to provide reasons for their determinations. Any reasoning provided by a trial court's order would necessarily be that of the trial judge, not the jury. Because the final decision belonged to the jury, this reasoning would be unhelpful on appeal and could undermine confidence in the jury's determination. We think it is enough that by entering the sentence recommended by the jury, the trial court has made an independent determination according to the trial rules that there is sufficient evidence to support the jury's decision.

Pittman, *supra*, 885 N.E.2d at 1254. And when the trial court exercises it "traditional Trial Rule 50 and 59(J) (7) functions" to set aside a jury's recommendation, its order need only comply with those rules. Id.

III. REVIEWING THE CHARGES

A. Is Your Client Eligible?

1. Age

The first question you should ask is whether your client is eligible for LWOP? If he is under 16, he is not eligible, and you should move to dismiss the LWOP request pursuant to Ind. Code 35-50-2-3. (Note that if your client is aged 16 - 18, he would not be eligible for the death penalty, but remains eligible for life without parole.)

2. Mental Retardation/Intellectual Disability

In 1994, the Indiana General Assembly amended its sentencing and death penalty statutes to provide that a defendant was ineligible for the death penalty if the trial court determined, in a pre-trial hearing, that he is "a mentally retarded individual" as defined at Ind. Code 35-36-9-2. When LWOP was added to the death penalty statute, Ind. Code 35-50-2-9, the same exemption applied. In 2002, in Atkins v. Virginia, 122 S.Ct. 2242, the U.S. Supreme Court held that the 8th Amendment prohibits execution

of those with mental retardation, but the prohibition against sentencing defendants with mental retardation to LWOP resides wholly in the Indiana Code, in Ind. Code 35-50-2-3, 35-50-2-9, and 35-36-9-1, et seq. In 2015 Indiana's statutes were amended to use the term "intellectual disability' rather than "mental retardation, in accordance with usage in the field."

Although Ind. Code 35-36-9-2 refers only to the dismissal of death penalty requests, it is clear from reading this section together with the sentencing statutes that it applies to LWOP requests as well. See Smallwood v. State, 773 N.E.2d 259, 262, f.n.2 (Ind. 2002). If the trial court does not find that your client has intellectual disability and dismiss the LWOP request against your client, you can still present your evidence of intellectual disability as evidence in mitigation during the penalty phase. Rogers v. State, 698 N.E.2d 1172 (Ind. 1998). And even if the trial court dismisses the LWOP request against your client, your client's intellectual disability still has mitigating value in arguing against a lengthy sentence that is the "functional equivalent" of LWOP. See Young v. State, 696 N.E.2d 386 (Ind. 1998) (Sentence of 195 years, functionally equivalent to LWOP, found manifestly unreasonable in light of defendant's mental retardation, and reduced to 135 years.)

The Indiana Code defines "individual with intellectual disability" as follows:

> "individual with intellectual disability" means an individual who, before becoming twenty-two (22) years of age, manifests:
>
> (1) significantly subaverage intellectual functioning; and
>
> (2) substantial impairment of adaptive behavior; that is documented in a court ordered evaluative report.

IC 35-36-9-2. The statutory definition was originally adopted from a definition developed by the American Association on Mental Retardation (AAMR).

The professional terminology has changed over the years, moving from "mental retardation to "intellectual disability," and the 2015 Indiana General Assembly amended the Indiana statutes to reflect this change. The AAMR has become the American Association on Intellectual and Developmental Disability (AAIDD). In 2010, AAIDD issued the following definition:

> Intellectual disability is characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before the age of 18.

Both the statutory and the clinical definitions contain three distinct components:

1. Significantly impaired intellectual functioning (generally an IQ score in the range of 70 – 75);

2. Significantly impaired adaptive behavior (generally the skills an individual needs to care for himself, relate to others, and meet the demands of living in a community; and

3. Onset during the developmental period (age 18 in the clinical definitions and 22 in the Indiana statutory definition).

For more on how to screen for, investigate and develop evidence of mental retardation/intellectual disability, see "A Practitioner's Guide to MR/ID Part 1." You can also find more about this in IPDC's Death Penalty Defense Manual. Two things to remember: (1) most of us do not recognize mental retardation/intellectual disability when we see it, and those with intellectual disability work hard to hide it; and (2) experts with actual experience and expertise in diagnosing intellectual disability and providing services to those with it are the most credible and valuable.

B. Other Nuts & Bolts of Charging: What Can/Must the Prosecutor Do

Under the statute, Ind. Code 35-50-2-9, the prosecutor must request life without parole by alleging at least one statutory aggravating circumstance on a page separate from the rest of the charging information. Unlike an habitual offender enhancement, there is no time limit on filing an LWOP request, so long as the defendant is afforded an opportunity to prepare a defense. See, e.g., Daniels v. State, 453 N.E.2d 160 (1983); Games v. State, 535 N.E.2d 530 (1989). However, these cases were decided before the filing deadline for an habitual offender enhancement was added to the statute, and the issue can certainly be revisited. Under current case law, the most likely remedy for late filing of an LWOP request is a continuance. Games, *supra.* However, if an LWOP request is filed in retaliation for the exercise of a constitutional right, i.e., filing a speedy trial motion, you can move to dismiss it on grounds of vindictive prosecution.

Prosecutors often threaten the filing of an LWOP request in the course of plea negotiations, or otherwise make known their intent to file the request at some future point. There is dicta from the Indiana Supreme Court suggesting that the defense cannot preclude the prosecution from its announced intent to amend a murder charge and file an LWOP request by entering a guilty plea to the murder charge before it is amended. See Anderson v. State, 615 N.E.2d 91 (1993).

Typically, when the prosecution alleges a 35-50-2-9(b) (1) aggravator, intentional killing while committing or attempting to commit a specified felony, they will charge the underlying felony at the guilt-innocence phase as well. Double jeopardy does not prevent the state from charging and obtaining a conviction for the underlying felony at the guilt-innocence phase and then using it as the basis for an aggravating circumstance at the penalty phase. See, e.g., Overstreet v. State, 783 N.E.2d 1140, 1165 (Ind. 2003); Laux v.

State, 821 N.E.2d 816 (Ind. 2005). **However, if the jury acquits on the underlying felony, that serves as an acquittal on the (b) (1) aggravator as well.**

Conversely, the state may choose not to charge the underlying felony at the guilt-innocence phase, and it is not necessary that they do so. See Lowery v. State, 640 N.E.2d 1031 (Ind. 1994). Remember, though, that the state bears the burden of proving beyond a reasonable doubt each element of its alleged aggravating circumstance(s) at the penalty phase. In the case of a (b) (1) aggravator, this includes proving each element of the underlying felony, if it has not been charged and proved at the guilt-innocence phase, and the jury should be instructed accordingly.

Finally, regardless of the men's rea required by the particular alleged aggravator – intentional murder for the (b) (1) aggravator, and knowing or intentional murder for the others – the State need not charge your client with such a murder at the guilt-innocence phase. See Landress v. State, 600 N.E.2d 938, 940 (Ind. 1992); Harrison v. State, 659 N.E.2d 480, 482 (Ind. 1995). If, however, the state charges only felony murder, a conviction on this charge alone will not support a sentence of death or LWOP. Id. The state will have to prove the requisite men's rea and degree of involvement at the penalty phase. Id. See also Pittman v. State, 885 N.E.2d 1246, 1258-59 (Ind. 2008); Kiplinger v. State, 922 N.E.2d 1261, 1264-65 (Ind. 2010). **And if the State charges both a felony murder and a knowing or intentional murder at the guilt-innocence phase, and the jury convicts only on the felony murder, their rejection of the knowing or intentional murder serves to preclude the finding of any charged aggravator.** Please see the following discussion of aggravators.

C. Reviewing & Challenging the Aggravator(s)

You should review the alleged aggravating circumstance(s) in the state's life without parole request, just as you would look at a charged offense. What are the elements of the alleged aggravator(s)? Many statutory aggravators have been interpreted and narrowly defined in case law, as you will see below in the discussion of potential challenges to each aggravator. And in Pittman v. State, 885 N.E.2d 1246 (Ind. 2008), the Court set out the men's rea and degree of involvement required for a defendant to be eligible for death or LWOP.

If a (b) (1) aggravator is alleged – intentional killing while committing or attempting to commit a specified felony – the Court wrote that "the State must prove that the defendant was a major participant in the killing and the killing was intentional." Pittman, *supra*, 885 N.E.2d at 1257. This should be read in light of Landress v. State, 600 N.E.2d 938 (Ind. 1992), in which the Court held that the intent to kill cannot be imputed from a co-defendant for the purpose of proving this aggravator.

If any of the other seventeen aggravators is alleged, although they do not contain language setting out a particular men's rea, the Pittman Court held that the state must prove that the defendant was **either the sole killer or an active participant in the killing**, and that the killing itself was **knowing or intentional**. Pittman, *supra*, 885 N.E.2d at 1258-59. The Court reached this holding as a matter of statutory construction,

reasoning that when Ind. Code 35-50-2-9(a) refers to "murder," it means a "knowing or intentional" killing as defined in Ind. Code 35-42-1-1(1).

Remember that the state must prove the existence of every element of the alleged aggravators beyond a reasonable doubt. This is not a lay-down. Even in multiple aggravator cases, our Supreme Court has reversed death and LWOP sentences because the state has not proved at least one aggravating circumstance. See, e.g., Ingle v. State, 746 N.E.2d 927(Ind. 2001) (kidnaping element of (b) (1) aggravator and lying in wait aggravators not proved); Nicholson v. State, 768 N.E.2d 443 (Ind. 2002) (neither intent element of (b) (1) aggravator nor torture aggravator was proved); or because the jury has not made the requisite unanimous finding, see Kiplinger v. State, 922 N.E.2d 1261 (Ind. 2010).

In some circumstances, you may want to move to dismiss an alleged aggravator because it cannot, by definition (or interpretation in case law) be applied to your client and/or the acts he is alleged to have committed. In other circumstances, you may present evidence tending to disprove the aggravator, and/or argue to the sentencer that the state has not proved the existence of each element of the aggravating circumstance(s) beyond a reasonable doubt. Finally, you can challenge the sufficiency of the evidence supporting a finding that an aggravator exists, in a TR 50 or 59(J) (7) motion or on appeal. Pittman, *supra*, 885 N.E.2d at 1254.

Below is a list of the current aggravating circumstances set out at IC 35-50-2-9(b), their elements as interpreted by the Indiana Supreme Court, and a non-exhaustive list of suggested challenges to them. Because the aggravating circumstances are the same for both the death penalty and LWOP, case law interpreting these circumstances applies to both death penalty and LWOP cases. See, e.g., Ajabu, *supra*, 693 N.E.2d 921 (Ind. 1998.); Farber, *supra*, 703 N.E.2d 151 (Ind. 1998); Warlick, *supra*, 722 N.E.2d 809 (Ind. 2000).

I encourage you to look at the Indiana capital case law outline for cases involving your charged aggravator(s) as well.

1. (b)(1) The defendant committed the murder by intentionally killing the victim while committing or attempting to commit any of the following:

(A) Arson (IC 35-43-1-1).
(B) Burglary (IC 35-43-2-1).
(C) Child molesting (IC 35-42-4-3).
(D) Criminal deviate conduct (IC 35-42-4-2) (before its repeal).
(E) Kidnapping (IC 35-42-3-2).
(F) Rape (IC 35-42-4-1).
(G) Robbery (IC 35-42-5-1).
(H) Carjacking (IC 35-42-5-2).
(I) Criminal gang activity (IC 35-45-9-3).
(J) Dealing in cocaine or a narcotic drug (IC 35-48-4-1).
(K) Criminal confinement (IC 35-42-3-3).

The elements of this aggravator include intent to kill. If your client is charged with intentional murder and felony murder, and is acquitted on the intentional count, that constitutes a finding against the state as to this element, and they cannot proceed to the penalty phase on this aggravator. You should move to dismiss the death penalty request if the state itself does not do so. If there was no finding on your client's intent to kill at the guilt-innocence phase, i.e., if the state charged only felony murder, and/or if the state has charged a "knowing **or** intentional" killing, the state must prove intent to kill during the penalty phase to establish this aggravating circumstance. See Harrison v. State, 659 N.E.2d 480 (Ind. 1995); Nicholson v. State, 768 N.E.2d 443 (Ind. 2002); Pittman, *supra*, 885 N.E.2d 1246 (Ind. 2008); Kiplinger v. State, 922 N.E.2d 1261 (Ind. 2010).

If your client was not the sole actor, "the State must prove that the defendant was a major participant in the killing and the killing was intentional." Pittman, *supra*, 885 N.E.2d, at 1257. A co-defendant's intent to kill cannot be imputed to your client for the purpose of establishing this aggravator. See Landress v. State, 600 N.E. 2d 938 (Ind. 1992) (specifically held applicable to LWOP cases in Ajabu v. State, 693 N.E.2d 921 (Ind. 1998)).

The underlying felony must also be proved to establish this aggravator. If it was not charged at the guilt-innocence phase, raise any challenge to the alleged felony that you would if it had been charged at the guilt-innocence phase, and put the state to its proof on each element. (See, e.g., Ingle v. State, 746 N.E.2d 97 (Ind. 2001) (where abductor merely seeks to get victim, rather than third party, to do or not do something, kidnaping is not established.) Make sure the jury is instructed on each element of the underlying felony, and on the state's burden of proof. If the state in fact charged the underlying felony at the guilt phase, and the jury acquitted your client, you should move to dismiss this aggravator if the state itself does not do so.

For case law on what constitutes "while committing," see, e.g., F. Davis v. State, 477 N.E.2d 889, 884 (Ind. 1985) ("the phrase 'while committing' denotes a continuing chain of events under our felony-murder statute. In other words, when there is a close proximity in terms of time and distance between the underlying felony and the homicide and there is no break in the chain of events from the inception of the felony to the time of the homicide, we treat the two events as part of one continuous transaction.") See also Krempetz v. State, 872 N.E.2d 605 (Ind. 2007).

