The Jury Expert™ For Excellence in Persuasion, Communication & Jury Selection

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For Civil Rights: Insights on Jury Selection and Prosecution in a Landmark Civil Rights Case

In June 2005, Edgar Ray Killen was convicted of three counts of manslaughter for his role in orchestrating the 1964 killings of Michael Schwerner, Andrew Goodman and James Chaney, three civil rights workers in rural Mississippi. Killen received a hung jury at his original trial 40 years ago when a lone holdout juror said she could never convict a preacher.

District Attorney Mark Duncan, a lead prosecutor on the case, and Andy Sheldon, a trial consultant for the prosecution, discuss some of the challenges and research methods in the Killen case, as well as some lessons learned.

INTERVIEW WITH CONSULTANT ANDREW SHELDON, J.D., PH.D.

TJE: From a consultant's perspective, what are some of the biggest challenges in trying a civil rights case? What were some of the unique challenges specific to the Killen case?

Sheldon: Beyond the challenges that we see in any case, the old civil rights cases had lain dormant for 40 years and many people probably hoped the prosecutions were dead in the water, out of time and memory. One challenge was discovering the extent of the anti-prosecution sentiments, e.g., "He's too old to prosecute." "He should be forgiven." "Bringing this up again will just reopen old wounds." Another challenge involved education, i.e., how to convey to young jurors who had not been born during the Civil Rights Era the context of those times, the issues, the pervasive racial

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violence and intolerance. A third challenge was trying the cases in a way that would galvanize rather than antagonize jurors, and this meant choosing themes that were often less than revolutionary. The Killen case had its own versions of these challenges. For example, the local anti-prosecution feelings involved the Choctaw[1] people who often professed to have "no opinion" when asked for an opinion, or who were angry because no one has ever prosecuted the crimes against their people. Because Neshoba County, MS, was so rural and so isolated and so small, many people either knew or knew of the defendant and refused to believe that a preacher could be so evil. A final challenge was working with prosecutors who had never used trial consultants and were, at first, pretty skeptical about our value.

Many people either knew or knew of the defendant and refused to believe that a preacher could be so evil.

TJE: How do your research and consulting goals and processes change when working on civil rights cases compared to other cases?

Sheldon: It is generally easier to become productively involved in cases where the client seeks out your expertise and wants to listen to your advice than in these cases in which, almost uniformly, the prosecutors had never used trial consultants and were extremely skeptical. There were significant exceptions in the seven Civil Rights cases and I think we can say that, after the fact, we have a lot of new friends who became convinced of our usefulness during the course of their trial. But we faced some early rough going in some situations.

Because we were often working on a pro bono basis and because the states were often unable to pay our fees, there was no significant pre-trial research (excluding the church bombing cases in Alabama) in these cases—no focus groups or mock trials or attitude surveys to help focus the case. But we were able to get out into the community to conduct some field research, to interview people and to get their opinions.

In the Killen case, we located an attitude survey that had been conducted by the Southern Research Group as a gift to the State of Mississippi and it was extremely helpful. Dr. Amy Johnson of Zagnoli McEvoy Foley[2] was immensely helpful in conducting community research in the county prior to trial.

We were asked to join the prosecution team late in the process, which meant that a pressure-cooker environment was created and we probably spent more late, late nights processing information than we would have, given a more relaxed pace.

TJE: What types of services have you provided in these historic cases? Which do you think are most helpful to attorneys? Were these services helpful in the Killen case?

Sheldon: We were only limited by time and the creativity of our clients. We created and analyzed supplemental juror questionnaires, created themes, drafted voir dire questions, assisted in jury selection, drafted openings and closings, conducted extensive pre-trial research in a couple of cases, monitored the jury during trial and celebrated when it was over.

Overall, I would think that our ability to understand the thoughts and feelings of jurors and to apply that knowledge to the decision-making process was probably

[1] The Choctaw Indian Nation, a Muskogean tribe also known as Chakchiuma, or Chatot, traces its roots to the Mississippi Valley and some parts of Alabama.

[2] Zagnoli McEvoy Foley LLC is a trial consulting firm located in Chicago, IL.

the most helpful service. Most lawyers that I encounter appreciate help during jury selection and these lawyers were no exception.

