St. Mary's Law Journal

Volume 30 | Number 2 Article 2

1-1-1999

Dead Man Talking: Competing Narratives and Effective Representation in Capital Cases Essay.

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ESSAY

DEAD MAN TALKING: COMPETING NARRATIVES AND EFFECTIVE REPRESENTATION IN CAPITAL CASES

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"I just want to say that I know it's so hard for people to lose someone they love so much, I think it's best for me just to say nothing at all."

— Karl Hammond, June 21, 1995.

I. PROLOGUE

Karl Hammond, strapped in the middle of the night to a gurney in the Walls Unit of the Texas Department of Criminal Justice, Institutional Division, decided on these as his last words before he was filled with a lethal quantity of poisons and executed. Ironically, this statement, saying "nothing at all," is the *best* possible summary of his case, the courts that reviewed it, and the attorneys involved in the process that landed him on death row. In fact, the trial record clearly indicates that the State's presentation was complete and well-presented, yet Karl's defense was almost invisible. For instance, during the guilt-innocence phase of the trial, the State produced 28 witnesses and presented over 116 pieces of evidence.[1]

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1. *See* Record at vi-xv, xxxv-xxxix, State v. Hammond, No. 87-CR-0200 (226th Dist. Ct., Bexar County, Tex. Mar. 11, 1987). A criminal case is a bifurcated proceeding, consisting of a guilt-innocence phase and a punishment phase. *See* Phyllis L. Crocker, *Concepts of Culpability and Deathworthiness: Differentiating Between Guilt and Punishment in Death Penalty Cases*, 66 FORDHAM L. REV. 21, 23-25 (1997) (describing the phases of a death penalty case); Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 303 (1983) (naming the guilt phase and the penalty phase as the two phases of a capital trial). The jury determines a defendant's guilt or innocence in the first phase of the trial. *See* Phyllis L. Crocker, *Concepts of Culpability and Deathworthiness: Differentiating Between Guilt and Punishment in Death Penalty Cases*, 66 FORDHAM L. REV. 21, 23 (1997) (indicating that during the guilt phase, the jury determines whether the defendant is guilty or innocent); James M. Doyle, *The Lawyers' Art: "Representation" in Capital Cases,* 8 YALE J.L. & HUMAN. 417, 423 (1996) (stating that jurors determine a defendant's guilt or innocence at the first phase of the trial, but determine the punishment at the second phase). If the jury finds the defendant guilty, it must then make an "individualized determination about whether the defendant should be sentenced to death or life imprisonment" during the punishment phase of the trial. Phyllis L. Crocker, *Concepts of Culpability and Deathworthiness: Differentiating Between Guilt and Punishment in Death Penalty Cases*, 66 FORDHAM L. REV. 21, 23 (1997). These two phases of the trial are distinct, and they must remain so for a variety of reasons. *See* James M. Doyle, *The Lawyers' Art: "Representation" in Capital Cases*, 8 YALE J.L. & HUMAN. 417, 423 (1996) (describing the two phases as separate from one another); Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 303 (1983) (explaining that the capital trial is divided into "two separate but intimately related trials"). A guilty verdict simply proves that the defendant deserves to be punished, but it does not necessarily mean that he should be sentenced to death. *See* Phyllis L. Crocker, *Concepts of Culpability and Deathworthiness: Differentiating Between Guilt and Punishment in Death Penalty Cases*, 66 FORDHAM L. REV. 21, 28

In contrast, Karl's defense counsel, consisting of two court-appointed attorneys who were law partners in San Antonio,[2] conducted minimal cross-examination of the State's witnesses and produced no witnesses of their own.[3]

In the early stage of the proceedings, Karl's sister, Rebecca May, spoke with the defense attorneys. She suggested that they investigate Karl's alibi and his work record at M.D. Mechanical, where he was employed at the time of the crime. According to Rebecca May, Karl's trial attorneys replied that they were given only $500 for investigation and expert fees and that the investigator who had been hired to take statements from family members had already cost them more than that amount.[4] In other words, the attorneys were unwilling to prepare an adequate defense because the money made available to them was already spent, making further defense-building efforts infeasible.

Unfortunately for Karl, this "strategy," based on a lack of funding, led to a virtual absence of any defense presentation. For example, several weeks into trial and at the end of the day on March 26, 1987, the prosecutors and the defense attorneys met with the

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(1997) (stating that a finding of guilt only establishes that the defendant should be punished, not that he will be sentenced to death). Otherwise, every guilty verdict, which always leads to a punishment phase, would result in a death sentence and defeat the purpose of a bifurcated proceeding. *See id.* at 26 (opining that "[e]quating guilt and punishment defeats the purpose of individualized sentencing in a bifurcated proceeding").

2. According to the Texas Legislature, a criminal defendant "is entitled to be represented by counsel." TEX. CODE CRIM. PROC. ANN. art. 1.051(a) (Vernon Supp. 1999). To this end, the court *shall* appoint an attorney to defend an individual who cannot afford his own counsel. *See id.* art. 1.051(b)-(c) (noting that "[a]n indigent defendant is entitled to have an attorney appointed" and defining indigent to mean "a person who is not financially able to employ counsel"); *id.* art. 26.04 (providing a list of factors for the court to consider when determining whether an individual is indigent).

3. In several instances, Karl's defense counsel abstained completely from cross-examining the State's witnesses. *See, e.g.*, Record at 2751, *Hammond*, No. 87-CR-0200 (releasing the State's witness, one of the first people who viewed the victim, without cross-examining him); *id.* at 2874 (dismissing another State's witness without conducting a cross-examination).

4. According to the Texas Code of Criminal Procedure, court-appointed counsel "*shall* be reimbursed for reasonable expenses incurred with prior court approval for purposes of investigation and expert testimony and shall be paid a reasonable attorney's fee." TEX. CODE CRIM. PROC. ANN. art. 26.05 (Vernon 1989). Prior to 1987, the code allowed "a reasonable fee [for these expenses] to be set by the court but *in no event to exceed $500.*" *See* Act of Sept. 1, 1987, 70th Leg., R.S., ch. 979, § 3, 1987 Tex. Gen. Laws 3323, 3324 (eliminating the $500 cap on investigative and expert testimony expenses).

trial judge in chambers, outside of the jury's presence.[5] For appellate purposes only, defense counsel submitted affidavits, which the investigator had taken from family members, pertaining to Karl's alibi defense.[6] These affidavits developed a reasonable alibi defense in relation to the date and time of the capital murder charge.[7] However, after Karl's attorneys placed these documents in the record, they "rested" and "closed" in the trial judge's chamber.[8]

As later demonstrated by Karl's actions at trial, not a single person adequately explained the significance of this event to Karl.[9] At the very most, the attorneys had only ten minutes to talk to their investigator and Karl before the proceedings took place in the judge's chambers.[10] Karl, who had always expected to testify and intended to have his witnesses presented on his behalf, believed that "resting" meant the defense would not present any evidence that day but would wait until the next morning to begin their side of the case. Of limited intelligence and from all accounts suffering from mental illness,[11] Karl did not realize, nor was it explained to him, that he would not be allowed to testify or call witnesses on his behalf.

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5. *See* Record at 3105, *Hammond*, No. 87-CR-0200.

6. *See id.* at 3107. These affidavits were marked as Defense Exhibits 2, 3, 4, and 5.

7. Defendant's Exhibit 2 contains the affidavit of Cynthia Knowles, Karl's girlfriend. *See* Knowles Aff., Def.'s Ex. 2, *Hammond*, No. 87-CR-0200. In her affidavit, Miss Knowles explained that she remembered "that on the night of September 4, 1986, . . . Karl was dropped at our house on New Lite around 9:45 p.m. And he went to work the next morning. . . ." *Id.* Defendant's Exhibit 3 is the statement of Rebecca B. May, Karl's sister, who asserted that she "dropped Karl off at New Lite Village Apt., where he stays with his girlfriend . . . . " May Aff., Def.'s Ex. 3, *Hammond*, No. 87-CR-0200. Defendant's Exhibit 4 presents the affidavit of Milligan Hammond. *See* Hammond Aff. Def.'s Ex. 4, *Hammond*, No. 87-CR-0200. In his statement, he discusses how Karl was dropped off at his girlfriend's apartment on the night in question. *See id.* The affidavit of Theresa May Young is presented in Defendant's Exhibit 5. *See* Young Aff., Def.'s Ex. 5, *Hammond*, No. 87-CR-0200. Ms. Young asserted that Karl was "around the [sic] crowd in and out of the house off and on all night." *Id.*

8. *See* Record at 3109, *Hammond*, No. 87-CR-0200.

9. The author spent many years representing Karl during his post-conviction proceedings in state and federal courts. The factual assertions that relate to Karl's understanding, when not taken from the record, are drawn from the independent investigation conducted pursuant to that representation. This investigation included interviews with all the family members and attorneys involved in the case, interviews with numerous fact witnesses, and numerous discussions with Karl.

10. *See* Record at 3106, *Hammond*, No. 87-CR-0200.

11. *See infra* Part III.B.

Subsequently, on March 30, the trial resumed.[12] The previous night, Karl had called all of his witnesses on the telephone and explained to them the importance of being in the courtroom the next day to testify. His sisters, Rebecca May and Elaine Brown, were present in court on March 30, as were the family members of Karl's girlfriend, Cynthia Knowles. Rebecca and the members of Cynthia's family were available to testify in support of Karl's alibi. Moreover, all of the witnesses were prepared to testify as to mitigating circumstances relevant to Karl's sentencing. However, none of these witnesses were called because the defense had rested and closed.

On March 30, when Karl finally realized that the introduction of evidence was indeed over and the jury was going to be charged, he took his defense into his own hands. Before the jury was brought into the courtroom, Karl stood up in court and told the trial judge that his constitutional rights were being violated.[13] In addition, he indicated that neither he nor his witnesses had been allowed to testify on his behalf. In fact, Karl stated, "I have my witnesses out there, Your Honor, waiting to testify in my behalf."[14] Unfortunately, in response, the judge promptly removed Karl from the courtroom.[15] When the bailiffs later brought Karl back into the courtroom,[16] the judge, instead of conducting an inquiry into the reasons for Karl's statements, immediately admonished him by stating, "Now you can take your choice, you can sit there and listen and keep your mouth shut or I'll gag you."[17] Karl then persisted in the only manner that he felt was left to him in light of his attorneys' behavior:

> THE DEFENDANT: Well, Your Honor, I feel like my rights have been violated and I have my witnesses here, out here in the audience, Your Honor. They're willing to testify in my behalf.

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12. *See* Record at 3141, *Hammond*, No. 87-CR-0200 (indicating that the court reconvened on March 30, 1987). Between the time of the conference in the trial judge's chambers and the next day in open court, no significant trial events occurred. No further testimony had been taken, and no arguments had commenced.

13. *See id.* at 3142.

14. *Id.* at 3142-43.

15. *See id.* at 3143 (reporting that the judge stated "all right . . . [t]ake him out of the room").

16. *See id.* at 3143-44. While Karl remained outside the courtroom, the judge instructed the jury to leave. *See id.*

17. *Id.* at 3144.

> THE COURT: It doesn't make a bit of difference. You made that decision and your attorneys have made that decision.
> THE DEFENDANT: Well, my attorneys, they—they bringing me in here unaware of anything. You know, they don't come to the jailhouse or visit me, tellin' me what's gonna happen before I go to court the day before I go to court or anything. They just pull me up in this courtroom and leave me in the blind. . . .[18]

At this point in the proceedings, without any apparent concern for Karl's complaints, the judge again threatened to gag him if he did not keep quiet.[19] Karl responded that he would only keep quiet and abide by the trial court's order if his witnesses could testify.[20] The judge then ordered the bailiff to "[b]ring the gags and we'll gag him. We'll see that he keeps quiet."[21]

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18. *Id.* at 3144-45.

19. *See id.* (begging the court once again to allow his witnesses to testify).

20. *See id.* at 3145.

21. *Id.* A trial judge may bind and gag a defendant in order to preserve "dignity, order and decorum" in the courtroom; however, "no person should be tried while shackled and gagged except *as a last resort.*" Illinois v. Allen, 397 U.S. 337, 344 (1970) (emphasis added); *see also* Shaw v. State, 846 S.W.2d 482, 486 (Tex. App.—Houston [14th Dist.] 1993, pet. ref'd) (stating that binding and gagging should be a last resort because an accused has the precious right "to be tried before an impartial jury with the presumption of innocence fully intact and free of prejudice"). The rationale for a rule against restraints is equally applicable during the punishment stage when the jury must decide the severity of a defendant's punishment. *See id.* at 487 (discussing the significance of a rule against restraints during the punishment stage). Only a showing of "exceptional circumstances" will warrant drastic measures, including gagging a defendant in the jury's presence. *See id.* at 486.

Texas courts have acknowledged only a limited number of situations as constituting such extreme circumstances; those circumstances include when "an accused has expressed his intention to escape, has made threats of physical violence, has resisted being brought to court, has repeatedly interrupted the court proceedings, [or] has attempted to leave the courtroom." *See, e.g.*, Brown v. State, 877 S.W.2d 869, 870 (Tex. App.—San Antonio 1994, no pet.) (discussing the exceptional circumstances that may justify the gagging of a defendant); *Shaw*, 846 S.W.2d at 486-87 (listing some extreme circumstances that may give rise to a trial judge ordering the defendant to be gagged in the jury's presence). However, because these extreme measures can severely impede the fairness of the proceedings, "[a] decision to have [him] restrained is 'subject to the closest scrutiny and review by the appellate court.'" *See Brown*, 877 S.W.2d at 870-71 (quoting Gray v. State, 99 Tex. Crim. 305, 321, 268 S.W. 941, 949 (1924)). Courts have actually identified at least three ways in which restraints can harm a defendant: (1) a jury is prejudiced by the inference that "the court has already decided that the defendant is not only guilty, but also dangerous and untrustworthy;" (2) "the interference that a physical restraint causes with a defendant's thought processes, the use of his mental faculties, and his ability to communicate with counsel during trial;" and (3) "physical restraints are an affront to the court and its proceedings." *Id.* at 871; *see Allen,* 397 U.S. at 344 (discussing the problems that result when a defendant is gagged); Ralph H. Kohlmann, *The Presumption of Innocence: Patching the Tattered Cloak*

Only after the judge ordered Karl gagged did his attorney speak up, plainly without consulting with Karl about his preferences:

> Judge, we prefer, if the Court's going to do that, that he be excused from the courtroom entirely, just not be in here. I think that would be preferable to having him gagged and tied here in front of the jury.[22]

The judge then again responded by admonishing Karl without any inquiry into his complaints:

> THE COURT: You can sit there and stay still or you're going to be chained and gagged. You make your choice. Are you going to sit there and keep quiet?
> THE DEFENDANT: (No audible answer.)[23]

When the jury was eventually allowed to return to the courtroom, Karl again asserted his right to testify and present a defense. The following excerpt from the trial record presents the ensuing conversation between Karl and the trial judge:

> THE DEFENDANT: Again, Your Honor, I still say you violated my Constitutional rights.
> THE COURT: You sit down, now you sit down.
> THE DEFENDANT: I have a right to testify.
> THE COURT: Wait a minute. Wait a minute. Wait.
> THE DEFENDANT: I have a right to testify. I have a right to testify.
> THE COURT: Take the jury out, please.
> THE DEFENDANT: I have people here to testify for me. You all people have violated my rights. I'm not getting a fair trial here.[24]

Immediately, after this outburst and once again without inquiry, the judge ordered Karl removed from the courtroom.[25] Even the witnesses who were present to testify on his behalf sensed the injustice. In fact, as Karl was being taken from the courtroom, his sister, Rebecca May, spoke out:

After Maryland v. Craig, 27 ST. MARY'S L.J. 389, 410-11 (1996) (identifying physical restraints of a defendant as "one example of a procedure that can have a detrimental impact on the defendant's presumption of innocence").

22. Record at 3144-45, *Hammond*, No. 87-CR-0200.

23. *Id.*

24. *Id.* at 3146-47.