2. (b)(2) The defendant committed the murder by the unlawful detonation of an explosive with intent to injure person or damage property.

On its face, this aggravator merely requires the state to prove intent to injure persons or damage property. However, see the note above from Pittman v. State, 885 N.E.2d 1246, 1258-59 (Ind. 2008), regarding the requirement that the defendant be either the sole killer or an active participant in the killing, and requiring that the killing be at least knowing or intentional. See the *Leonard* memorandum in support of a motion to dismiss the LWOP request based in part on this aggravator.

3. (b)(3) The defendant committed the murder by lying in wait.

This aggravator includes the elements of "waiting, watching, concealment, and taking the victim by surprise." See F. Davis v. State, 477 N.E.2d 889 (Ind. 1985). The waiting, watching, and concealment must be used as a "direct means to attack or take control of the victim." Id.; Ingle v. State, 746 N.E. 927 (Ind. 2001). This aggravator cannot apply to one who arranged for another to kill and was elsewhere while accomplices lay in wait. Thacker v. State, 556 N.E.2d 1315 (Ind. 1990). Our Court has also determined that the language of this aggravator "makes clear the defendant is assumed to be the killer." Pittman v. State, 885 N.E.2d 1246, 1259 (Ind. 2008). If your client is an accomplice who is not alleged to have been present or to have been the killer, you should file a motion to dismiss. If you go to trial on this aggravator, challenge the sufficiency of each of these elements.

4. (b)(4) The defendant who committed the murder was hired to kill.

(b)(5) The defendant committed the murder by hiring another person to kill.

These aggravators require proof that the killer was motivated by "pecuniary gain." See Thacker v. State, 556 N.E.2d 1315 (Ind. 1990). You should also put the state to its proof that the killer was actually hired "to kill." As with the aggravator above, our Court has determined that the language of this statute "makes clear the defendant is assumed to be the killer." Pittman v. State, 885 N.E.2d 1246, 1259 (Ind. 2008). Therefore the defendant must either be the sole killer or an active participant in the killing, and the killing itself must be at least knowing or intentional.

5. (b)(6) The victim of the murder was a corrections employee, probation officer, parole officer, community corrections worker, home detention officer, fireman, judge, or law enforcement officer, and either:

(A) The victim was acting in the course of duty; or
(B) The murder was motivated by an act the victim performed while acting in the course of duty.

One of the most important elements of this aggravator, as interpreted by the Indiana Supreme Court, is the requirement that the defendant **knew** of the alleged official status of the victim at the time of the killing. Castor v. State, 587 N.E.2d 1281 (Ind. 1992). Put the state to its proof regarding your client's knowledge that the victim was a law enforcement officer, or other alleged official, at the time of the killing.

Also, of course, you should put the state to its proof on the elements of whether the victim was acting in the course of duty, and if subpart (B) is alleged, whether the killing was motivated by an act of the victim committed while in the course of duty.

Finally, see the note above from Pittman v. State, 885 N.E.1246, 1258-59 (2008), requiring that the defendant be either the sole killer or an active participant in the killing, and that the killing must be at least knowing or intentional.

6. (b)(7) The defendant has been convicted of another murder.

For purposes of this aggravator, "conviction" means the entry by a trial court of a judgment of conviction. Lockhart v. State, 609 N.E.2d 1093 (Ind. 1993). In dicta, in Thompson v. State, 492 N.E.2d 264 (Ind. 1986), the Indiana Supreme wrote: "it may also be argued that for conviction of another murder to serve as an aggravating circumstance warranting consideration of a death sentence, the prior conviction must have existed at the time of commission of the principle murder charged. Such interpretation would be consistent with our rule that criminal and penal statutes must be strictly construed against the State and in favor of the defendant where construction is necessary." However, in Hough v. State, 560 N.E.2d 511 (Ind. 1990), the Court rejected this argument.

See also the note above from Pittman v. State, 885 N.E.1246 (2008), requiring that the defendant be either the sole killer or an active participant in the killing, and that the killing must be at least knowing or intentional.

7. (b)(8) The defendant has committed another murder, at any time, regardless of whether the defendant has been convicted of that other murder.

In State v. McCormick, 272 Ind. 272, 397 N.E.2d 276 (Ind. 1979), the Indiana Supreme Court held that where the "other murder" alleged as an element of this circumstance is unrelated to the death-charged murder, application of this aggravator violates due process by exposing the defendant to a trial on that murder charge at the penalty phase before an undeniably prejudiced jury. Other cases have clarified that in order to be related, and to be applicable for charging under this aggravating circumstance, the other murder(s) must be prosecuted in the same action as the instant offense. See, e.g., Williams v. State, 669 N.E.2d 1372 (Ind. 1996); Wrinkles v. State, 690 N.E.2d 1156 (Ind. 1997); Monegan v. State, 721 N.E.2d 243 (Ind. 1999). If the other murder which the state alleges as part of this aggravator is not being prosecuted together with the death-charged murder, move to dismiss this aggravating circumstance.

See the Leonard memorandum in support of a motion to dismiss the LWOP request based in part on this aggravator.

Finally, see the note above from Pittman v. State, 885 N.E.1246 (2008), requiring that the defendant be either the sole killer or an active participant in the killing, and that the killing must be at least knowing or intentional.

8. (b)(9) The defendant was:

(A) under the custody of the department of correction;
(B) under the custody of a county sheriff;
(C) on probation after receiving a sentence for the commission of a felony; or
(D) on parole; at the time the murder was committed.

There is no case law interpreting whether the custody or probation or parole status

elements of this aggravating circumstance must be legally valid. If a question exists as to the legality of your client's custody or status, raise it in a motion to dismiss this aggravating circumstance. This aggravating circumstance is also open to a proportionality challenge, raised in a motion to dismiss, and based on the grounds for the custody or probation or parole status. For example, if subpart (C) is alleged, and your client was on probation for an offense which would have been a misdemeanor but for an enhancement (i.e., a DUI offense enhanced to a class D felony pursuant to IC 9-30-5-3), file a motion to dismiss raising a proportionality challenge under Ind. Const. Art. I, Sec. 16. See Clark v. State, 561 N.E.2d 759 (Ind. 1990).

If you go to a penalty phase with this aggravator, you can limit the evidence which the state puts on to prove your client's status. In Old Chief v. U.S., 117 S.Ct.644 (1997), the U.S. Supreme Court held that, where the defendant's legal status as having a prior felony conviction was all that mattered under a statute, the defendant could stipulate to that status and prevent the state from admitting even a record of conviction naming the offense.

See also the above note from Pittman v. State, 885 N.E.1246 (2008), requiring that the defendant be either the sole killer or an active participant in the killing, and that the killing must be at least knowing or intentional.

In his concurrence/dissent in post-conviction appeal in Saylor v. State, 765 N.E.2d 535 (Ind. 1997), Justice Sullivan wrote the following: "I do not think that making a defendant eligible for death on the sole basis of a knowing killing while on probation 'genuinely narrows the class of persons eligible for the death penalty and ... reasonably justifies the imposition of a more severe sentence on the defendant compared to others found guilty of murder,' [Zant v.]Stephens, 462 U.S. at 877, as required by the U.S. Constitution." The Indiana Supreme Court has more recently confronted this issue and concluded that not only is this aggravator constitutional, but that a trial court did not abuse its discretion in giving it great weight. Gibson v. State, 51 N.E.3d 204 (Ind. 2016).

9. (b)(10) The defendant dismembered the victim.

In a motion to dismiss, this aggravating circumstance can be challenged as facially vague, and can also be challenged in its application to your client's actions. Raise these challenges not only under the 8th Amendment to the U.S. Constitution, but also under Art. I, Sec. 16 of the Indiana Constitution. See, e.g., Maynard v. Cartright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372, for discussion of analysis of vagueness claims, focusing on "whether the challenged aggravating circumstance adequately informs the jury regarding what it must find in order to impose the death penalty, or whether it leaves the jury with unchanneled discretion to make an arbitrary and capricious decision." See also Bivins v. State, 642 N.E.2d 928 (Ind. 1994), regarding higher standard of proportionality in Indiana Constitution.

See also the note above from Pittman v. State, 885 N.E.1246 (2008), requiring that the defendant be either the sole killer or an active participant in the killing, and

that the killing must be at least knowing or intentional.

10. (b)(11) The defendant

(A) burned, mutilated, or tortured the victim; or
(B) decapitated or attempted to decapitate the victim;
while the victim was alive.

In Nicholson v. State, 768 N.E.2d 443 (2002), the Indiana Supreme Court defined the torture aggravator as requiring the following: "an appreciable period of pain or punishment intentionally inflicted and designed either to coerce the victim or for the torturer's sadistic indulgence. Put another way, torture is the gratuitous infliction of substantial pain or suffering in excess of that associated with the commission of the charged crime." Although the victim experienced extreme suffering as she choked to death due to tissue taped inside her mouth lodging in her throat, this was not intentional and did not constitute torture.

In Leone v. State, 797 N.E.2d 743 (2003), the Court reversed a trial court's finding of torture, finding that the defendant's actions did not exceed the scope of murder or child molestation, and were accompanied by statements of remorse. The defendant had bound the victim's hands and mouth with duct tape, made her walk from her trailer to his camper, cut her clothes off with a box knife, attempted vaginal intercourse and performed oral sex, and placed a dog choker collar around her neck and strangled her with it. "Although Leone's actions were despicable, they did not exceed the scope of murder or molestation. He did not attempt to coerce [the victim] through torturous acts, nor did he appear to indulge in sadistic acts. In fact, he continually expressed remorse for his actions, and contacted the police to pick him up. We conclude that the evidence was inadequate to support a finding of torture."

See also the note above from Pittman v. State, 885 N.E.1246 (2008), requiring that the defendant be either the sole killer or an active participant in the killing, and that the killing must be at least knowing or intentional.

See the Leonard memorandum in support of a motion to dismiss the LWOP request based in part on this aggravator.

11. (b)(12) The victim of the murder was less than twelve (12) years of age.

When this aggravator is charged, the state need only show beyond a reasonable doubt that victim was less than 12 years old, not that the defendant was aware of the victim's age. Stevens v. State, 691 N.E.2d 412 (1997).

However, see the above note from Pittman v. State, 885 N.E.1246 (2008), requiring that the defendant be either the sole killer or an active participant in the killing, and that the killing must be at least knowing or intentional.

12. (b)(13) The victim was a victim of any of the following offenses for which the

defendant was convicted:

(A) Battery as a Class D felony or as a Class C felony under IC 35-42-2-1.
(B) Kidnapping (IC 35-42-3-2).
(C) Criminal confinement (IC 35-42-3-3).
(D) A sex crime under IC 35-42-4.

Although this aggravator was adopted together with expansions to (b) (9), largely in response to Alan Matheney's murder of his wife while on a one-day leave from his prison sentence for a prior battery against her, and was more than likely intended to apply to domestic situations in which the victim was "previously" the victim of one of the specified offenses, there is no legislative history to document this. The Indiana Supreme Court has held that it can be found where the specified offense and the murder occur in a single episode, and has also found that it is not duplicative of the (b)(1) aggravator based on the same specified offense. In so finding, the Court reasoned that one aggravator focuses on the defendant's character, and the other focuses on the victim's suffering. See Overstreet v. State, 783 N.E.2d 1140 (Ind. 2003).

See also the above note from Pittman v. State, 885 N.E.1246 (2008), requiring that the defendant be either the sole killer or an active participant in the killing, and that the killing must be at least knowing or intentional.

13. (b)(14) The victim of the murder was listed by the state or known by the defendant to be a witness against the defendant and the defendant committed the murder with the intent to prevent the person from testifying.

Clearly, the state must prove either that the victim was listed as a witness against the defendant, or if not listed, that the defendant knew, at the time of the killing, that the victim would be a witness against the defendant.

Further, the state must show that the defendant was a major participant in the killing, and that the killing must have been at least knowing or intentional. See Pittmann v. State, 885 N.E.1246 (2008).

Finally, the aggravator requires proof of specific intent to prevent the victim from testifying. If the defendant was not the sole actor, argue that this specific intent cannot be imputed to him/her from a co-defendant. See Landress v. State, 600 N.E.2d 938 (Ind. 1992).

14. (b)(15) The defendant committed the murder by intentionally discharging a firearm (as defined in IC 35-47-1-5):

(A) into an inhabited dwelling; or
(B) from a vehicle.

Because this aggravator states that the defendant committed the murder, the state must show that the defendant was the sole actor or a major participant in the killing, and that the killing was at least knowing or intentional. See Pittmann v. State, 885

N.E.1246 (2008). The state must also prove that the defendant had the specific intent set out in the aggravator, and if the defendant was not the sole actor, argue that it cannot be imputed to him/her from a co-defendant. See Landress v. State, 600 N.E.2d 938 (Ind. 1992).

15. (b)(16) The victim of the murder was pregnant and the murder resulted in the intentional killing of a fetus that has attained viability (as defined in IC 16-18-2-365).

The state must prove that the fetus had attained viability, and that the defendant specifically intended to kill the fetus. You should also argue that the state must prove that the defendant knew that the fetus was viable, and had specific intent to kill a viable fetus. Argue that this specific intent cannot be imputed from a co-defendant. See Landress v. State, 600 N.E.2d 938 (1992). You should also argue that the state must show that the defendant was either the sole actor or an active participant in the killing. See Pittman v. State, 885 N.E.2d 1246 (2008).

16. (b)(17) The defendant knowingly or intentionally:

(A) Committed the murder:
- (i.) In a building primarily used for an educational purpose;
- (ii.) On school property; and
- (iii.) When students are present; or

(B) Committed the murder:
- (i.) In a building or structure owned or rented by a state educational institution or any other public or private postsecondary educational institution and primarily used for an educational purpose; and
- (ii.) At a time when classes are in session.

