THE IMPORTANCE OF STORYTELLING AT ALL STAGES OF A CAPITAL CASE

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I. INTRODUCTION

Professor Sean O'Brien first approached me about contributing to this Symposium in March 2008. He wrote that the focus of the Symposium would be on the power of the narrative to unlock compassion and mercy for capital defendants. His hypothesis was that although law reviews typically look to professors for submissions, death penalty litigators would probably have a far deeper level of understanding of this particular subject. He said he thought of me because the topic was reminiscent of my discussion of defending an especially brutal death penalty case in Welsh White’s Litigating in the Shadow of Death: Defense Attorneys in Capital Cases.

Professor O'Brien's inquiry raised a number of important questions. What are the techniques and styles of storytelling that are being used by the capital defense bar? Are there traditional elements of effective storytelling that appear in these successful efforts on behalf of capitaly charged clients? How can narrative techniques be utilized in practices? What is the relationship between a thorough life history investigation of a capital defendant and the ability to present a compelling narrative? Are there limits to creative styles and methods?

In this article I will answer these questions from the perspective of a defense attorney who has been litigating death penalty cases at the trial level since 1982. From 1982-2009, I have tried to be a good and effective storyteller to jurors and other decision-makers in capital cases, and my own story techniques have been largely shaped and guided by the stories that have been told by other capital litigators, and by the vast and growing literature on applied storytelling in legal cases.

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2 "Storytelling is a fundamental part of legal practice, teaching, and thought. Telling stories as a method of practicing law reaches back to the days of the classical Greek orators who were lawyers." Nancy Levit & Allen Rostron, Calling For Stories, 75 UMKC L. Rev. 1127, 1127 (2007). Surprisingly, "[u]ntil more recently . . . there were very few academic articles written about the use of storytelling in the nuts-and-bolts practice of law itself;" although "[t]he criminal defense bar, for years, has been writing practitioner pieces about the nuts and bolts of storytelling techniques with juries." Ruth Anne Robbins, An Introduction to Applied Storytelling and to This Symposium, 14 Legal Writing 3, 12 (2008).


By concentrating on defense counsel, I do not ignore or underestimate the crimes committed or the role of the prosecutor as an effective storyteller in these cases. As Professor Federman and many others have pointed out, "[t]he crimes (alleged or actual) are embedded in the capital punishment process; stories of violence form the core of criminal law and only gain strength on appeal." One important limit to defense creative styles and methods in these cases is surely that "the state bats first, creating an instant narrative when someone is accused of murder. Words get thrown about and stick: brutal, vicious, violent, dangerous. A picture of the criminal is set in motion that carries through to the appeal process." From defense counsel’s standpoint, the virtue of effective storytelling is "to turn the dominant narrative – the one created by the state that stresses the crime and its brutality – upside down by calling for a reversal of traditional courtroom storytelling." "If there is one dominant theme that explains [a successful defense], it is that the capital defendant's attorney must tell a powerful and coherent story of injustice in order to obtain . . . [victory]."

At the trial level, the injustice of executing the client centers on the concept of developing and presenting mitigation. As Professor Craig Haney has written, in a well-tried capital case, there is a stark juxtaposition that now regularly occurs in capital penalty trials: a conventional "crime master narrative" – one that many jurors come into the courtroom already endorsing or predisposed to believe – is contrasted with a "mitigation counter-narrative" that incorporates a more comprehensive and empirically well-documented understanding of a capital defendant's life.

In the pages that follow, I explore how this "mitigation counter-narrative" is actually developed and presented by skilled capital defense teams. For the most part, I use examples that come from my own cases or from the cases of capital defense practitioners or mitigation specialists that I highly respect and with whom I have worked. My own storytelling technique in this article is chronological. I begin at the beginning with the investigation of a capital case

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3 Federman, supra note 1, at 8. See also Craig Haney, Evolving Standards of Decency: Advancing the Nature and Logic of Capital Mitigation, 36 Hofstra L. Rev. 835, 842 (2008) ("In a capital case, the crime master narrative is also typically at the heart of the prosecutor's argument that the jurors should return a death verdict – a heinous crime has been committed by an essentially bad or evil person who should pay the ultimate penalty. Because his crime is regarded as entirely the product of his free and autonomous choice-making, unencumbered by past history or present circumstances, the defendant alone is seen as fully culpable for it.")

4 Id.

5 Id.

6 White, supra note 1, at 178.

7 Haney, supra note 3, at 836.

8 "The common way of organizing a story is, as Aristotle wrote almost 2,500 years ago, in three parts: the beginning, the middle, and the end." Foley & Robbins, supra note 2, at 475-76 (quoting ARISTOTLE'S POETICS 65 (Francis Fergusson ed., S.H. Butcher trans., Hill & Wang 1961)).
and examine several steps in the capital criminal trial process at which effective storytelling is critical.9

II. THE RELATIONSHIP BETWEEN A THOROUGH LIFE HISTORY INVESTIGATION OF A CAPITAL DEFENDANT AND THE ABILITY TO PRESENT A COMPELLING NARRATIVE

No matter how skillful a storyteller defense counsel might be, storytelling in death penalty cases is not like writing a novel or a screenplay, although there are certainly common elements to all three endeavors.10 Most obviously, defense attorneys cannot “engage in fiction or . . . invent a character out of whole cloth to suppress the ‘real’ image of their client, already convicted of a heinous crime.”11

While there is a strong parallel between lawsuit storytelling and storytelling as entertainment, the parallel is not exact. Like any analogy, it can be taken too far. Therefore, a word of caution is appropriate. If the jury ever comes to believe that a lawyer is trying to tell a good yarn, then the effort is a total failure. The lawyer loses credibility, and the client loses the case. This methodology should not be taken too far and demands some subtlety. Thus, exaggeration, melodrama, or the use of props, dialogue, or other such overtly theatrical devices can doom the storyteller to failure. As with anything done in the courtroom, sincerity is the watchword.12

Therefore, an important caveat to the use of storytelling in a capital trial is that

9 A trial is a retelling of the story of the occurrence. The tale is repeated in various ways by different people during the trial. The lawyer is a storyteller during voir dire examination in some jurisdictions, in opening statement, and in final argument. Also, while witnesses tell the story during direct examination, the lawyer once again becomes the storyteller during cross-examination. Powell, supra note 2, at 90. I would argue that storytelling is critical at all stages of a capital case, including the investigative stage, negotiations, motions practice, voir dire, opening statement, direct examination, cross examination, jury instructions, and closing argument. To keep this article to a somewhat reasonable length, I will focus on the investigative stage, negotiations, voir dire, penalty phase opening statement, penalty phase jury instructions, and penalty phase closing argument. Tips for storytelling at the other stages of a capital trial can be gleaned from the many resources cited in footnote 2.

10 See Wendy Nicole Duong, Law Is Law and Art Is Art and Shall the Two Ever Meet? Law and Literature: The Comparative Creative Processes, 15 S. Cal. Interdisc. L.J. 1, 2 (2005) (“As disciplines, law and the literary art share commonalities. For example, both disciplines depend and thrive on the artful use of language. Both disciplines can, and have, become effective tools for advocacy and social reform. Law can benefit from the craft of the literary art, and can borrow therefrom. Conversely, the drama of the law practice and notions of jurisprudence can, and have, become a rich source of material for the literary artist to explore human nature and society.”)

11 Federman, supra note 1, at 8; see also Powell, supra note 2, at 90.

12 Powell, supra note 2, at 91.
the fiction writer can invent aspects of the story to propel the characters and events to a particular resolution. The legal writer, however, lacks such literary license. This difference amplifies the legal writer’s need to discover information about the characters and the conflict. The legal writer’s main problem often is not that he has “bad” facts, that is, facts that do not tend to lead toward the desired resolution, but instead that he does not have enough facts, that he has not done enough investigation.13

In other words, “[d]epicting characters in legal advocacy and argumentation, including the narrative components of . . . litigation in death penalty cases . . . is . . . quite different from character development in film or the novel. It is factual and truthful storytelling, meticulously built upon a record.”14

The “record” at the trial level is primarily based upon the thorough life history investigation that the capital defense team is constitutionally obligated to undertake.15 An exhaustive social history investigation undertaken by a skilled mitigation specialist is premised on the well-grounded assumptions that “no meaningful account of criminal behavior can begin without extensive social historical knowledge about the life of the perpetrator” and that “because people’s actions are influenced in large part by their past experiences, counter-normative behaviors (like crime) must be partly rooted in counter-normative social historical experiences.”16

The primary duty of a mitigation specialist is “to discover the lived experience of a defendant and the people who knew him, then organize the information into a life history that defense counsel, courts, expert witnesses, jurors, and, ultimately, the client’s life will depend upon.”17 “The theory and skills of effective storytelling can be helpful to defense teams as they build their case narrative.”18 Good mitigation specialists look for good storytelling witnesses and they are themselves skillful in discovering and telling stories.19

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13 Foley & Robbins, supra note 2, at 467.
14 Meyer, Characters, supra note 2, at 877-78.
16 Haney, supra note 3, at 843.
17 Richard Dudley & Pamela Blume Leonard, Getting It Right: Life History Investigation As The Foundation For a Reliable Mental Health Assessment, 36 Hofstra L. Rev. 963, 988 (2008).
18 Id. at 985 n.21.
19 One of an attorney’s first jobs may be to extract relevant memories from a client or a witness. This may best be accomplished by a questioner who is both an investigator and an artist: the investigator to carefully review and clarify each of the statements made by the witness, and the artist to imagine the scene in his or her own mind, filling in the missing areas of the mental canvas with creative suggestions and then testing.
Consider this example from a social history report concerning Jehad Baqleh, a Jordanian client with obvious neuropsychological impairments who had been diagnosed by defense MRI testing with a rare brain structural disorder called “agenesis of the corpus callosum.”\(^{20}\) The diagnosis certainly had mitigating value. But the persuasive part of the narrative was not in the diagnostic label, but in the possible etiology of the disorder. After much hard work to overcome cultural barriers to communication, the mitigation specialist learned some important facts from the client’s sister, Rowida, and conveyed them in an investigative report containing this compelling narrative:

Rowida’s mother, Jurjitte, attempted to abort not only Jehad, Rowida said, but also Basimah and Hussam (brothers). Rowida had been told by her mother that the family hardships due to the various wars and because they were poor, having so many children was difficult. When Jurjitte became pregnant with Basimah (sister), and later with Hussam, Jurjitte did what she could to induce a spontaneous abortion. Rowida explained that her mother took the advice of women friends in her attempt to abort these two pregnancies; she ate certain herbs, lifted heavy things, jumped up and down and crawled around on her stomach. Not surprisingly, these attempts of Jurjitte’s failed. Rowida added that her mother was pregnant one other time, which she miscarried. When Jurjitte was pregnant with Jehad, though, she sought the assistance of a medical doctor. This doctor gave Jurjitte medicine to induce a spontaneous abortion and when the medicine did not work, Jurjitte went to the hospital to have a procedure to terminate her pregnancy. Rowida recalled accompanying her mother to the hospital for an evening appointment. Rowida remained in a waiting area while Jurjitte waited for the doctor to arrive at the hospital to perform the procedure. While Jurjitte waited, the doctor telephoned and explained that he had a car accident and would not make it to the hospital to perform the procedure. Rowida said her mother told her that while she was awaiting her procedure, there were other women in the room who were screaming from the pain of their own abortions. A woman near Jurjitte asked her whether she had an abortion before, and when Jurjitte replied she had not, the women told her that abortions were very painful and there was a lot of bleeding. Rowida said her

out these hypotheses on the witness. Encouraging the witness to use a pencil to sketch out each scene being discussed is also a valuable activity. Even if the people in the pictures are stick figures and none of the streets are straight, the process of transferring key images from the witness’s mind to the white empty surface will often uncover facts that otherwise lay dormant.

One cannot overstate the importance of taking the time for exhaustive interviewing of witnesses to access these images. As David Binder wrote in his seminal work on fact investigation, “[E]ffective fact investigation is the underpinning for most of the other major tasks litigators undertake.”

James Parry Eyster, Lawyer as Artist: Using Significant Moments and Obtuse Objects to Enhance Advocacy, 14 LEGAL WRITING 87, 96 (2008) (quoting DAVID A. BINDER & PAUL BERGMAN, FACT INVESTIGATION FROM HYPOTHESIS TO PROOF 3 (1984)).

\(^{20}\) Agenesis of the corpus callosum is the failure to develop the large bundle of fibres that connect the cerebral hemisphere; the cognitive, behavioral, and neurological consequences of this structural disorder are wide-ranging. See Lynn Paul et al., Agenesis of the Corpus Callosum: Genetic, Developmental, and Functional Aspects of Connectivity, NATURE REVIEWS, April 2007, at 287.
mother told her it was "God's will" for her to have the baby, and Jehad was born.\(^{21}\)

The point of this story is clear: "what happens to us as children helps to shape our thoughts, feelings, and actions as adults."\(^{22}\) Although this point is never explicitly made in this story, it is undeniably made through powerful visual images, even if unstated.\(^{23}\) Uncovering stories like these is the goal of the mitigation investigation. "The art of narrative persuasion – telling a story to make a point – is often best achieved not by summary, but rather by recreating illustrative scenes," such as the one set forth above.\(^{24}\) "Careful selection of testimonial pieces and construction of these pieces into a whole further enable the reader to understand [the client's] psychology."\(^{25}\) Defense counsel will not be able to create these illustrative scenes in the courtroom unless he uncovers them through an exhaustive life history investigation. The life history investigation should be done by a trained mitigation specialist, but defense counsel must be a part of it to be an effective storyteller in the courtroom. He must hear the client and his witnesses tell the client's story and he must visit and absorb the places that have shaped and harmed the client.\(^{26}\)

III. STORYTELLING WITH THE PROSECUTOR

In federal death penalty practice, and in some other jurisdictions, there is a formal process set up for defense counsel to try to persuade the prosecutor not to seek the death penalty.\(^{27}\) Often, as in federal practice, these mitigation


\(^{22}\) Haney, supra note 3, at 856.

\(^{23}\) See Eyster, supra note 19, at 101 ("Attorneys are wordsmiths and feel more comfortable with words than with images. However, in presenting images verbally, lawyers should resist the urge to talk too much about them. Rather, they will benefit most by describing the powerful moment or object and then refraining from explaining its significance, symbolism, or metaphor. Images serve as an alternative to legal analysis and do not benefit from extensive critical exposition.").

\(^{24}\) Meyer, Cinematic, supra note 2, at 900.

\(^{25}\) Id. at 901. Meyer rightly cautions that "[t]he advocate must be careful not to manipulate the reader overtly, however, or he risks being cast . . . in the role of manipulator and fabricator of stories." Id.

\(^{26}\) SPENCE, supra note 2, at 91 ("Danny's story was made vivid and memorable because the lawyer put himself into the hide of Danny, tried to feel it as Danny felt it, and encouraged him to relive the experience by having him speak in the present tense. Most stories we hear from lawyers are poorly constructed previews of the story to come, previews that would not compel us to rush to the movie house.").


In any post-indictment case in which the United States Attorney is considering whether to request approval to seek the death penalty, the United States Attorney shall give counsel for the defendant a reasonable opportunity to present any facts, including any mitigating factors, for the consideration of the United States Attorney.

Section 9-10.120 provides:
submissions take the form of detailed paper presentations of mitigating evidence. The opportunity for creative storytelling at this point in the process has been taken advantage of by many federal capital practitioners, with the result that the federal government has decided not to seek the death penalty in many cases.

A few examples will illustrate how storytelling is done well in this context. Nancy Pemberton, a friend, lawyer, and skillful mitigation specialist, has worked with me on several of my capital cases. In one San Francisco case, she contributed the social history narrative section of a mitigation letter that was written on behalf of our client David George to the United States Department of Justice’s Capital Review Committee. She began her narrative with a number of bullet-point summaries, including the following:

**Extremely destructive social environment** - David George is the product of the crack cocaine epidemic that devastated so many communities in the 1980s, including Bayview Hunters Point (BVHP), and that continues to wreak havoc in those same communities 25 years later. Mr. George was born and raised in this dysfunctional world, and did not have the benefit of a supportive family structure to alleviate the debilitating effects of a destructive social environment.

**Childhood Exposure to Violence** - Throughout his childhood and adolescence, Mr. George was exposed to and the direct victim of extremely violent behavior.

**No positive social interventions** - Because of racism and for other reasons explained below, Mr. George has not had the benefit of positive social interventions to assist him with the many disabilities he has suffered throughout his lifetime.  

Each point is then developed in detail, using storytelling as a way to draw the reader into the client’s life and community. The story of the client’s extremely destructive social environment features objective statistical data and quotes from official reports, but the way it is put together is compelling:

Bayview Hunters Point was until recently a predominately African-American community, and remains overwhelmingly a community of color. Although the area has high home ownership, it is also the site of two of the four largest public housing projects in the City. During World War II, the community provided the labor necessary to keep the West Coast’s largest shipyard working. BVHP was a thriving neighborhood, with businesses and organizations to meet all of the needs of the community.

In any case in which (1) the United States Attorney recommends that the Attorney General authorize seeking the death penalty, or (2) a member of the Capital Review Committee requests a Committee conference, a Capital Case Unit attorney will confer with representatives of the United States Attorney’s Office to establish a date and time for the Capital Review Committee to meet with defense counsel and representatives of the United States Attorney’s Office to consider the case. No final decision to seek the death penalty shall be made if defense counsel has not been afforded an opportunity to present evidence and argument in mitigation.

After World War II, the need for the shipyard declined, and it was finally closed in 1974. In 1952, a freeway severed the community from the rest of the City and benign neglect became institutionalized. "To [the City’s] shame, negligence has led to [the following] significant social problems." (2003-2004 Report of the Civil Grand Jury for the City and County of San Francisco, The More Things Change, the More They Stay the Same: The City and County of San Francisco and The San Francisco Unified School District are Failing to Address the Educational Needs of the Bayview Hunters Point Community.) BVHP suffers from a 30% unemployment rate, 250% higher than the rest of the City. Twenty percent of the people earn less than $15,000 a year. The average household income for people living in public housing, like David George and his family, is $10,000 per year. There are four times as many hazardous waste sites in BVHP than in any other part of the City. It is the location of a third of all homicides in the City although it contains only one eighth of the population.

The school district has neglected the community. Despite the stated mission of the school district to “provide each student with an equal opportunity,” low-income minority students are four times more likely than their wealthier white counterparts to experience high teacher turnover, and twice as likely to have old or insufficient textbooks at school. “[E]thnic background and family circumstances strongly predict whether students will encounter broken plumbing and even mice, rats and cockroaches in the classroom.” (Id.) The Grand Jury found that many of BVHP’s neediest children do not receive available services because the parents do not complete and return the documentation necessary to provide the services. Thus, children go hungry. They go without the needed supports to make their education a success. Thirty eight percent of BVHP students drop out of school before their senior year. During the years that David attended elementary and middle schools, between 45% and 65% of the student population consisted of educationally disadvantaged youth.29

She then goes on to explore the client’s dysfunctional family system:

David’s mother, Mavis Williams, is one of twelve children born to Alma Jones. One of Ms. Jones’ children was killed in an intentional drowning when he was eight years old. Ms. Jones’ eldest son is serving a life sentence in Pelican Bay State Prison, having been convicted of rape and murder at the age of 19. He was turned in by his mother, and he has not been seen by any family member since he was incarcerated.

Eight of Ms. Jones’ children, including Mavis Williams, are substance abusers, having fallen prey to the crack cocaine that proliferated in poor communities of color during the 1980s and beyond. Three of the children suffered from mental illness. One daughter who managed to remain drug-free, Maggie Williams, died of uterine cancer earlier this year, at age 69. Everyone loved and revered Maggie, and her loss continues to ripple through the family. Ms. Jones, in particular, mourns the loss of her daughter.