25. *See id.*

> He's not getting a fair trial. They won't let him speak. I'm his witness. I'm his witness. I'm here. There's two more here. They're not letting him testify. I know where he was. It's not fair. It's not fair.[26]

In response to this complaint, the judge held Rebecca May in contempt of court, contending that she was "disrupting" the proceedings.[27] He then fined her $500 and sentenced her to 30 days in jail.[28] The judge never inquired about the substance of her complaint and never afforded Rebecca May, though indigent, an opportunity to be heard or to have counsel represent her on the contempt charge.[29] The judge only ended this summary process and sentence with a cold, "Take her away."[30]

After the disposition of Rebecca May's case,[31] the judge ordered the bailiffs to gag Karl.[32] With Karl gagged before the jury and his sister in jail, the trial court effectively silenced Karl Hammond and his would-be alibi witnesses, thus preventing the jury from ever hearing their testimony. Thereafter, Karl Hammond was found guilty of capital murder and sentenced to death.[33]

In the fall of 1990 and after the Texas Court of Criminal Appeals had denied Karl's direct appeal, I, as an attorney for the then-extant Texas Appellate Practice and Educational Resource Center, was assigned to Karl's case.[34] My first duty was to write a petition

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26. *Id.* at 3147.

27. *See id.*

28. *See id.* at 3148.

29. According to a Texas court, "[t]he right to counsel afforded to those accused of a crime by the provisions of the Texas Code of Criminal Procedure apply equally to alleged constructive criminal contemnors." *Ex parte* Goodman, 742 S.W.2d 536, 540 (Tex. App.—Fort Worth 1987, no pet.).

30. Record at 3148, *Hammond*, No. 87-CR-0200.

31. *See id.* (indicating that the jury was not present during the disposition of Rebecca May's contempt charge).

32. *See id.* at 3149 (noting that Karl was physically gagged and threatened by the court to be tied up if he tried to remove his gags).

33. *See id.* at 3221, 3607-08.

34. *See* Hammond v. State, 799 S.W.2d 741, 750 (Tex. Crim. App. 1990) (en banc) (affirming the trial court's judgment). In his appeal, Karl raised several points of error. In his first and second points of error, he contended that the trial court erred by failing to grant the State's challenge for cause against one venireman because she was absolutely disqualified for jury service due to a former conviction. *See id.* at 742. The court held that whether such venireman was disqualified was a question for the trial court to resolve. *See id.* at 744-45. In his third point of error, Karl argued that the lower court erred by failing to grant his motion for mistrial made in response to a prosecution statement regarding Karl's decision not to testify. *See id.* at 747. However, the court found that the statement was

for writ of certiorari to the Supreme Court of the United States.[35] This effort was intended both to seek an avenue of redress and to allow sufficient time for the reading and analysis of the massive trial and appellate record accompanying Karl's case.

During my career as a defense attorney, no other record or event has suggested a more certain victory in the courts. I even showed the portion of the record discussed above to those with whom I worked. We all agreed that this was the one case that we were sure to win. How could it be otherwise? The record showed an assertion of the right to testify by the defendant and a trial court judge so interested in denying the defendant's testimony that the judge's response to such an assertion was to have the defendant gagged. However, as I stood behind the Plexiglas that separated Karl from the world at his last moments of life, I was embarrassed at my ignorance and hubris in 1990, and I felt disconsolate and forever altered

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harmless and "was cured by the trial court's prompt instruction to disregard." *Id.* at 748. In his fourth point of error, Karl complained that the trial court should have granted his motion for mistrial after the prosecutor brought in facts outside the record during his summation. *See id.* Again, the court found that such error was cured by the trial court's subsequent jury instruction to disregard the evidence. *See id.* at 749. Karl's fifth point of error asserted that the lower court erred by overruling his objection to the prosecution's final argument during punishment phase, which made reference to an extraneous offense. *See id.* at 749. In his final point of error, Karl contended that Article 37.071 of the Code of Criminal Procedure was unconstitutional in that it contained "no provisions for directing and instructing the jury's consideration of mitigating circumstances at the punishment phase of trial." *Id.* Despite this claim, the court held that Karl had no standing to challenge the constitutionality of this statute and overruled his final point of error. *See id.* at 750.

35. Indeed, my public role in this case began in the Supreme Court of the United States when, in light of my father's death in February, 1991, I requested an extension of time in order to file a petition for certiorari. This application was part of others submitted by the Texas Resource Center. Justice Scalia, although begrudgingly allowing an extension of time, wrote:

> In my view, none of these applications, as an original matter, would meet the standard of "good cause shown" for the granting of an extension. The application in Hammond's case, No. A-635, sets forth as additional justification the death of counsel's father—which would in some circumstances qualify as "good cause shown." The counsel in question, however, is not one who has been working diligently on the petition and has been prevented by the death from completing his work, but rather an attorney affiliated with the Resource Center who now, because no other counsel has been found since the unexplained withdrawal of appellate counsel, "intends to prepare" applicant's petition. There is no indication why some other attorney at the Resource Center could not have undertaken this last-minute task, nor why the task has been left to the last minute.

Madden v. Texas, 498 U.S. 1301, 1304 (1991).

in my understanding of how far the law will bend to kill one person.

II. INTRODUCTION

Recall the statue of Lady Justice. She stands blindfolded, with the scales of justice in one hand and her sword in the other.[36] The scales of justice signify that the law and facts will be considered and weighed.[37] The sword symbolizes "the power and authority of the law, its ability to protect those who cannot protect themselves, and its ideal of delivering swift and sure justice."[38] The blindfold stands for the idea that "all who come before her will be treated in like manner, without regard to race, creed, or economic class."[39] In criminal law, and particularly in capital punishment cases,[40] Lady

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36. *See* Abraham Fuchsberg, *The Blindfold of Justice*, N.Y.L.J., Oct. 4, 1990, at 2 (identifying the statue as the "[c]lassic image of Justice"); *see also* Lois J. Schiffer & Timothy J. Dowling, *Reflections on the Role of the Courts in Environmental Law*, 27 ENVTL. L. 327, 328 (1997) (describing the statue of Lady Justice).

37. *See* Lois J. Schiffer & Timothy J. Dowling, *Reflections on the Role of the Courts in Environmental Law*, 27 ENVTL. L. 327, 328 (1997) (discussing the symbolism that the statue of Lady Justice must impart to passersby).

38. *Id.*

39. *Id.*

40. In 1971, the Supreme Court of the United States granted certiorari in *Furman v. Georgia* and two companion cases to determine whether "the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." Furman v. Georgia, 408 U.S. 238, 239 (1972) (per curiam). This systemic question was the only one remaining after the Court decided in the previous term that the Due Process Clause of the Fourteenth Amendment does not restrict discretion in capital sentencing schemes. *See* McGautha v. California, 402 U.S. 183, 196, 221 (1971) (stating that the Fourteenth Amendment Due Process Clause does not invalidate extant systems of capital punishment because "[t]he Constitution requires no more than that trials be fairly conducted and that guaranteed rights of defendants be scrupulously respected"). In *Furman*, by a slim five-justice majority, the Court invalidated the death penalty, as it then existed in the country, under the Cruel and Unusual Punishment Clause of the Eighth Amendment. *See Furman*, 408 U.S. at 239-40 (declaring that the death sentence given to three petitioners after they were convicted of one murder and two rapes constituted cruel and unusual punishment). Justice Brennan, writing a concurring opinion, believed that the death penalty was, in all circumstances, cruel and unusual punishment. *See id.* at 305 (Brennan, J., concurring) (disapproving of the continued use of the death penalty by states). In reaching that conclusion, Justice Brennan relied on the "principle . . . that a punishment must not be so severe as to be degrading to the dignity of human beings." *Id.* at 271. Brennan also further concluded that:

> Death is truly an awesome punishment. The calculated killing of a human being by the State involves, by its very nature, a denial of the executed person's humanity . . . . An executed person has indeed "lost his rights to have rights." As one 19th century proponent of punishing criminals by death declared, "When a man is hung, there is an

Justice's pronouncement of equal justice is to be carried out in both the guilt-innocence phase as well as the punishment phase, as each requires a weighing of evidence in order to decide the question at hand appropriately.[41]

Consequently, during the punishment phase of a capital case, the jury's duty to balance this evidence and determine the appropriate punishment requires, and is aided by, the production of additional evidence and testimony offered by defense counsel, showing that the defendant does not deserve to die.[42] In this respect, defense

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end of our relations with him. His execution is a way of saying, 'You are not fit for this world, take your chance elsewhere.'"

Id. at 290. Justice Marshall was the only justice to state a similar belief, arguing that the death penalty was impermissible under the Eighth Amendment because it denied the ultimate humanity of the condemned. *See id.* at 370-71 (Marshall, J., concurring) (relying on antibarbarism, a reason other jurisdictions have given for shunning capital punishment, to conclude that the death penalty violates the Eighth Amendment). Although none of the justices joined this broad reading of the ultimate moral expression inherent in a sentence of death, not one justice disputed the argument either.

Despite the *Furman* decision, the death penalty was resurrected. In Texas, the Legislature crafted and adopted a new capital sentencing scheme that focused on the individual criminal. *See generally* TEX. CODE CRIM. PROC. ANN. art. 37.071 (Vernon 1981 & Supp. 1999) (establishing the applicable procedure for a capital case). Subsequently, the Supreme Court of the United States determined that Texas' new procedures passed constitutional muster by introducing mitigating factors, ensured that any sentence would be tailored to the individual crime and would eliminate the capriciousness and arbitrariness that the Court found unconstitutional in *Furman*. *See* Jurek v. Texas, 428 U.S. 262, 271 (1976) (stating that "in order to meet the requirement of the Eighth and Fourteenth Amendments, a capital-sentencing system must allow the sentencing authority to consider mitigating circumstances"); *see also* Kenneth Andrew Zimmern, Note, Satterwhite v. Texas: *A Return to Arbitrary Sentencing?*, 42 BAYLOR L. REV. 623, 632 (1990) (discussing the *Jurek* decision, which held Texas' sentencing scheme to be constitutional).

41. The punishment phase does not address the seriousness of the crime, but rather asks "whether the defendant is less deserving of a death sentence because of his character or background, in spite of, even in the fact of, the seriousness of the murder." Phyllis L. Crocker, *Concepts of Culpability and Deathworthiness: Differentiating Between Guilt and Punishment in Death Penalty Cases*, 66 FORDHAM L. REV. 21, 59 (1997). Only serious crimes justify the possibility of a death sentence; therefore, "[i]f the applicability of the death penalty hung on the seriousness of the crime alone, the role of the jury at the sentencing would be greatly circumscribed." *Id.* at 59-60. Only a sentencing scheme that allows "the introduction of mitigating factors ensures a sentence tailored to the individual and eliminates the arbitrariness and capriciousness which might render a death sentence unconstitutional." Kenneth Andrew Zimmern, Note, Satterwhite v. Texas: *A Return to Arbitrary Sentencing?*, 42 BAYLOR L. REV. 623, 632 (1990).

42. *See* Phyllis L. Crocker, *Concepts of Culpability and Deathworthiness: Differentiating Between Guilt and Punishment in Death Penalty Cases*, 66 FORDHAM L. REV. 21, 29 (1997) (opining that "the jury may consider a greater breadth of evidence than that allowed at the guilt phase"). Evidence that the defense presents at the punishment stage is

counsel has a duty to present mitigating evidence, which often reflects such things as the defendant's record, background, and character.[43] Essentially, defense counsel's role is to "attempt to demonstrate that [these] mitigating factors outweigh aggravating factors."[44]

In addition, if the ultimate decision in a capital case truly rests on the decision of whether to exclude an individual from the group of "us," then the reason for doing so must be compelling.[45] Of

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often referred to as mitigating evidence. *See id.* at 31 (defining mitigating evidence as "any aspect of a defendant's character or record and any of the circumstances of the offense that the Defendant proffers as a basis for a sentence less than death"); *see also* Jeffrey A. Walsh, Comment, *Voluntary Intoxication As a Mitigating Circumstance During the Death Penalty Sentencing Phase: A Proposal for Reform*, 29 ST. MARY'S L.J. 1067, 1077-91 (1998) (explaining the history and role of mitigating circumstances in Texas death penalty jurisprudence). Although this evidence may not provide a defense to the crime, it can certainly provide reasons why the defendant should not be executed. *See* Phyllis L. Crocker, *Concepts of Culpability and Deathworthiness: Differentiating Between Guilt and Punishment in Death Penalty Cases*, 66 FORDHAM L. REV. 21, 32 (1997) (noting that "though evidence may not provide a legal excuse from criminal responsibility at the guilt phase, the same evidence may serve to mitigate a defendant's punishment by explaining his conduct in a way that shows he is not worthy of a death sentence").

43. *See* Phyllis L. Crocker, *Concepts of Culpability and Deathworthiness: Differentiating Between Guilt and Punishment in Death Penalty Cases*, 66 FORDHAM L. REV. 21, 31-34 (1997) (describing the types of character and background evidence that may be useful in mitigating the defendant's punishment).

44. Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 318 (1983).

45. *Cf.* Licia A. Esposito, Note, *The Constitutionality of Executing Juvenile and Mentally Retarded Offenders: A Precedential Analysis and Proposal for Reconsideration*, 31 B.C. L. REV. 901, 925-26 (1990) (asserting that "[a]lthough a majority of the United States Supreme Court has not considered the constitutionality of the death penalty under a compelling state interest . . . approach . . . the state may justify the regulation of [fundamental] rights only by a 'compelling state interest'"). Commentators who argue for a strict scrutiny review point to the irrevocability of the death penalty. *See* Margaret Jane Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishment Clause*, 126 U. PA. L. REV. 989, 1022 (1978) (commenting on the irrevocability of sterilization, lobotomy, and death as well as the fact that "the government cannot cancel or even ameliorate the effects of such actions" as compelling reasons for strict scrutiny); Licia A. Esposito, Note, *The Constitutionality of Executing Juvenile and Mentally Retarded Offenders: A Precedential Analysis and Proposal for Reconsideration*, 31 B.C. L. REV. 901, 926 (1990) (pointing to irrevocability as one factor that commentators use as a basis for strict scrutiny). In fact, courts have adopted strict scrutiny analysis when dealing with other issues that involve irrevocability. *See* Margaret Jane Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishment Clause*, 126 U. PA. L. REV. 989, 1023 & n.136 (1978) (citing cases where courts have considered irrevocability when requiring a compelling state interest). Because human decisions are fallible, deprivation of a particular right that cannot be undone or mitigated requires the "utmost care in the first instance." *Id.* at 1023-24.

course, natural inclinations would seem to favor sparing a human life in all its richness and unique character. In fact, in this regard, execution should only occur if the compelling reason for imposing the death penalty outweighs the individual's humanness. However, to do so effectively and to ensure the reliability of the death-sentencing decision, the full story, including both the reasons for separating an individual from society and the reasons for the continued affiliation of the individual and society, must be fully presented and argued before a jury.[46]

Telling the full story places a burden on defense counsel to present the defendant's human side.[47] In fact, one can say that a defense counsel's *only* defense against a prosecution's presentation of a horrific crime is to humanize the defendant.[48] Accordingly, defense counsel must put on a "case for life" by presenting evidence of the defendant's family memories, school records, medical history, and any other mitigating information that would warrant imposing a sentence of life rather than death.[49]

Because of the stronger need to humanize the defendant in a *capital* case, two separate narratives must be presented to the jury in an ideal capital trial. These narratives are the paladins of the respective sides in battle and can be labeled the "Kill Story" and the "Human Story."[50] The Kill Story is told by those who wish to remove the person from society, and it primarily focuses on the

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46. *Cf.* TEX. CODE CRIM. PROC. ANN art. 37.071, § 2(a) (Vernon Supp. 1999) (permitting evidence to be presented "by the state *and* the defendant . . . as to any matter . . . relevant to sentence" (emphasis added)).