TJE: What was the most useful thing you learned from the pre-trial research done in the Killen case? Was there anything surprising about the research findings?

Sheldon: The site-based research prior to trial was immensely helpful. Dr. Amy Johnson and I interviewed people in Philadelphia, MS for two days, two weeks before trial, and were surprised by the widespread, deeply-held belief that it was unfair to single out one person (Killen) when it was obvious that others who had been involved were not being prosecuted. Selective prosecution was foul play to these folks. A second surprise was the posture the Choctaw Indians took: hands off. Whenever a Choctaw was asked for an opinion, they responded with "No opinion." Participating in this trial was a very dicey thing for the Choctaw since they have suffered civil rights abuses against their members that have never been prosecuted.

The truth really is that evil flourishes when good men and women do nothing.

TJE: How, if at all, did that research process differ from your typical pre-trial research process?

Sheldon: We were able to interview more local people than we usually do. It is always helpful to get the opinions of real people, not just numbers and percentages in a statistical summary, because probing yields significant information.

TJE: Share with us some highlights of the Killen trial.

Sheldon: One highlight was working with my colleague, Beth Bonora, again. She and I have selected the juries in many of these cases and she is top notch, the best there is. Beth's firm, Bonora D'Andrea[3], has supported the work in these cases from the beginning. I have always thought of Beth as the mother of all trial consultants.

Another delightful highlight of the Killen trial was the collaboration among trial consulting firms. I received help from Bonora D'Andrea and Zagnoli McEvoy Foley, both good trial consulting friends who did not hesitate to step up to the plate and offer their services free of charge.

Meeting Rita Schwerner Bender and her husband, Bill; Mrs. Chaney, Ben Chaney and their family; and Dr. Goodman were wonderful. My enduring connections with the families of the victims are a source of continuing pleasure and inspiration.

As for a trial highlight, it had to be when the former mayor of Philadelphia claimed from the stand that Preacher Killen was really a wonderful person and that the KKK was pretty wonderful too. You may have seen Anderson Cooper go berserk on CNN when asking the ex-mayor if he actually believed what he said.

TJE: In historic cases, it must be more difficult than usual to find jurors who say they can be fair and impartial. As a consultant, how do you deal with that? Do you have jury selection strategies especially for these types of cases?

Sheldon: Actually, it was more difficult only because people were largely up front and honest about their concerns and doubts and fears. They had heard and read and watched and talked about these cases for decades, wondering if anything would ever happen. As a result, we needed to talk with each person, separately, in a protected setting like the judge's chambers, so we could plumb the depths of that fear and attempt to expose any bias. The primary strategy

[3] Bonora D'Andrea, LLC is a trial consulting firm located in San Francisco, CA.

was always to create a good supplemental juror questionnaire and to use individual, sequestered voir dire. Additional goals were to secure sequestration and anonymity for the jury to protect their safety during and after the trial.

TJE: Is there anything else about your experience with civil rights cases you'd like to share with other litigators or trial consultants?

Sheldon: I never relinquished the ideals that I carried with me as I entered law school and so as a lawyer, I have felt ashamed that we had not completed this work. The truth really is that evil flourishes when good men and women do nothing.

Lawyers as a group should feel good about the fact that the process worked—even after 40 years. The lawyers who prosecuted these cases did so for all of us and I think we should name names: I think we can all look to Bobby DeLaughter, now Judge DeLaughter, as a beacon and mentor; to Ed Peters and Bob Helfrich, now Judge Helfrich; Lee Martin; to Mike Moore and Jim Hood; and to Doug Jones, Robert Posey, Don Cochran and Jeff Wallace, as reminders of what good lawyering is all about. These lawyers were all in politically sensitive positions and had no idea what they might have to give up or go through when they started in on these highly dubious cases. This is what we are supposed to be about. And now I know it's true. I hope we can do better next time.

Dr. Andrew Sheldon, president of Sheldon Associates, received his J.D. from the University of Florida and his Ph.D. in clinical psychology from Georgia State University. Dr. Sheldon is a member of the Georgia State and Atlanta Bar Associations, and past President of the American Society of Trial Consultants. He may be reached at (404) 872-5123 or by e-mail at main@sheldonassociates.com.