Mavis had her first child (Charles Hollins) at age 16; the father was 20 years old. Two years later, she had her second child (Kevin George) and David followed on Kevin’s heels in 1982. Mavis and Jeffrey George, the

29 Id. at 44-45.
father of Kevin and David, lived in Sunnydale from about 1982 to 1987. This period is recalled by all of the boys, Charles, Kevin and David, as the happiest time of their lives. By 1987 though, Mavis and Jeffrey were both abusing crack cocaine, and unable to pay their bills. They were evicted from their Sunnydale residence and lost all of their belongings. Their marriage ended and so too did their ability to be parents. The three boys essentially raised themselves. In 1987 when Mavis and Jeffrey split up, Mavis moved with the three boys into her mother's home in Hunter's Point. The rest of David's childhood was spent moving in and out of his grandmother's home.

Alma Jones had moved into public housing with her children in 1970 and still lived in the same apartment. Many of Ms. Jones' children and grandchildren continued to reside with her, sometimes with their romantic partners, throughout David's childhood. At any one time, 20 or 25 people were living in Ms. Jones' home. Life in the house was completely chaotic and privacy was impossible. Adults and children wandered in and out of the house all day long, and often into the night. Because so many of the adults were substance abusers, Ms. Jones kept locks on her refrigerator and kitchen cupboards to prevent thefts. Arguments among the adults were daily events. David, his brothers, and his cousins were the target of capricious discipline by adults often angry because they could not feed their drug addiction. The boys were "whupped" with belts, electric cords, even toy racetrack parts. They were also subjected to daily verbal abuse.

Every room in the house served as a bedroom. Ms. Jones slept with one grandchild in her bed. Someone slept on the couch, another slept in the living room chair. Many of the children, including David, slept on the floor, with nothing more than blankets as a cushion... 

Between 1987 and 1997, Mavis and the boys moved 20 to 25 times. Mavis would get an apartment on her own but would be unable to keep up the rent payments and would be evicted. The family often went without heat or electricity, sometimes without furniture. In one apartment, they ran an extension cord from a neighbor's house in order to keep the refrigerator running but they had no heat over the winter. Jeffrey George sometimes provided child support but often withheld it because he believed Mavis was spending the money on drugs, not on the children. Charles recalls his mother pawning the boys' only video game and never getting it back.30

The client's exposure to community violence is described in these words:

Since he was four or five, David's life has been punctuated by gunfire. During the late 1980s and early 1990s, the neighborhoods of Hunter's Point and Sunnydale were "at war." Shots rang out every few days. David's Sunnydale home was riddled with bullets within days after they moved out in 1987; he saw the bullet holes when he and his mother returned to get their belongings. In Hunter's Point, David and his family had to hit the floor whenever shots were fired; only Ms. Jones remained in her chair near the door because she was physically unable to get on the floor. Between 1986 and 1995, over 100 people were killed in BVHP.31

30 Id. at 47-48.
31 Id. at 48-49.
America the beautiful this is not. But it was the reality of David George's life and community, and the story needed to be told to the government lawyers in Washington who would recommend "yea" or "nay" as to whether the government would attempt to kill David George for his crimes. Luckily, mercifully, they listened and recommended against seeking death.

David George's story is not atypical of the backgrounds of many capital defendants other capital defense practitioners and I have represented. In fact, such stories are more the norm. At the same time that Nancy Pemberton and I were representing David George, we were also representing another capital defendant named Edgar Diaz, who lived across town in the Sunnydale Projects of San Francisco. His life story contained some of the same mitigation themes as David George's case. We also knew from reading mitigation letters in other federal capital cases that many of these same themes were commonly advanced in Washington in cases involving minority capital defendants raised in urban ghetto environments. Can you be a persuasive storyteller by telling the same story over and over again?32

The key lies in the Supreme Court's mandate that the Eighth Amendment requires "precise and individualized sentencing."33 Effective storytelling, like sentencing, needs to be "precise and individualized." In Edgar Diaz's case, although the mitigation themes were similar to other cases, there were unique aspects about him and his story that served to set him apart and called for creativity in storytelling. Thus, Nancy Pemberton's description of Edgar's social history began by quoting a letter he had written when he was in the fifth grade:

My family comes from San Francisco. Everytime they drink they start talking about everything. Then when it gets dark they go home and listen to some oldies. My neighborhood got nothing nice. Cause every night they be

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32 In capital cases, this problem is not confined to presentations before bodies like the Capital Review Committee of the Department of Justice, which is the same decision-maker in case after case.

In multi-defendant capital cases, it is commonly argued by capital defense counsel that a severance of trials is necessitated by the fact that the co-defendants have similar backgrounds and thus their mitigation presentations will be diluted by repetition. See, e.g., United States v. Milburn, No. CR 05-00167 WHA, 2008 WL 2557973, at *6 (N.D. Cal. June 24, 2008) ("According to defendants, . . . [t]he effect of mitigating evidence could be diluted in another way; as each defendant presents his side, the jury could feel that 'it has heard that [argument] before.'") (denying severance on this ground).

A related argument is that severance is necessary because one defendant's mitigation story is more compelling than the other, thus disadvantaging the client with the less compelling story. See United States v. Bernard, 299 F.3d 467, 476 (5th Cir. 2002) (upholding the lower court's decision not to sever capital defendants' trial, even though one defendant offered mitigating evidence of his Christian conversion and other defendant lacked comparable mitigating evidence); United States v. Williams, No. CR-05-920-RSWL, 2008 WL 4644830, at *18 (C.D. Cal. Oct. 15, 2008) ("A joint penalty phase will not dilute Defendants' mitigation evidence and violate their right to individualized sentencing. Neither Defendant has presented evidence that the other's mitigation evidence is so overwhelming that it would cause incurable prejudice to him.").

shooting each other. But sometimes they just don’t [illegible], they shoot cars. And when the people put the boards up they kick them down again. And my friends are nice. When I have something I give them some and if they have something they give me some. . . .

Her description of the Sunnydale Housing Project followed:

Sunnydale, where Mr. Diaz was raised, is the largest housing project in San Francisco, located in Visitacion Valley. The tenants live in squalor. The projects were poorly built and are even more poorly maintained. Mildew grows in everyone’s apartments; the concrete walls and slabs keep the apartments damp and cold. Every building has boarded up units; the surrounding grounds are sown with crabgrass, which is mowed only when it gets knee-high. Broken glass and trash litters the landscape.

Pemberton then focused on Edgar’s exposure to community violence:

Mr. Diaz first saw (rather than heard) people shooting at each other when he was about 12, and first witnessed someone actually “laid out” from being shot while in middle school. Terrified, he and his friend who were walking home from school snuck by, trying to avoid drawing attention to themselves. Guns and ammunition were (and are) stashed all over the Sunnydale projects, in the bushes and under stairs, happened upon by any child playing outside. Gun violence was the norm throughout his life. Friends and acquaintances were wounded, some were killed.

In 2004, Mr. Diaz watched a man shoot himself and witnessed a friend being shot. Both times he acted humanely, getting the victims to the hospital. When he took his friend to the hospital, he was rewarded by the police detaining and questioning him about the shooting.

Children raised in public housing such as the Sunnydale Projects, suffer all the effects of being severely traumatized. “In the Nation’s largest public housing projects, the damage [of gun violence] goes well beyond the lives lost and injuries inflicted. According to a report from the U.S. Department of

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34 Letter from Michael N. Burt to United States Department of Justice 39 (May 26, 2006) (quoting a fifth grade writing assignment by Edgar Diaz).
35 Id. at 39. This passage reminds me of the last verse of James McMurtry’s 2004 song, We Can’t Make It Here:

In Dayton, Ohio
Or Portland, Maine
Or a cotton gin out on the great high plains
That’s done closed down along with the school
And the hospital and the swimming pool
Dust devils dance in the noonday heat
There’s rats in the alley
And trash in the street
Gang graffiti on a boxcar door
We can’t make it here anymore

James McMurty, We Can’t Make It Here, on CHILDISH THINGS (Compadre Records 2005), available at http://www.jamesmcmurtry.com/lyrics/childish_things_05.htm.
Housing and Urban Development, public housing residents are more than twice as likely as other members of the population to suffer from firearms victimization, one in five residents reports feeling unsafe in his or her neighborhood, and children show symptoms of posttraumatic stress disorder (PTSD) similar to those seen in children exposed to war or other major disasters.36

And, finally, some tidbits about Edgar’s birth and his family, including the following:

The violence Mr. Diaz experienced was not limited to his neighborhood – it infected his home, a home devoid of support and companionship except for his mother. His father was deported before Mr. Diaz was born; the father was subsequently killed in his home country.

Mr. Diaz’ mother is a severe alcoholic, herself born into a family of alcoholics. Her father died from alcohol abuse, most of her siblings suffer the disease of alcoholism. Mrs. Diaz began abusing alcohol while in high school, continued as an adult and through her pregnancy, and continues to this day. When Mrs. Diaz gets drunk, which she does regularly, she gets violent. She hurts herself and she hurts others.

During labor and delivery of Mr. Diaz, Mrs. Diaz tested positive for cocaine metabolites and the baby showed signs of mild withdrawal. Mr. Diaz was born prematurely (37 weeks), was underweight for his gestational age, and had to be kept in the hospital several days beyond his birth. During his 3-week check-up, the medical staff noted as complications Mrs. Diaz’ history of drinking beer and brandy several times a week and smoking cocaine at least once a week throughout her pregnancy, and expressed concern that Mr. Diaz suffered fetal alcohol effects.37

Like David George, Edgar Diaz was spared a death penalty prosecution.38 Perhaps both men were spared for reasons other than the compelling nature of their life stories or the way in which their stories were told. But there can be no denying the fact that at the charging stage of a capital case, effective storytelling has its place, even with hardened prosecutors who have heard many similar stories before.