47. *See* Austin Sarat, *Speaking of Death: Narratives of Violence in Capital Trials*, 27 L. & SOC'Y REV. 19, 40 (1993) (describing the defense counsel's overall goal in the penalty phase as a presentation of "a human narrative, an explanation of the defendant's apparently malignant violence as in some way rooted in understandable aspects of the human condition").

48. *See* James M. Doyle, Essay, *The Lawyers' Art: "Representation" in Capital Cases*, 8 YALE J.L. & HUMAN. 417, 426 (1996) (explaining that because "[t]he prosecution concentrates on one brief, vivid incident, whereas the defense review[s] an entire life" and that if defense counsel doesn't act, the "client's humanity will be obscured by the prosecutor's representation").

49. *See id.* (discussing one method of "humanizing" a defendant).

50. These labels are the author's sole creation, although other commentators have referenced the need to humanize a defendant by presenting evidence of his background and circumstances. *See, e.g.*, James M. Doyle, Essay, *The Lawyers' Art: "Representation" in Capital Cases*, 8 YALE J.L. & HUMAN. 417, 426 (1996) (discussing the human side of the defendant); Austin Sarat, *Speaking of Death: Narratives of Violence in Capital Trials*, 27 LAW & SOC'Y REV. 19, 40 (1993) (referring to the human narrative).

narrative of the criminal act.[51] In contrast to that powerful story is the narrative of the individual, or the Human Story, which serves as the primary foundation for those who seek to continue, through a life sentence, the individual's relationship with the community.

This Essay seeks, through a deconstruction of Karl Hammond's case, to identify and illustrate the values of telling both of these combating stories. Part III describes both the Kill Story and the Human Story in Karl's case, as interpreted from the voluminous record of his trial, appeals, and petitions. Part III also demonstrates, using Karl's case as an example, how the failure to tell one side of the story in either the guilt-innocence phase or the punishment phase can have a prejudicial effect on the jury's decision in a capital case. Part IV then discusses how, despite Karl's attempts, the trial court prevented him from providing his own Human Story. Essentially, Part IV strives to demonstrate how persuasive the Kill Story can be if the defendant is not allowed to tell his story, particularly if he is denied the right to speak. This Essay seeks to reveal the necessity of providing both competing narratives. Otherwise, as Karl's case shows, the Kill Story will inevitably prevail.

III. THE COMPETING NARRATIVES

The two competing narratives can best be illustrated through a discussion of Karl Hammond's case. Both the Kill Story presented at trial and the Human Story that could have been presented are quite powerful. Furthermore, besides the breadth of these two narratives, Karl's case also exemplifies the necessity of presenting each story in order to determine appropriately the legal issues presented.

A. *The Kill Story*

In Karl Hammond's case, the Kill Story consisted of a powerful narrative of brutal action. Nonetheless, the Texas Court of Criminal Appeals, on mandatory direct appeal after Karl's conviction

51. In Texas, the Kill Story can also be used to demonstrate that the defendant poses a continuing threat to society, which is a necessary element to secure a sentence of death. *See* TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(b) (1) (Vernon Supp. 1999).

and sentencing,[52] appropriately began its opinion by recognizing that the facts in Karl's case were not an integral part of appellate review. In fact, the court stated, "Appellant brings six points of error. He does not assail the sufficiency of the evidence in any respect. We therefore will not recite the facts of the offense except as necessary to explicate particular points of error."[53] Despite this statement, the appellate court, when faced with a serious claim possibly requiring reversal, such as the claim that the prosecutor directly commented on Karl's silence during closing argument, gratuitously introduced the Kill Story to counter any legal claim. The following is an example taken from the Court of Criminal Appeals' opinion:

> The evidence against appellant at the guilt phase of trial, although circumstantial, was fairly compelling. Vetter died in her own apartment as a result of multiple stab and cut wounds, once through the heart. She had been beaten about the face, probably by a right-handed individual. (Appellant was shown to be right handed.) A large volume of blood was discovered on the floor of the kitchen, and a wide smear of blood led from the kitchen to the carpet in the living room, where her nude body was found in a "silhouette" of blood. Appellant's palm and bloody footprints were lifted from the scene. His right palm print was taken from the handle of the butcher knife, the apparent murder weapon, found hidden in the apartment .... Dr. DiMaio, Chief Medical Examiner for Bexar County, personally performed the autopsy upon Vetter. He testified that seminal fluid was found in Vetter's mouth, rectum, and vagina, and sperm was present in her vagina. Although the serologist who attempted to type the seminal fluid was unable to do so, cross-examination of none of these witnesses revealed any evidence positively to contradict the prosecutor's theory of the case.[54]

Unfortunately, after presenting this persuasive Kill Story, the court barely attempted to connect it to the reason for denying the appellate claim.[55] However, the Court of Criminal Appeals noted that

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52. *See* TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(h) (Vernon Supp. 1999) (noting that a "judgment of conviction and sentence of death *shall* be subject to automatic review by the Court of Criminal Appeals" (emphasis added)).

53. Hammond v. State, 799 S.W.2d 741, 742 (Tex. Crim. App. 1990) (en banc).

54. *Id.* at 747-48.

55. *See id.* at 748 (noting that the portion of the prosecutor's argument about which the appellant complained came at the conclusion of a lengthy narrative of what he believed the evidence showed).

the "Appellant presented no evidence [for defensive purposes] at the guilt phase of the trial . . . [nor any] evidence, mitigating or otherwise, at either the guilt or punishment phase of trial."[56]

As Karl's case proceeded through the state and federal courts, the Kill Story changed little, but each individual court's characterization of the facts became more grim. For example, the United States Magistrate Judge that reviewed Karl's post-conviction habeas corpus petition prefaced his recommendation to the federal district judge by stating that "[t]he details of this crime form a grisly, but necessary, part of the narrative of events leading up to the conviction of, and the imposition of the death penalty on, Karl Hammond."[57] In a very lengthy recitation of the Kill Story, under a heading entitled "The Crime and the Victim," the Magistrate Judge wrote:

> At approximately 10:42 p.m., Steven Harris, the apartment security guard, responded to [a] call regarding [a] torn screen at Ms. Vetter's apartment and discovered the nude, battered, and bloody body of Ms. Vetter lying face up and spread eagled on the floor of her apartment.
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> . . . .
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> The Emergency Medical Technicians' description of the condition of Ms. Vetter's body was . . . [that] both eyes were swollen and discolored and the right eye was completely swollen shut, both lips were completely swollen, her body was covered in blood, she displayed stab wounds on both her legs, and she displayed stab wounds in the chest.
>
> . . . .
>
> Ms. Vetter's autopsy . . . revealed that she had suffered numerous severe injuries, including, at least three blows to her face and head that caused lacerations, significant swelling, and bruises to both her eyes and her mouth, at least one strong blow or possibly a kick in the area of her vagina sufficient to cause three tears in the opening of the vagina, three incised wounds of an apparently defensive nature on her left hand, and eight other stab wounds, three in the chest area, one in the right calf, one in the right thigh and three in the left thigh. One of the chest wounds was described as a gaping wound approximately one inch long and five inches in depth, which penetrated the

56. *Id.* at 749.

57. Memorandum and Recommendation of the United States Magistrate Judge at 1-2, Hammond v. Collins, No. SA-92-CA-873 (W.D. Tex. May 12, 1993).

> left chest wall, went between the third and fourth ribs, penetrated the left lung, went entirely through the heart, and penetrated further into the left lung beneath the heart. This wound was identified as the injury which caused the death of Donna Lynn Vetter.[58]

The Magistrate Judge also highlighted another critical fact in the Kill Story: "The victim, Donna Lynn Vetter, was an employee of the FBI and the FBI was involved extensively in the investigation of the crime."[59]

This Kill Story, reiterated again by the federal district court, was refined in scope but exaggerated in characterization when the case reached the United States Court of Appeals for the Fifth Circuit. In regard to the facts of the crime, the court wrote:

> We start with the grisly story of sub-human acts of mayhem, torture and murder that is so common in these death sentence appeals. On September 4, 1986, Donna Lynn Vetter, an FBI employee, was found beaten, raped and murdered in her apartment. Ms. Vetter's eyes were swollen and discolored, her body was covered with blood, and she had stab wounds in her chest and both legs. The autopsy revealed at least three blows to her face and head and at least one strong blow or kick in the area of her vagina, as well as eight other stab wounds. Hammond's fingerprints, blood and hair, were found at the scene; his bloody palm print was also found inside the apartment on a window and on the probable murder weapon (which was hidden under a chair cushion).[60]

These accounts by the state and federal courts, taken together, impress a distilled Kill Story on the audience: Donna Lynn Vetter (woman), an FBI employee (ties to law enforcement), was sexually assaulted (raped orally, anally, and vaginally), savagely attacked (beaten and kicked everywhere, including her vagina), and brutally murdered (stabbed numerous times, bleeding to death). The Kill Story, thus, did its duty in Karl's case; it demonstrated that Karl's alleged actions were "grisly," constituted "sub-human act[s] of

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58. *Id.* at 2-5. As the district court noted, "In addition, Ms. Vetter's autopsy revealed the presence of semen in her mouth and anal cavity, the presence of sperm and semen in her vagina, that her assailant was probably right-handed, that the blows inflicted upon her had been administered with 'full force' or 'fairly hard force,' that the blood-stained clothes found at the crime scene had apparently been cut off her body, and that her stab wounds were consistent with a knife found later that same morning at the crime scene." *Id.* at 5. The tests on the semen and sperm samples were "inconclusive." *Id.* at 6-7.

59. *Id.* at 2 n.1.

60. Hammond v. Scott, No. 93-08796, slip op. at 2 (5th Cir. Aug. 23, 1994).

mayhem, torture and murder," and supported the imposition of the death penalty.[61]

B. *The Human Story*

Unquestionably, the distilled Kill Story is powerful in its suggestion that the actor has somehow forfeited his place among the community of humanity. In fact, if the Kill Story were *not* so powerful, the death penalty would not be a possible punishment. However, the Human Story is an equally important consideration and must be balanced against the act-based facts. For example, in Karl's case, his social history and impairments certainly would convince many, although not everyone, that execution was inappropriate, particularly for such a damaged person.[62]

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61. *Id.* The silent issue of race also hangs about this case; the female victim was white and the "sub-human" assailant was black. *Cf.* Jose Felipe Anderson, *Will the Punishment Fit the Victims? The Case for Pre-Trial Disclosure, and the Unchartered Future of Victim Impact Information in Capital Jury Sentencing,* 28 RUTGERS L.J. 367, 417-18 (1997) (stating that "[w]hen the victims are white, historically a black defendant is treated more harshly"); Scott W. Howe, *The Failed Case for Eighth Amendment Regulation of the Capital-Sentencing Trial*, 146 U. PA. L. REV. 795, 820-22 (1998) (commenting on empirical studies that indicate racial discrimination based upon the victim's and the defendant's race).

A study by Professors David Baldus, Charles Pulaski, and George Woodworth is the most frequently cited statistical analysis of this racial issue. *See, e.g.*, McCleskey v. Kemp, 481 U.S. 279, 353 (1986) (referencing the Baldus study); Sheila Foster, *Intent and Incoherence*, 72 TUL. L. REV. 1065, 1146-48 (1998) (pointing to the Baldus study for statistical support of racial discrimination in criminal sentencing procedures). In *McCleskey*, the Supreme Court noted that:

> The Baldus study demonstrates that black persons are a distinct group that are singled out for different treatment in the Georgia capital sentencing system. The Court acknowledges, as it must, that the raw statistics included in the Baldus study . . . indicate that it is much less likely that a death sentence will result from a murder of a black person than from a murder of a white person. White-victim cases are nearly 11 times more likely to yield a death sentence than are black-victim cases. The raw figures also indicate that even within the group of defendants who are convicted of killing white persons and are thereby more likely to receive a death sentence, black defendants are more likely than white defendants to be sentenced to death.

McCleskey, 481 U.S. at 353. The Baldus study focused on Georgia's death-sentencing systems, but the statisticians suggested that there is evidence of infrequency, arbitrariness, and discrimination in the capital sentencing schemes of other states as well. *See* DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY 229-79 (1990) (presenting evidence of sentencing disparities in other states).

62. In one case, a court stated, "It cannot be said that there is no reasonable probability that the results of the sentencing phase of the trial would have been different if mitigating evidence had been presented to the jury." Thomas v. Kemp, 796 F.2d 1322, 1325 (11th Cir. 1986); *see* Ellen Kreitzberg, *Death Without Justice*, 35 SANTA CLARA L. REV.

1. Childhood

Karl grew up in a turbulent home characterized by violence and abuse. His father, Benny Haywood, drank scotch every day, often to the point of drunkenness, and became increasingly dangerous and abusive when he did so.[63] Indeed, Benny was drunk "most of the time."[64] Moreover, when Benny was drunk, he beat his wife.[65] He also "beat the hell out of" his children,[66] even raping and sexually abusing his daughters.[67] Young Karl was aware of, and witnessed, this brutalization.[68] Additionally, Karl himself was a target, as Benny whipped him with a belt, a shoe, and his hands.[69] Once, when Karl was seven or eight, Benny struck him in the face hard enough to knock him to the ground.[70] Karl's mother, likewise, beat him with a belt, her hands, and an extension cord.[71]

Furthermore, one evening when Karl was about ten years old, his father was unusually drunk and his eyes were red; he was angry, cursing, and threatening.[72] Karl's mother had just returned home from the hospital, where she had been treated for ulcers.[73] Despite her recent hospitalization, Benny was beating her.[74] Karl's brother, Oscar Anderson, confronted Benny about his abusiveness toward the family, and a struggle ensued.[75] Oscar got Benny's gun away from him and in the presence of ten-year-old Karl, his sister Elaine, and their mother, shot Benny several times.[76] Still in a rage, Oscar also repeatedly slashed Benny's throat and face with a

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485, 503 n.78 (1995) (listing a number of cases where death sentences were reversed and life sentences were imposed on appeal after new counsel presented mitigating evidence).

63. *See* Hearing on Petition for Post Conviction Writ of Habeas Corpus at 194-95, 197, 279, *Ex parte* Hammond, No. 87-CR-0200-W1 (226th Dist. Ct., Bexar County, Tex. May 12, 1992) (hereinafter referred to as Hearing on Habeas Petition).

64. *Id.* at 280 (documenting the testimony of Karl's sister, Janice Brown).

65. *See id.* at 196, 281-82.

66. *Id.* at 195 (presenting the testimony of Karl's other sister, Rebecca May).

67. *See id.* at 197-200.

68. *See id.* at 198.

69. *See id.* at 193, 278.

70. *See id.* at 204-05.

71. *See id.* at 205-06, 265, 283-84.

72. *See id.* at 299-300.

73. *See id.* at 302.

74. *See id.*

75. *See id.* at 303-05.

76. *See id.* at 306-08.

box-cutting razor.[77] Thus, Karl witnessed the last few moments of his father's violent and gruesome death.

Benny's slaying traumatized the entire family.[78] As for Karl, he was multi-traumatized by the effects of his childhood physical abuse, his sisters' sexual abuse, his turbulent home environment, and the experience of seeing his father murdered before his own eyes.[79] Soon after his father's death, Karl turned to illegal drugs, at least partially to relieve his psychological pain.[80] The consequences of this trauma persisted until his death, perhaps because Karl's very low intellectual functioning made him especially vulnerable to great psychological harm.[81]

2. Substance Abuse and Mental Illness

Karl's continued drug abuse included the use of solvents (in particular spray paint), marijuana, LSD, hallucinogens, and alcohol.[82] Solvents are considered extremely "neurotoxic," that is, poisonous to the central nervous system; solvents also can cause serious organic brain damage, which can lead to behavioral abnormality or

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77. *See id.* at 308-09.

78. *See id.* at 311 (providing testimony during the writ hearing that revealed the impact of the trauma on the family). Prior to the incident, Oscar worked two jobs and went to school. *See id.* at 311 (providing a transcript of testimony presented by Karl's sister, Janice Elaine Brown). Afterwards, however, he started using drugs and could not keep a job. *See id.* Karl's sister also testified that Karl began "sniffing paint, dropping out of school, leaving, coming in when he got ready." *Id.* at 312-13.