This aggravator is written in a way that leaves room to challenge whether your client committed the murder in a place and at a time described in the statute. Was the building "primarily used for an educational purpose?" Further, you can challenge the vagueness in the language on due process grounds, for not giving your client sufficient notice of the aggravated conduct. See Kolender v. Lawson, 461 U.S. 352 (1983).

Also, the state must show that your client was the sole actor or a major participant in the killing. See Pittman v. State, 885 N.E.2d 1246 (2008).

17. (b)(18) The murder is committed:

(A) in a building that is primarily used for religious worship; and
(B) at a time when persons are present for religious worship or education.

This aggravator is written in a way that leaves room to challenge whether your client committed the murder in a place and at a time described in the statute. Was the building "primarily used for a religious purpose?" Further, you can challenge the vagueness in the language on due process grounds, for not giving your client

sufficient notice of the aggravated conduct. See Kolender v. Lawson, 461 U.S. 352 (1983).

Also, the state must show that your client was the sole actor or a major participant in the killing, and that the killing itself was at least knowing or intentional. *See* Pittman v. State, 885 N.E.2d 1246 (2008).

IV. FIGHTING FOR A LESSER SENTENCE -- DEVELOPING YOUR CASE

A. Penalty Phase Investigation

Although mitigating circumstances are considered at any sentencing hearing, in an LWOP case, the defense has an opportunity to present mitigating circumstances to the jury at a penalty trial phase immediately following the guilt-innocence trial. The jury will be asked to determine whether the state has proved its alleged aggravating circumstance(s) beyond a reasonable doubt, and whether this aggravator(s) outweighs mitigating circumstances presented. The jury cannot consider recommending LWOP, and the judge cannot impose it, unless the answer to both questions is yes. Because of this, it is crucial to complete a full mitigation investigation, looking both for evidence which would rebut the State's alleged aggravating circumstance(s), and for mitigating circumstances which would warrant a sentence less than LWOP.

What your penalty phase investigation is attempting to discover is not simply a few mitigating circumstances which can be cited to the jury. These circumstances standing alone, in the abstract, can be easily dismissed. You must anticipate your jurors' response that, after all, everybody got a few whacks growing up, we all know people who were abused physically or sexually, or who were poor and often hungry, and none of them grew up to commit murder. What you are attempting to do is discover the story of your client's life – to find the rich, human details that help jurors get a full sense of who your client is and what his life has been like. It is important to be broad-minded in your search, and not to limit your focus to any particular category of mitigation, such as positive character evidence, evidence intended to evoke sympathy, substance abuse or mental health evidence, or what have you. Like anyone, your client's life will have many aspects, both positive and negative. You must explain this complex story to the jury, and you can only explain what you yourself understand. There is no legal requirement that your mitigation evidence have a "nexus" to the crime charged, Tenard v. Dretke, 542 U.S. 274 (2004), but it may be more powerful if you are able to draw a connection.

The Indiana Supreme Court has said, "Life without parole is reserved for use in only the most heinous of crimes that so shock our conscience as a community." Conley v. State, 972 N.E.2d 864, 880 (Ind. 2012). The penalty phase is your opportunity to show the jury that you client and his offense do not fit within that class. It is your opportunity to present to jury and judge reasons why your client should not spend the rest of his life in prison. Mitigating circumstances include virtually "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a" lesser sentence. Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978).

In the capital context, the Indiana Supreme Court has recognized the crucial nature of presenting mitigation and anti-aggravation evidence at the penalty phase. In Smith v. State, 547 N.E.2d 817, 822 (1989), the Court wrote, "In the absence of any mitigating circumstances, which ... may include virtually anything favorable to the accused, or of evidence to rebut the existence of the charged aggravating factors, a death sentence is a foregone conclusion." Moreover, the Court held that "[a] decision by defense counsel not to present evidence can be deemed reasonable only if it is 'predicated on a proper investigation....'" Id., at 821. The Court found counsel's failure to investigate and prepare for the penalty phase to be ineffective assistance of counsel. It is certainly arguable that the same would be true in an LWOP case.

B. Seeking funds for a mitigation specialist

You must begin to prepare for both phases simultaneously, as soon as possible after you are appointed to the case. The typical mitigation investigation involves both gathering records, which may be old and difficult to locate, and interviewing people regarding sensitive and unpleasant experiences. Both are difficult and time-consuming. Because you will be busy with other aspects of trial preparation, and because you likely do not have the skills needed to conduct the sensitive interviews which will be necessary, it is important to seek funds to hire a mitigation specialist and to do so as soon as possible. A more typical factual investigator can be used to investigate and develop mitigation arising from the circumstances of the offense itself, although some mitigation specialists cover both types of mitigation.

A sample motion for funds to hire a mitigation specialist is available. If your motion for funds to hire a mitigation specialist is denied, you should not simply wait and hope your judge will reconsider at a later date. Begin getting signed release forms from your client and gathering records, such as medical, school, employment, and military. If you develop leads on types of investigation and interviewing that you cannot do, use this to support a renewed motion for funds to hire a mitigation specialist. But do not simply forgo a mitigation investigation in hopes that the trial court will change its mind, or that the denial of a mitigation specialist will be reversed on appeal.

In Cox v. State, 696 N.E.2d 853 (Ind. 1998), the trial court denied counsel's request for funds to hire a mitigation specialist, filed six months before trial. Counsel renewed this motion after the jury returned a guilty verdict, and the trial court granted it. The penalty phase was set to begin eight days later. Two days before the trial reconvened, defense counsel moved for a continuance to provide fifteen additional days for the mitigation specialist to work, and also requested funds to hire a neurologist to test the defendant and prepare to testify at the penalty phase. The mitigation specialist testified in support of both motions, telling the court that she had obtained medical records that indicated the testing and further investigation was necessary. The trial court denied both motions. On appeal, the Indiana Supreme Court held that under the circumstances, the trial court did not abuse its discretion. The Court wrote:

> The trial court pointed out that Cox had over a year to obtain this data and that counsel was as qualified as the mitigation specialist

> to assess the data for purposes of requesting expert testing. The court noted that after it had denied Cox's original request for a mitigation specialist Cox faced a strategic decision: whether to conduct mitigation investigation without a court appointed investigator or to hope that a later request for assistance would be granted. Cox apparently chose not to investigate when there was still ample time to do so, but chose to wait until days before sentencing. Further, the court had granted Cox's request to have other investigative assistance available to him throughout the trial. Under these circumstances, the trial court did not abuse its discretion in denying the motion for a continuance and the request for funding to hire a neurological expert, or the request for more time for the mitigation specialist to complete work that, at least in significant part, the trial court concluded could have been done by counsel in the several months preceding trial.

Id., 696 N.E.2d at 862 - 63.

C. Working with your client and his family

You will also need to explain to your client and his family why you are beginning to prepare for the penalty phase so soon. Their likely understanding will be that you are simply giving up and writing off any challenge to the murder charge. You must explain to them that LWOP is a very serious sentence, and you are preparing to defend your client from it in every possible way. Explain that there will be no time to prepare for sentencing after trial; unlike other cases, where sentencing is set 30 days after trial, the penalty phase will begin immediately if your client is convicted. You can explain what you are trying to do and why you need to begin now. Occasionally a defendant charged capitally will refuse to allow mitigation to be presented, arguing that he would rather be killed than spend the rest of his life in prison. It is less likely that a client facing a maximum of LWOP will refuse to allow development of mitigation that can reduce his sentence, but some may believe that it is not worth the potential shame for them and their families. Regardless, it is necessary to develop mitigation, whether your client ultimately allows you to present it or not. It is also important to make sure that both your client and his family understand the importance of mitigation, and that they understand why you are digging into their family secrets. Your mitigation specialist can assist you with this. If your client simply seems depressed and unwilling to help himself, you may want to bring in a mental health professional to help you work with him.

D. Seeking adequate time

It is important to work with your mitigation specialist, meeting regularly and making decisions together about the direction of the investigation, and keeping track of and responding to concerns your client may have about the process. This will enable you to make informed decisions about what needs to be done and what isn't as important, so that you can the best use of the time available. Because preparing for both phases of trial will take time, a sample motion for continuance and memorandum of law are available.

In practice around the state, attorneys have generally been given more time to prepare for LWOP cases than other serious felony and murder cases, but less time and less money for a mitigation specialist than in death penalty cases. Because most mitigation specialists are used to working with attorneys in capital cases, it is important to come to an understanding as soon as possible regarding how much time, and how many hours' payment, will likely be available. If you both know up front what to expect, you can make the best use of your time.

For more information on the penalty phase investigation process, see Jan Dowling's excellent outline, *Social History Investigation*.

E. Young Clients

If your client is 16 to 18 or even 20, his youth provides significant potential for mitigation. In Roper v. Simmons, 543 U.S. 551, 125 S.Ct. 1183 (2005), the U.S. Supreme Court made juveniles ineligible for the death penalty, relying in part on neuroscience and brain development research suggesting that areas of the brain that control impulsivity, judgment and risk-taking are not fully developed until the early 20s. In Graham v. Florida, 130 S.Ct. 2011 (2010), the Court made juveniles convicted of non-homicide offenses ineligible for LWOP, noting that juveniles have both "lessened culpability" and "greater capacity for change." Id., 130 S.Ct. at 2026. The Court wrote further that a sentence of Life Without Parole "'means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of the [juvenile] convict, he will remain in prison for the rest of his days.'" Graham, 130 S.Ct. at 2027 (quoting Naovarath v. State, 105 Nev. 525, 779 P.2d 944, 944 (Nev. 1989)).

In Miller v. Alabama, 132 S.Ct. 2455 (2012), the Court struck down sentencing schemes that provided for mandatory LWOP for juveniles convicted of murder.

The Miller majority wrote:

> Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features--among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him--and from which he cannot usually extricate himself--no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth--for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys. See, e.g., Graham, 560 U.S., at ___, 130 S. Ct. 2011, 176 L. Ed. 2d 825 ("[T]he features that distinguish juveniles from

> adults also put them at a significant disadvantage in criminal proceedings"); J. D. B. v. North Carolina, 564 U.S. ___, ___, 131 S. Ct. 2394, 180 L. Ed. 2d 310 (2011) (discussing children's responses to interrogation). And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it.

Miller v. Alabama, 132 S.Ct. at 2468. The majority went on to briefly recount the mitigating factors in each of the two cases before it.

The Miller majority held that the Eighth Amendment forbids these mandatory sentencing schemes that made "youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence." They wrote that this holding was sufficient to decide the cases before them, but went on to write that:

> given all we have said in Roper, Graham, and this decision about children's diminished culpability and heightened capacity for change, **we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon. That is especially so because of the great difficulty we noted in Roper and Graham of distinguishing at this early age between "the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption."** Roper, 543 U.S., at 573, 125 S. Ct. 1183, 161 L. Ed. 2d 1; Graham, 560 U.S., at ___, 130 S. Ct. 2011, 176 L. Ed. 2d 825.

Id. at 2469.

Indiana does not have mandatory LWOP sentencing, but it is up to you to ensure that the many mitigating circumstances of your client's life – his "youth (and all that accompanies it,)" are presented to the jury in a compelling manner. See Justice Rucker's dissenting opinion in Conley v. State, 972 N.E.2d 864, 886-88 for a brief example.

Further, in Montgomery v. Louisiana, 136 S.Ct. 718 (2016), the U.S. Supreme Court clarified that Miller rendered LWOP unconstitutional for "juvenile offenders whose crimes reflect the transient immaturity of youth." A sample motion is available arguing that mere consideration of the mitigating effects of youth is not enough, but that the sentencer must make a finding that the juvenile is "irreparably corrupt" before he or she is eligible for LWOP.

Finally, be aware the Indiana Supreme Court has extended the logic of Roper, Graham and Miller to sentences that are the "functional equivalent" of LWOP, such as a sentence of 150 years. See Brown v. State, 10 N.E.3d 1 (Ind. 2014).

F. Mental Health Issues

Mental disabilities pervade most LWOP client's lives, causing suffering we often fail to comprehend in our focused efforts to resolve their murder charges. Many suffer from a constellation of recognized mental disorders, brain damage from a variety of causes, and experiences that have left them with what can only be described as tormented psyches. These disabilities and disorders can prevent us from working effectively with our clients, and can lead them to behave in ways that are not only maddening but self-destructive. They can cause jurors to turn away in fear or indifference and to decide that our clients should be locked away for good. But these same disorders can also serve as powerful mitigation if we can develop and present them to jurors so that they can empathically understand the profound and tragic ways that these disorders have impacted our client's lives. Except in the rare instance where these problems rise to the level of establishing a defense of insanity, they should not be presented as an "excuse" for the charged crime, but as information that jurors need in order to understand this individual defendant and to fairly consider what punishment is appropriate for this defendant and this offense.

Although there are two statutory mitigating circumstances in Indiana that relate to your client's mental state, *(*see Ind.Code 35-50-2-9(c)(2) and (6)) your mental health mitigation need not rise to the level of satisfying one of these statutory mitigators. See Evans v. State, 598 N.E.2d 516 (Ind. 1992). It is part of the "diverse frailties of humankind" that the U.S. Supreme Court recognized give rise to "the possibility of compassionate and mitigating factors," and that should be considered in determining the appropriate punishment for your client. Woodson v. North Carolina, 428 U.S. 280, 304 (1976). It's important to remember that mental health evidence may also be helpful in challenging the men's rea element of an aggravator or the underlying offense, and to pursue those challenges where they are available. But again, your mental health evidence need not rise to that level in order to be relevant. It may simply help paint for your jurors a truly compelling picture of your client as a sympathetic human being, rather than a cold-blooded monster.