IV. STORYTELLING IN JURY SELECTION

Once the capital case enters the trial phase, rules begin to emerge which both restrict and shape our ability to tell stories to the fact-finder. For instance, in the jury selection phase of any criminal case, lawyers are generally prohibited from posing “stake out” questions which ask a juror to consider a certain state of

37 Id. at 41-42.
38 In Edgar’s case, the government initially decided to pursue death, but relented after Edgar offered to plead guilty for a sentence of forty years.
facts and then ask how the juror would vote if the facts were found to be true.\footnote{For an insightful discussion of what is, and what is not, a “stake out” question, see Chief Judge Bennett’s discussion in United States v. Johnson, 366 F. Supp. 2d 822, 845 (N.D. Iowa 2005).} This rule obviously restricts a defense lawyer’s ability to creatively craft voir dire questions, which artfully tell the story of the case. Some judges adhere to the prohibition against “stake out” questions in all cases, including capital cases.

However, in \textit{Morgan v. Illinois},\footnote{504 U.S. 719 (1992).} the Supreme Court confirmed that in order to protect a capital defendant’s right to a fair trial, a juror is properly removed for cause at any stage of the proceedings if the juror’s views in favor of the death penalty would “prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.”\footnote{Id. at 728-29 (quoting \textit{Wainwright v. Witt}, 469 U.S. 412, 424 (1985)).} In \textit{Morgan}, the Court “reiterate[d]” that a juror, who would “automatically” impose a death sentence following conviction for murder is properly excluded under this standard.\footnote{\textit{Morgan}, 504 U.S. at 729, 736.} Such “ADP” jurors are properly excused because they “obviously deem mitigating evidence to be irrelevant to their decision to impose the death penalty; they not only refuse to give such evidence any weight but are also plainly saying that mitigating evidence is not worth their consideration and that they will not consider it.”\footnote{Id. at 736.}

The \textit{Morgan} standard of exclusion, sometimes referred to as “life qualification,” however, encompasses more than the class of ADP jurors, i.e., those who would “automatically” choose death as a general proposition for all convicted of murder. Pursuant to \textit{Morgan}, “[a]ny juror to whom mitigating factors are . . . irrelevant” – not merely those jurors who “obviously” deem it so – “should be disqualified for cause, for [they have] formed an opinion concerning the merits of the case without basis in the evidence developed at trial.”\footnote{Id. at 739 (Scalia, J., dissenting).} Justice Scalia pinpointed the Court’s holding in his dissent: “The Court today holds that . . . the Constitution requires that voir dire directed to this specific ‘bias’ be provided upon the defendant’s request; and that the more general questions about ‘fairness’ and ability to ‘follow the law’ that were asked during voir dire in this case were inadequate.”\footnote{Id. at 739 (Scalia, J., dissenting).}

Importantly, \textit{Morgan} also indicates that a broad range of mitigation-impaired jurors are constitutionally unqualified. As Justice Scalia stated in his dissent:

\begin{quote}
[I]t is impossible in principle to distinguish between a juror who does not believe that any factor can be mitigating from one who believes that a particular factor – e.g., “extreme mental or emotional disturbance[”] – is not
\end{quote}
mitigating (presumably, under today's decision a juror who thinks a "bad childhood" is never mitigating must also be excluded).\(^{46}\)

In other words, "the class of mitigation-impaired – and constitutionally unqualified – jurors includes not only those who are unable or unwilling to ever consider any form of mitigation, but also those who are either unable or unwilling ever to consider a particular mitigating factor."\(^{47}\)

Morgan clarifies that, in a capital case, questioning of potential capital jurors as to whether they would automatically or nearly always vote for the death penalty on the facts of the particular case, or could consider and give effect to the relevant mitigating factors in the case, is not only suitable, but constitutionally required if a capital defendant is to receive a voir dire adequate to protect his right to a trial before an impartial tribunal.\(^{48}\) During voir dire, therefore, some courts have held that a capital defendant is not limited to general or theoretical inquiries as to whether a venire member has a bias for the death penalty as a general proposition, and that the defendant must also be allowed to question potential jurors as to whether they will consider and give effect to the mitigating factors relevant in the particular case in light of the crime and the aggravating factors that that prosecutor intends to prove.\(^{49}\)

How this type of case-specific voir dire is actually done involves good storytelling technique, but in certain kinds of capital cases the story being told by defense counsel is counterintuitive. For instance, in his book, Litigating in the Shadow of Death, Welsh White describes the jury selection strategy in a case I was involved in some time ago, People v. White.\(^{50}\) As Welsh White correctly describes, the facts of the two murders charged against Mr. White were horrific,

\(^{46}\) Id. at 744 n.3.
\(^{48}\) See Kater v. Maloney, 459 F.3d 56, 66 (1st Cir. 2006) ("Death penalty cases present special concerns about what voir dire may be constitutionally required, and there are special voir dire rules in such cases."); United States v. Fulks, 454 F.3d 410, 430 n.7 (4th Cir. 2006) ("In addition to establishing that a capital defendant is entitled to a jury that will consider mitigating evidence, the Court in Morgan concluded that such a defendant must also receive the benefit of a voir dire "adequate" to identify unqualified jurors."); Van Poyck v. Florida Dept. of Corrections, 290 F.3d 1318, 1328 (11th Cir. 2002) ("[A] trial court has a duty to question (or allow questioning of) prospective jurors to ensure that a person who would automatically vote for the death penalty is disqualified.") (citing Morgan, 504 U.S. at 729-32).
\(^{49}\) See United States v. Johnson, 366 F. Supp. 2d 822, 845 (N.D. Iowa 2005) ("[T]he court holds that, in this case, 'case specific' questions are appropriate – indeed, necessary – during voir dire of prospective jurors to allow the parties to determine the ability of jurors to be fair and impartial in the case actually before them, not merely in some 'abstract' death penalty case. After all, if the jury selected in this case imposes the death penalty on Angela Johnson, there will be nothing 'abstract' about that determination or the penalty imposed.") (emphasis in original); United States v. Wilson, 493 F. Supp. 2d 402, 404 (E.D.N.Y. 2006) ("I agree that certain case-specific questions can be appropriate in capital voir dire."); United States v. Fell, 372 F. Supp. 2d 766 (D. Vt. 2005) (following Johnson because it "thoroughly and persuasively discusses this question" and noting that, "[i]f properly formed, case-specific questions help identify various forms of juror bias").
\(^{50}\) WHITE, supra note 1, at 120-30.
the evidence against him was overwhelming, and in the event of conviction, the prosecutor had a long line of White's prior victims lined up to describe his extensive history of violence. On the other hand, his case in mitigation was also compelling, including, among many other elements, an extensive history of physical and sexual abuse as a child, mental illness, and wrongful incarceration in barbaric juvenile and adult institutions.51

We wanted to accomplish three goals in jury selection. First, we wanted to eliminate from the potential jury pool as many automatic death penalty jurors as possible. Second, we wanted the potential jurors who were not eliminated for cause to understand completely the aggravating nature of the case so that each juror could give us an honest assessment of whether any mitigation would matter after the prosecutor proved up the charges and the facts in aggravation. Third, we wanted to intentionally downplay the nature of our mitigating evidence to increase our chances of excluding ADP jurors and to hopefully enhance the weight of that evidence when it actually was presented. The kind of story that we told in our questioning of potential jurors to accomplish these goals sounded more like a story a prosecutor would be telling:

Q. (By Mr. Burt). So far we have been talking in the abstract, and just in fairness to you to, let you know what's coming here, I want to give you a little background on the case. And I do this not to shock you or to offend you or to get your emotions up about this, I do it because this is what you are going to be asked to listen to and we want to get people's reaction to it now before it's too late. Because once we start the case, and if you are selected and you hear evidence that causes you some problems, then it's too late. This is case that involves two killings. And the first one occurred in May of 1984. And at that time Mr. White was 23 living in San Francisco and he was down in the Market, Seventh Street area of the city. And he met a young acquaintance of his who was a 17-year-old runaway street person. The two of them went out to Lands End, which is out near where you work. You work at Fort Miley Hospital?

A. Right. 42nd and Clement.

Q. Right to the left down the hill is the area where the first killing took place. And Mr. White and this runaway went out to that area, and at the time Mr. White was living out there in a tent with two juveniles, 16, 17-year-old white males. And after Mr. White and the runaway got out there, Mr. White and the two juveniles proceeded to tie this runaway up, they beat him with some sticks, they took a syringe and injected some sort of a substance, the evidence is unclear on what this is, into the runaway's temple. They did various other acts of torture, and then they killed the boy and after he was dead, or about the time of his death, they decapitated him and then also dismembered the arms and legs with various instruments, buried the body. Head in one place and body parts in another. And then the three of them just went about their way.

Then about six months later in September of 1984 Mr. White was by himself down on Polk Street. He picked up a young 15-year-old runaway who was acting as a male prostitute. They agreed to have sex together. They

51 White's book summarizes the mitigation case in detail. See WHITE, supra note 1, at 123-30.
drove in a car out to Golden Gate Park. They did have sex. And after they had sex Mr. White took the boy out of the car, led him down a path, stabbed him in the chest and cut his throat. Killed him. Left him lying there in the park.

About a month after that, October of ’84, Mr. White was arrested up in Oregon for unrelated charges. And shortly after he was taken into custody he volunteered to the Oregon police that he had killed two people in San Francisco. And the police made arrangements with the San Francisco police to bring him down here, he was brought down here. He led the police out to Lands End. He dug up the body, helped the police dig up the body at Lands End. He implicated the other two juveniles who were involved in the killing, and he also confessed to the Golden Gate slaying. The police then took a tape recorded statement, two tape recorded statements from him in which he went into great detail about what I just told you. . .