79. *See id.* at 334-36 (indicating that the murder was "extraordinarily traumatic" for Karl).

80. *See id.* at 202-03, 558-59 (providing a transcript of Rebecca May's testimony concerning Karl's use of spray paint and the defense psychiatrist's testimony that Karl used solvents as "a way to not have to feel . . . [the] pain").

81. *See id.* at 334-37. Typically, individuals suffering from mild mental retardation face significant difficulty in coping and adapting to situations. *See* Denis W. Keyes et al., *Mitigating Mental Retardation in Capital Cases: Finding the "Invisible" Defendant*, 22 MENTAL & PHYSICAL DISABILITY L. REP. 529, 531 (1998) (discussing mental retardardation and some of the problems associated with the condition). The inability to cope with certain situations may be one basis for concluding that individuals with low intellectual functioning are more susceptible to psychological harm. *Cf. id.* at 537 (listing basic characteristics of mentally retarded individuals, including "deficits in adaptive skills" and "poor planning and coping skills").

82. *See* Hearing on Habeas Petition at 338, *Ex parte Hammond*, No. 87-CR-0200-W1 (noting psychologist Dr. Riley's testimony that confirmed Karl frequently used solvents and had begun to use other drugs such as marijuana, alcohol, LSD).

cognitive impairments, such as that exhibited by Karl.[83] In fact, from the age of ten, Karl frequently experienced auditory and visual hallucinations.[84] To Karl, these apparitions seemed real.[85] One hallucination consistently reoccurred from the age of ten to the end of Karl's life—Karl's perception of a monstrous specter calling itself "Ozzie."[86]

Texas Department of Corrections (TDC) records from Karl's previous incarcerations[87] also corroborate a history of command hallucinations and suicide attempts that were diagnosed as symptoms of psychosis.[88] These records further indicate that Karl took a number of antipsychotic medications.[89] Karl's parole records simi-

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83. *See id.* at 338-39 (revealing the doctor's testimony concerning the neurotoxicity of solvents); *see also* 1 TREATMENT OF PSYCHIATRIC DISORDERS 470 (Glen O. Gobbard, M.D. ed., 2d ed. 1995) (noting that "Toluene is one of the most commonly abused solvents, causing psychosis and delirium . . . that may persist for weeks").

84. *See* Hearing on Habeas Petition at 342, *Ex parte Hammond*, No. 87-CR-0200-W1.

85. *See id.* at 350 (discussing Karl's reaction to the hallucinations).

86. *See id.* at 342-43.

87. *See id.* State's Ex. 9 (providing copies of Karl's records from when he was incarcerated by the Texas Department of Corrections (TDC)).

88. During the defense's direct examination, a psychologist testified that Karl exhibited several symptoms of psychosis. *See id.* at 343-45. The doctor further noted that Karl told examiners "he was hearing noises, that these voices were often very derogatory and critical of him, that they also sometimes told him that other people in his environment were very dangerous or threatening, [and] urged him to hurt other people" and attempt suicide. *Id.* at 343. Psychosis generally refers to a mental condition that is marked by a loss of contact with reality. *See* 1 TREATMENT OF PSYCHIATRIC DISORDERS 944-46 (Glen O. Gobbard, M.D. ed., 2d ed. 1995) (defining psychosis).

89. *See* Hearing on Habeas Petition at 346, *Ex parte Hammond*, No. 87-CR-0200-W1 (presenting a psychologist's testimony that he believed the records stated that Karl was taking Taractan or Haldol). Records obtained from the TDC indicate that Karl was taking Mellaril, Taractan, Haldol, and Cogentin. *See id.* State's Ex. 9. Mellaril is prescribed to manage the symptoms of psychiatric disorders such as depression and anxiety. *See* PHYSICIANS' DESK REFERENCE 2269-70 (50th ed. 1998). The medication reduces agitation and tension in patients suffering from mental and emotional disturbances. *See id.* Haldol is a common tranquilizer used to treat symptoms of psychotic disorders. *See id.* at 1575 (noting that Haldol is usually used as treatment only after the patient fails to "respond to psychotherapy or medications other than antipsychotics"). This drug is also prescribed to control vocal utterances and tics of Tourette's Disorder in children and adults. *See id.* Haldol produces numerous potential side effects, including anxiety, confusion, and exacerbation of psychotic symptoms including hallucinations. *See id.* at 1576. Cogentin is used to treat parkinsonism and extrapyramidal disorders which may be caused by neuroleptic drugs. *See id.* at 1621-22. This medication, however, may exacerbate mental symptoms in patients with mental disorders. *See id.* The side effects of this drug include "confusion, disorientation, memory impairment, [and] visual hallucinations" and exacerbation of pre-existing psychotic symptoms. *See id.* at 1621.

larly reflect that he suffered from significant mental problems that negatively affected his ability to exist in the world without treatment and medication.[90] In fact, when Karl was initially paroled, treatment enabled him to transition successfully to the free world; nonetheless, he eventually deteriorated in the absence of his medication.[91]

Karl was also diagnosed as suffering from paranoia by Dr. John C. Sparks, chief psychiatrist at the Bexar County Jail.[92] A person diagnosed with paranoia typically exhibits a "fixed delusional system" or a system of fixed false beliefs that dominate the individual's thoughts and actions.[93] Moreover, paranoia can make an individual incompetent to stand trial, depending on the content of the delusional system in question.[94] Notably, however, neither Dr. Sparks nor Karl's defense counsel made any attempt to ascertain the content of Karl's fixed delusional system or measure its likely effect on his thoughts and behavior.

Extensive neuropsychological testing also indicated that Karl suffered from moderate organic brain impairment.[95] As a result,

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90. *See* Hearing on Habeas Petition at 347, *Ex parte Hammond*, No. 87-CR-0200-W1 (referring to Karl's parole records that stated he would need medication to help him cope with the difficulties of adjusting to his release).

91. *See id.* at 348. Karl attempted unsuccessfully to obtain medications from local pharmacies. *See id.* at 351 (providing the psychologist's testimony that Karl "tried to obtain medication just by going to drug stores and asking if [he] could buy these drugs just over-the-counter"). He also made an effort to see a physician to get the medications, but again his attempts failed. *See id.* (noting that Karl tried to contact the doctor who had previously treated him but was unable to find him).

92. *See id.* at 588 (providing Dr. Sparks' diagnosis of paranoia, which was evidenced by psychological tests performed on February 25, 26, and 27, 1987).

93. *See id.* at 589 (continuing Dr. Sparks' diagnosis). Delusion, a central symptom of paranoia, is defined as "a fixed, false belief." *See* WILLIAM H. REID & MICHAEL G. WIDE, DSM-IV TRAINING GUIDE 281, 326 (4th ed. 1995) (describing the features associated with paranoia). Persons suffering from paranoia typically interpret the actions of others as threatening or malevolent. *See id.* at 281 (listing the disorder's chief symptoms).

94. *Cf.* WILLIAM H. REID & MICHAEL G. WIDE, DSM-IV TRAINING GUIDE 281-82 (4th ed. 1995) (discussing the effects of paranoia).

95. *See* Hearing on Habeas Petition at 366-74, *Ex parte Hammond*, No. 87-CR-0200-W1 (reporting testimony about Karl's performance on the Halstead Reitan Batter, which indicated that he was "impaired on 4 out of 7" categories). The Halstead Impairment Index is used to quantitatively "reflect the overall adequacy [of an individual's] neuropsychological functioning." 2 RALPH M. REITAN & DEBORAH WOLFSON, TRAUMATIC BRAIN INJURY 78 (1988). This exam is fairly reliable although it is not based upon a complete set of neuropsychological tests. *See id.* (describing the reliability of the index). Moreover, according to the authors:

he had severe problems with reasoning, problem-solving, abstract thought, and responding to complex or unfamiliar situations.[96] Personality testing further reflected that Karl suffered from "severe psychopathology."[97] In particular, the testing indicated that he suffered from Post-Traumatic Stress Disorder,[98] a major mental illness with destructive consequences, which he probably developed as a result of witnessing his father's murder.[99] Testing also

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> Intellectual impairment refers to pathological reduction of those adaptive behaviors customarily grouped as intellection. It is a psychological construct which is measured by quantifying behavior . . . . It may result from a wide variety of causes including: temporary alterations of brain physiology (e.g., alcohol intoxication); brain lesion, proximal causes described in purely psychological terms and without known physical bases such as depression, anxiety, psychoses, etc.

CLINICAL NEUROPSYCHOLOGY: CURRENT STATUS AND APPLICATIONS 2 (Ralph M. Reitan & Leslie A. Davison eds. 1974).

96. *See* Hearing on Habeas Petition at 373-74, *Ex parte Hammond*, No. 87-CR-0200-W1 (describing the problems Karl faced as a result of his "moderate neuropsychological dysfunctions"); *see also* JOSEPH D. MATARAZZO, WECHSLER'S MEASUREMENT AND APPRAISAL OF ADULT INTELLIGENCE 490-501 (5th ed. 1972) (describing a person with minimal signs of psychopathology as an individual who can probably lead a successful life when given business opportunities, an education, and family support). However, Matarazzo also notes that individuals evidencing psychopathology and unlawful drug use are often confused in decision-making situations. *See id.* at 501-03; *see also* WILLIAM H. REID & MICHAEL G. WISE, DSM-IV TRAINING GUIDE 190 (4th ed. 1995) (explaining that a person exposed to a traumatic event may also have trouble sleeping and concentrating).

97. Hearing on Habeas Petition at 375-76, *Ex parte Hammond*, No. 87-CR-0200-W1. The Rorschach Diagnostic Procedure has been used for years "to detect organic brain damage, to assess the level of anxiety and hostility, [and] to determine developmental level of functioning." MARVIN R. GOLDFRIED ET AL., RORSCHACH HANDBOOK OF CLINICAL AND RESEARCH APPLICATIONS ix (1971). Although several other tests may be employed to evaluate these characteristics, the Rorschach has certain assets that make it attractive and reliable. *See id.* at 6 (noting that the Rorschach "unquestionably possesses assets which few other measures share"). For a more detailed explanation and analysis of the Rorschach, see generally MARVIN R. GOLDFRIED ET AL., RORSCHACH HANDBOOK OF CLINICAL AND RESEARCH APPLICATIONS (1971), and ROY SCHAFER, PSYCHOANALYTIC INTERPRETATION IN RORSCHACH TESTING (1954).

98. The American Psychiatric Association's *Diagnostic and Statistical Manuals of Mental Disorders* identify several diagnostic criteria for Post-Traumatic Stress Disorder. *See* WILLIAM H. REID & MICHAEL G. WIDE, DSM-IV TRAINING GUIDE 189-91 (4th ed. 1995). First, the individual must have been exposed to a traumatic event which threatens death, serious injury, or a threat to one's bodily integrity or that of another person. *See id.* Secondly, the individual must experience symptoms of persistent re-experiencing, continuing avoidance, or recurring increased arousal which lasts longer than one month. *See id.* Finally, the symptoms must cause clinically significant functional impairment. *See id.*

99. *See* Hearing on Habeas Petition at 376, 543, *Ex parte Hammond*, No. 87-CR-0200-W1 (stating that when Karl was confronted with stimuli, "the idea, the thought that he projected onto them were things associated with the mutilation of his father that he observed"); *see also* WILLIAM H. REID & MICHAEL G. WISE, DSM-IV TRAINING GUIDE 189

indicated that Karl functioned best when his environment was orderly and maintained; thus, in stressful situations, his psychological functioning would deteriorate markedly, causing him to face great difficulty when coping with those situations.[100] Further testing also revealed that Karl suffered from acute clinical depression, and as a result, was personally isolated and alienated from those around him.[101]

3. Limited Intellectual Capacity

In addition to these mental illnesses, Karl was of limited intelligence. Testing conducted during post-conviction proceedings demonstrated that Karl's verbal IQ was 77, his performance IQ was 81, and his full-scale IQ was 77.[102] These results placed him in the "borderline mentally retarded" level of intellectual function-

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(4th ed. 1995) (emphasizing that the traumatic event that triggers Post-Traumatic Stress Disorder must be directly experienced, witnessed, or concerned with a family member or other person to whom the individual is closely associated).

100. *See* Hearing on Habeas Petition at 379, 383, *Ex parte Hammond*, No. 87-CR-0200-W1 (discussing the response characteristics of psychosis); *see also* 1 TREATMENT OF PSYCHIATRIC DISORDERS 1044 (Glen O. Gabbard, M.D. ed., 2d ed. 1995) (adding that because patients with psychotic disorders, such as schizophrenia, are "frequently agitated, particularly in the context of a marked stressor," the first step in treating such a patient is to establish a "safe and controlled environment").

101. *See* Hearing on Habeas Petition at 381, 394, *Ex parte Hammond*, No. 87-CR-0200-W1 (suggesting that Karl's symptoms were indicative of major depression).

102. These scores reflect Karl's performance on the Wechsler Intelligence Scale Revised test. *See id.* at 351-54 (discussing the types of questions asked and the doctor's assertion that approximately 80-85% of the population would score higher than Karl). This test includes six verbal and five nonverbal subtests, resulting in performance, verbal, and full scale intelligence quotients. *See* HAZEL Z. SPRANDEL, THE PSYCHOEDUCATIONAL USE AND INTERPRETATION OF THE WECHSLER ADULT INTELLIGENCE SCALE REVISED 6 (2d ed. 1995). The Verbal Scale's subtests include "Information, Digit Span, Vocabulary, Arithmetic, Comprehension, and Similarities." *Id.* The Performance Scale's subtests include "Picture Completion, Picture Arrangement, Block Design, Object Assembly, and Digit Symbol." *Id.* This test is considered a valid measurement of mental retardation and many agencies use it to diagnose neuropsychological disfunctioning and personality disorders. *See id.* at 70 (noting the validity of these test results and their uses).

A person's intelligence quotient (IQ) is "the ratio between a particular score which an individual attains . . . and the score which an average individual of his life age may be assumed to attain on the same test." JOSEPH D. MATARAZZO, WECHSLER'S MEASUREMENT AND APPRAISAL OF ADULT INTELLIGENCE 95-96 (5th ed. 1972). IQ tests provide a comparison of an individual's brightness to that of another person of the same age. *See id.* at 96. However, an "IQ merely states that a person's intelligence test score at any given time is defined by his relative standing among his age peers." *Id.* at 101.

ing.[103] These scores were also found to be consistent with previous tests and his school records, which revealed significant intellectual impairments as well.[104]

All of these facts tend to demonstrate that Karl's destructive adult behavior was more than likely the unfortunate result of his traumatic childhood and his severe mental deficits, neither of which were within his ability to control or change. Importantly, all these findings were consistent with Karl's previous records and with earlier testing results available at the time of his capital murder trial. Moreover, this powerfully mitigating account of his life was indisputably relevant to a jury's decision as to whether he should live or die.[105] Although this evidence does not exonerate Karl from full responsibility for his crime, it provides a basis from which a rational jury could have concluded, as its reasoned moral response, that Karl's life should have been spared.

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103. *See* Hearing on Habeas Petition at 543, *Ex parte Hammond*, No. 87-CR-0200-W1 (classifying Karl as having "borderline intellectual capabilities"); *see also* JOSEPH D. MATARAZZO, WECHSLER'S MEASUREMENT AND APPRAISAL OF ADULT INTELLIGENCE 125 (5th ed. 1972) (providing tables of intelligence classification and classifying an IQ between 70 and 79 as borderline retarded). The American Psychiatric Association divides mental retardation into four categories of mental impairment depending on the degree of intellectual impairment: mild, moderate, severe, and profound. *See* 1 TREATMENTS OF PSYCHIATRIC DISORDERS 98-100 (Glen O. Gabbard, M.D. ed., 2d ed. 1995) (describing mental retardation). Often, negative psychosocial experiences cause personality dysfunction in mentally retarded individuals. *See id.* at 102-03. Typically, mentally retarded individuals experience repeated rejection, failure, and disapproval, all which lead to low self-esteem and can result in a maladaptive personality and dysfunctional behavior in as much as half of the adult mentally retarded population. *See id.* The most dysfunctional patterns include explosive and disruptive behavior, affective instability, and introverted personality. *See id.*

104. *See* Hearing on Habeas Petition at 354-56, *Ex parte Hammond*, No. 87-CR-0200-W1 (mentioning testimony that Karl's previous records indicate a similar IQ); *see also* Petition for Reprieve from Execution of Death Sentence and Commutation of Sentence to Imprisonment for Life, *In re* Hammond, app. C (providing copies of Karl's school records that show poor performance and low aptitude scores on standardized tests) (submitted to Hon. Jack D. Kyle, Chairman and the Members of the Texas Board of Pardons and Paroles and on file with the *St. Mary's Law Journal*).