INTERVIEW WITH DISTRICT ATTORNEY MARK DUNCAN

TJE: From a prosecutor's perspective, what are some of the biggest challenges in trying a civil rights case? What were some of the unique challenges specific to the Killen case?

Duncan: The biggest challenge was the reinvestigation of the case—trying to find out who was alive or dead, including potential witnesses and defendants. If they were alive, we had to locate them, and in the case of witnesses, determine if they were capable of testifying, and what evidence they had to offer. We also had to find out what physical evidence still existed. This required many hours on the part of lawyers and investigators. We were fortunate to have the transcript of the federal civil rights trial from the 1960's. Without it this trial would not have been possible.

The biggest challenge was overcoming the feelings of some that the trial should not be brought.

As for the trial itself, the biggest challenge was overcoming the feelings of some that the trial should not be brought. Also, trying to convince a jury of someone's guilt by primarily using the testimony of deceased witnesses was an obstacle.

TJE: How are your research and consulting needs different when you are prosecuting a civil rights case compared to your run-of-the-mill criminal case?

Duncan: Researching the case was unusual in that we had to know 1960's law as well as present-day law. At times we were using 1960's substantive law, and today's procedural rules. The assistance to the attorney general's office in investigation and research was very valuable. Without their involvement, the prosecution would not have been possible.

TJE: What types of trial consulting services did you use in this case? Were there any services that you found particularly useful?

Duncan: For the first time in my career, we used jury consultants. Their ability to organize

the vast amount of information we had during jury selection was most helpful. They also had experience in the prosecution of civil rights era cases, which gave them tremendous insight in jury selection and trial strategy. They had a lot to offer besides selecting a jury.

In the past I had viewed jury consultants as kind of hokey. In most cases, in a small community such as ours, we can get by with our personal knowledge of jurors. However, after the Killen case, I would not hesitate to use a jury consultant should a similar case come along.

TJE: What was the most useful thing you learned from the pre-trial research done for the Killen case?

Duncan: The felony-manslaughter statute, which was in effect in the 1960's, was vital to being able to get a guilty verdict in the Killen case. We knew we were weak in being able to show that Killen participated in or ordered the murders. Much of our evidence suggested that he instead organized an assault. We knew from other inadmissible evidence that murder is what Killen intended, and we could argue from circumstantial evidence that was the case. The felony-manslaughter statute solved all those problems for us. Statements from jurors following the verdict pretty much tell us that there would not have been a guilty verdict without the manslaughter instruction. The manslaughter verdict should not be viewed as a failure on the part of the jury to view these killings as murder; they most certainly were, but rather, the verdict was a reflection of the available evidence.

Regardless of how much attention a case draws, it must still stand on its own legally and in terms of the evidence.

TJE: Share with us some highlights of the Killen trial.

Duncan: To me, the highlight of the trial was the testimony of the family members of the victims, especially Rita Bender, the widow of Mickey Schwerner. I thought it was very important to get the jurors to identify with the victims. I think this was the first time their story had really been told to the people of Neshoba County. I knew from talking with Rita before the trial that she would be perfect for our case, but her testimony turned out better than I could have dreamed. She was our first witness, and I had expected her testimony to last 10 to 15 minutes. Instead, she talked for about 45 minutes. It was riveting testimony, some of the most powerful and emotional I have ever seen in a courtroom.

Also, the testimony of Mike Hatcher was crucial. He was our main surviving witness who could implicate Killen. He really laid out Killen's involvement in the KKK, and statements Killen had made before and after the murders in a way that reading a transcript could not do.

For me personally, closing argument was special. I saw it as a chance for me to speak up for Neshoba County in a way that had never been before. I was pleased with the way it came out.

TJE: In historic cases, it must be more difficult than usual to find jurors who say they can be fair and impartial. As a prosecutor, how do you deal with that? Do you have jury selection strategies especially for these types of cases?

Duncan: Finding fair and impartial jurors in the Killen case was a challenge. Obviously, there were people with strong opinions on both sides of the case. These persons were relatively easy to identify. The harder part was identifying those who said they could be fair, but we knew would be sympathetic to the defense.