You should also consider the relevance of your client's mental state to other issues in your case. Is your client presently competent to stand trial? What was his mental state at the time of the crime, or when he was interrogated by police or when he confessed to other parties? Your client's mental state may provide a basis for challenging the voluntariness and reliability of his confession or the voluntariness of his consent to search. It may also provide the basis of your guilt-innocence phase defense, either through an insanity defense, or challenging the men's rea element of the charged offense(s). One benefit of incorporating mental health evidence into your guilt-innocence phase in some way is that research conducted as part of the Capital Jury Project indicates that approximately half of all capital jurors make their decision about the appropriate penalty during the guilt-innocence phase, before you have had a chance to put on any of your mitigation case. Evidence put on in support of defense positions at the guilt-innocence phase has a better chance of reaching and influencing jurors before their minds are made up as to the appropriate penalty. For more on putting on mental health and other mitigation evidence during your guilt-innocence phase, see Jodie English's hand-

out, Front-Loading Mitigation," and for more on putting the two phases together, see Section IX, Preparing for Battle, below.

While mental health evidence will come into play in nearly every capital case, be forewarned that you should not simply hire a psychologist or psychiatrist to "evaluate" your client before you have gathered significant information from your mitigation investigation. You need information from your mitigation investigation to help you determine the particular area(s) of expertise you want your mental health professional(s) to have, and to support your request for them, and you will also need significant background information to provide to your mental health professional in order to direct her focus and to enable her to perform a competent, informed evaluation. Id., See also, e.g., Prowell v. State, 741 N.E. 2d 704 (Ind. 2001). But Prowell also demonstrates the problems inherent in waiting too late in your investigation and trial preparation to hire the mental health professional(s) that you need, so that they do not have adequate time to perform a competent evaluation. In addition to giving your mental health expert adequate time and information about your client, you will need to be clear about your reason for hiring her and what role she will play on your team. Only a mental health professional that you intend to put on the stand as a witness need be listed as such and disclosed to the prosecution; an expert you merely consult with need not be disclosed. See Stevens v. McBride, 489 F.3d 883, 896-97 (7th Cir. 2007)(citing T.R. 26(4)(b)(4)).

Mental health experts can play many different roles. They can serve as a consultant for your team, helping you identify potential issues and identify other experts who can assist you. Some mental health experts are skillful and insightful interviewers who can elicit sensitive information from your client and his family and friends and can serve as part of your mitigation investigation team. They can also help you work with your client, helping you navigate your client's various mental disorders in order to communicate effectively with your client, and helping your client cope with the stresses of an LWOP prosecution. Even the healthiest client can become depressed and/or anxious while facing the possibility of a life in prison with no possibility of parole, and a mental health expert may be able to help you work with your client to avoid self-destructive behavior and make reasonable decisions about the progress of plea negotiations and your mitigation case.

And of course, mental health experts can testify at trial, helping tie together and explain the impact of childhood experiences and environment, brain damage, or any of a broad spectrum of mental disabilities. You may need experts from a variety of different specialties, depending on your client's individual problems. And do not disregard mental health professionals who have examined or treated your client in the past. If they can be properly prepared, their testimony can have special credibility with the jury because their observations were not made in preparation for this case.

V. EXPERTS

You should wait to hire additional experts until your mitigation investigation begins to give you more information about your client and indicate what areas you need experts to help explain to you and to your jury. **This does not mean, however, that you can simply wait until shortly**

before trial to talk to your mitigation specialist to see what they've found and what experts they recommend hiring. You must vigorously pursue the investigation and bring experts in as early as possible to give you the time you need to develop your guilt and penalty phase theories and to prepare your expert(s) for direct and cross-examination. It is important for your expert(s) to know everything that might come up on cross-examination -- surprises in the courtroom can only spell disaster. For a discussion on working with experts to make the most effective use of them at trial, see *Developing the Expert/Attorney Relationship to Help the Client: An 8-Step Process*, by Edward Monahan and James J. Clark.

If you have been able to hire a mitigation specialist, he or she can help you identify what experts you need, help you select them, and help you support your request for funds to hire them. To avoid tipping your hand to the prosecution, seek *ex parte* rulings on motion(s) for funds to hire experts. For a discussion on obtaining funds, including sample funds motions and a sample motion and order for ex parte determination on funds motions, see *Getting Funds for Experts & Investigators.*

VI. PLEA NEGOTIATIONS

Plea negotiation is one area in which LWOP cases seem less like death penalty cases and more like other murder or multiple-count felony cases. In an LWOP case, your own experience with non-capital plea negotiations can serve you well in assessing the strength of the state's case, the realistic sentencing range available, the interests of the parties and other "stakeholders," and so on. At this writing, the Department of Corrections has indicated that it will treat an incoming prisoner sentenced to LWOP no differently than it would an inmate with any other "long-term" sentence. There are no distinctions in terms of placement or program eligibility. However, in practice, prisoners serving LWOP are generally at the bottom of the waiting list for programs, and this may be very important to your client.

VII. FIGHTING FOR A FAIR TRIAL -- PRE-TRIAL MOTIONS PRACTICE

As in a death penalty case, you will need to conduct an aggressive pre-trial motions practice. There are many motions you may need to file in order to obtain a fair trial for your client, and to preserve error for review on appeal if your motion is unsuccessful. I have already mentioned motions for co-counsel, continuance, and funds to hire a mitigation specialist and experts, as well as a motion to dismiss the LWOP request alleging that Ind. Code 35-50-2-9 is unconstitutional in light of Ring v. Arizona, 536 U.S. 584 (2002) and Hurst v. Florida, 136 S.Ct. 616 (2016). A short sample motion on this ground is available.

A motion for change of judge, motion for change of venue or a motion to select the jury from another county pursuant to Ind. Code 35-36-6-11 may also be appropriate to ensure your client a fair trial by an impartial judge and jury.

If your client's trial is joined with that of a co-defendant(s), a severance motion may be appropriate. Keep in mind that because of the jury penalty phase, antagonistic theories of mitigation, such as claiming lesser culpability than the co-defendant, present additional grounds for severance of defendants. (A sample severance motion is available.)

There are also special evidentiary concerns in an LWOP trial penalty phase, as will be discussed in the next section of this outline. In Bivins v. State, 642 N.E.2d 928 (1994), the Indiana Supreme Court held that only the charged statutory aggravator(s) can be considered in deciding whether to sentence a defendant to death, and that to allow exposure to and consideration of other potential aggravation creates an impermissible risk of a disproportionate sentence in violation of Art. I, Sec. 16 of the Indiana Constitution. If you litigate to keep out prior bad acts at the guilt-innocence phase, you should argue that the risk that the jury might consider these prior bad acts in making its sentencing recommendation should be weighed in as prejudice against any probative value they might have.

Bivins clearly gives you grounds to keep out non-statutory aggravation at the penalty phase. The Indiana Supreme Court has held that Bivins applies to LWOP cases. See, e.g., Ajabu v. State, 693 N.E.2d 921 (Ind. 1998.); Farber v. State, 703 N.E.2d 151 (Ind. 1998); Warlick v. State, 722 N.E.2d 809 (Ind. 2000).

Taking a broader perspective, it can be helpful to file a pre-trial motion to exclude any mention of non-statutory aggravation from voir dire through final argument to jury and/or judge, a sample of which is available. Prosecutors often cannot help pointing out what they consider your client's bad character traits, which are not proper factors for the jury to consider in making their sentencing decision. Cooper v. State, 854 N.E.2d 831 (Ind. 2006); Castillo v. State, 974 N.E.2d 458 (Ind. 2012).

A fuller discussion of pre-trial motions practice in capital cases (and by extension, LWOP cases) is available.

VIII. A SHORT PRIMER ON PENALTY PHASE EVIDENTIARY ISSUES

A. Introduction

Indiana's statute governing procedure at death penalty and life without parole trials, Ind.Code 35-50-2-9(d), provides that, if the defendant has been convicted at a jury trial, "the jury shall reconvene for the sentencing hearing." The jury may consider "all the evidence introduced at the trial stage of the proceedings, together with new evidence presented at the sentencing hearing." **Although the statute does not specify whether the rules of evidence apply at the jury penalty phase, the Indiana Supreme Court has held that they do, with some exceptions that will be discussed below.** See Dumas v. State, 803 N.E.2d 1113, 1121 (Ind. 2004).

The statute does not specify what new evidence may be presented by the state at the jury penalty hearing, but the Indiana Supreme Court has made clear that, as a matter of Indiana constitutional law, only evidence relevant to the alleged aggravating circumstance(s), or to rebut any tendered mitigating evidence, may be presented by the state or be considered by the jury or judge at this phase. Bivins v. State, 642 N.E.2d 928, 955 (1992). Indiana Pattern Jury Instructions -- Criminal, Preliminary Instruction No. 15.02 instructs jurors that they may consider all evidence introduced at both the first and second phases of trial, while Preliminary Instruction No. 15.03 instructs them that they may not consider any circumstances weighing in favor of death or life without parole other than those specifically charged by the State in the Charging Information. If you

litigate to keep out prior bad acts evidence at the guilt-innocence phase, be sure to include the potential harm at the penalty phase in your weighing of prejudicial impact.

Ind.Code 35-50-2-9(d) goes on to provide that "[t]he defendant may present any additional evidence relevant to: (1) the aggravating circumstance alleged; or (2) any of the mitigating circumstances listed in subsection (c)." Ind. Code 35-50-2-9(c) lists seven specific mitigating factors, and ends with subsection (c)(8), "any other circumstances appropriate for consideration. As discussed below, developing case law makes clear that the scope of mitigation evidence is quite broad.

B. The State's Case in Chief

In Bivins v. State, 642 N.E.2d 928 (1994), the Indiana Supreme Court announced that only aggravating circumstances set out in Ind.Code 35-50-2-9(b) can be considered in making a capital sentencing determination. Consequently, the state is severely restricted as to the evidence which it can put in during its case-in-chief at the penalty phase.

Prior to Bivins, the Indiana Supreme Court had held that, as long as one statutory aggravating circumstance from Ind.Code 35-50-2-9(b) was proved, the sentencer could consider other aggravating circumstances from the general felony sentencing statute at Ind.Code 35-38-1-7.1. Minnick v. State, 544 N.E.2d 471 (Ind. 1989). In Bellmore v. State, 602 N.E.2d 111 (Ind. 1992), the Court refused to extend this consideration to aggravating circumstances not specifically enunciated in Ind.Code 35-38-1-7.1.

In Bivins, however, the Court ruled that, "[w]hen the death sentence is sought, courts must henceforth limit the aggravating circumstances eligible for consideration to those specified in the death penalty statute, Indiana Code Section 35-50-2-9(b)." Id., at 955. The Court based its ruling on Art. I, Sec. 16 of the Indiana Constitution, which provides protections similar to but more extensive than the Eighth Amendment to the United States Constitution. Article I, Sec. 16 provides, in part:

> Cruel and unusual punishments shall not be inflicted. All penalties shall be proportioned to the nature of the offense.

The Bivins majority wrote:

> The consideration and weighing of aggravating circumstances to select which persons shall receive the death sentence essentially constitutes a determination of whether the death penalty is proportionate to the nature of the offense, including the character of the offender. Because of the ultimate gravity of the punishment, Indiana's death sentence procedure must be cautiously restrained to assure maximum compliance with the proportionality concerns of Article I, Section 16 of our state constitution. When a trial court in death sentencing evaluation considers the more general statutory criteria that authorize enhancing non-capital sentences [footnote omitted], we perceive a serious risk that the resulting

> aggravating circumstances, when weighed against mitigating circumstances, will present a significant possibility of disproportionate sentencing not sufficiently related to the specific aggravating circumstances designated by our legislature as appropriate for the death sentence.

Id., at 955.

The Bivins majority contrasted the restrictions imposed upon consideration of aggravating circumstances with the "open-ended" statutory (and constitutional) authorization for consideration of virtually any mitigating circumstances. Applying its newly announced rule, the Bivins majority held that victim impact evidence had been erroneously, though harmlessly, admitted against Mr. Bivins:

> With our determination today that Indiana's statutory death penalty aggravators are the only aggravating circumstances available, the admissibility of the victim impact evidence in the present case hinges upon its relevance to the death penalty statute's aggravating and mitigating circumstances.

The Court thus made clear that any evidence presented by the state in its penalty-phase case-in-chief would have to be relevant to a charged statutory aggravating circumstance. Beware, however, that the state may offer additional evidence to rebut mitigation evidence tendered by the defense. See the discussion of the state's rebuttal evidence, below. And keep in mind that even evidence which is relevant to the charged aggravator(s) may be subject to challenge under Ind. Ev. R. 403, because its prejudicial impact outweighs any probative value. When you are thinking about the state's possible evidence and its potential prejudicial impact, be sure to consider the impact in both phases – guilt-innocence and penalty. For instance, facts which support an alleged aggravating circumstance, such as prior convictions or probationary or parole status, are clearly admissible in the penalty phase, but you should be able to keep them out of the jury's hearing before that point, due to their likely prejudicial impact at the guilt phase. See Thompson v. State, 690 N.E.2d 224, 228 - 29 (Ind. 1997). Conversely, if you are litigating to keep out prior bad acts evidence in the guilt-innocence phase, consider whether they might later create the kind of risk of disproportionate sentencing the Bivins Court was concerned about in the penalty phase. If so, you should include that in your argument regarding the potential prejudicial impact.

A sample Motion to Exclude Any Reference to Non-statutory Aggravators During Voir Dire, Argument, or Trial is available, and can be helpful in shutting down the state's portrayal of your client, through evidence and argument, as a bad character who needs to be locked up for good.

C. Defense Evidence at the Penalty Phase

While the state is limited in its penalty phase case-in-chief to presenting evidence that is relevant to charged aggravating circumstances set out by statute at Ind.Code 35-50-2-

9(b), the range of mitigating circumstances that the defense can present is wide open. Ind.Code 35-50-2-9(c) sets out seven specific mitigating circumstances, and then adds a catch-all category, "any other circumstances appropriate for consideration." Ind.Code 35-50-2-9(c)(8). The Indiana Supreme Court has described this catch-all category as including "virtually anything favorable to the accused." Smith v. State, 547 N.E.2d 817, 822 (Ind. 1989).

In Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978), Chief Justice Burger, writing for a plurality of the Court, wrote that, under the Eighth and Fourteenth Amendments, the sentencer cannot be precluded from considering, as a mitigating factor, "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." In Eddings v. Oklahoma, 455 U.S. 104,110 (1982), the majority adopted this aspect of Lockett. Later cases have further developed this reasoning. Smith, *supra*, quotes the following passage from Penry v. Lynaugh, 492 U.S. 302, 327-28 (1989):

> >The Constitution limits a State's ability to narrow a sentencer's discretion to consider relevant evidence that might cause it to *decline to impose* the death sentence.' [Citation omitted.] (Emphasis in original.) Indeed, it is precisely because the punishment should be directly related to the personal culpability of the defendant that the jury must be allowed to consider and give effect to mitigating evidence relevant to a defendant's character or record or the circumstances of the offense. Rather than creating the risk of an unguided emotional response, full consideration of evidence that mitigates against the death penalty is essential if the jury is to give a 'reasoned moral response to the defendant's background, character, and crime.' [Citations omitted.] In order to ensure 'reliability in the determination that death is the appropriate punishment in a specific case,' [citation omitted,] the jury must be able to consider and give effect to any mitigating evidence relevant to a defendant's background, character, or the circumstances of the crime." Penry v. Lynaugh, 492 U.S. 302, 327-28 (1989).

Smith v. State, 547 N.E.2d 817, 822 (1989).

1. Application of the Rules of Evidence

As noted above, the rules of evidence apply to jury penalty phases in capital and LWOP cases in Indiana. Dumas v. State, 803 N.E.2d 1113, 1121 (Ind. 2004). However, the Dumas Court acknowledged that the rules are subject to limitations imposed by the *state and federal constitution,* citing as an example Green v. Georgia, 442 U.S. 95, 99 S.Ct. 2150, 60 L.Ed.2d 738 (1979). Id. Green and his co-defendant were charged with kidnapping, raping, and killing a single victim, and the two were tried separately. At his penalty phase, Green tried to introduce testimony from a witness who had testified for the state at the co-Defendant's trial that the co-Defendant had confided to him that he had killed the victim after sending Green away

on an errand. The trial court kept this testimony out on hearsay grounds. The U.S. Supreme Court, in a *per curiam* opinion, wrote:

> Regardless of whether the proffered testimony comes within Georgia's hearsay rule, under the facts of this case its exclusion constituted a violation of the Due Process Clause of the Fourteenth Amendment. The excluded testimony was highly relevant to a critical issue in the punishment phase of the trial, see Lockett v. Ohio, 438 U.S. 586, 604-605 (1978) (plurality opinion); Id., at 613-616 (opinion of BLACKMUN, J.), and substantial reasons existed to assume its reliability.

Id., 442 U.S. at 98, 99 S.Ct. at 2151.

The lesson of Green, read together with Lockett and its progeny, seems to be that, while the rules of evidence apply at a jury penalty phase in a capital or LWOP trial, a Defendant has a due process right to present **reliable** evidence that is **highly relevant** to a **critical issue** at sentencing. This could be to rebut the state's aggravating circumstance(s), or to support a mitigating circumstance that you are offering. Mitigation can be virtually any aspect of the Defendant's character or history or any circumstance of the offense. Your mitigation specialist and experts can help you in framing an argument as to the relevance and importance of a particular item of evidence. Capital Jury Study research can also be helpful in demonstrating the importance of different types of aggravating and mitigating circumstances to capital jurors.

2. Scope of Mitigation Evidence

(C) Evidence Regarding Defendant's Character and Record

The scope of mitigation evidence regarding a Defendant and his character or history is completely wide open -- virtually any fact about the Defendant's good character, such as work history, military record, family involvement, parenting, artistic abilities, lack of criminal record, teaching cell-mates to read while awaiting trial, etc.; Defendant's background and formative experiences, such as childhood abuse or neglect or other difficulties and their impact on Defendant's cognitive and emotional development; mental health issues; drug and alcohol abuse issues, etc. Evidence of this type will generally be considered relevant mitigation. (But if your evidence is excluded by hearsay or another rule of evidence, you will have to establish its reliability and admissibility as discussed above.)

(D) Evidence Regarding Circumstances of the Offense

Mitigation evidence regarding the circumstances of the crime is more problematic. Obviously, evidence about the crime itself would generally be admissible during the guilt-innocence phase of a capital or life without parole trial. However, issues of admissibility arise when the defendant proffers additional reliable

evidence about the circumstances of the crime that was not admissible during the guilt-innocence phase due to hearsay or other prohibitions, and the defendant must prove that it is highly relevant as mitigation evidence. The other likely scenario in which admissibility of this evidence arises is after an appellate ruling in which the conviction is affirmed and the penalty is reversed and the case is remanded for a new penalty phase only.

In Oregon v. Guzek, 546 U.S. 517 (2006), the U.S. Supreme Court examined the admissibility of circumstances of the offense evidence at a new penalty phase after appellate remand. The Court divided evidence regarding the offense into two categories: (1) evidence concerning **how** the Defendant committed the crime, and (2) evidence concerning **whether** the Defendant committed the crime, often referred to as residual or lingering doubt evidence. This is an important distinction to remember, because the Court treated the two types of evidence very differently.

(1) Evidence Regarding *How* Defendant Committed the Crime/Involvement Relative to Other Participants

The Guzek Court wrote that evidence regarding **how** Defendant committed the crime, which includes Defendants mental state at the time and Defendants degree of involvement in the killing relative to other participants, was traditional sentence-related evidence, and that these sorts of circumstances of the offense have been recognized as mitigating circumstances that the sentencer must be allowed to consider. In Lockett v. Ohio, *supra*, for example, the Court reversed Sandra Lockett's death sentence because Ohio's sentencing scheme prevented the judge from taking into account the fact that she played a minor role in the crime and remained outside the store where the murder took place. In Green v. Georgia, *supra*, the Court held that hearsay rules could not be used to exclude evidence that the co-Defendant committed the murder after sending the Defendant away. *(*See also, e.g., Rupe v. Woods, 93 F.3d 1434 (9th Cir. 1996), the 9th Circuit Federal Court of Appeals reversed a death sentence because reliable results of a polygraph taken by a testifying co-Defendant were excluded from Rupe's penalty phase. The polygraph results indicated that the co-Defendant was untruthful when he claimed minimal, after-the-fact only involvement in the bank robbery in which two clerks were killed.) In Indiana, evidence of this type may be relevant not only in mitigation, but to challenge the *men's rea* element of an alleged aggravating circumstance.

(2) Evidence Regarding *Whether* Defendant Committed the Crime -- Residual Doubt

The Guzek Court did not look as favorably on evidence regarding **whether** the Defendant committed the murder, which it characterized as pure residual doubt evidence. The Court stopped short of finding that the 8th Amendment does not require that Defendant be allowed to present residual doubt evidence, holding instead that even if there is such a right, it would not require admission of the evidence that Guzek sought to introduce.

Guzek involved a new penalty phase after two appellate remands. During the

guilt phase of Guzek's original trial, he had put on alibi testimony from his mother and grandfather. At his new penalty phase, a state statute provided for Guzek to present transcripts of evidence from the original trial, as well as "additional relevant evidence." Ore. Rev. Stat. Sec. 138.012(2)(b). Guzek sought to put his mother on the stand to provide additional alibi evidence. The trial court excluded this testimony, finding that it was not relevant to any mitigating circumstance. The Oregon Supreme Court reversed this ruling, holding that the 8th Amendment created a right to offer residual doubt evidence. State v. Guzek, 86 P.3d 1106 (Ore. 2004). The U.S. Supreme Court reversed the Oregon Supreme Court, holding that even if the 8th Amendment creates a right to present residual doubt evidence at a capital penalty phase, it would not prohibit a state from limiting that evidence to transcripts and exhibits from the previous trial. Because Guzek had a right to present any transcripts and exhibits he chose from the original trial, and because he had not shown that the additional evidence he wanted to put on had been unavailable at the original trial, the Court found that the 8th Amendment did not create a right to present the additional live testimony that he sought to introduce. It stopped short of finding that the 8th Amendment does not create a right to present residual doubt evidence of any sort.

Even had the Guzek Court explicitly held that the 8th Amendment does not require admission of any additional residual doubt evidence at a capital penalty phase, the states are free to allow its admission. Courts in a few states have held that pure residual doubt evidence – evidence going to **whether** the defendant committed the crime, is admissible penalty phase mitigation evidence. In State v. Stewart, 288 S.Ct. 232, 341 S.E.2d 789 (1986), the South Carolina Supreme Court wrote:

> The jury in the first trial was able to hear all the evidence which was admitted in the guilt phase, including the testimony of appellant's alibi witnesses. During the penalty phases, the jury was able to consider the alibi testimony along with the other evidence in determining the appropriate sentence. **It is unjust to exclude appellant's alibi evidence as a matter of law from the consideration of the resentencing jury merely because the appellant did not receive a proper sentencing hearing in the first trial.**

Id., 341 S.E.2d at 190-91 (emphasis added). See also State v. Teague, 897 S.W.2d 248 (Tenn. 1995); State v. Hartmann, 42 S.W.3d 44, 57-58 (Tenn. 2001); People v. Gay, 42 Cal. 4th 1195, 178 P.3d 422 (2008).

Research from the Capital Jury Project, a comprehensive study of capital juries funded by the National Science Foundation, suggests that jurors' residual doubt concerning the Defendant's guilt is highly important to their decision about whether the death penalty is appropriate, and may in fact be the most powerful factor weighing against imposing a death sentence. See Garvey, *"Aggravation*

and Mitigation in Capital Cases: What do Jurors Think?" 98 Colum. L. Rev. 1538, 1563 (1998). See also Geiner & Amsterdam, *Why Jurors Vote for Life or Death: Operative Factors in Ten Florida Death Penalty Cases,* 15 Am. J. Crim. L. 1, 28 (1988); Bowers, Sandys & Steiner, *Foreclosed Impartiality in Capital Sentencing: Jurors Predispositions, Guilt-trial Experience, and Premature Decision Making*, 83 Cornell L. Rev. 1476, 1536 (1998).

The Indiana Supreme Court has not decided this issue. The statute makes no provision for what evidence may be presented by **either party**, or how, in the event of an appellate remand for a new penalty phase. Although the plain language of the statute appears to require that the jury that convicted the defendant "shall reconvene for the sentencing hearing," the Indiana Supreme Court has ruled, not surprisingly, that this is not necessary in the event of a remand for a new penalty phase. Burris v. State, 642 N.E.2d 961 (Ind. 1994). Burris had argued that it was necessary to find and reconvene his original jury because capital (or LWOP) juries at the penalty phase "continue to be concerned with [the defendant's] guilt or innocence and the manner in which the crime was committed and those facts play a major role in their determination…." Id., 642 N.E.2d at 964. The Burris Court did not discuss what evidence should be provided to the jury at a "penalty-phase-only" remand, nor has the Court done so in any other case.

(3) Other Residual Doubt Issues

(a) Residual Doubt Argument

The Indiana Supreme Court has implicitly recognized residual doubt as a proper subject for jury argument at a capital or LWOP penalty phase. In Harrison v. State, 659 N.E.2d 480 (Ind. 1995), the Court cited, without comment, the weakness of the state's evidence against Harrison as one of four mitigating circumstances which Harrison argued to his jury. In Miller, *supra*, 702 N.E. 2d at 1069-70, the Court held that failure to present argument regarding residual doubt was not ineffective assistance of counsel, but did not suggest that defense counsel could not have argued residual doubt. In contrast, the Court wrote that there could be circumstances in which counsel would be ineffective for failing to argue "the degree of a defendant's participation or the defendant's *men's rea*," traditional "how defendant committed the crime" circumstances recognized in Guzek. 702 N.E.2d at 1069. Of course, the right to argue residual doubt to the jury would hardly be adequate at a post-remand penalty phase before a jury that has not heard the Defendant's evidence of innocence.

(b) Residual Doubt Jury Instruction

In Overstreet v. State, 783 N.E.2d 1130 (Ind. 2003), the Indiana Supreme Court held that the trial court's rejection of the Defendant's tendered residual doubt instruction did not violate the 8th Amendment or the state constitution,

where "nothing the trial court did [impaired] Defendant's ability to **argue** residual doubt to the jury, and nothing in Defendant's penalty phase argument … directed it to consider residual doubt." Id., 783 N.E.2d at 1163 (emphasis added). The Court noted that Overstreet did not offer separate state constitutional analysis. In reaching its conclusion, the Court quoted from Franklin v. Lynaugh, 487 U.S. 164 (1988), in which the U.S. Supreme Court found that a Defendant's 8th Amendment rights had not been violated under similar circumstances. (As it would do more recently in Guzek, the Court in Franklin expressed doubts about the existence of an 8th Amendment right to have a capital jury consider residual doubts, but stopped short of holding that the 8th Amendment would never entitle a Defendant to a jury instruction on residual doubt, instead finding merely that even if such a right existed, it was not violated under the circumstances before it.)

Still, in light of the number of Defendants who have been wrongfully convicted and sentenced to death – at this writing 150 nationally in the post-Furman era, two of them in Indiana -- a number of reviewing bodies have recommended that juries be instructed on residual doubt. A blue-ribbon commission appointed by then - Massachusetts governor Mitt Romney, and co-Chaired by Indiana University – Bloomington Law School Professor and death penalty supporter Joseph Hoffman, recommended instructing juries that they could impose a death sentence only if they had "no doubts" about the Defendant's guilt. *Report of the Governor's Council on Capital Punishment*, reprinted in 80 Ind. L. J. 1, 20-21 (2005). Similarly, the Constitution Project's Death Penalty Committee recommends instructing jurors to consider any lingering doubts they have about the Defendant's guilt. *Mandatory Justice: Eighteen Reforms for the Death Penalty*, 40-41 (2001). The bi-partisan committee is made up of former judges, prosecutors, defense attorneys, victim advocates and other public officials, and included both death penalty supporters and opponents. The Committee reaffirmed this recommendation in July 2005, in *Mandatory Justice Revisited*.