105. *Cf.* Penry v. Lynaugh, 492 U.S. 302, 327-28 (1989) (emphasizing that mitigating evidence in regard to a defendant's character or the circumstances of the offense are relevant to a jury's consideration "precisely because the punishment should be directly related to the personal culpability of the defendant"); Ellen Kreitzberg, *Death Without Justice*, 35 SANTA CLARA L. REV. 485, 493 (1995) (suggesting that a court require counsel to accumulate evidence about the defendant's life in order to effectively ensure that the mandate for individualized sentencing is followed).

C. *Why Must Both Stories Be Told?*

Everyone who agrees that the ultimate question for the jury in a capital case is whether it must remove an individual from the community of humanity by ordering his execution should also agree that it is necessary that both sides of a defendant's story be adequately presented and argued. One can easily see that although the Kill Story is the foundation of a criminal conviction, the Human Story is the only way to preserve the defendant's life. This simple premise of telling both sides of the story is the heart of our collective reliance on the adversarial system.[106]

Our nation's system of criminal justice also presumes that defense counsel will act as an advocate for the accused.[107] To that end, the Supreme Court of the United States has repeatedly emphasized the "fundamental" role of counsel to a fair trial.[108] The Court has found such counsel to be constitutionally ineffective if "conduct so undermined the proper functioning of the adversary process that the trial cannot be relied upon as having produced a just result."[109] The inquiry is, thus, twofold: (1) whether counsel's

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106. *See* THOMAS C. MARKS, JR. & J. TIM REILLY, CONSTITUTIONAL CRIMINAL PROCEDURE 10-11 (1979) (describing the adversarial system as the dispute resolution method that we inherited from English Common Law and developed into our own system, wherein a jury and judge are presented with facts from counsel for the state and the person charged with the criminal offense, in order to make a fair decision); T. KENNETH MORAN & JOHN L. COOPER, DISCRETION AND THE CRIMINAL JUSTICE PROCESS 67 (1983) (explaining the adversary process as one in which the rights of the state and the accused are best protected through the defense counsel's representation of the rightful interests of his client, the prosecutor as the representative of the state, and the judge or jury as a neutral determiner of the facts); DAVID W. NEUBAUER, AMERICA'S COURTS AND THE CRIMINAL JUSTICE SYSTEM 21-22 (2d ed. 1984) (indicating that the safeguards of the adversarial system provide the safest means to determine the guilt or innocence of an accused while protecting his rights).

107. *See* Anders v. California, 386 U.S. 738, 744 (1967) (noting that the constitutional requirements of equality and due process require counsel to support a client to the best of his ability).

108. *See* U.S. CONST. amend. VI (stating that "[i]n all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defense"); *see also* United States v. Cronic, 466 U.S. 648, 653 (1984) (affirming that the right to counsel is a fundamental part of the criminal justice system); Argersinger v. Hamlin, 407 U.S. 25, 31 (1972) (acknowledging that a fair trial necessitates the assistance of counsel); Gideon v. Wainwright, 372 U.S. 335, 343-44 (1963) (affirming the fundamental nature of the right to counsel).

109. Strickland v. Washington, 466 U.S. 668, 686 (1984).

performance is in fact deficient, and, (2) if so, whether this failure was prejudicial to the defense.[110]

In Karl's case, as has been demonstrated, both stories were available. Nonetheless, his attorneys chose to ignore the one story, the Human Story, that could have saved Karl's life. I even asked myself why competent attorneys would choose not to present such a powerful story. A conversation I had sometime earlier with one of Karl's original attorneys may very well provide a clue as to why they decided to ignore the very information that could have saved Karl's life.

I met Karl's lead trial attorney while visiting the Bexar County District Attorney's Office on other business one year before Karl became my client for his post-conviction proceedings. He asked if I was there for Karl Hammond's case. When he learned that I was not, he commented, "Well, if you ever get around to old Karl, now there's a guy that deserves to die. The death penalty was made for him." This type of attitude and the complete failure to investigate or present any available defenses at the guilt-innocence phase of the trial, or to investigate or present any available mitigating evidence at the punishment phase of the trial, rendered Karl's entire trial a one-sided and unchallenged Kill Story proceeding.

1. The Guilt-Innocence Phase

The testimony by the defense counsel in Karl's habeas proceedings revealed that they simply accepted the State's version of the crime and proceeded to make all strategic decisions about how to conduct the defense based on the unverified assumption, confirmed neither by independent investigation nor by independent testing, that the State's version of the facts was correct.[111] In fact, one of Karl's attorney's described the evidence of Karl's guilt as

110. *See id.* at 687 (stating that "[u]nless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable"). Texas has accepted the *Strickland* standard for both phases of a capital case. *See Ex parte* Walker, 777 S.W.2d 427, 430 (Tex. Crim. App. 1987) (concluding that *Strickland* articulated "[t]he proper standard by which to gauge the adequacy of representation by counsel at the guilt-innocence stage"); Hernandez v. State, 726 S.W.2d 53, 57 (Tex. Crim. App. 1986) (explaining that Texas courts "will follow in full the *Strickland* standards in determining effective assistance and prejudice resulting therefrom").

111. *See* Hearing on Habeas Petition at 107, 167, *Ex parte* Hammond, No. 87-CR-0200-W1 (226th Dist. Ct., Bexar County, Tex. May 12, 1992) (expressing the conclusion of

"overwhelming."[112] That description, however, turned completely on his own unquestioning acceptance of the State's fingerprint and serology evidence.[113] Unfortunately, defense counsel never obtained an independent expert to test either the fingerprint or the serology evidence to determine whether the conclusions of the State's expert were reliable.[114] Instead, counsel "assumed," without any empirical basis, that any expert he would have obtained would have reached the same conclusion as the State's expert.[115] Counsel's remarkable insistence at the hearing that any expert testimony disagreeing with the conclusions of the State's expert would "obviously [be] perjured,"[116] demonstrated just how convinced counsel was that the State's version of events was above attack.[117]

Counsel's uncritical acceptance of the State's version of the offense resulted in a total abdication of the responsibility to undertake an investigation of the State's case.[118] This failure, combined with counsel's failure to present Karl's available defenses to the charges, rendered Karl defenseless at the guilt-innocence phase of his trial. As the evidence adduced at the habeas hearing made clear, counsel had no justification whatsoever for not vigorously pursuing Karl's only plausible lines of defense against the death penalty.

As to Karl's alibi defense, counsel rejected it on two apparent bases: an untested assumption *ab initio* that the State's physical evidence was unassailable and an apparent misunderstanding of the actual alibi facts. At the writ hearing, counsel claimed that he discounted the possibility of presenting, or even fully investigating, Karl's alibi because it did not account for his whereabouts from

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Karl's attorney that the State's evidence was over-powering and there was no reason to conduct independent testing).

112. *Id.* at 107.

113. *See id.* (describing the evidence that the State possessed against Karl).

114. *See id.* at 134.

115. *See id.* (opining that if defense counsel had employed experts, testimony from such experts would have been consistent with the State's experts).

116. *Id.* at 134.

117. *See id.* at 167 (referencing counsel's insistence that "no amount of money" would change the fact that the State's evidence was correct).

118. *Cf.* Ferri v. Ackerman, 444 U.S. 193, 204 (1979) (stating that defense counsel has a responsibility to act independently from the government and to oppose it in adversarial litigation); Profitt v. Waldron, 831 F.2d 1245, 1248-49 (5th Cir. 1987) (discussing an attorney's burden to investigate mental history).

8:30 p.m. to 10:00 or 10:30 p.m. on the night of the murder.[119] This assertion, however, was factually erroneous; the interval of time during which Karl could not be accounted for, according to his alibi witnesses, was only fifteen minutes.[120]

In essence, Karl's defense counsel failed to investigate the facts of his alibi, to prepare any available witnesses, and, ultimately, to offer any kind of defense. Notably, Karl recalled only two visits of about ten minutes each with both attorneys while he was in the Bexar County Jail and only one other discussion over the phone with the second chair attorney. A third visit with both attorneys was solely for the purpose of obtaining hair and blood samples. During these meetings, his attorneys made no attempt to formulate a defense strategy. Karl did not even see his attorneys again until they were together in the courtroom for voir dire.[121]

At the habeas hearing, Karl's lead trial attorney tried to explain various omissions. He also claimed to have performed some investigation, but he felt the testimony was not credible. For example, he believed that presenting Karl's alibi defense at the guilt-innocence phase would cost the defense its "credibility" at the punishment phase.[122] Given that the defense called no witnesses and presented no theory for life at the punishment phase, counsel's rationalization is hardly believable. Similarly, counsel's repeated and adamant insistence that the State's case was "overwhelming," and that the "only hope" for the defense lay in the hope that the court would commit reversible trial error,[123] makes it impossible to believe counsel's claim that he spent 400 to 500 hours working on Karl's case.[124]

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119. *See* Hearing on Habeas Petition at 108-09, 137, *Ex parte Hammond*, No. 87-CR-0200-W1.

120. *See id.* at 252-55, 262.

121. Recall, however, that Karl's sister, Rebecca May, made attempts to talk to Karl's attorneys in the early stages of the proceedings, but her efforts were rebuffed because of finances. *See id.* at 330-31; *see also supra* notes 4 and accompanying text.

122. *See id.* at 110 (answering questions asked by attorney on cross-examination).

123. *See id.* at 124-25 (presenting testimony where Karl's defense counsel stated that they were "placed in a position of attempting to get the judge to create error").

124. *See id.* at 161-62. Counsel's submitted bills do not reflect that hourly total, and additional funds, beyond the total amount counsel received, could have been available had counsel submitted requests for additional funds that properly documented the time allegedly spent on the case. *See id.* at 49-51.

Simply, counsel's explanation for failing to present a defense on Karl's behalf is unpersuasive and is contradicted by the evidence. In light of Karl's actions in procuring witnesses himself for his defense, counsel's additional testimony that Karl never actually wanted to testify on his own behalf seems ludicrous.[125] This assertion is also inconsistent with the known facts concerning Karl's diligent efforts to contact witnesses who would have corroborated his alibi and make certain they would appear in court.

At the very least, once Karl's defense attorneys decided not to present Karl's alibi defense and challenge the State's "overwhelming" evidence, they certainly had the responsibility to develop and present a well-grounded mental illness defense to the charges. The record demonstrates that Karl's attorneys were aware of his history of mental illness and contemporaneous mental problems, and that they even filed a notice of intent to raise the insanity defense.[126] Notwithstanding this information and their apparent original intent, counsel utterly failed to conduct a reasonable investigation into Karl's mental health and family background. Most significantly, counsel failed to secure even an *independent* evaluation of Karl's mental condition. Instead, counsel acquiesced in the judgment of the state-paid psychiatrist—who, in fact, found Karl to be mentally ill, but not incompetent. Counsel presented neither mental health evidence nor any other affirmative defense. Thus, abandonment of his only other viable defense at the guilt-innocence phase, particularly once Karl's alibi defense was jettisoned, seems strategically irrational.

Further, with respect to the notice of "intent to offer evidence of insanity," lead counsel admitted that he had a good-faith basis for filing the motion—that is, a good-faith basis for believing that Karl suffered from a serious mental disease or defect.[127] Karl's attorney even acknowledged that he knew, based on his conversations with

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125. *See id.* at 153-54 (referring to the testimony of Karl's attorney that Karl did not wish to testify).

126. Although defense counsel's familiarity with Karl's life history was undoubtedly shallow, it was obvious that they had sufficient awareness of his prior mental health problems to make investigation of a mental status defense imperative. For example, counsel acknowledged that they had reviewed the records of Karl's previous incarceration in the Texas Department of Corrections. Those records, *inter alia*, contained psychiatric diagnoses of schizophrenic disorder, paranoid schizophrenia, schizotypal personality, schizoeffective disorder, major depression, and chronic schizophrenia. *See id.* at 522.

127. *See id.* at 86.

Dr. Sparks, that Karl had "a psychosis."[128] Additionally, counsel claimed to have been aware that Karl was taking antipsychotic drugs before or during trial, which obviously would have alerted a competent attorney that Karl suffered from serious mental problems.[129] Finally, counsel admitted having reviewed Karl's parole records.[130] Those records clearly indicated that Karl was sufficiently mentally ill and was at risk in the community unless he had access to treatment and medication.[131]

Notwithstanding all of these acknowledgments, defense counsel presented none of the extensive available evidence establishing Karl's history of mental illness or his contemporaneous mental problems. Moreover, this information was not developed through investigation and even the readily available facts were not presented during either phase of the trial. Significantly, counsel even failed to request available court funds to obtain an independent mental health examination by a qualified expert. Had counsel undertaken a thorough investigation of Karl's mental condition, counsel would have discovered additional significant evidence that would have supported a defense of insanity.[132] Instead, counsel presented no evidence—in fact, no defense–whatsoever.

In light of the minimal effort made by Karl's defense counsel during the guilt-innocence phase of the trial and their conclusions that the State's case was unassailable, the only reasonable defense strategy available to defend Karl and overcome the State's powerful Kill Story was to turn all efforts towards the development and presentation of adequate evidence and argument during the punishment phase. In other words, if the Kill Story was inevitable, it was incumbent on Karl's counsel to present an effective Human

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128. *See id.* at 89-90.

129. *See id.* at 74.

130. *See id.* at 58.

131. *See id.* at 347.

132. The testimony of Dr. Riley, a clinical psychologist specializing in neuropsychology, revealed Karl had suffered from recurrent hallucinations since the age of ten. *See id.* at 342. In fact, during an incarceration in the Texas Department of Corrections, Karl displayed psychotic symptoms, such as hearing voices which encouraged him to commit violent acts towards others. *See id.* at 343. After his incarceration, Karl was treated at a mental health and retardation clinic, where he reported hearing a particular voice talking to him and was "upset and agitated;" this event occurred in the same year as his arrest in this case. *See id.* at 350.

Story that might convince the jurors to spare his life. However, once again, Karl's attorneys failed to meet that challenge.

2. The Punishment Phase

The Supreme Court of the United States has emphasized the primacy of a defense attorney's duty to investigate a client's available defenses for both phases of trial.[133] In *Strickland v. Washington*,[134] the Court stated:

> Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.[135]

Numerous courts have also recognized that a thorough pretrial investigation is "[o]ne of the primary duties defense counsel owes to his client."[136] In other words, unless counsel undertakes "a reasonably substantial, independent investigation into the circumstances and the law from which potential defenses may be derived," he cannot provide effective assistance.[137] As the United States Court of Appeals for the Fifth Circuit stated in *Baldwin v. Maggio*,[138]

> That obligation to investigate, in the context of a capital sentencing proceeding, requires defense counsel to undertake a reasonably thorough pretrial inquiry into the defenses which might possibly be offered in *mitigation* of punishment, and to ground the strategic selection among those potential defenses on an informed, professional evaluation of their relative prospects for success. . . . [W]hile "counsel for a criminal defendant is not required to pursue every path until it bears fruit or until all conceivable hope withers," neither is effective assistance given by a decision, tantamount to an abdica-

133. *See* Strickland v. Washington, 466 U.S. 668, 691 (1984) (discussing the scope of a defense counsel's duty to investigate).

134. 466 U.S. 668 (1984).

135. *Strickland*, 466 U.S. at 691.