In the Killen case we had access to a community attitude survey, which gave us a lot of insight into the views of the community. Because I was from Neshoba County, I had a good idea of how people felt about the case. My goal in jury selection was to root out as many opinions about the case as possible. If a juror had an opinion about the case, they were going to get every chance in the world to let it be heard. This meant that we probably lost some jurors who were favorable to the prosecution, but it was important to do everything we could to not let someone on the jury who just would not vote guilty. After identifying those jurors as best we could, my goal was to find jurors who

would understand that the bad reputation of Neshoba County and Mississippi around the world was caused by Killen and his friends, and would also understand that a not guilty verdict would just make things worse. I wanted jurors who, when presented with sufficient evidence, were ready and willing to do something about what Killen had done to us.

TJE: Were there any particular "lessons learned" from the Killen jury selection? What advice would you give litigators regarding jury selection in this type of climate?

Duncan: The only thing I would do differently regarding jury selection is to get the jury consultants involved earlier. We really did not engage them until right before trial. We were too busy with trial preparation. At the least, I would have had them involved with the jury questionnaire we used. In a case such as Killen, I think it is important to use a consultant with experience in civil rights era trials. That experience gives them insight into the issues surrounding those cases that is very valuable.

TJE: Is there anything else about your experience with civil rights cases you'd like to share with other litigators?

Duncan: The best advice I could give a prosecutor who is faced with a case such as Killen is to treat the case just like any other. That is what I did. Regardless of how much attention a case draws, it must still stand on its own legally and in terms of the evidence. Let the evidence be your guide. If you have enough evidence, forge ahead. If not, say so and move on. Also, don't limit yourself. Like my mother used to tell me, "Can't never could."

District Attorney Mark Duncan is a Philadelphia, Mississippi native. He graduated from Philadelphia High School in 1977, earned his undergraduate degree in banking and finance from Ole Miss in 1981 and his law degree in 1983. Duncan has tried a wide variety of criminal cases in his tenure as District Attorney. His lifelong experience in Philadelphia and his passion for and knowledge of Philadelphia citizens were said to be significant assets for the prosecution. He may be reached through the Mississippi 8th Circuit District Attorney's office at (601) 656-1991.

Quick Courtroom Tips

By Bob Gerchen

Tell Witnesses and Jurors What You Want Them to Do, Not What You Don't Want Them to Do

Jimmy Johnson has coached N.C.A.A. national champions and N.F.L. Super Bowl champions. He has said that he always expressed his coaching advice in the positive. Instead of telling a player, "don't fumble," he would say, "protect the ball." And the player would think about protecting the ball, as opposed to thinking about fumbling. There's a *big* difference.

It's the same with witnesses and jurors. The human mind doesn't do a good job of hearing the word "don't," as in "whatever you do, don't think of a pink elephant right now."

So, while you're working at getting the image of a pink pachyderm out of your mind, remember to tell someone to "remember" instead of "don't forget," or to "look up" instead of "don't look down."

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For more information on Bob's new book,
101 Quick Courtroom Tips for Busy Trial Lawyers,
visit www.CourtroomPresentationTips.com.

The Closing Argument: Emotional Appeals

By Ronald J. Matlon, Ph.D.

Appealing to emotions in argument is often denounced. Perhaps it should be denounced if it goes overboard. However, while undue emotional appeals are to be avoided, some emotionalism in summations is strategically wise. Why? Because you are really asserting a point of view—you are urging belief in the stories you tell. "Dry appeals to the pure intellect with no emotional content are not very persuasive."[1] Therefore, the basic elements of salesmanship, emotional appeal included, apply to the summation.

Emotionalism in the closing argument can take several different forms. Those we will examine here include dramatic presentation, exciting use of visual aids, direct psychological appeals, and the use of vivid language.

Dramatic Presentation

One form of emotionalism in the summation is the dramatic presentation. Only lawyers capable of using a dramatic voice and manner should try this approach. Those without this skill appear phony. Dramatic presentations may involve modulating your voice from a whisper to a shout or parading around the courtroom and playing center stage.