And I tell you those facts really for two reasons. One, to let you know that this is not a case of mistaken identity. It’s really a case where you are going to be — your job in the first phase of the case is to determine Mr. White’s degree of involvement, not whether he was involved, but whether he was involved to the extent of being guilty of murder in the first degree, of murder with special circumstances as to both crimes. So, you would listen to the tapes, you would hear the juvenile participant, then you decide the case based on the court’s instructions of what constituted murder in the first degree. And that would be your task in the first phase. And we would be arguing to you that it’s not murder in the first degree, but some lesser degree. I also tell you those facts because for obvious reasons people have a strong response about the kind of crimes that we are dealing with here. And I wanted to get your reaction, what response you had to just hearing those facts? . . .

A. Well, to get . . . to my reaction, I remember hearing, I don’t remember specific details, but I do remember hearing about a body and decapitated head being found out there. And torture murders to me are very difficult.

Q. Sure.

A. I mean being empathetic with the victim. I can see a degree of remorse or on the surface of what you have told me at least that the person was arrested on an unrelated charge and must have had some either guilt pangs or may be the dread that he was eventually going to be found out and tried for this and wanted to clear the boards.

Q. Yeah.

A. So, I can respect that part of it in terms of his assisting the police and making the statement and implicating the other people.

Q. Okay. I guess one of the concerns we have is people hear those facts and they are so overwhelmed by them that they say: If I found him guilty of first degree murder, which involves willful, deliberate, premeditated murder, and I found he was guilty of torture murder and multiple murder, or multiple murder, that would really be the end of the case for me in terms of punishment because I think that the only appropriate response to those facts is the death penalty. And I won’t consider anything less than that given what you have just told me this case involves. Do you feel that way or have some other feeling?

A. No, I don’t. You have mentioned two other things, one is that he had been abused as a child.

Q. Uh-huh.
A. And there was mention of alcoholism.
Q. Uh-huh.
A. While these aren’t socially acceptable things, I mean, they are outrageous acts, I don’t feel like I could – I don’t feel that way at this point that it would be an automatic verdict of death.
Q. That’s really what we are asking at this point. We are not asking how you would vote because you haven’t heard all the evidence because it would be flushed out in greater detail in both phases, that is not our purpose to get you to commit one way or the other. The only thing we want to be sure is that you are not going to decide the case before you have heard any of our mitigation. That you think the case itself is so bad that you think the only appropriate punishment is death, and I take it from what you said you don’t feel that way?
A. No. . . . I believe I would still want to hear further testimony or whatever can be presented before deciding on the penalty.
Q. That’s great. That’s what we are looking for. And the first thing you would hear in the second phase of the case would be the prosecution calling witnesses in support of what the court told you were aggravating circumstances. That’s just a legal term for evidence concerning Mr. White’s prior felony convictions, and evidence of criminal activity involving violence which did not necessarily result in a conviction, but which did result in harm to other people. So just, again, to let you know where he would be going on that issue, you would learn that before these killings Mr. White had been convicted down in Los Angeles County of assault with intent to commit murder in 1971. That he served a prison term for that offense, about seven years up at the medical facility at Vacaville. That he was released of that. And you would also learn that even before that offense he was convicted of unlawful sexual intercourse, a felony, in Pennsylvania. . . . So, you would hear a witness – probably the woman who he had sex with get up here and describe what happened. And you would hear the woman who was harmed by Mr. White in Los Angeles that resulted in that conviction. And you would probably have the court papers introducing into evidence showing that he was, in fact, convicted of those offenses. In addition to that you would also hear from other people who were victimized by him, assaulted by him. And some people we have talked to have said: well, if you tell me the guy has committed crimes of the type you are talking about here involving torture, premeditated murder, and that he has a substantial history of assaultive conduct, my mind is really going to be turned off to any mitigation given the history and the crimes?
A. Would this – what’s presented also include his history at Vacaville?
Q. It would as part of our presentation. In other words, in mitigation we would essentially present a life history which would show what institutions he has been in, what treatment he received or did not receive, more importantly did not receive, and the effect that those institutions had upon him. . . . For instance, that when he was very young he was sent to an institution when he was a juvenile that included adult prisoners. He was a juvenile, ran away from home because of the child abuse situation, was put into an institution that mixed juveniles and adults. So, you would hear all about the institutions, what they were like, what happened to him in those institutions. You might hear testimony from people who treated him, psychiatric social workers, or doctors who examined him. That would all be presented to you as part of our case in mitigation.
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A. Well, again, I would say that I would want as much information as I could possibly have before I would want to make a determination whether it would be life in prison or death.

Q. And you think even after hearing the bad history that your mind would be open to listening to the entire picture before you made up your mind?

A. Certainly.

Q. And that you wouldn't make up your mind on the question of penalty until you have listened to all the evidence and deliberated with your other fellow jurors back in the jury room?

A. Yes, I would want to hear both sides as much entire – of the entire picture as I could pro and con.52

This person, of course, was a very highly desirable juror for the defense, having survived the “heavy-on-the-aggravation, light-on-the-mitigation” gauntlet that the defense made each prospective juror run through. A great many other prospective jurors did not survive this gauntlet, either indicating after the crime story or the aggravation story that a death penalty would be inevitable if the prosecutor proved up the facts implicit in our stories. As Welsh White concludes, “(a)lthough employing this strategy has some risks, it does have the potential for reducing the extent to which the jurors selected will be inclined to impose the death penalty.”53

Whatever jury selection strategy is employed, storytelling has its place in this phase of a capital case. In all capital cases,

[the storytelling trial lawyer must fathom the stories stored in each juror’s mind, so, as an effective communicator, he or she can activate the scripts that will lead to the listener’s understanding. It is a matter of reaching into the jurors’ minds and pulling out those stories that match the client’s favorable story. If stories are not carefully structured, the listener will scan unfavorable scripts and apply those to the situation at hand.54

53 WHITE, supra note 1, at 138. White indicates that “[t]he main risk is that, by asking the potential jurors whether they would be willing to consider a sentence other than death if specific aggravating facts are established, the defense is suggesting to the jury that the prosecution will in fact be able to establish those aggravating facts.” Id. at 138 n.118. Other risks are that the defense is also suggesting that the prosecution will be able to establish the charged crime itself, and that revealing facts in aggravation would seem to lessen any chance of a fair hearing in the guilt phase of the case. In William White’s case, it was a certainty that he would be convicted and that the aggravators would be established. The last risk involved in this strategy is the impact it has on the attorney-client relationship when the client repeatedly hears his lawyer sounding like a prosecutor. Careful preparation of William White alleviated that concern in his case, but in other cases, especially with mentally impaired clients, the task might not be so easy.
54 Murray Ogborn, Making Your Case Come to Life: Storytelling and Theme Creation, in 1 ATLA ANN. CONVENTION REFERENCE MATERIALS 189 (2001).
V. STORYTELLING IN PENALTY PHASE OPENING STATEMENT

"Storytelling in the opening statement is all about the creation of strong mental images that will endure throughout the trial." The critical essence of a good story in opening statement is that "the storyteller creates in the listener a strong visual image of the occurrences that are the story. The objective of the trial lawyer is to cause the jurors to visualize the events and picture the story as the lawyer desires it." Great trial lawyers like Gerry Spence consider the opening statement the most critical part of the trial:

I have often said that if I am given the opportunity to engage in an effective voir dire, that is, if I can open up the jurors to the issues in my case and create a trusting relationship with them, and if thereafter I can make an effective opening statement, the case is mostly won.

While outlining the elements of good storytelling in opening statement, Spence emphasizes that the importance of the opening statement is magnified when, as in most penalty phases, the lawyer cannot put the client on the stand to tell his own life story:

The truth is that we can tell [the client’s] story better than he. Our lives are not at stake. We haven’t sat in a smelly concrete box suffering a year of nightmares about this moment when we must win on the stand or perish. We’re not facing a prosecutor with greater communicative skills than our own. As lawyers, our business is to tell true, compelling stories. And the story we tell will likely not be severely interrupted in the opening whereas in his cross-examination the prosecutor will chop up [the client’s] story like chicken liver. As skilled storytellers we have prepared the accused’s story, remembering that every story has a beginning, a middle, the climax, and the end. We will be able to tell the story to the jury and support it with evidence during the trial, and put it all together again in the final argument much more effectively than [the client] will ever be able to do under fire.

Capital defenders know the importance of the opening statement and for years we have been taught not to forgo the opportunity to make a detailed opening statement, especially in the penalty phase. Perhaps one of the best penalty phase opening statements I have ever read was given by my co-worker Kevin McNally in a recent federal capital case in New York. Although space

55 Powell, supra note 2, at 90.
56 Id. at 90-91.
57 SPENCE, supra note 2, at 128.
58 Id. at 141.
59 United States v. Quinones, No. S3-00-Cr.-761 (S.D.N.Y. July 1, 2002). The facts of the case are set forth in United States v. Quinones, 511 F.3d 289 (2d. Cir. 2007). Kevin McNally is the director of the Federal Death Penalty Resource Counsel Project. See http://www.capdefnet.org/fdprc/about_us/who_we_are/we_are_frames.htm.
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limitations prevent me from reprinting the full opening, which was masterful, the heart of the opening was the telling of the client's life history:

You might ask, what diminished the defendant's control?
What shaped the choice that the defendant made?
What shaped his morality and his value system?
How did we get here?
What happened?
How was he damaged, if he was, before he got here?
Counsel for the government talked about there being another side.

There always is. And there is here.

Thirty-six years ago a child of God was born. And I say that because all children are children of God.

He was the youngest of six children. The oldest sister is Nancy. His older brother was Anibal. Then came Diana, and then Arlene, or Lily, and then Sandra, and then the boy, the baby boy. The boy's mother was Elba. The father was Carlos. They lived in dire poverty. His mother had five
children age of five or younger. Now, the father of Nancy and Anibal and Diana was a man named Enicio Ramos. Carlos fathered Lily, Sandy and Alan.

Mom and dad were born in Puerto Rico. Mom's mother and both sisters suffered from psychiatric illness. In fact, the boy's grandmother was hospitalized for a psychiatric condition.