136. Magill v. Dugger, 824 F.2d 879, 886 (11th Cir. 1987) (citing House v. Balkcom, 725 F.2d 608, 618 (11th Cir. 1984)).

137. Baldwin v. Maggio, 704 F.2d 1325, 1332-33 (5th Cir. 1983) (citing Washington v. Strickland, 693 F.2d 1243, 1250-52, 1257 (5th Cir. Unit B 1982), *rev'd* 466 U.S. 668 (1984)).

138. 704 F.2d 1325 (5th Cir. 1983).

> tion of the defendant's cause, not to investigate potential defenses at all.[139]

Furthermore, the failure to interview witnesses or discover readily available mitigating evidence is an error in trial preparation, not trial strategy.[140] Consequently, any choice by counsel that flows "from lack of diligence in preparation and investigation is not protected by the presumption in favor of counsel."[141]

Moreover, the importance of a thorough investigation acquires singular significance in the sentencing phase of a capital trial.[142] As one court stated, "in a capital case the attorney's duty to investigate all possible lines of defense [must be] strictly observed."[143] In capital cases, it is not unlikely that, as in this case, defense attor-

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139. *Baldwin*, 704 F.2d at 1332-33 (emphasis added) (quoting *Strickland*, 693 F.2d at 1250-58, and Lovett v. Florida, 627 F.2d 706, 708 (5th Cir. 1980)); *see also* Cunningham v. Zant, 928 F.2d 1006, 1016 (11th Cir. 1991) (declaring that "[i]n order to determine what evidence might be appropriate, defense counsel has the duty to conduct a reasonable investigation"); Kubat v. Thieret, 867 F.2d 351, 369 (7th Cir. 1989) (clarifying that "defense counsel must make a significant effort, based on reasonable investigation and logical argument, to ably present the defendant's fate to the jury and to focus the attention of the jury on any mitigating factors"); Middleton v. Dugger, 849 F.2d 491, 493 (11th Cir. 1988) (promulgating that "[a]n attorney has a duty to conduct a reasonable investigation, including an investigation of the defendant's background, for possible mitigating evidence"); Knighton v. Maggio, 740 F.2d 1344, 1350 (5th Cir. 1984) (stating that in a capital case, trial counsel who makes "no investigation whatsoever relevant to the punishment phase," acts "in a vacuum" and falls below the standard for competent counsel).

140. *See* Kenley v. Armontrout, 937 F.2d 1298, 1304 (8th Cir. 1991) (explaining that "[c]ounsel's performance may be found ineffective if [he] performs little or no investigation").

141. *Id.*; *see* Cook v. Lynaugh, 821 F.2d 1072, 1078 (5th Cir. 1987) (noting that counsel who "forthrightly testified it never 'struck his mind' to investigate" cannot be said to have made a tactical judgment); Wilson v. Butler, 813 F.2d 664, 672 (5th Cir. 1987) (stressing that the attorney's failure to investigate was not based on a reasonable strategy because there was no evidence he had given any thought to the possibility of an investigation).

142. *See* Magill v. Dugger, 824 F.2d 879, 886 (11th Cir. 1987) (indicating that "[t]he seriousness of the charges against the defendant is a factor that must be considered in assessing counsel's performance").

143. Osborn v. Shillinger, 861 F.2d 612, 627 (10th Cir. 1988) (quoting Coleman v. Brown, 802 F.2d 1227, 1233 (10th Cir. 1986)); *see* Profitt v. Waldron, 831 F.2d 1245, 1248 (5th Cir. 1987) (observing that "[w]here counsel (1) makes some exploration of the insanity defense but fails to take an obvious and readily available investigatory step which would have made the defense viable, (2) does not produce reasonable tactical reasons for not pursuing further investigation, and (3) raises no other plausible defense, courts may find ineffective assistance of counsel" (citing Walker v. Mitchell, 587 F. Supp. 1432, 1433 (E.D. Va. 1984))); Jones v. Thigpen, 788 F.2d 1101, 1103 (5th Cir. 1986) (determining that defense counsel who "either neglected or ignored critical matters of mitigation at the point when the jury was to decide whether to sentence Jones to death" provided ineffective assistance).

neys conclude that guilt is a foregone conclusion; however, whether the accused lives or dies should not likewise be a foregone conclusion. For this reason, courts have typically given special attention to capital cases where little or no mitigating evidence is presented in support of a life sentence.[144]

In Karl's case, careful examination of "all the circumstances" clearly reveals that his defense attorneys failed to adequately investigate, present, or argue evidence that would have, at a minimum, presented an argument to the jury that Karl's life should be spared. Substantial information existed that established the fact that Karl suffered from some sort of mental disability that had dramatically impaired his functioning since childhood.[145] Although the exact nature of Karl's impairment was unclear, the evidence within his defense attorneys' knowledge indicated that his behavior was largely a function of his various disorders. In addition, Karl's defense attorneys were *actually* aware that he had a prior history of mental illness. His lead attorney even testified at the habeas hearing that he reviewed records of Karl's previous incarceration, which included diagnoses of schizophrenic disorder, paranoid schizophrenia, schizotypal personality, schizo-effective disorder, major depression, and chronic schizophrenia.[146] Counsel also testified that he knew Karl was taking antipsychotic drugs before

144. *See, e.g.*, Harris v. Dugger, 874 F.2d 756, 762-64 (11th Cir. 1989) (finding that counsel provided ineffective assistance by failing to present mitigating evidence in a trial resulting in a death penalty); *Kubat*, 867 F.2d at 368-69 (deciding that counsel was ineffective for failure to present available mitigating evidence and instead relying solely on a sympathy closing); *Osborn*, 861 F.2d at 626-27 (determining that counsel's failure to uncover mitigating evidence and rely on a single line of defense, which resulted in a death sentence, was ineffectiveness of counsel); King v. Strickland, 748 F.2d 1462, 1463-64 (11th Cir. 1984) (recognizing that, in a case resulting in a death sentence, failure to present character witnesses for mitigation purposes constituted ineffective representation); Bolder v. Armontrout, 713 F. Supp. 1558, 1566 (W.D. Mo. 1989) (stating that "[a] decision on whether a particular defendant receives the death penalty is a balancing process . . . [and jurors should] . . . weigh mitigating factors against aggravating factors in deciding whether a defendant should live or die"); Mathis v. Zant, 704 F. Supp. 1062, 1067 (N.D. Ga. 1989) (asserting that a death sentence cannot stand when counsel fails to present mitigating evidence and provide an inadequate closing argument).

145. *See supra* Part III.B.

146. *See* Hearing on Habeas Petition at 75, *Ex parte* Hammond, No. 87-CR-0200-W1 (226th Dist. Ct., Bexar County, Tex. May 12, 1992) (providing a physician's testimony about documentation of such disorders).

trial[147] and was aware of the State's own psychiatrist's report that indicated Karl suffered from paranoia.[148] This evidence pointed to a single plausible conclusion—Karl's behavior was the product of a phenomenon over which he had no control, namely, some variety of mental disability.

Because the historical record established that Karl's mental infirmity was the key to his unstable behavior, this fact adequately explained that disability *was* the defense attorneys' paramount duty at the sentencing phase of Karl's trial. Plainly, Karl's only defense to the death penalty was for counsel to develop and present a consistent, comprehensive, and above all, accurate account of the biological and environmental origins of Karl's behavior. Nevertheless, defense counsel made little effort to investigate, and absolutely no attempt to understand, the true character of Karl's mental problems.

Even if one could conclude that a reasonable defense attorney need not have obtained a comprehensive, independent mental health evaluation of Karl to present at the punishment phase, it is virtually impossible to reject the idea that counsel should have presented to the jury other mitigating evidence. With respect to Karl, such evidence could have consisted of lay testimony by family and friends, the otherwise available facts of Karl's abusive upbringing, his traumatic family history, his drug and substance abuse, and the onset of his mental disorders.[149] This testimony, although far less effective in the absence of expert interpretation, would have provided some significant mitigating information about Karl's background. Moreover, such mitigating evidence would have formed a persuasive Human Story, which is essential to a jury's decision regarding whether a capital defendant should live or die. Consequently, counsel's inaction deprived the jury of that information and Karl of his constitutional right to an individualized sentencing determination.[150]

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147. *See id.* at 74 (providing testimony that indicated Karl was taking drugs before trial).

148. *See id.* (noting counsel's testimony wherein he affirmed his inspection of the State files).

149. *See supra* Part III.B.

150. *Cf.* Penry v. Lynaugh, 492 U.S. 302, 328 (1989) (stating that the risk of the jury not being instructed that they are able to consider mitigating evidence, such as evidence of

Essentially, in either trial phase, Karl's counsel neither discovered, investigated, presented, nor argued on Karl's behalf. Simply put, Karl's defense attorneys failed to provide a Human Story that would provide the jury with meaningful reasons as to why Karl should be permitted to live. Counsel effectively ignored the mounds of mitigating evidence that existed at the time of trial—evidence that probably would have been enough to counter the Kill Story and save Karl's life. Basically, trial counsel's failure to do anything amounted to an abdication of responsibility, left Karl defenseless, and fulfilled his belief that the "death penalty was made" for Karl Hammond.

IV. The Law of Silencing a Defendant

Not surprisingly, given the complete lack of defense effort, Karl tried to speak for himself.[151] However, his attempts in court to provide a Human Story resulted in the court silencing and physically gagging him.[152] The trial court's silencing of Karl's efforts to protect and defend himself against the Kill Story formed the basis of the two primary legal issues in Karl's case: (1) the defendant's right to speak for himself, and (2) the prejudicial effect of gagging a defendant in the jury's presence.

A. *The Right to Speak*

An accused's right to present a defense is one of the fundamental principles of this nation's criminal justice system. This principle is particularly true when the defense includes the testimony of the accused, for as the Supreme Court of the United States has stated, "At this point in the development of our adversary system, it cannot be doubted that a defendant in a criminal case has the right to take the stand and to testify in his or her own defense."[153] This right to testify is grounded in several constitutional principles. First, the Fourteenth Amendment guarantees "that no one shall be deprived of liberty without due process of law [which] include[s] a

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mental retardation and past abuse, in determining whether to impose the death penalty is incompatible with the Eighth and Fourteenth Amendments).

151. *See supra* notes 13-25 and accompanying text.

152. *See id.* (describing the court's response to Karl's efforts).

153. Rock v. Arkansas, 483 U.S. 44, 49 (1987).

right to be heard and to offer testimony."[154] Second, the Sixth Amendment right to compulsory process grants a defendant the right to call witnesses on his behalf at trial.[155] As the Court stated in *Rock v. Arkansas*, "Logically included in the accused's right to call witnesses whose testimony is 'material and favorable to his defense,' . . . is a right to testify himself, should he decide it is in his favor to do so."[156] Third, the Fifth Amendment right to be free from compelled testimony has, as its necessary corollary, the right to testify in one's own behalf.[157] Indeed, the Supreme Court has emphasized that such a right is "[e]ven more fundamental to a personal defense than the right of self-representation."[158]

The decision whether to exercise the right to testify remains with the accused, just as the accused retains the ultimate authority to make other fundamental decisions regarding his case, such as whether to plead guilty, waive a jury, or seek an appeal.[159] As with these fundamental rights, a defendant's waiver must be knowing,

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154. *Id.* at 51 (citing *In re* Oliver, 333 U.S. 257, 273 (1948), and Ferguson v. Georgia, 365 U.S. 570, 602 (1961) (Clark, J., concurring)).

155. *See* Washington v. Texas, 388 U.S. 14, 19 (1967) (reiterating that the Sixth Amendment provides a criminal defendant with the right to offer the testimony of witnesses).

156. *Rock*, 483 U.S. at 52 (quoting United States v. Valenzuela-Bernal, 458 U.S. 858, 867 (1982)); *see also* Faretta v. California, 422 U.S. 806, 819 (1975) (stating that "[i]t is the accused, not counsel, who must be 'informed of the nature and cause of the accusation,' who must be 'confronted with the witnesses against him,' and who must be accorded 'compulsory process for obtaining witnesses in his favor'" (quoting U.S. CONST. amend. VI)).

157. *See Rock*, 483 U.S. at 52-53 (acknowledging that the right to testify coexists with the guarantee against compelled testimony); *see also* Brooks v. Tennessee, 406 U.S. 605, 611-12 (1972) (holding that an accused's privilege against self-incrimination is violated by a Tennessee statute that requires an accused to testify first or not at all).

158. *Rock*, 483 U.S. at 52.

159. *See id.* at 53 & n.10 (noting that the choice to testify is a fundamental decision of the accused); *see also* Nix v. Whiteside, 475 U.S. 157, 164 (1986) (contending that although no express right of a criminal defendant to testify on his own behalf exists, the fact that the right exists has long been assumed, and the court has also intimated the existence of such a right as an off-shoot to the Fifth Amendment's privilege not to testify); Jones v. Barnes, 463 U.S. 745, 751 (1983) (recognizing the accused's right to make fundamental decisions relating to his case, such as testifying on his own behalf, taking an appeal, or pleading guilty); *Brooks*, 406 U.S. at 613 (finding that the accused cannot be restricted in his decision of whether or not he will testify in his own defense); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (providing that "[i]n a criminal case, a lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive a jury trial and whether the client will testify").

voluntary, and intelligent.[160] Moreover, this right is not permanently waivable; a defendant may reassert the right to testify, and a trial court must allow such testimony, unless the State can show significant prejudice.[161]

The Texas Court of Criminal Appeals has recognized that the application of these principles requires a trial court to allow testimony of a defendant even after the defense has both rested and closed.[162] In Karl's case, no significant events occurred between

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160. *See, e.g.*, United States v. Teague, 953 F.2d 1525, 1534 (11th Cir. 1992) (en banc) (stating that any waiver of the right to testify must be knowing and voluntary); Galowski v. Murphy, 891 F.2d 629, 636 (7th Cir. 1989) (indicating that "the right to testify is a personal right that belongs to the accused and may be waived only by the accused").

161. *See* United States v. Walker, 772 F.2d 1172, 1177-84 (5th Cir. 1985) (noting that a court, when evaluating a party's motion to reopen, should consider the timeliness of the motion, the character of the testimony, the reasonableness of the movant's excuse, and the prejudice to the nonmovant). *Walker* was decided before the Supreme Court considered *Rock*; however, that case was the most direct controlling precedent for Karl. In *Walker*, the Fifth Circuit held that the trial court abused its discretion when it refused to allow the defense to reopen its case so that the defendant could testify on his own behalf. *See id.* at 1184-85. In Karl's case, as in *Walker*, a short time passed between the defense's decision to rest and the defendant's request to reopen the defense case. *Compare id.* at 1176 (noting that the defense rested on Friday afternoon and moved to reopen on the following Monday morning), *with* Record at 3109, 3142, State v. Hammond, No. 87-CR-0200 (226th Dist. Ct., Bexar County, Tex. Mar. 11, 1987) (indicating that the defense rested on Thursday and Karl complained about not being able to testify on the following Monday before the jury was charged). Moreover, granting the defendant's request to testify would not have interfered with the orderly flow of the trial because no significant events occurred between the defense resting and the defendant's subsequent assertion of the right to testify. Indeed, in *Walker*, the State had put on rebuttal witnesses after the defense had rested; in this case, because there were no intervening witnesses, no reason suggested that Karl had strategically withheld testimony until the State's rebuttal witnesses had given their testimony. *Cf. Walker*, 772 F.2d. at 1181 (raising, but ultimately rejecting, the possibility that the defendant strategically delayed his own testimony until state's rebuttal witnesses had testified). Overall, the Fifth Circuit's decision in *Walker* makes clear that a trial court must offer a "valid reason to justify a denial of a defense motion to reopen" when the defendant seeks to testify. *Id.* at 1185 (quoting United States v. Larson, 596 F.2d 759, 779-80 (8th Cir. 1979)). Moreover, the Fifth Circuit emphasized that:

> Walker's testimony in his own defense is of such inherent significance that the district court, as a matter of fairness, should have permitted him to testify. Walker had not testified at all, and his testimony would be of particular interest to the fact finder because he would be testifying as the alleged active participant in the activities which were the focus of the trial. Where the very point of a trial is to determine whether an individual was involved in criminal activity, the testimony of the individual himself must be considered of prime importance.