3. Other Limitations on Mitigation Evidence

The Indiana Supreme Court has placed **some** limits on the nature of relevant mitigation evidence. In Wisehart v. State, 484 N.E.2d 949 (Ind. 1985), the Court upheld a trial courts exclusion of testimony from two penalty phase witnesses regarding the morality and appropriateness of the death penalty in general. The Court wrote, "The issue to be decided by a trial jury is whether the sentence is appropriate for the particular offense and the particular offender." Id., 484 N.E.2d at 957. Mitigation evidence must be directly related to the particular Defendant and the particular offense, and may not merely concern larger issues concerning the death penalty and its application. See also Spranger v. State, 498 N.E.2d 931 (Ind. 1986); Underwood v. State, 535 N.E.2d 507 (Ind. 1989).

D. State's Rebuttal Evidence

The Indiana Supreme Court has held that the state can offer evidence to rebut evidence tendered by the defense in mitigation, see, e.g., Woods v. State, 547 N.E.2d 772 (Ind. 1989). Likewise, Bivins did not close the door to the state tendering penalty phase evidence in rebuttal that it could not offer in its case-in-chief.

The scope of rebuttal is within the discretion of the trial court, but is generally limited to evidence which tends to explain, contradict, or disprove evidence offered by the adverse party. See, e.g., Stewart v. State, 531 N.E.2d 1146 (Ind. 1988); Steele v. State, 475 N.E.2d 1149 (Ind. 1985).

It would be a mistake simply to severely restrict the presentation of mitigation evidence in order to keep out damaging rebuttal evidence. Guideline 10.11(G) of the 2003 *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* provides:

> In determining what presentation to make concerning penalty, counsel should consider whether any portion of the defense case will open the door to the prosecution's presentation of otherwise inadmissible aggravating evidence. Counsel should pursue all appropriate means (e.g., motions *in limine*) to ensure that the defense case concerning penalty is constricted as little as possible by this consideration, and should make a full record in order to support any subsequent challenges.

The most important way to limit damage from rebuttal evidence of prior crimes or bad acts is to conduct a thorough investigation so that counsel is aware of potential rebuttal, and also to seek discovery of intended rebuttal with prior bad acts or other evidence that the state anticipates using. The defense is entitled to discovery of rebuttal witnesses who are known before trial. Reid v. State, 267 Ind. 555, 372 N.E.2d 1149 (Ind. 1978); Mauricio v. Duckworth, 840 F.2d 454 (7th Cir. 1988). Under Ind. Ev. R. 405, the defense can discover specific bad acts with which the state intends to cross-examine defense character witnesses.

Rather than forego putting on a compelling mitigation case, the defense team can seek to develop evidence that will mitigate these prior bad acts, as well, and that will take away some of the sting of evidence put on in rebuttal. Pre-trial motions in limine can provide information about what will and will not come in at trial, so that informed decisions can be made. Bear in mind, however, that a ruling on a pre-trial motion in limine does not preserve the issue for appeal. Azania v. State, 730 N.E.2d 646 (Ind. 2000)

Below is a discussion of case law regarding the scope of the state's penalty phase rebuttal evidence.

1. Defendant's Character – Prior Bad Acts

Some prosecutors have argued that any mitigation evidence is essentially "character" evidence which opens the door to anything the state cares to present to show Defendant's bad character. The Indiana Supreme Court has rejected so broad a definition of penalty phase evidence and its consequent rebuttal.

In Thompson v. State, 462 N.E.2d 264 (Ind. 1986), the Defendant presented penalty phase lay witnesses who testified to his good reputation as a worker. The state cross-examined these witnesses regarding the Defendant's firing three years earlier for stealing from his then-employer. The Court held that because the Defendant had put his character trait as a worker in issue, the state had a right to cross-examine his witnesses regarding their knowledge of specific acts of bad character with regard to that trait.

In Brown v. State, 577 N.E.2d 221 (Ind. 1991), the Defendant offered the testimony of psychologists that she was not aggressive, that she was dominated by her co-Defendant, and that she had low intelligence. The state cross-examined one of these psychologists regarding the usefulness of a videotape of the Defendant's prior testimony to demonstrate her level of intelligence. The state then played this videotape, which contained evidence of other specific bad acts committed by the Defendant. The Court held that because the Defendant offered evidence regarding her own character, she opened the door to the subject of her character for the trait in issue, so that the state could introduce evidence of specific bad acts. The scope of rebuttal is within the discretion of the trial court, the Supreme Court wrote, and evidence of past crimes may properly be used to refute testimony regarding the Defendant's mental condition and behavioral deficiencies.

In Rouster v. State, 600 N.E.2d 1342, 1348-49 (Ind. 1992), the Court held that evidence of an unrelated, uncharged robbery was properly admitted to rebut the claimed statutory "lack of significant criminal history" mitigator set out at Ind. Code 35-50-2-9(c)(1). In Lambert v. State, 743 N.E.2d 719, 713 (Ind. 2001), this mitigating circumstance was held to open the door to evidence of Lambert's juvenile history. In Wilkes v. State, 917 N.E.2d 675, 692 (Ind. 2009), the Defendant was convicted of murdering a woman and her two daughters, and the Court held that his claim of lack of significant criminal history opened the door to evidence of uncharged sexual misconduct with one of the daughter/victims.

The testimony of a psychologist that there was no indication of profound psychological disturbance or of sadistic tendencies in the Defendant's psychological profile opened the door to the testimony of two women that the Defendant had brutally raped them, in Miller v. State, 623 N.E.2d 403 (Ind. 1993).

In Fleenor v. State, 622 N.E.2d 140, 149 (Ind. 1993), the Defendant interposed an insanity plea at the guilt-innocence phase, and a court-appointed psychiatrist testified at length on the Defendant's behalf. On cross-examination during this guilt-innocence phase testimony, the state elicited the psychiatrist's opinion that "given the

opportunity, [the defendant] will continue to involve himself in similar behavior in the future." In the penalty phase, this testimony was referred to during cross-examination of defense mitigation witnesses who testified that there was a low probability that the Defendant would be dangerous in the future. The Supreme Court held this to be proper rebuttal.

In Allen v. State, 749 N.E.2d 1158 (Ind. 2000), the Court reviewed the reasonableness of trial counsel's decision not to put on certain types of evidence in order to keep out evidence of a prior conviction for voluntary manslaughter, the facts if which were similar to the charged murder. Consequently, the Court was not defining the actual parameters of penalty-phase rebuttal, but the reasonableness of trial counsel's concerns about opening the door. The Court reached the following conclusions:

> (a) Evidence of Allen's difficult childhood and family history, because it "contained numerous positive references to Allen's role as a protector of the younger children in his neighborhood and family, his role as 'man of the house,' his tendency to take blame for others, and his practice of stealing to feed his family ... [was] a form of character evidence that could open the door to Allen's criminal history." Note that it is the positive character evidence, not simply the evidence of Allen's difficult childhood, that the Court reasons might open the door.
>
> (b) Evidence about abuses Allen suffered at the Boy's School, absent any reference to his incarceration as an adult, could have created an inference that he did not have an adult criminal history, and the state could have rebutted this inference with his prior convictions. Again, the Court is speculating as to how the door might be opened.
>
> (c) Evidence from a psychologist regarding brain dysfunctions that could limit Allen's ability to control his behavior could not have opened the door to the prior convictions. The Court wrote that "[t]here is no nexus between Allen's mental health status and his criminal history. To say that this evidence would open the door to evidence of prior convictions would improperly allow a jury to learn the details of a defendant's criminal history every time a defendant introduced a mental health diagnosis as mitigation evidence." Here, the Court is clear that mental health evidence could not have opened the door to Allen's prior conviction.
>
> (d) Testimony from a forensic psychologist regarding the statistical likelihood that Allen would commit dangerous acts while incarcerated, would have opened the door to Allen's prior convictions, because in reaching his conclusions, the psychologist would have relied in part on Allen's conduct while incarcerated on those convictions. Here, the Court is clear that this evidence would have opened the door.

2. Victim Impact Evidence

As discussed above, in Bivins v. State, 642 N.E.928, 956-57 (1994), the Indiana Supreme Court held that victim impact evidence may be admitted at a capital penalty phase in Indiana only if it is relevant to a charged statutory aggravating circumstance or to rebut tendered mitigation.

In Wrinkles v. State, 690 N.E.2d 1156, 1169-1171 (Ind. 1997), the Court held that where the defense had called one of the victim's mother at the penalty phase to testify that she opposed the death penalty for religious reasons, the trial court properly allowed the state to cross-examine the witness regarding the impact of witnessing his parents' murder on her grandson, whom she was raising as a result of the murders.

In Allen v. State, 686 N.E.2d 760, 786-87 (Ind. 1997), the Court held that where the defendant claimed that the victim had sworn at him, drawn a knife, and used a racial epithet after allowing him into her home, the victim's daughter was properly allowed to testify that the victim was very religious, taught Sunday School, never swore, and was not violent.

Even if victim impact evidence is ruled admissible in your case, keep in mind that the federal constitution places **some** restrictions on this evidence. The majority in Payne v. Tennessee, *supra*, wrote that, "[i]n the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the due process clause of the Fourteenth Amendment provides a mechanism for relief." Payne, 111 S.Ct. at 2608. Also, Payne did not alter the earlier holdings of Booth v. Maryland, 482 U.S. 496 (1987), and South Carolina v. Gathers, 490 U.S. 805 (1989), that admission of "a victim's family member's characterizations and opinions about the crime, the defendant and the appropriate sentence violates the Eighth Amendment." Payne, *supra*, at 2611, n.2.

IX. PREPARING FOR BATTLE

A. Consistent Guilt and Penalty Phase Theories (Avoiding "He didn't do it, but if he did, here's why")

Consistent guilt-innocence and penalty phase theories not only preserve your credibility, they allow you to begin building your case for life throughout the trial, beginning with voir dire. Studies of capital jurors have indicated that most of them begin thinking about the appropriate penalty before the guilt phase is over. Planning both guilt and penalty phases as a coherent strategy enables you to take advantage of this fact, and to weave your mitigation themes throughout trial. The same frailties that provide mitigation may also help you challenge the voluntariness of your client's confession, or to challenge the state's "story" of how the crime occurred. Even if the intent to kill is not an element of the charged aggravating circumstance, challenging the intentionality of the killing can carry great weight with jurors. If your client was a lesser participant in the killing, or was easily led by a co-defendant, establishing these facts early can also help to steer jurors away from a death sentence before they even reach the penalty phase.

For more on how to "front-load" your mitigation during the guilt-innocence phase of trial, particularly mental health evidence, see Jodie English's outline on front-loading mental health mitigation, and the special note on mental health experts from the outline, "Getting Funds for Experts and Investigators." For a fuller discussion regarding selecting and pursuing consistent theories at guilt and penalty phases, see Integrating Theories for Capital Trials: Developing the Theory of Life, by Mary Ann Tally, and Matching the Theory of the Case to the Theory of Mitigation, by Andrea Lyon.

B. Your Battle Plan for the Penalty Phase

Essentially, your penalty phase case is a plea for "possibility," rather than a sentence of life imprisonment without possibility of parole. It is a case that says you don't have to throw away the key, and that allows for the possibility of redemption and rehabilitation and even re-entry by your client into the outside world at some point. Although you will want to weave your mitigation evidence and themes into your case throughout trial, the penalty phase is your opportunity to coherently present your mitigation case. Identifying the stories that need to be told and selecting and preparing the lay and expert witnesses and documentary and demonstrative evidence is an ongoing job that should involve your entire defense team.

The basic components of a penalty phase case include circumstances regarding the Defendant or the offense that lessen the Defendant's moral culpability, the Defendant's remorse, and the Defendant's potential for rehabilitation. A list of common mitigating circumstances is available. Note that this list was compiled with the death penalty in mind.

As you plan your penalty phase, you will need to carefully select evidence to support the components of your case, and witnesses to present this evidence. It is often good to present a mix of lay and expert witnesses. All experts can be too dry and unmoving, while all lay witnesses doesn't explain to the jury why things that happened to your client are important and how they led to his involvement in the charged killing. Consider the strengths and weaknesses of various lay witnesses, including rebuttal potential they may open up (i.e., if you bring the client's mother in to testify about family circumstances during his childhood, she may say, "He was always such a good boy," and open the door to prior bad acts you intended to keep out). Remember that hearsay from lay people you don't use can come in as the basis for your experts' opinions, if it is the sort of thing experts in their field routinely rely on. Ind. R. Ev. 703. To see an actual penalty phase plan put together by experienced capital litigators, see the Penalty Phase Plan for William Melvin White.

X. PICKING AND PROTECTING YOUR JURY

Because your jury will be determining not only guilt or innocence, but penalty as well, you will need to focus on both phases during voir dire. It is important to select jurors who can consider your mitigation, and who can consider a sentence less than LWOP for your client. It is also important to let them know that there may be a penalty phase. Otherwise, there is a good chance that when you come back for the penalty phase, they will resent the fact that they had to

come back after they thought their job was done. Much worse, they may resent the fact that you are now trying to make "excuses" for the murder for which they just convicted your client.

Of course, you need to explain to the jury why you're talking about the penalty before trial. Explain to them that in case you reach that point, you have to know whether they can fairly consider appropriate punishment for you client -- you will not be allowed to start over or find new jurors in the event they convict your client. They should not presume from this that your client is guilty.