His mother was beaten by [sic] sticks by her mother. At one time she, you will hear in the evidence, tried to cook her.

The boy's father was the youngest of 14 or 15 children in Puerto Rico. The boy's grandfather beat his father with sticks and a belt. This child's mother was emotionally and physically sick much of the time. She suffered from asthma and depression, as you could readily understand for a mother who had five children under five and little or no money or resources.

Over the years she turned to medication to deal with the awful situation she was in. The boy's father was not very literate, and didn't have any marketable skills. As a baby the child would stand crying in its crib unattended. You can understand why.

The young family struggled to survive, and in the first few years things were not as bad as they would get.

But slowly there was a downward spiral of just despair. As the pressure continued to build on this young family, dad sought escape in the streets with drugs and alcohol, and mom just couldn't deal with it and took her medication, her Valium and took to bed.

Within a few years things had totally fallen apart. There's no money, and because there's no money there is sometimes no food. There's no lights. There is no furniture. By the time the boy was 12 years old, the family had lived in between 10 and 20 apartments welfare hotels, shelters, and foster homes.

Making matters worse, the family had no extended support. There weren't relatives here that could pick up and help out with the situation.

Sadly, no teacher or policeman or social worker rescued the boy or his siblings. The food would run out after the first week after the welfare check was delivered.
Literally the children were starving at times. In 1977, when the boy was nine years old, after a complaint of sexual abuse by Diana against the father, Emma Harold, a social worker, made a home visit.

On that day, in a seven-person household with five children, the total food on hand was some rice and a can of peas.

The children would fend for themselves, and they sometimes would eat uncooked spaghetti or uncooked rice. Mayonnaise sandwiches were a meal.

DEFENDANT QUINONES: Excuse me, your Honor. At this point, please, can I go inside.

THE COURT: Yes. Go ahead.60

After the client exits the courtroom, the story obviously too painful to listen to, the opening continues:

MR. McNALLY: This is what the records, which will be in evidence, indicate. The part about the no food is on the bottom. The social worker wrote, and you can see it up there, “There is just a terrible abject poverty here; that we really haven’t seen anything like this very often, even though we have seen a lot of people on welfare.”

What little money welfare could provide went for, of course, the rent and some food, but increasingly too often for drugs for daddy.

Mom took to playing the numbers. She would say, and you will hear it, to help buy food for the children. As she would put it, occasionally she would win. When the money went, the electricity went and the light went.

Eighteen days after this first home visit, Rosa Jurarbe, another social worker, showed up at 1893 Crotona Parkway North, Apartment IF.

What she wrote, this different social worker, was, “There’s no phone, the apartment is very dingy and somewhat frightening and isolated. The bareness of the apartment is exaggerated by broken furniture. The living room had no light, nor did the bedrooms. The only available light was in the kitchen. However, there was no table or chairs in the kitchen. The boy first remembers his father cornering his mother when was three years old.”

That was the same year that a man and a dog upstairs were shot to death, and the bodies dragged out by the police.

The family was living at 179th and Honeywell at the time, and the little boy and his siblings remembered the gunfire and diving under the table or under the bed for protection. The older brother would be sent to the store, and he would be robbed frequently.

The evidence in this case will show that families shape little boys like this little boy, but it will also show that communities shape little boys and other children.

At 179th and Honeywell the boy watched from a window while a neighborhood gang dragged an African-American man from a delivery truck and beat him, stomping him until the little boy could see blood running from his mouth.

The murders were common. Drugs infested the neighborhood.

Eventually that building caught on fire and the family had to move to a Red Cross shelter. At age of 5 the family moved to 1604 University Avenue.

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60 Transcript of Opening Sentencing Phase Statement at 2942-44, Quinones, No. S3-00-Cr.-761.
At this point there were no phone, no TV, no couch, little furniture, often no electricity and often no food.

Mom was increasingly sick. The boy constantly worried about money, and he would hide little pieces of bread and then later share them with his brothers and sisters when there wasn’t any food.

The family didn’t celebrate holidays or birthdays, certainly not in the later years. There were no turkeys cooked on Thanksgiving. The child never had a birthday party. He never had a birthday cake. And, as he would put it years later to a psychologist, not even a cupcake with a candle.\(^6\)

The opening continues for another eighteen pages. McNally artfully describes in excruciating detail the trauma witnessed by and inflicted upon “the boy” and the “living hell” of his life.\(^6\) The narrative follows the boy into adulthood where “[a]s he grew older, the boy felt increasingly responsible for doing something about this situation.”\(^6\) His good deeds and positive attributes are chronicled, “[o]ver the years, this man, now a boy, grew to be a man. And he began to support his father his mother, his siblings, but it is actually the next generation that he helped.”\(^6\) “Unbelievably, unlike his parents, Alan never descended into drug use. Unlike his parents and the government witnesses in this case, he never raised a hand to a woman.”\(^6\)

McNally continued:

Despite a horrific childhood, there is much good in the man. The children will come here and talk about trips to amusement parks, remembering birthdays, Christmas gifts, taking them out to eat and talking to them about the importance of staying in school and staying off the streets; talking to them about relationship problems.

You can tell what’s going on here. The evidence will be that he tried to create a family. He did it doing bad things. There’s no doubt about that. But his heart was good. This is not a common drug dealer. You won’t find evidence of big cars and mansions and flashy jewelry and being self-centered and being that kind of stuff. This is an unusual man. He’s done many good things.\(^6\)

Although the mitigation evidence in this case was based in part on expert testimony and diagnosis of posttraumatic stress disorder, in the opening the experts and the diagnosis take a back seat to the story itself:

Because he suffered such a chaotic, abusive, neglectful, deprived and violent childhood, Alan Quinones suffers what’s called posttraumatic stress disorder. That’s something that soldiers in combat have come back with because of exposure to violence. It’s something that children like in Beirut

\(^6\) Id. at 2945-47.
\(^6\) Id. at 2947.
\(^6\) Id.
\(^6\) Id. at 2954.
\(^6\) Id. at 2955.
\(^6\) Id. at 2957.
who witness extreme violence suffer from. And it affects his ability to think clearly when particularly he is under stress. We will present the testimony of a social worker, two psychologists, and a psychiatrist to explain this disorder, what the results of it are and how it affects Alan.

Sanford Drob is a psychologist. He did the testing, which indicated that Mr. Quinones suffers from posttraumatic stress disorder. The evidence will be that a person can only suffer so much trauma, witness so much violence before it affects you in a very profound way.67

In the concluding portion of the opening, McNally reminds the jury that “[y]ou should keep in mind that the, I think as the judge pointed out, the default sentence, the presumed sentence, unless they overcome their burden of proof beyond a reasonable doubt, is in fact a horrible one, which is life in the cage forever.”68 His concluding remark is:

Finally, you will each understand after hearing the evidence that the death penalty is inappropriate and unnecessary in this particular case. While the law as I just mentioned says that any one of you individually can reject the death penalty, we are going to actually ask you to be unanimous and impose life without any possibility of release. The reason that we are asking you to do that unanimously, even though we don’t have to, is that it’s the right thing to do in this case with the evidence that you will hear. What we’re saying to you, with all respect, is that it’s justice here.69

I quote this opening statement at some length because I think it well-illustrates the effective use of storytelling in a capital case. “Lawsuit stories often suffer from their close association with lawyers. Many lawyers cannot help but choke the humanity out of a story by reducing it to its legal essentials.”70 The opening statement in the Quinones case is not about “legal essentials”; it is about the humanity of Mr. Quinones. An effective opening statement in the sentencing phase of a capital trial must, then, develop the nature and character of the people involved. Because the story is a human one and turns on human emotion, it is often the case that the conduct of the people involved can be explained by their character – what kind of people they are and how they react to human problems. Developing the character of key players as a way of explaining why things happened the way they did provides a useful opportunity to address the virtues and vices of those whose conduct is under scrutiny.71

67 Id. at 2961.
68 Id. at 2962.
69 Id. at 2964.
70 Powell, supra note 2, at 92.
71 Id. at 94.
VI. STORYTELLING IN PENALTY PHASE JURY INSTRUCTIONS

In federal death penalty practice, and in some other jurisdictions, defense counsel has the opportunity to craft proposed jury findings on factors in mitigation. Here again is another opportunity for creative storytelling, and one that is closely tied to the specific story the jury is being asked to accept.

In the Quinones case discussed above, the defense took full advantage of this opportunity to retell the story of the case in these proposed mitigation findings:

a. One or more other persons involved in the murder of Eddie Santiago will not be punished by death and will likely not be imprisoned for life.
b. Alan Quinones was raised in an environment of severe poverty and deprivation in which violence was common and schooling inadequate.
c. Alan Quinones was raised in a chaotic and abusive family, where drug abuse, psychological difficulties, and/or violence was present and where positive role models were lacking.
d. Alan Quinones was deprived of such basic necessities as food, shelter and clothing.
e. Alan Quinones suffered physical abuse at the hands of his parents and/or witnessed physical and/or sexual abuse of his siblings.
f. Alan Quinones suffers from psychological disorders.
g. Alan Quinones was exposed to various corruptive community influences, including disorganized family structure, high unemployment, early exposure to criminal activity, rampant drug trafficking to obtain necessities and community status, corrupt older male role models, distrust of police and the judicial system, pervasive community violence, and pervasive and extensive access to weapons and firearms.

72 In United States v. Taveras, No. 04-CR-156, 2006 WL 1875339, at *9 (E.D.N.Y. July 5, 2006), the defense proposed that 109 mitigating factors be submitted to the jury. Senior Judge Weinstein ruled that 109 mitigating factors was "far too detailed a list to submit to the jury to assist in its deliberations." Id. Defendant was directed to redraft his list of proposed mitigating circumstances. Should he be unable to do so, the following list will be used:
1. As a child, defendant was a victim of physical, sexual, and emotional abuse; suffered extreme poverty and deprivation; and was affected by his father’s mental illness.
2. Defendant suffered a severe beating in the Bronx in 1989 that made him prone to react strongly to threats to his safety.
3. Defendant has cognitive limitations and learning disabilities that have never been treated and that significantly diminished his capacity to appreciate the wrongfulness of his actions at the time of the crime.
4. Defendant does not pose a significant threat to the safety of other inmates or correctional officers while incarcerated.
5. Defendant has demonstrated the potential for rehabilitation within prison.
6. Execution of defendant will negatively affect his family and friends.
7. Other factors regarding defendant’s background or the circumstances of the offense justify imposition of a sentence other than death.