Id. at 1179.

162. *See* Yee v. State, 815 S.W.2d 691, 691 (Tex. Crim. App. 1991) (affirming the court of appeal's reversal of the trial decision). The court of appeals, whose opinion was af-

the defense resting and Karl's assertion of his right to testify. Karl objected before the charge was read and before final arguments began in the case.[163] He demonstrated clearly to the trial court that he wished to testify and that he wished to present witnesses.[164] Karl also indicated that his witnesses were present, available, and prepared to testify on his behalf.[165] Moreover, the trial court was fully aware of the main content of his witnesses' testimony because the defense had already submitted their affidavits to the trial court before they rested.[166] Other than Karl's likely alibi testimony, "it appears obvious that any defendant's testimony could be material and bear directly on the main issues of the case."[167]

The State's primary argument, greatly assisted by Karl's trial counsel, was that Karl's effort to testify was not genuine but rather a "calculated attempt to disrupt his trial."[168] The record simply does not support such an argument. Notably, this argument rests entirely on the following self-serving testimony by Karl's trial counsel at the state post-conviction hearing:

> He later told us . . . that he had been instructed by someone in the jail to do the performance in order to somehow or another protect

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firmed by the Texas Court of Criminal Appeals, held that a trial court has no discretion to prevent the presentation of witnesses by the defense before arguments have been concluded without, at the very least, inquiry into the nature of the testimony. *See* Yee v. State, 790 S.W.2d 361, 362 (Tex. App.—Houston [14th Dist.] 1990), *aff'd*, 815 S.W.2d 691 (Tex. Crim. App. 1991). According to the court, "a court must inquire into and determine if the proffered evidence is admissible, material to the resolution of disputed issues, and readily available. If it is, the court has no discretion to deny the request." *Id.* (quoting Fuller v. State, 737 S.W.2d 113, 115 (Tex. App.—Tyler 1987, no pet.)). The court also stated that "[w]ithout such inquiry, the trial court has no sound basis for excluding evidence which the defendant may be entitled to have considered by the trier of fact. This is true regardless of the weight of the evidence or the issue upon which it is offered." *Id.* at 362; *see also* Rogers v. State, 774 S.W.2d 247, 263 (Tex. Crim. App. 1989) (holding that "a trial judge commits reversible error when he refuses a request to reopen for the purpose of producing relevant and admissible evidence, regardless of its weight or the issue upon which it is offered, so long as the request is timely under the statute and does not threaten to unduly impede the trial").

163. *See* Record at 3105, *Hammond*, No. 87-CR-0200.

164. *See supra* notes 13-25 and accompanying text.

165. *See supra* notes 12-14 and accompanying text.

166. *See supra* notes 5-8 and accompanying text.

167. *See Yee*, 790 S.W.2d at 362-63.

168. Findings of Fact, Conclusions of Law, and Order on Applicant's Petition for Post-Conviction Writ of Habeas Corpus at 64, *Ex Parte* Hammond, No. 87-CR-0200-W1 (226th Dist. Ct., Bexar County, Tex. Aug. 24, 1992).

> his rights or create some kind of record, but that he still understood why we had not presented the evidence and agreed with us.[169]

Contrary to the defense attorney's assertion, this statement actually supported Karl's argument that he needed to make his desire known in order to preserve his rights.[170] Furthermore, the above-quoted testimony of trial counsel is not only consistent with Karl's own account of the events, as introduced by the State at the post-conviction hearing, but it also confirms the sincerity of Karl's desire to testify and to present evidence.[171]

Finally, and perhaps most importantly, the best evidence of whether Karl was genuinely asserting his right to testify is the trial record itself. The trial judge certainly understood that Karl was trying to testify. This understanding is reflected in the trial judge's ruling; he rejected Karl's effort to testify on the ground that Karl and his attorney "ha[d] already made the decision."[172] Moreover, the judge did not in any way indicate that he regarded Karl's invocation of the right as "non-genuine" or insincere.

Notably, when a trial court understands and addresses a defendant's request as an effort to assert his constitutional right to testify, non-record evidence that purports to reinterpret the defendant's request is not relevant and should not be considered.[173] However,

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169. *See* Hearing on Habeas Petition at 114-15, *Ex parte* Hammond, No. 87-CR-0200-W1 (226th Dist. Ct., Bexar County, Tex. May 12, 1992).

170. *Cf.* Underwood v. Clark, 939 F.2d 473, 476 (7th Cir. 1991) (citing jurisdictions that require the defendant to protest directly to the judge in order to protect his right to testify); United States v. Edwards, 897 F.2d 445, 446 (9th Cir. 1990) (concluding that the court does not have a duty to advise a defendant of his right to testify).

171. *See* Hearing on Habeas Petition, State's Ex. 4, *Ex parte Hammond*, No. 87-CR-0200-W1 (noting Karl's statement that indicated that he did not understand the consequences of agreeing to the trial counsel's decision "to rest behind the State"). When Karl subsequently described the colloquy to a fellow inmate, the inmate explained what had actually transpired and informed him that he needed to assert his right in open court in order to testify and present evidence. *See id.* (describing Karl's advice from a fellow inmate).

172. *See* Record at 3144, State v. Hammond, No. 87-CR-0200 (226th Dist. Ct., Bexar County, Tex. Mar. 11, 1987).

173. *See* Hearing on Habeas Petition at 113, *Ex parte Hammond*, No. 87-CR-0200-W1 (describing non-record evidence). In addition, the purported conversation between Karl and his counsel was not properly before the state post-conviction court. By trial counsel's own account, the conversation occurred after the presentation of evidence at the punishment phase of Karl's trial. *See id.* (recalling the timing of the conversation in relation to the presentation of evidence at trial). Hence, the conversation did not bear at all on counsel's trial decisions that were the subject of the post-conviction hearing. In such a posture,

despite that notion, the federal district court concluded that any error in denying Karl his right to testify was "harmless."[174] Yet, the denial of a defendant's right to testify is generally not subject to harmless-error analysis.[175] Rather, in denying Karl the right to tes-

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Karl's purported statements fall squarely within the attorney-client privilege and could not be waived absent his consent. Moreover, Karl preserved his objection to the disclosure at the state postconviction hearing. *See id.*

174. *See* Memorandum Opinion and Order at 23, Hammond v. Collins, No. SA-92-CA 873 (W.D. Tex. Sept. 28, 1993). In Karl's case, the district judge was making a de novo determination on the portions of the magistrate judge's memorandum and recommendation objected to by the defendant. A person "in custody pursuant to the judgment of a State court" may petition the Supreme Court, a Supreme Court Justice, a circuit judge, or a district court for a writ of habeas corpus, subject to certain restrictions. *See* 28 U.S.C. § 2254(a) (1994) (identifying the members of the federal judiciary who may entertain a petition for writ for habeas corpus). The writ shall not be granted unless the prisoner has exhausted all remedies available to him in the courts of the State in which he is being detained. *See id.* § 2254(b) (providing that a prisoner must avail himself of all State judicial remedies before pursuing a federal remedy). The rules governing Section 2254 also implicitly indicate that federal district courts may review habeas corpus petitions. *See id.* § 2254 (addressing rules governing Section 2254 for the district courts); *see also* Preiser v. Rodriguez, 411 U.S. 475, 483 (1993) (stating that a federal district court may review a habeas corpus petition once all state remedies have been exhausted); Sumner v. Mata, 449 U.S. 539, 542 (1981) (implying that Section 2254(a) gives federal district courts the right to hear habeas corpus cases after all state court remedies have been exhausted).

175. *See* Luce v. United States, 469 U.S. 38, 42 (1984) (stating that an error that denies a defendant the right to testify cannot be considered harmless); Martinez v. Ylst, 951 F.2d 1153, 1157 (9th Cir. 1991) (explaining that denial of a defendant's right to testify will be harmless in only the most extraordinary cases); *see also* Chapman v. California, 386 U.S. 18, 23 (1967) (indicating that some constitutional rights are so necessary to a fair trial that their denial can never constitute harmless error). In fact, Chief Justice Rehnquist recently clarified the distinction between "trial errors," which may be "quantitatively assessed in the context of other evidence presented," and "structural errors," which "affect the framework within which the trial proceeds." Arizona v. Fulminate 499 U.S. 279, 307-08, 310 (1991) (Rehnquist, C.J., dissenting). In *Arizona v. Fulminante*, Chief Justice Rehnquist concluded that all trial errors, including the admission of involuntary confessions, should be subject to harmless-error analysis because courts are capable of ascertaining whether the erroneous inclusion or exclusion of evidence had an impact on the verdict. *See id.* at 308 (Rehnquist, C.J., dissenting) (acknowledging the ability of a court to decide the impact of the admission of certain evidence on the outcome). Structural errors, on the other hand, protect values that transcend the trial and safeguard the public's perception of the trial as "fundamentally fair." *See id.* at 310 (Rehnquist, C.J., dissenting) (citing Rose v. Clark, 478 U.S. 570, 577-78 (1986)). Accordingly, structural errors, such as the refusal to permit a defendant to represent himself at trial, should require reversal without regard to such errors' contribution to the resulting verdict. *See id.* at 309-10 (Rehnquist, C.J., dissenting).

Although all the courts that addressed Karl's claim applied some form of harmless-error analysis, the right to testify is one of the sole remaining rights that is not logically aided by such review. *See* Marjorie L. Rifkin, Note, *The Criminal Defendant's Right to Testify: The Right to Be Seen but Not Heard*, 21 COLUM. HUM. RTS. L. REV. 253, 274-75 (1989) (asserting that in many cases where courts find the defendant was refused the right to testify, the

error is ruled "harmless" and no further action is taken). The finding of harmless error in a case where the right to testify is denied rarely has an affect on the final verdict. *See, e.g.*, Ortega v. O'Leary, 843 F.2d 258, 262 (7th Cir. 1988) (finding that the absence of the defendant's testimony did not deprive him of a fair trial since the error was harmless); United States v. Bernloehr, 833 F.2d 749, 751 (8th Cir. 1987) (relating that a defendant's failure to testify would not make the verdict reversible on appeal); Alicea v. Gagnon, 675 F.2d 913, 915 (7th Cir. 1982) (stating that the denial of the defendant's right to testify will not impact the validity of the jury's verdict because the denial is harmless error). The right of an accused to testify at trial is a structural right because it is principally directed toward preserving the integrity of the criminal process rather than advancing the accuracy of the criminal trial. In *Rock,* the decision announcing the constitutional right to testify on one's own behalf, the defendant's "hypnotically refreshed" testimony was of questionable reliability. *See* Rock v. Arkansas, 483 U.S. 44, 62 (1987) (holding that the Arkansas rule of exclusion of all post-hypnosis testimony would infringe on a defendant's right of testifying on his own behalf). Although the Supreme Court insisted that such potentially unreliable evidence must be admitted when offered by the defendant herself, the Court left open the possibility that states could absolutely exclude hypnotically refreshed testimony if offered by other witnesses. *See id.* at 58 n.15 (explaining that a criminal defendant may admit unreliable evidence if offered by himself). Hence, the overriding justification for recognizing the right was the Court's perception that protecting a defendant's "opportunity to be heard" is essential to public confidence in our criminal system. *See id.* at 51 (citing *In re* Oliver, 333 U.S. 257, 273 (1948)).

Furthermore, the right to testify also protects dignitary values. *See* Marjorie L. Rifkin, Note, *The Criminal Defendant's Right to Testify: The Right to Be Seen but Not Heard*, 21 COLUM. HUM. RTS. L. REV. 253, 253-54 (1989) (stating that "courts characterize the right to testify as fundamental . . . and personal" and that the constitutional basis for the right to testify is expressly fundamental and implicitly personal); *see also* Faretta v. California, 422 U.S. 806, 819 (1975) (concluding that the "Sixth Amendment does not provide merely that a defense shall be made for the accused" but personally grants the accused the right to make his own defense). The right affirms the idea that the defendant deserves the careful attention of the jurors and permits the defendant to be a participant in, rather than a passive observer of, the proceedings that will determine his fate. *Cf.* Godinez v. Moran, 509 U.S. 389, 400 (1993) (quoting *Faretta*, 422 U.S. at 834, as emphasizing that although the defendant "'may conduct his own defense ultimately to his own detriment, his choice must be honored'"); *Faretta*, 422 U.S. at 819 (recognizing that the Sixth Amendment allows a defendant the right to self-representation); Myers v. Johnson, 76 F.3d 1330, 1333 (5th Cir. 1996) (acknowledging the implied right of a criminal defendant to represent himself at trial within the Sixth Amendment). Given that the right to testify predominantly protects values other than accuracy, it is inappropriate to tolerate the denial of that right simply because of strong evidence of guilt. *Cf.* Waller v. Georgia, 467 U.S. 39, 49 n.9 (1984) (claiming that the denial of the right to public trial is not amenable to harmless-error analysis); James Edward Wicht III, *There Is No Such Thing As a Harmless Error: Returning to a Rule of Automatic Reversal*, 12 BYU J. PUB. L. 73, 82 (1997) (discussing other structural rights, in addition to the right of a public trial, that have not been subject to the harmless error analysis). Further, like the decision to represent oneself at trial, the decision to take the stand often undermines rather than advances a defendant's chances at trial. Essentially, the decision to take the stand may present specific and apparent dangers, as it opens the defendant to cross-examination and impeachment. Hence, to apply harmless-error analysis would be to condone the error in the vast majority of cases. Similarly, the Supreme Court has reasoned in the context of self-representation that:

tify, the court committed error of a terrible magnitude. In the end, the courts closed the door on Karl and prevented any possible expression of the Human Story, which was necessary to defend against the Kill Story. Without such a defense, Karl's death sentence was a virtual certainty.

B. *Gagging the Speaker*

In addition to silencing the Human Story by violating Karl's right to speak, the trial court reinforced the Kill Story by physically gagging Karl in the jury's presence.[176] Generally, a person who stands accused is presumed innocent and is entitled "to the indicia of innocence in a jury trial."[177] Accordingly, the Supreme Court of the United States has held that in the presence of a jury, an accused is generally entitled to be free of gags, handcuffs, leg shackles, or other unusual means of restraint so as not to label him as a bad person or suggest that the fact of his guilt is a foregone conclusion.[178] The Court consistently has characterized such restraints as an "inherently prejudicial practice" that must be subject to close judicial scrutiny.[179]

> Since the right of self-representation is a right that when exercised usually increases the likelihood of the outcome unfavorable to the defendant, its denial is not amenable to 'harmless error' analysis. The right is either respected or denied; its deprivation cannot be harmless.

McKaskle v. Wiggins, 465 U.S. 168, 177 n.8 (1984).

176. *See* Record at 3149-51, State v. Hammond, No. 87-CR-0200 (226th Dist. Ct., Bexar County, Tex. Mar. 11, 1997).

177. United States v. Theriault, 531 F.2d 281, 284 (5th Cir. 1976); *see also* Eaddy v. People, 174 P.2d 717, 718-19 (Colo. 1946) (noting that "every defendant is entitled to be brought before the court with the appearance, dignity, and self-respect of a free and innocent man"); Shelley A. Nieto Dahlberg, Comment, *The REACT Security Belt: Stunning Prisoners and Human Rights Groups into Questioning Whether Its Use Is Permissible Under the United States and Texas Constitutions*, 30 ST. MARY'S L.J. 239, 282-83 (1998) (explaining that all persons "are entitled to a fair and impartial trial").

178. *See* Kennedy v. Cardwell, 487 F.2d 101, 105 (6th Cir. 1973) (emphasizing that a fair and impartial trial requires that a prisoner be presented to the jury free from shackles and bonds); United States v. Samuel, 431 F.2d 610, 614-615 (4th Cir. 1970) (contending that a defendant should be entitled to be relieved of handcuffs so as not to suggest that the fact of his guilt is a foregone conclusion); Cox v. State, 931 S.W.2d 349, 352 (Tex. App.—Fort Worth 1996, pet. dism'd) (en banc) (noting that when a defendant is restrained in the jury's presence, his constitutional presumption of innocence is harmed).