You need to inquire into their attitudes toward LWOP. Although there is no statutory disqualification for jurors who could not consider imposing LWOP, as there is for the death penalty, (Ind. Code 35-37-1-5(a)(3)), jurors must be able to follow the law and render an impartial determination. If a potential juror could not consider imposing LWOP, they are subject to a cause challenge by the **state.** If he or she would automatically vote for LWOP and could not consider a term of years, or if he or she could not consider mitigating circumstances, **you** can challenge them for cause. Your client is entitled to an impartial jury for both the guilt-innocence and penalty phases of trial.

In the capital context, determining whether a potential juror's opposition to the death penalty would support a challenge for cause, the Courts have written that the "standard is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Wainwright v. Witt, 469 U.S. 412, 424. The juror must be able to consider imposing a death sentence. In Dye v. State, 717 N.E.2d 5 (Ind. 1999), the Indiana Supreme Court wrote: "The basic logic of Witt is that it is proper to excuse jurors who are unable to carry out their duties in the case before them. A juror's willingness to recommend a death sentence under other circumstances is irrelevant to that inquiry."

In Morgan v. Illinois, 504 U.S. 719, 728 – 30 (1992), the Supreme Court confirmed that "life qualification" of capital jurors is also required. The Court held that jurors who would **always** or **automatically** vote for the death penalty (ADPs) should be struck for cause, just as those who could **never** vote for death should be. The Morgan Court wrote:

> A juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do. Indeed, because such a juror has already formed an opinion on the merits, the presence or absence of either aggravating or mitigating circumstances is entirely irrelevant to such a juror. Therefore, based on the requirement of impartiality embodied in the Due Process Clause of the Fourteenth Amendment, a capital defendant may challenge for cause any prospective juror who maintains such views.

Id., 504 U.S. at 729.

It is a reasonable extension of these cases, as well as the Indiana Supreme Court's holding in Dye, that jurors in an LWOP case must be willing and able to consider voting against LWOP "in the case before them," Dye, *supra*, at 17, and be able to consider "in good faith the evidence of aggravating **and mitigating circumstances** as the instructions require him to do." Morgan,

supra, 594 U.S. at 729(emphasis added). See also Averhart, 470 N.E.2d 666, 164 (1998):

> The Indiana death penalty statute, 35-50-2-9, requires a jury assembled on the issue of capital punishment to consider any mitigating circumstances. Such consideration is required under Eddings v. Oklahoma, 1982) 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1; Enmund v. Florida, (1982) 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed. 2d 1140; Gregg v. Georgia, (1976) 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859; *reh. denied;* and Jurek v. Texas, (1976) 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929, *reh. denied.* All of these cases **require individualized consideration of all factors involving mitigation** and the defendant's character.

In order to ensure the jurors' ability to consider all available penalties in the case actually before them, you must be allowed to inquire hypothetically about their ability to consider all penalties in light of the aggravating circumstances actually alleged, just as the Dye Court recognized, and also in light of the types of mitigating circumstances you intend to present. The state may argue that you are attempting to "condition" jurors to be receptive to your mitigation, or seeking a pledge to give weight to your mitigation, but you are merely seeking to determine the juror's ability to follow the law in your case, just as the Dye Court says the state must be able to do. Hypothetical questions have long been authorized in order to assess bias and elicit preconceived ideas about a planned defense theory. See, e.g., Steelman v. State, 602 N.E.2d 152, 158 (Ind. Ct. App. 1992).

Please note that you are asking if jurors can "consider" a sentence less than LWOP. In Gibson v. State, 43 N.E.3d 231, 238 (2015), the Indiana Supreme Court held that the trial court had not abused its discretion in limiting defense counsel from presenting jurors specific facts from the case before them and then asking what their verdict would be. (citing Davis v. State, 598 N.E.2d 1041, 1047 (Ind. 1992).

Because you will be inquiring about attitudes toward punishment and ability to consider mitigation, you will want to ask for additional time for voir dire. You can save the court's time and give yourself advance information about juror attitudes by using a written questionnaire to elicit initial information about these issues. A sample questionnaire is available. Also, although you are not entitled to them, as you would be in a death penalty trial (Ind. Code 35-37-1-3), you may also want to seek more peremptories.

If your client is a member of a racial minority, particularly if your client is Black, the impact of race on juror decision making is another important consideration. A discussion of the pervasiveness and impact of implicit, or unconscious, racial bias, and the benefits of selecting a racially diverse jury is available in IPDC's Death Penalty Defense manual, *Defending a Capital Case*, available both on IPDC's web site and in print.

In a death penalty case you would be entitled to a sequestered jury, but there is no such entitlement in an LWOP case. See Johnson v. State, 749 N.E.2d 1103 (Ind. 2001). There are actually two schools of thought as to whether sequestration is desirable, because of the difficult interpersonal dynamics that can develop over a lengthy trial, making deliberations more difficult. In addition, jurors can begin to feel like hostages, identifying with and being grateful to their

caretakers (the state) and resenting those who had them locked up (and usually they think that's the defense).

In the Oklahoma City Bombing case, defense counsel asked instead for a special order admonishing the jurors not to discuss the case, view television news (or news teasers to whatever extent possible), read newspapers, or get on-line due to the risk of e-mail or other contact with information about the case. A similar order was granted in a capital murder trial in Warrick County, IN, and is available. You can have jurors provided with redacted newspapers and videotapes of television programs. Such an order may protect your jury from influence, without the expense and other problems associated with sequestration, and because of that your trial court may be more willing to grant it.

If your jury is sequestered, it is important to consider what they will be doing and what they will be exposed to. You may be able to prevent their being taken past newspaper boxes and big-screen TVs as they are taken to and from their hotel. You will also want to scrutinize the activities and entertainment they will be provided. You don't want them watching vigilante movies or attending a barbeque at the home of the officer who arrested your client. A sample *Motion for Notice of Conditions of Jury Sequestration* is available

Finally, Jury Rule 20(A)(8) provides for jurors to be instructed that "jurors, including alternates, are permitted to discuss the evidence among themselves in the jury room during recesses when all are present, as long as they reserve judgment about the outcome of the case until deliberations commence." A handful of states have adopted such a policy, but Indiana is the only state that allows pre-deliberation discussion in criminal cases. Allowing the jurors to discuss the evidence before the defense case has even begun encourages them to begin forming opinions, despite the rule's caveat, and it potentially colors and biases the way the judges hear the defense case, threatening the defendant's due process rights. A sample motion to have the rule declared unconstitutional and inapplicable in a capital case (adaptable to LWOP) is available.

XI. INSTRUCTING THE JURY

Penalty phase instructions are the final opportunity to explain for the jury how to evaluate and use your mitigation evidence in reaching their final decision. It is important that the jury understand what mitigating circumstances are and how they figure in the decision-making process. A general instruction defining and explaining the nature of mitigating circumstances is essential.

There are differing opinions regarding whether individual instructions setting out specific tendered mitigating circumstances are beneficial. Some lawyers worry that such instructions may tend to limit jurors' consideration of potential mitigation, while others believe that jurors will not take mitigating circumstances seriously unless they are specifically instructed on them by the Court, particularly since the Court will instruct them on specific **aggravating** circumstance(s). Many courts will not give instructions on specific mitigating circumstances, even if defense counsel requests them. One thing is certain; you **CAN ARGUE** your tendered mitigating circumstances to the jury in your penalty phase closing argument, explaining to the jury why they matter. These arguments, together with instructions defining and explaining

mitigation generally, will help guide the jury in making its decision. It is also important that the jury understand that they are **never** required to vote for either the death penalty or life without parole, even if they find that the aggravating circumstance(s) has been proved beyond a reasonable doubt and outweighs mitigating circumstances.

The Indiana Pattern Jury Instructions for death penalty and life without parole trials, compiled by the Indiana Judges Association Criminal Instructions Committee, are available. A couple of good pattern instructions are worth noting. Pattern Final No. 8 generally defines and explains the wide open nature of mitigation, and points out that mitigating circumstances need not be found unanimously. Final No. 4 explains to jurors that even if they unanimously find the existence of an aggravating circumstance, and further find that it outweighs mitigation, they may recommend **any** of the two available sentences: a term of years or life without parole. On the other hand, Final No. 9 says that the state does not bear the burden of proving that aggravation outweighs mitigation beyond a reasonable doubt. Although this is the holding of the Indiana Supreme Court, in State v. Barker, 809 N.E.2d 312 (Ind. 2004), you will want to object in light of Hurst v. Florida, 136 S.Ct. 616 (2016), in which the Court struck down Florida's death penalty statute because it allowed the judge, rather than the jury, to make this finding. You will also want to object to the references to the jury's decision as a recommendation, rather than a decision, because it diminishes their sense of responsibility for the life or death decision. See Caldwell v. Mississippi, 472 U.S. 320 (1985); Stroud v. State, 809 N.E.2d 274 (Ind. 2004). Pattern Final No. 11 explains that if the defendant is sentenced to a term of years, he is eligible to earn credit time up to a maximum of 50% of the sentence imposed. Given that all but level 6 felonies earn credit time at a maximum of 25%, you should ask for this to be corrected.

XII. FINAL JURY ARGUMENT

A. Prosecutor's argument

It's important to keep the prosecutor from making improper arguments to the jury. Prosecutors often cannot help pointing out what they consider to be your client's bad character traits, which are not proper factors for the jury to consider in making their sentencing decision. Bivins v. State, 642 N.E.2d 928 (Ind. 1994). For instance, in Cooper v. State, 854 N.E.2d 831 (Ind. 2006), the Indiana Supreme Court reversed a sentence of life without parole where the prosecutor told jurors they could consider the fact that he was "an unsavory character" who was "sponging off" three different women. In Castillo v. State, 974 N.E.2d 458 (Ind. 2012), the Court found prosecutorial conduct rising to the level of fundamental error where he told jurors the defendant was "a problem," "uncontrollable, "violent, vicious, manipulative," and "broken." The prosecutor also told jurors not to compare the aggravating circumstance (victim under 12) to the tendered mitigating factors, in effect urging them to violate their duty to weigh aggravation against mitigation.

Even if you have filed a pretrial motion to exclude any reference to non-statutory aggravation, it is helpful to file a Motion to Preclude Improper Final Argument just before closing penalty phase arguments. This helps educate your judge, and puts the prosecutor on notice that many of the very arguments he is likely to make are improper.

B. Defense Argument

The following are common components of defense final penalty phase argument in an LWOP case:

Explain aggravators and mitigators
Walk jurors through decision making process
Charged aggravator(s) – Did state prove beyond reasonable doubt
If so, weigh against
Your mitigation
Even if aggravation outweighs mitigation, LWOP IS NEVER REQUIRED
Your mitigation
D's remorse
D's potential for rehabilitation ("You don't have to throw away the key.")
Sentencing range available if not sentenced to LWOP
You can trust the court to sentence D appropriately

XIII. THE JURY'S DECISION AND BEYOND

A. Jury Findings Regarding the Existence of At Least One Aggravator

In 2002, in anticipation of the holding in Ring v. Arizona, 536 U.S. 584 (2002) the Indiana General Assembly amended Indiana's death penalty statute to require that before a jury may "recommend" death or life without parole, it must first unanimously find the existence of at least one aggravating circumstance beyond a reasonable doubt. Ind. Code 35-50-2-9(d). The jury is given special verdict forms indicating whether they have unanimously found the existence of the alleged aggravating circumstance(s) beyond a reasonable doubt. Id.

If the jury unanimously finds that no alleged aggravating circumstance has been proved beyond a reasonable doubt, it is discharged and life without parole is no longer available when the trial court pronounces sentence. Id.

If the jury cannot unanimously agree whether any alleged aggravator has been proved beyond a reasonable doubt, they are also discharged, and if the state chooses to continue seeking a sentence of life without parole, a new jury must be convened for a new penalty phase. See Bostick v. State, 773 N.E.2d 266 (Ind. 2002); State v. Barker, 768 N.E.2d 425 (Ind. 2002); Kiplinger v. State, 922 N.E.2d 1261 (Ind. 2010); Lewis v. State, 2016 Ind. LEXIS 691 (Ind. 2016). You should seek to dismiss the state's LWOP request, or in the alternative, seek a new jury to be convened.

If your jury hangs on the existence of an aggravating circumstance, you have a genuine opportunity to negotiate an agreed settlement. A jury that has heard all of the evidence from both the guilt-innocence and penalty phase could not unanimously agree that any alleged aggravating circumstances had been proved beyond a reasonable doubt. If the state chooses to convene a new jury and try again, you have a second opportunity to persuade jurors to spare your client life without parole through challenging the alleged aggravating circumstance(s) and presenting evidence of mitigating circumstances.

If the jury unanimously finds the existence of at least one alleged aggravator, they may proceed to determine whether the aggravator(s) outweighs any mitigating circumstances, and to determine what sentence is appropriate. Ind. Code 35-50-2-9(d).

B. Jury's Penalty Determination

1. Jury Hangs on Penalty Determination

If your jury returns a verdict unanimously finding at least one aggravating circumstance, but cannot unanimously agree on the appropriate penalty, Ind.Code 35-50-2-9 at subsection (f), continues to provide that "the court shall discharge the jury and proceed as if the hearing had been to the court alone." In Wilkes v. State, 917 N.E.2d 675 (Ind. 2009), the Indiana Supreme Court upheld this provision, affirming a death sentence imposed by the trial court after the jury found the aggravators but could not agree on the penalty. The Court held that the finding of an alleged aggravator beyond a reasonable doubt satisfied the 6th Amendment right to jury trial set out in Ring v. Arizona, 536 U.S. 584 (2002), because only the existence of an aggravating circumstance is a "fact" making the defendant eligible for death. The Court reasoned, as it had in earlier cases such as Ritchie v. State, 809 N.E.2 258 (2004), that the weighing of aggravators and mitigators was not a "fact" but a weighing process, and therefore was not an element that needed to be found by a jury beyond a reasonable doubt.