Id.
h. Alan Quinones performed numerous good deeds and acts of generosity to others.

i. Alan Quinones has been a model prisoner and is likely to make a positive adjustment to further incarceration.

j. Life imprisonment without release is itself a very severe punishment.

k. The execution of Alan Quinones will emotionally injure innocent loved ones and cause these persons needless psychological harm.

There are countless examples of such instructional storytelling in federal capital cases, with the range of proposed findings varying from simple statements such as “the client is a human being” to more elaborate statements such as the following:

- “The evidence does not establish Mr. McGriff’s guilt of the capital crimes with sufficient certainty to justify imposition of a sentence of death.”

- “Rudy Sablan is a talented artist and continues to rehabilitate himself through his artwork and he has used his creative talents in a way that is beneficial to others and shows his love and concern for them.”

- “. . . active in his Church, and his church activities benefited the lives of other members of his congregation in times of need.”

- “. . . the victim . . . involved himself in the underworld criminal activity of guns, knowing the risks involved in his activity, which led to his demise.”

- “. . . additional evidence, including DNA and other forensic evidence, which might have proved his guilt or innocence to an absolute certainty, was not available.”

- If Mohamed is executed, “he will be seen as a martyr and his death may be exploited by others to justify future terrorist acts.”

- “Several government sponsored support systems, including education and probation, failed to intervene in Billie’s downward spiraling path.”

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73 Jury’s Verdict Form - Penalty Phase, United States v. Quinones, No. S3-00-Cr.-761 (S.D.N.Y. 2004).

74 See, e.g., Verdict Regarding Mitigating Factors, United States v. Lawrence, No. 2:05-CR-11(S.D. Ohio 2006) (“Daryl Lawrence is a human being.”) (four jurors found this factor true); Findings On Mitigating Factors, United States v. Mayhew, No. 2:03-CR-165 (S.D. Ohio 2005) (“John Mayhew is a human being.”) (twelve jurors); Special Finding, United States v. Bass, No. 97-CR- 80235, (E.D. Mich. 2003) (“John Bass is a human being”) (stipulated by the parties as established). I am greatly indebted to my fellow Federal Death Penalty Resources Counsel Steve Potolsky for compiling the jury mitigation findings discussed in this section.


76 Special Findings Form, United States v. Sablan, No. 00-Cr-00531-WYD (D. Co. 2007) (three jurors/one juror).

77 Special Verdict, United States v. Catalan-Roman, No. CRIM. 02-117(PG) (D. P.R. 2005) (twelve jurors).


- "... served his country well in Desert Storm, Grenada, and for 22 years in the United States Army."  
While capital defense counsel can learn much about instructional storytelling from the wording of the foregoing factors and the number of jurors who actually subscribed to them, perhaps even more illuminating is what jurors wrote into the forms as their own reasons for not imposing death. For example, in United States v. Al Owhali, the jurors were asked to write in any additional answered mitigating factors, and they responded:
- "Executing Al Owhali could make him a martyr for Al Queda’s cause." (ten jurors)
- "Executing Al Owhali may not necessarily alleviate the victims’ or victims’ families’ suffering." (nine jurors)
- "Lethal injection is very humane, and the Defendant will not suffer." (4 jurors)
- "Life in prison is a greater punishment since his freedom is severely curtailed." (five jurors)
- "Al Owhali was raised in a completely different culture, society and belief system." (four jurors)  
As these examples illustrate, in death penalty cases where counsel has some input into the jury instructions, storytelling possibilities are limited only by the facts of the case and counsel’s imagination and artistic writing skill.

As trial lawyers, we attempt to control every aspect of the drama played out before the jury. Before the trial starts, we file motions to limit or exclude evidence. We select jurors who we believe will be most disposed to our defense and strike those who we think will favor the prosecution. During trial we object to evidence that is irrelevant and demonstrate why the government’s witnesses are unworthy of belief. But all too often we do not try to exercise that same level of control over the instructions the jurors are told they must follow to reach their verdict.  

In a death penalty case, "[t]his is simply unconscionable."  

VII. STORYTELLING IN PENALTY PHASE CLOSING ARGUMENT

The dramatic highpoint of the capital trial is the penalty phase closing argument. The artful penalty phase final argument is “not a rehashing of evidence. It is not a summary, witness by witness, recounting what each witness

86 Id.
87 See SPENCE, supra note 2, at 224 (“The final argument is a fight. It’s more. It’s the climax of the war in which we’ve been engaged.”).
has said. . . . The argument is an argument, the reasoning that supports justice, the creation of the whole aura of brightness that shines down on our case.  

Gerry Spence and other great trial lawyers maintain that:

Every argument, in court or out, whether delivered over the supper table or made at coffee break, can be reduced to a story. An argument, like a house, yes, like the houses of the three little pigs, has structure. Whether it will fall, whether it can be blown down when the wolf huffs and puffs, depends upon how the house has been built. The strongest structure for any argument is story.

According to Spence, step number one in constructing a winning final argument is to identify the heroes and the villians. In a criminal case,

we want to cast ourselves in the role of the hero, the humble hero to be sure, the kindly hero who smiles through his tears, who has been courageous, steadfast, and true, and at the same time to cast the other side as the uncaring, greedy, insensitive villain who exercises his power over the weak and the helpless . . . .

At the same time, we seek to “empower the jurors as heroes and cast them in the role of rescuing champions who refuse to deliver the helpless defendant to the state to imprison or to kill . . . .” We must also identify the victims, and in a capital murder trial the victims include both the murdered as well as his family, and the family of the accused who faces the death penalty.

How do these principles play out in a well-tried capital case? Let’s return to the Quinones case. We saw above how Kevin McNally skillfully told his client’s life history in the opening statement. What does he do to further that story and his cause in the closing argument? He begins by identifying his heroes and his victims and by reframing the central issue to be decided by the jury:

What is right under these circumstances, not only given what was done, but who it would affect? A death sentence for Alan Quinones would have such a huge negative effect on so many innocent people you wonder whether that would be the morally correct choice in this situation.

To impose a death sentence on this first-generation immigrant who grew up in the killing fields of the Bronx, one witness, I don’t know whether it was Mr. Lugo or the next witness, talked about it reminded him of Berlin at the end of World War II. I think of Beirut. I think of Iraq now. Would imposing a death sentence on this first-generation immigrant, who grew up the way he grew up and who struggled to lift up his family and in the end sacrificed

88 Id. at 228 (emphasis in original).
89 GERRY SPENCE, HOW TO ARGUE AND WIN EVERY TIME: AT HOME, AT WORK, IN COURT, EVERYWHERE, EVERY DAY 8 (1995).
90 SPENCE, supra note 2, at 231-32.
91 Id. at 232.
92 Id.
93 Id. at 233.
himself to do that, would that be the moral decision that we want to make here?

Look at the second generation. I am not telling you that all those folks are going to make it. I'm not telling you that Alan Jr. is going to make it or that Isaiah is going to make it when Maria dies. Look at these children here who have been lifted up, the wrong way morally, would that be a moral decision?

I think about the movie *Gangs of New York* and having the name McNally and that being about Irish gangs. You think back to the violence in the Five Points neighborhood, those of you who saw that movie, of those first-generation immigrants.

Mr. Anders is right. Eddie [the victim] was a good person, too. What he was referring to is that there's substantial evidence before you that Alan is a good person. He is a good person. He is a generous caring person. There's two kinds of people. There are evil people who do evil things. That is a death penalty case. And there are good people who do evil things. That's not a death penalty case.94

McNally next briefly attacked the sufficiency of the evidence to prove the aggravating factors, during the course of which he touched up the fact that the mother of one of the defendant's children had testified as a cooperating witness for the government during the penalty phase. This mention gave him the opportunity to again talk about the victims in the case:

A significant thing about Janet Soto . . . is the horrible situation she was in, in having to testify at a death penalty phase for the father of her son. We respectfully submit that it is a reason not to vote for the death penalty so that someone doesn't have to sit down with Isaiah someday and explain that, yes, your father was executed by the government, and, yes, your mother testified on behalf of the government at the proceeding in which it was determined he was going to die.95

Seeking again to identify his main hero and to foreshadow a discussion of his mitigating life history, McNally tells the jury:

Mitigation doesn't have to be that immediate. In fact, as you will learn from the instructions, mitigation can also be things that happened a long time ago, even sometimes things that are not connected to the crime. But what happened to Alan in his life a long time ago is in fact connected to what happened to Eddie Santiago. We will see that at the end.

This man has made at times a heroic struggle to lift up his family. He is a good person and those things are strong mitigating circumstances and something for you to consider when you make this moral decision. We kill when it is absolutely necessary. It is just simply not here.96

95 Id. at 3938.
96 Id. at 3939.
McNally next stresses the hardship of the alternative penalty of life imprisonment without parole, drawing attention to the instruction he crafted and painting a vivid image of what the client’s life will be like:

He is not the worst of the worst, mitigating factor No. 10. Life imprisonment without release is itself a very severe punishment. As I mentioned, a number of people think it’s worse. It is life in a cage not much bigger than your bathroom. You have no control over anything in your life, whether it be what you eat or whether the lights are on or whatever. There is not going to be any more Halloween parties, no more graduations of nephews to attend, just years just rolling by endlessly.97

He alludes to the irrevocability of the death penalty and the lack of certainty of the client’s guilt:

What happened – who actually killed Eddie? Is there no doubt in this case whatsoever?