179. *See, e.g.*, Holbrook v. Flynn, 475 U.S. 560, 569 (1986) (emphasizing that shackling and prison clothing are unmistakable indications of the need to separate the defendant from the community); Estelle v. Williams, 425 U.S. 501, 503-04 (1976) (suggesting that an

Although a trial court's determination to take the extraordinary measure of gagging a defendant during trial is reviewed on appeal under an abuse of discretion standard,[180] due process requires that physical restraints be used only under extreme circumstances, and then, only as a last resort.[181] The Supreme Court has articulated the rationale behind this proposition:

> Trying a defendant for a crime while he sits bound and gagged before the judge and jury would to an extent comply with that part of the Sixth Amendment's purposes that accords the defendant an opportunity to confront the witnesses at the trial. But even to contemplate such a technique, much less see it, arouses a feeling that no person should be tried while shackled and gagged except as a last resort. Not only is it possible that the sight of shackles and gags might have a significant effect on the jury's feelings about the defendant, but the use of this technique is itself something of an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold.[182]

Despite this pronouncement, the Supreme Court has also held that a trial court, when "confronted with disruptive, contumacious, stubbornly defiant defendants," must be permitted certain remedies in order to restore orderly proceedings, including, "as a last resort," the use of physical restraints.[183] The Court's rationale is premised on the notion that a trial court must have some remedies when a contumacious defendant is intent on frustrating, impeding, or aborting the proceedings. In other words, "the accused [cannot] be permitted by his disruptive conduct indefinitely to avoid being tried on the charges brought against him,"[184] for "[t]o allow the

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accused should not be compelled to go to trial in prison attire because of the possible impairment to his presumption of innocence).

180. *See* United States v. Nicholson, 846 F.2d 277, 279 (5th Cir. 1988) (noting that the trial court has sound discretion when balancing the interests of using shackles for safety reasons and not prejudicing the fact-finding process); United States v. Bentvena, 319 F.2d 916, 930 (2d Cir. 1963) (applying an abuse of discretion standard when reviewing the trial court's decision to gag the defendant).

181. *See* Illinois v. Allen, 397 U.S. 337, 344 (1970) (suggesting that restraints not be employed except as a last resort); *see also* Spain v. Rushen, 883 F.2d 712, 728 (9th Cir. 1989) (criticizing the trial court for prematurely restraining the defendant); United States v. Esquer, 459 F.2d 431, 433 (7th Cir. 1972) (acknowledging that restraints should be used only in extreme circumstances).

182. *Allen*, 397 U.S. at 344.

183. *Id.* at 343-44.

184. *Id.* at 346.

disruptive activities of a defendant like respondent to prevent his trial is to allow him to profit from his own wrong."[185] Nonetheless, using physical restraints is arguably excessive; the Supreme Court, therefore, has reserved the physical restraint option for those defendants who "engage in speech and conduct which is so noisy, disorderly, and disruptive that it is *exceedingly difficult or wholly impossible to carry on the trial.*"[186] Most courts throughout the country have followed this annunciation of the appropriate standard by the Supreme Court, resorting to restraints only when similarly egregious misconduct on the part of the defendant was calculated to impede or abort the proceedings.[187]

Although gagging may be appropriate occasionally, never has there been a case like Karl's where physical gags were used on a defendant who simply asserted his constitutional rights. Justice Douglas even stated that the use of restraints is *not appropriate* when the defendant is raising a legitimate question of whether his

185. *Id.* at 350 (Brennan, J., concurring); *see* Shelley A. Nieto Dahlberg, Comment, *The REACT Security Belt: Stunning Prisoners and Human Rights Groups into Questioning Whether Its Use Is Permissible Under the United States and Texas Constitutions*, 30 ST. MARY'S L.J. 239, 285 (1998) (arguing that physical restraints should be used only in limited situations).

186. *Allen*, 397 U.S. at 338 (emphasis added). According to the Court, Allen first insisted on representing himself, and then he proceeded to inappropriately question prospective jurors at length. *See id.* at 339. He argued with the judge "in a most abusive and disrespectful manner" and even threatened to kill the judge. *Id.* at 339-40. Allen then "tore the file which his attorney had and threw the papers on the floor," ignored repeated warnings of the judge, and on two occasions expressed his clear intent to prevent the trial from going forward at all. *Id.* at 340-41. Specifically, he stated that "[t]here's not going to be no trial, either. I'm going to sit here and you're going to talk and you can bring your shackles out and straight jacket and put them on me and tape my mouth, but it will do no good because there's not going to be no trial." *Id.* He finally responded to questions of the judge but only "with vile and abusive language." *Id.* at 339-41.

187. *See, e.g.*, Stewart v. Corbin, 850 F.2d 492, 495-96 (9th Cir. 1988) (indicating that the defendant was gagged after twice deliberately violating court direction not to request to take a lie detector test before the jury, after the defendant's conduct created "total chaos" in the courtroom, and after the defendant threatened a major prosecution witness); People v. Palermo, 298 N.E.2d 61, 61 (N.Y. 1973) (stating that the defendant was gagged after refusing to be quiet and shouting at the judge); Kimithi v. State, 546 S.W.2d 323, 324-25 (Tex. Crim. App. 1977) (concluding that the defendant was gagged after making repeated accusations of "repressive racism" against the proceedings, repeated false medical claims, demands to be tried by the United Nations, references to the court as a "kangaroo court," and giving "patently false" answers to questions of the judge).

constitutional rights have been honored.[188] In that respect, Justice Douglas asked:

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188. *See Allen*, 397 U.S. at 352 (Douglas, J., concurring) (discussing the need for physical restraints when defendants are disruptive). Justice Douglas cited a colloquy from the trial of William Penn that resulted in the defendant's removal:

> "*Rec.* Sir, will you plead to your indictment?
> "*Penn.* Shall I plead to an Indictment that hath no foundation in law? If it contain that law you say I have broken, why should you decline to produce that law, since it will be impossible for the jury to determine, or agree to bring in their verdict, who have not the law produced, by which they should measure the truth of this indictment, and the guilt, or contrary of my fact?
> "*Rec.* You are a saucy fellow, speak to the Indictment.
> "*Penn.* I say, it is my place to speak to matter of law; I am arraigned a prisoner; my liberty, which is next to life itself, is now concerned: you are many mouths and ears against me, and if I must not be allowed to make the best of my case, it is hard, I say again, unless you shew me, and the people, the law you ground your indictment upon, I shall take it for granted your proceedings are merely arbitrary
> . . . .
> "*Rec.* The question is, whether you are Guilty of this Indictment?
> "*Penn.* The question is not, whether I am Guilty of this Indictment but whether this Indictment be legal. It is too general and imperfect an answer, to say it is the common-law, unless we knew both where and what it is. For where there is no law, there is no transgression; and that law which is not in being, is so far from being common, that it is no law at all.
> "*Rec.* You are [an] impertinent fellow, will you teach the court what law is? It is 'Lex non scripta,' that which many have studied 30 or 40 years to know, and would you have me to tell you in a moment?
> "*Penn.* Certainly, if the common law be so hard to be understood, it is far from being very common; but if the lord Coke in his Institutes be of any consideration, he tells us, That Common-Law is common right, and that Common Right is the Great Charter-Privileges . . . .
> "*Rec.* Sir, you are a troublesome fellow, and it is not for the honour of the court to suffer you to go on.
> "*Penn.* I have asked but one question, and you have not answered me; though the rights and privileges of every Englishman be concerned in it.
> "*Rec.* If I should suffer you to ask questions till to-morrow morning, you would be never the wiser.
> "*Penn.* That is according as the answers are.
> "*Rec.* Sir, we must not stand to hear you talk all night.
> "*Penn.* I design no affront to the court, but to be heard in my just plea: and I must plainly tell you, that if you will deny me Oyer of that law, which you suggest I have broken, you do at once deny me an acknowledged right, and evidence to the whole world your resolution to sacrifice the privileges of Englishmen to your sinister and arbitrary designs.
> "*Rec.* Take him away. My lord, if you take not some course with this pestilent fellow, to stop his mouth, we shall not be able to do any thing to night.
> "*Mayor.* Take him away, take him away, turn him into the baledock."

Id. at 353-55 (Douglas, J., concurring) (citation omitted).

> Would we tolerate removal of a defendant from the courtroom during a trial because he was insisting on his constitutional rights, albeit vociferously, no matter how obnoxious his philosophy might have been to the bench that tried him? Would we uphold contempt in that situation?[189]

The situation posed by Justice Douglas is precisely what befell Karl. Although he politely, albeit insistently, asserted his constitutional right to speak at trial, he hurled no epithets, used no vile and abusive language, and did not raise patently frivolous objections simply for the purpose of disrupting the proceedings. Yet, instead of investigating Karl's complaints, the trial court demonstrated its clear intent to silence Karl from the very first moment he spoke, either by threats or by gags. As the former had no effect on Karl's assertion of his constitutional rights, the latter was employed.

Even in extreme circumstances where some restraint of the defendant becomes necessary, it is the "duty of the trial court to examine less restrictive measures that may serve to guarantee the security of the courtroom before resorting to such shackling."[190] The Supreme Court has outlined less-drastic and constitutionally viable alternatives to gagging a defendant: (1) citing the accused for contempt; or (2) taking the accused out of the courtroom until he promises to refrain from his disorderly conduct.[191] It is widely agreed, however, that gagging is the most prejudicial and least acceptable of the three alternatives.[192] As Justice Brennan has stated:

> [T]hese three methods are not equally acceptable. *In particular, shackling and gagging a defendant is surely the least acceptable of them.* It offends not only judicial dignity and decorum, but also that respect for the individual which is the lifeblood of the law.[193]

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189. *Allen*, 397 U.S. at 355 (Douglas, J., concurring). Justice Douglas' opinion suggested physical restraints may be warranted "where the courtroom is a bedlam and either the accused or the judge is hurling epithets at the other." *Id.* at 351 (Douglas, J., concurring). In Karl's case, the record reflects no bedlam but that created by the judge. Indeed, Karl was as polite as his attorneys had been to the court.

190. Hamilton v. Vasquez, 882 F.2d 1469, 1472 (9th Cir. 1989).

191. *See Allen*, 397 U.S. at 343-44 (detailing options for the trial court when a defendant is acting disruptively).

192. *See id.* at 344 (expressing the belief that shackling could have a negative effect on the jury).

193. *Id.* at 350-51 (Brennan, J., concurring) (emphasis added); *see also* Commonwealth v. Martin, 399 S.E.2d 623, 629 (Va. Ct. App. 1990) (proclaiming that the trial court

In the present case, there was no consideration or attempt at a less prejudicial alternative, in spite of the fact that such was requested by the defense counsel.[194] Certainly, removing Karl from the courtroom would have just as effectively accomplished the court's desired result of silencing Karl, and as defense counsel repeatedly emphasized, with less resulting prejudice.[195] Unfortunately, the trial court did not consider gagging as a last resort. On the very first occasion when Karl expressed his desire to testify, the court's immediate response was to offer him one choice: "[Y]ou can sit there and listen and keep your mouth shut or I'll gag you."[196] From that point on, the record clearly demonstrates that the trial court never considered any options other than gagging Karl.[197] In fact, the trial judge made it clear that he believed, and wrongly so, that he did not have the power to do so.[198]

Additionally, the trial court's written findings, entered approximately two weeks after Karl's trial concluded, demonstrated that the judge did not even consider any less restrictive alternative to gagging Karl. The judge simply asserted that "[t]he court's warnings and attempt at persuasion having been to no avail[,] the court's action in ordering the mouth of the defendant to be bandaged was absolutely necessary in order to maintain decorum in the courtroom, and to prevent absolute bedlam."[199] The trial court, thus, made no express findings whatsoever as to the unacceptableness of any less restrictive measures, and the court's findings reflect the fact that the court did not even consider defense counsel's proposed measure of removing Karl from the courtroom.

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abused its discretion when it gagged the defendant, without making any finding that the defendant's "presence was essential, or that alternatives were ineffectual or unavailable").

194. As previously stated trial counsel for Karl repeatedly requested that the less-restrictive alternative of having Karl removed from the courtroom entirely be employed. *See supra* note 22 and accompanying text.

195. *See* Record at 3145-46, 3148-51, State v. Hammond, No. 87-CR-0200 (226th Dist. Ct., Bexar County, Tex. Mar. 11, 1987). The record shows that the trial court entirely ignored these requests by counsel. *See id.* at 3145-46.

196. *Id.* at 3144.

197. *See id.* at 3144-51.

198. *Id.* at 3148. In fact, however, Texas law expressly provides that a trial "may proceed to its conclusion" when a defendant voluntarily "absents" himself from the proceedings after "pleading to the indictment or information." TEX. CODE CRIM. PROC. ANN. art. 33.03 (Vernon 1989).

199. Record at 154, *Hammond*, No. 87-CR-0200.

Restraining a defendant, especially to silence valid objections, has long been regarded as a seriously prejudicial practice.[200] The gagging of Karl was incalculably harmful in the guilt-innocence phase of his trial by constituting a comment on the weight of the evidence and on Karl's right to testify; in addition, this action impermissibly diminished the State's heightened burden of proof. Arguably, Karl's gagging was also equally prejudicial during the punishment phase because the jury was instructed to consider "all of the evidence submitted . . . in the trial of the first part of this case wherein you were called upon to determine the guilt or innocence of the defendant."[201] Thus, not only did the trial court, in tandem with defense counsel's failure, prevent Karl from providing a human alternative to the Kill Story, but the court also supported that Kill Story by physically manifesting the idea of how dangerous Karl actually was to society.

V. CONCLUSION

Karl Hammond's case indicates that a balance between the Kill Story and the Human Story is necessary in a capital trial. Such equilibrium is critical in order to instill confidence that the decision in favor of death is accurate and that a thorough balancing has been conducted by the jury. Moreover, his case demonstrates that, in representing a capital defendant, an attorney has an extremely high burden to investigate, place before the jury, and argue the Human Story. Furthermore, Karl's case exemplifies how members of the bench have an equally high burden to facilitate both narratives during each phase of the capital trial. These burdens arise because the Kill Story, absent any trial record expression of the Human Story, can corrupt the law and the courts, as judges seek to

200. *See* Illinois v. Allen, 397 U.S. 337, 337 (1970) (holding that gagging may be appropriate only where all other methods have been exhausted and the defendant is disruptive); Lovell v. State, 702 A.2d 261, 269 (Md. 1997) (discussing the prejudices that gagging a defendant may convey to a jury); *see also* S.R. Shapiro, Annotation, *Propriety and Prejudicial Effect of Gagging, Shackling, or Otherwise Physically Restraining Accused During Course of State Criminal Trial*, 90 A.L.R.3d 17, 23 (1980 & Supp. 1998) (finding numerous cases acknowledging the general rule that an accused has a right to be tried free and unrestrained from gags or shackles).

201. Record at 142, *Hammond*, No. 87-CR-0200 (giving the Charge of Court on Punishment).

justify the jury's decision rather than analyze the adequacy of the procedure or the counsel that assisted in the death verdict.

Unfortunately, in Karl's situation, any seemingly unassailable legal arguments were easily disregarded by all the courts involved. Although the arguments were based on centuries of considering the role of the defendant in the trial setting, what constitutes adequate counsel, and what ought to constitute a dignified proceeding under law, federal and state courts alike found that blind acceptance of the Kill Story to be the easiest way to dispose of Karl's case. Every important player within the system of justice in Karl's drama, who should have ensured that justice would be served, ultimately failed Karl. From the courts where Karl's Kill Story was told to the state-appointed lawyers, investigators, and "experts" who failed to articulate his Human Story, Karl was, through no fault of his own, effectively silenced. As a result, without the Human Story, the Kill Story triumphed and prevented any law from creeping into the conclusion that Karl must be separated from this world and must try his chance elsewhere.