In Hurst v. Florida, 136 S.Ct. 616 (2016), the U.S. Supreme Court struck down Florida's death penalty statute because it allowed the judge, rather than the jury, to weigh aggravators and mitigators and determine the appropriate sentence. You should have filed a motion to dismiss based on this ground, and if your jury hangs at this point in their determination, you should seek dismissal of the LWOP request, or in the alternative, a new jury.

If the trial court denies your request, you will have a fresh opportunity to make your case for sparing your client life without parole before a new decision maker – your judge. Because the trial judge will be acting as the sentencing decision maker, you have a right to present new evidence and argument before the judge. As the Court said in Pittman, the role of the trial court in this situation is similar to what it was before the 2002 amendments. Pittman, *supra*, 885 N.E.2d at 1254. In Averhart v. State, 614 N.E.2d 924 (Ind.1993), a pre-2002 case in which the jury had in fact unanimously recommended death, the Court wrote, AThe job of defense counsel at this final sentencing stage is profoundly important: it is to continue being an adversary to the prosecution and to challenge the conscience of the judge." Id., at 930.

In addition to any evidence and argument that you wish to present at the sentencing hearing, it can be very helpful to prepare and submit your own sentencing memorandum, setting forth your mitigating circumstances and the evidence supporting them, and your arguments concerning why LWOP is not necessary for your client. You may also want to remind the judge that an LWOP-qualified jury that had just seen and heard all of the evidence, convicted your client of murder, and

found at least one aggravator to exist, could not unanimously agree that LWOP was the appropriate penalty. In Wilkes, *supra*, the Indiana Supreme Court held that the fact that the jury, whose unanimous decision would otherwise be binding, could not reach agreement is an appropriate consideration for the judge in deciding the appropriate sentence. Id., 917 N.E.2d at 692 (Ind. 2009) (reversing Roche v. State, 96 N.E.2d 896 (Ind. 1992), Burris v. State, 642 N.E.2d 961 (Ind. 1994), and Holmes v. State, 671 N. 841 (Ind. 1996)). On post-conviction review, the trial court considered not only the failure to reach a unanimous decision, but the actual vote – 11-1 for life – and vacated Wilkes' death sentence.

The Indiana Code requires that the probation officer preparing the presentence report solicit a victim impact statement and include such a statement in the report. Ind. Code 35-38-1-8.5 and 35-38-1-9. However, in light of Bivins v. State, 642 N.E. 2d 928 (Ind. 1994), the trial court must not consider this statement in deciding whether to impose a sentence of death or life without parole. See Veal v. State, 784 N.E.2d 490 (Ind. 2003).

2. Jury Returns Unanimous Sentencing "Recommendation"

Indiana Code at 35-50-3-9(E) provides that "[i]f the jury reaches a sentencing recommendation, the trial court shall sentence the defendant accordingly." It took the Indiana Supreme Court several years to determine what the legislature meant by that. Early on, reversing a pre-trial dismissal of the state's death penalty request Ring-based 6th Amendment grounds, the Court opined that the amended statute prohibited a trial court from imposing a sentence of death or LWOP if the jury unanimously "recommended" against those sentences. State v. Barker, 809 N.E.2d 312, 318 (Ind. 2004). The majority noted that Barker did not challenge the trial court's authority to impose a sentence less than the jury recommended, and thus the Court declined to address that issue. Id., 809 N.E.2d at 318, n.5.

Three years later, in Kubsch v. State, 866 N.E.2d 726, 739 (Ind. 2007), the Court referred to its assessment of the role of judge and jury in a capital case after the 2002 amendments to the statute as "a work in progress." The Court highlighted two principles that were emerging: that there is one sentencing decision, to be made by the jury, Stroud v. State, 809 N.E.2d 274, 287, and Justice Boehm's contention that the amendments were not intended to "overturn traditional checks on jury error or jury discretion, or to eliminate the trial judge's function under Trial Rule 59," Helsley v. State, 809 N.E.2d 292, 307 (Boehm, J., concurring).

Finally, in Pittman v. State, 885 N.E.2d 1246, 1253-54 (2008), reviewing a challenge to the adequacy of a trial court's sentencing order, the Court wrote the following:

> If the jury makes a recommendation, the extent to which the judge is bound by that recommendation has not been fully resolved. See Kubsch v. State, 866 N.E.2d 726, 739 (Ind. 2007). We believe that the statutory directive to "sentence the defendant accordingly" is

> intended to direct the trial court to impose the sentence recommended by the jury except where the traditional allocation of functions between judge and jury authorize or require the judge to set aside the jury's findings. The trial court is obligated to follow the jury's recommendation **unless** (1) the recommendation is based on a statutory aggravator that is not supported by sufficient evidence; (2) there is error in the course of the trial that requires grant of a Motion to Correct Error or Motion for New Trial; or (3) the trial court exercises its role as the "thirteenth juror" to set aside the sentence and order a new sentencing phase.

Thus, a jury recommendation for something **less than lwop** should be safe from override by the trial court, while a recommendation **for lwop** can still be challenged pursuant to the Pittman Court's guidance. Is the state's evidence regarding the aggravating circumstance weak? If so, you can challenge the sufficiency of the evidence supporting the aggravator, and you can move for the death recommendation to be set aside and a term of years imposed. (Remember, if no aggravating circumstance has been established beyond a reasonable doubt, your client cannot be sentenced either to death or to LWOP.) If the jury found several aggravating circumstances, but even one of them can be set aside due to insufficiency of the evidence, the Pittman Court directs that the trial court can weigh the remaining aggravator(s) against mitigation and decide the appropriate sentence itself, just as it did before the 2002 amendment. Pittman, 885 N.E.2d at 1254. This gives you a new opportunity to argue for a sentence less than death before the judge.

If your client was not the sole actor, you may be able to challenge the sufficiency of the evidence as to his level of involvement in the killing, and/or challenge the men's rea element. Look again at the elements of the aggravating circumstance(s) in your case, and the evidence the state presented at trial. Aggravators like "lying in wait," or "torture" have been interpreted and narrowed by our Supreme Court, see, e.g., Ingle v. State, 746 N.E.2d 927 (Ind. 2001), and Nicholson v. State, 768 N.E.2d 443 (Ind. 2002). In Pittman itself the Court held that only murders which are knowing or intentional are eligible for the death penalty or LWOP. Pittman, *supra*, 885 N.E.2d at 1258-59.

Is there other trial error that warrants a motion to correct error or motion for a new trial? Are there new indications that your client may not have been competent to stand trial? Often, jailers will alter a defendant's medication to "get him ready" for trial, and these kinds of sudden changes can seriously impair your client's ability to perceive or assess his surrounding circumstances and to communicate effectively with you. This happened to Paul McManus, who was convicted and sentenced to death in Vanderburgh County for the murder of his estranged wife and two young daughters. At trial, McManus suffered panic attacks serious enough that he was hospitalized and the trial was continued for a week. Despite repeated requests from trial counsel, the trial court did not order a competence evaluation, but rather hired a psychiatrist to "fix him up" for trial. He was tried while under the effects of mind-altering drugs, and the Indiana Supreme Court affirmed his convictions and sentences, finding that

that "the consensus of the witnesses was that the medications assisted McManus in participating in his trial." The 7th Circuit Federal Court of Appeals ultimately reversed his convictions and sentences, finding that the state courts had unreasonably applied the federal due process standard for assessing competence to stand trial. The point is that even if the trial court rejects your request, it is important that you make it.

Finally, you can try to persuade the judge that the jury's LWOP verdict is against the weight of the evidence, so that, acting as thirteenth juror, the judge orders a new jury penalty phase. The state will likely argue that the judge's consideration is limited to evidence presented to the jury, but in Justice Boehm's concurring opinion in Helsley, he writes that the trial court can also consider mitigating circumstances presented in "the sentencing report." Helsley, *supra*, 809 N.E.2d at 307. This reference is to the pre-sentence report which is required to be prepared by probation and reviewed by the trial court, Ind.Code 35-38-1 *et seq.* This statutory requirement predated the 2002 amendments and was not altered by them. Id. You may want to work with the probation officer who is preparing the pre-sentence report, and you may also want to prepare your own sentencing memorandum for the trial court, setting out your mitigating circumstances and arguing why the evidence weighs in favor of a term of years and makes a sentence of LWOP inappropriate.

3. After the trial court pronounces sentence.

The death penalty statute provides for a victim's representative to make a victim impact statement **after** the trial court pronounces sentence. Ind. Code 35-50-2-9(e). Although it has no impact on the sentence, it can be very difficult to sit through, and it is important to prepare yourself, your client, and your team for this. Trial courts often allow the designated representative of the victim's family to vent a great deal of anger at the defendant and also at the defense team. Even if the family does not vent anger, this presentation can be very difficult to sit through, especially for your client. You can file a motion to ensure that the law is followed and the presentation is limited to one representative, but beyond that, there's not much you can do to rein it in. Make sure that you and your team, including your client, know that it's coming.

One final consideration is the adequacy of the trial court's sentencing order. In Harrison v. State, 644 N.E.2d 1244, 1262-63 (Ind. 1995), the Indiana Supreme Court wrote that the trial court's written sentencing findings must (1) identify each mitigating and aggravating circumstance found, (2) include the specific facts and reasons which led the court to find the existence of each such circumstance, (3) articulate that the mitigating and aggravating circumstances have been evaluated and balanced, (4) make clear that the jury's recommendation has been considered, [no longer appropriate, since the court is acting without a jury recommendation], and (5) set forth the trial court's personal conclusion that the sentence imposed is appropriate for this offender and this offense.

In light of the 2002 amendment to Indiana's death penalty statute, shifting the actual sentencing determination to the jury rather than the trial judge, our Court has

amended its instructions regarding the written sentencing order. In Pittman, *supra,* 885 N.E.2d 1246, the Court addressed this issue. When the trial court sentences in accordance with a jury's recommendation, the Court wrote,

> [A] Harrison-style sentencing order would be out of place. Juries are traditionally not required to provide reasons for their determinations. Any reasoning provided by a trial court's order would necessarily be that of the trial judge, not the jury. Because the final decision belonged to the jury, this reasoning would be unhelpful on appeal and could undermine confidence in the jury's determination. We think it is enough that by entering the sentence recommended by the jury, the trial court has made an independent determination according to the trial rules that there is sufficient evidence to support the jury's decision.

Id., 885 N.E.2d at 1254. And when the trial court exercises its "traditional Trial Rule 50 and 59(J)(7) functions" to set aside a jury's recommendation, its order need only comply with those rules. Id.

XIV. SUPPLEMENTARY MATERIALS DIRECTORY

A Practitioner's Guide to MR/ID, Part 1	A guide to screening for, investigating and developing evidence of mental retardation/intellectual disability
co-couns	Motion for appointment of co-counsel
co-couns.doc	Word version of above motion
conditions of sequestration	Motion for notice of jury sequestration conditions trial court intends to impose
contmmo	Memorandum of law in support of motion for continuance
contmmo.doc	Word version of above memorandum of law
contmot	Motion for continuance
contmot.doc	Word version of above motion
exclude non-stat	Motion in limine to exclude evidence and argument regarding nonstatutory aggravating circumstances
exclude non-stat.doc	Word version of above motion
experts	Article about selecting, working with, and preparing expert witnesses

Indiana capital case cites	List of Indiana death penalty and significant life without parole opinions
Indiana capital case outline	Outline of issues covered in Indiana death penalty and significant life without parole opinions
JEFrontloading	Outline by Jodie English on getting mental health evidence in at the guilt-innocence phase
JLWOPIrrepCorrupt	Sample motion arguing that before juvenile is eligible for LWOP, sentence must find them irreparably corrupt
jurquest	Sample written juror questionnaire
juryordr	Order admonishing non-sequestered jury to avoid discussing, reading, or viewing information regarding case
juryrule20(A)(8) motion	Motion to have Jury Rule 20(A)(8) declared unconstitutional with respect to death penalty and LWOP cases.
Juvenile LWOP Motion	Sample motion arguing that sentence must find that mere consideration of the mitigating effects of youth is not enough, but that the sentencer must make a finding that the juvenile is "irreparably corrupt" before he or she is eligible for LWOP.
LeonardMotiontoDismiss LWOPMemo	Memo of law in support of Motion to Dismiss LWOP based on constitutional challenges to the statute and inapplicability of charged aggravators
LWOPCasesMitMattered	Steve Schutte's list of LWOP cases in which mitigation mattered
LWOP List	Non-exhaustive list of LWOP cases in which co-counsel and/or mitigation specialists were provided
MandatoryJusticeRevisited	Report and recommendations on the death penalty, by The Constitution Project
Massachusetts Report – 80 Ind. L. J. 1	Report and recommendations on death penalty by Massachusetts "Blue Ribbon Commission."
Matching	Article by Andrea Lyon on matching up guilt-innocence theory with penalty phase theory
mitlist	List of common mitigating circumstances

mitspec	Motion for funds to hire mitigation specialist
mitspec.doc	Word version of above motion
motions	General discussion of pretrial motions practice in capital & lwop cases
pattern jury instructions	Indiana Pattern Jury Instructions for LWOP and Death Penalty Cases
penalty	Penalty phase plan prepared for Melvin White case
Prosarg-LWOP	Motion in limine to prevent improper final argument by prosecutor
Prosarg-LWOP.doc	Word version of above motion
Ring-Hurst Motion	Sample motion to declare 35-50-2-9 unconstitutional in light of Ring v. Arizona and Hurst v. Florida
Ring-Hurst Motion.doc	Word version of above motion
Severanc	Motion in opposition of state's motion to consolidate defendants (Useful as guide for severance motion, as well)
Socialhist	Outline by Jan Dowling on social history or mitigation investigation
Theories	Mary Ann Tally's discussion of selection of consistent guilt and penalty phase theories