There is no physical or other reliable type evidence, like from an ordinary citizen, independent of the criminal activity. All I am saying here is don’t make it irrevocable. You have in the newspaper about innocent people who have been released from death row years later when something was discovered. The evidence in those cases has often been the type of testimony that you heard. I am not saying this is one of those cases. All I am saying is that that is the scenario. That is the situation where good juries have in retrospect turned out to have made a mistake because something later on comes up that was not before that jury. There is no reason, there is no necessity here to make a decision totally irrevocable.98

He next discusses the government’s emphasis on the defendant having made his choices, and here he introduces some of the family background story that he had discussed in his opening and established through his witnesses:

I wanted to talk briefly about choices. This is probably not a very good example, but it’s the best we could come up with. You have a person, like any number of people who has no family history of addiction or psychological disorder, no childhood maltreatment or violence, violent exposure, no instability, has a good family, gets love and acceptance from them, from the parents, the family is stable, there is a structure to the family, there’s consistency, there’s role models, there’s positive relationships. And then you talk about choices, that person that I just described. If that person wants to become a drug dealer, that person sort of has to jump over all of that.

All right. That’s a choice. That is one choice. But not all choices are the same. What about a person who has a family history of addiction or psychological disorders or was mistreated or exposed to violence or suffered trauma or abandonment and lives in a corrupt community? What about that person? Is that the same choice? When you take away all that stuff, it’s just

97 Id. at 3940-41.
98 Id. at 3941.
a downhill roll for the person like that. Choices are different depending on the consequences.\footnote{Id. at 3942.}

He then moves into the heart of the closing, the description of the client's dismal life history and his successful struggle "to crawl out of that situation, the wrong way, the morally wrong way, and do good for other people before it all came crashing down."\footnote{Id. at 3948.} Here he repeats and amplifies on many of the same story lines and verbal images that he invoked during the opening, but now he has the evidence and the jury instructions to back him up:

The fact that his mom was a teenager at the time she got pregnant, the parental alcohol and drug abuse, the extreme—we are not talking about poverty. We are talking about extreme poverty.

What it was like to have no furniture. No electricity. And mom just couldn't assume household responsibilities. The apartment was filthy. There were no clean clothes to wear. There were dirty clothes filed everywhere. There were maggots in the laundry. How do you grow up like this, with rats and little or no food and being actually starving sometimes?

Doesn't that matter?

Eating junk food and mom spending the money on the numbers. Never going to a doctor or a dentist and having your teeth turn green and rot. Not in America.

OK. We can't do anything about that now except not execute this kid. We are about more than that. It is not just the gut wrenching testimony you heard. It is corroborated in the record. It is before you. You saw this in opening statement about how he described horrible abject poverty by a social worker who sees poverty every day. It must have been pretty bad. There is no food in the house when they visit and then you have a mission of Immaculate Virgin Records describing where he grew up, one of the twenty places he grew up as frightening for adult. What is it like for a seven-year-old kid?

Physical or emotional abuse. You saw how painful it was for Anibal to do this, and he only did it because he loved his brother so much.

You heard the testimony. Chronic domestic violence.

The worst part is seeing your mother beaten.

Periods of homelessness for these children. Fleeing into the night to sleep on subways or in parks or on the rooftop. Attending so many different schools.

Sexually traumatic exposure.

I mean, can you imagine a case where the list could be longer than this?

I mean, short of one parent murdering the other, what other mitigating circumstances could you possibly imagine in the worst nightmare you could imagine? Of course it matters when you make a moral decision about what happened.\footnote{Id. at 3945-47.}
Despite this adversity, the client emerges as a heroic figure:

As I said, these things have a terrible effect on all the children, and not just Alan. But look at what he does to try to pick himself up. He is the youngest of five. At the age of eight he gets himself a job delivering groceries, runs the money home to mom. He tried. Then he sees Anibal dealing drugs, and he follows in his footsteps in his midteens. That was a choice. Yes, it was.

But you put it in context, and it’s different than if my son decides to go sell drugs or somebody who has been fortunate, more fortunate in life than Alan has. He’s trying to help his siblings and others. You know, he goes and finds Diana in the streets and gets her food, doesn’t give her money because he knows she’ll spend it on drugs, takes her to a rehab clinic in the Bronx, hires a woman to take her to Florida so she can dry out.

He goes on to review the evidence in respect to each of the eleven mitigating factors identified in the instructions quoted above, reminding the jury that “[t]hose are lawful mitigating circumstances. Those are in and of themselves reasons to reject the death penalty in this case and impose the very harsh alternative punishment of life without hope of release.”

For instance, he argues:

Mitigating factor No. 8. Alan Quinones has performed numerous good deeds and acts of generosity to others. We know that that’s true.

The money may have been from illegal activities, but he could have bought a mansion, or he could have bought expensive jewelry, or he could have lived like your ordinary drug dealer. But that’s not who he is. Knowing the difference between one drug dealer who kills and is like that and another is a life and death distinction.

What did he do?

He took care of Carmen. He paid a bribe for his mom to have housing that she could actually afford and stay in, where she still lives. He helped his father. He helped his mother-in-law. He helped Anibal in prison. He helped Sandra. He came and got Diana and helped save her life, literally. She is where she is today because he came and got her and set her up in Allentown. She has kicked drugs. She’s got two jobs. She’s got husband.

We don’t execute people who do things like that.

I realize this is your first death penalty case, but you’ve read about death penalty defendants. Do you think this is a typical mitigation presentation in a death penalty case? I will leave it to you to judge.

After reviewing numerous other good deeds and acts of generosity to others, McNally uses the verbal image of a bridge to illustrate both his client’s resiliency and the damaged choices that he had to make:

\[\text{[Footnotes]}\]

102 Id. at 3950.
103 Id. at 3951.
104 Id. at 3953-54.
There is every mitigating circumstance you could think of present in this case. This is sort of an example of, maybe not the best way to explain it, but, you know, pretend we are all bridges. And you have a really good, warm, loving family. You don’t have to have much money. You are healthy physically, mentally. You have good genes, so you are not subject to any disease and you are free from childhood trauma and you have a strong bridge.

But when you have a history of dysfunction in your family and parental addiction and chaos and neglect and trauma you get cracks in the bridge. But Allan plugged those cracks on his own. Nobody helped him because he became the family helper. He became a survivor. He was searching for family. He was searching for mom, which is why he calls these women mom. And on top of that bridge he takes on everybody, not just some people, but everybody. The only way to do that is to have time and money. And dealing drugs gave him time and money and he supported them.\footnote{Id. at 3956-57.}

In the final portion of the argument, McNally returns to the theme of victims:

Mitigating circumstance number 11; the execution of Allan Quinones will emotionally injure innocent loved ones and cause these people needless psychological harm.

How much more pain do these people have to suffer? You know, if it was necessary that’s one thing, but if it’s not compellingly necessary an American jury will not needlessly impose pain on innocent people, particularly, innocent children and that is what a sentence of death would do in this case. You know we count thirty-five people there are more who would be devastated if you were to choose this unnecessary option of a sentence to death. And these are their names and you saw most of them testify.\footnote{Id. at 3958.}

His final words are:

Let’s stop this suffering. Let’s stop it now. There is no need for it. We respectfully submit that it is the moral choice here with great respect to Edwin Santiago and his family, with greatest respect it is not, a death sentence is not necessary to pay respect to Eddie Santiago and his family. A life sentence without release will do that. Finally, it’s justice. Life in prison without release is justice in this case. Thank you.\footnote{Id. at 3950-60.}

Ultimately, the jury in this case unanimously found true the statutory aggravating factor that Alan Quinones committed the murder of Eddie Santiago after substantial planning and premeditation.\footnote{Jury’s Verdict Form - Penalty Phase, United States v. Quinones, No. S3-00-Cr.-761 (S.D.N.Y. 2004)} It also unanimously found true the non-statutory aggravating factor that Alan Quinones killed Eddie Santiago to prevent him from, or to retaliate against him for, providing information and assistance to law enforcement authorities regarding the investigation and
prosecution of the defendant’s drug dealings.\textsuperscript{109} However, after deliberating for only two hours, the jury unanimously decided that Alan Quinones should not be put to death.\textsuperscript{110}

We are of course left to speculate whether the storytelling techniques used by Kevin McNally in both his opening statement and closing argument were the decisive factor in the jury’s rejection of the death penalty. The only thing we know for sure is that juries are typically moved by effective storytelling, that the storytelling techniques used in this case were very good, and that this jury was moved.

\textbf{VIII. CONCLUSION}

Oliver Wendell Holmes, Jr. once wrote that “[o]f course, the law is not the place for the artist or the poet.”\textsuperscript{111} Maybe not, but in this article I have attempted to demonstrate that in the modern era of death penalty litigation, creative and artistic storytelling techniques play an important role at all stages of a capital case. Competent capital defense attorneys are already skillfully using these techniques, and the growth of this narrative form of litigation will no doubt increase in the years ahead in all areas of the law. There are certainly limits and cautions that go along with the use of storytelling techniques, as I have tried to indicate.

Perhaps the best advice for the future is the following:

In order to gain and retain acceptance, the “narrative” form must be done extremely well, with dignity, responsibility, and the kind of ethical constraint that typifies the role of a jurist. At the same time, the narrative must be well-crafted to create the sense of “suspended disbelief” expected of the audience of the arts. This remains the most complex challenge for the “narrative” advocate and practitioner because the two antagonistic creative processes — law versus art — must somehow be reconciled and harmonized into a final product that represents the relative quest for truth (characteristic of law), rather than the freedom of imagination (characteristic of novelistic writing).\textsuperscript{112}

\footnotesize
\textsuperscript{109} Id.
\textsuperscript{110} Id.
\textsuperscript{111} OLIVER WENDELL HOLMES, The Profession of the Law, in COLLECTED LEGAL PAPERS 29, 29 (1920).
\textsuperscript{112} Duong, supra note 10, at 3.