Visual Aids

Emotions can also be aroused, and attention gained, through an exciting use of visual aids. If you ignore the use of visual aids, you ignore a whole framework of persuasion in psychology.[2] A defense lawyer could dramatize the idea of contributory negligence by tearing a sheet of paper into a large piece and a tiny one, and then holding them up for contrast, saying, "If my client was negligent… (showing them the large piece of paper), and the plaintiff was negligent… (showing them the small piece), then under the law, it is the sworn duty of this jury to find my client not guilty. It is not a matter of weighing which one was more negligent. Before he can collect ten cents, the plaintiff must prove that he, himself, was not even guilty of that much negligence (again showing the small piece of paper)."[3]

All kinds of visual aids are permitted in the closing argument. They can be used to communicate the case theme and issues to the jury. For example, you might list the elements of the cause of action on a chart or blackboard and cross out or erase the uncontested ones.[4] Charts can be used to show damage computations, chronology of events, lists of witnesses, and so on. Diagrams of accident scenes can recreate the movements and relative positions of the parties. The displaying of real evidence, such as the murder weapon in a homicide, is an effective persuasive technique. Tangible, visual material involves the eye and is a powerfully persuasive tool when used in the closing argument.[5]

Psychological Appeals

Another form of emotionalism is a direct psychological appeal. Psychological appeals should be aimed directly at the value systems and attitudes of the jurors. Value systems include such familiar ingredients as love of family, justice, Puritan morality, freedom, success, work, practicality, rationality, quantity (bigness, speed), safety, comfort, generosity, patriotism, conformity, fairness, and so forth. Attitudes related to these values are complex mixtures that reveal how one feels, what one knows or believes, and how one is predisposed to act.

When appealing to attitudes and values, you

[1] Spangenberg, C. (1977). Basic Values and the Techniques of Persuasion. *Litigation, 3*, 16.

[2] Cone, A.J. & Lawyer, V. (1966). *The Act of Persuasion in Litigation* (p. 335). Des Moines, IA: Dean-Hicks.

[3] Morrill, A. E. (1979). *Trial Diplomacy* (p. 95). Chicago, IL: Court Practice Institute.

[4] Tanford, J.A. (1983). *The Trial Process; Law, Tactics and Ethics* (p. 156). Charlottesville, VA: Michie.

[5] Peters, D. (1983). *Participatory Persuasion: Strategies and Research Needs in Opening Statements and Closing Arguments.* In R.J. Matlon & R.J. Crawford (Eds). *Proceedings of the 1983 Conference on Communication Strategies in the Practice of Lawyering* (p. 406) Annondale, VA: Speech Communication Association.

must try to "anchor" compatibility between yourself, your audience, and the decision that is being urged. Anchoring as a technique is based upon consistency theory.[6] Consistency theory's major premise is that people are more comfortable with consistency than inconsistency. We strive for balance in our lives, and any information that creates dissonance causes us to become tense.[7] So, the information that flows from your case must be consistent with (anchored into) your jurors' basic belief systems. The following offers sound advice regarding anchoring technique:

> The point to remember is that if you can anchor your case to one of these widely accepted foundations you will make it difficult for your opponent to sway the jury because their belief about your case cannot be altered without changing the other beliefs to which it is anchored. Since changing two or more interlocking beliefs is more difficult than changing an isolated belief, successful anchoring creates resistance to the persuasive attempts of your opponent. Obviously, the more firmly your case is anchored in the deeply held values and beliefs of the jurors, the more resistant they will be to counter persuasion.[8]

Emotion resides in the attitudes and values of the jurors. When these attitudes and values are tapped, people are likely to be moved to action. Here, for instance, is a psychological appeal to the value of life: "I am proud that our country places a higher value on life than any other country in the world. You judge a civilization by what it thinks of human life. I believe that it is a high mark of our civilization that we hold to the principle that life is our most precious and valuable commodity. Our forefathers thought so when they said that each person is entitled to life, liberty, and the pursuit of happiness." Or, a common appeal of defense lawyers is to ask a jury to leave sympathy out of the case and then ask for a fair trial. Such an appeal to fairness is like asking a jury to endorse motherhood: the appeal is virtually unattackable. As long as the rhetoric is not condescending, any appeal to anchor values can help to shape belief in the closing argument.

Psychological appeals should be aimed directly at the value systems and attitudes of the jurors.

Vivid Language Use

Some authors who write about persuasion explain that vivid language is the key to the whole process of using psychological appeals successfully.[9] After reviewing years of research of the Duke University Law and Language Project, an analyst concluded: "The manner in which a person speaks may be as important as what he says in shaping the conclusions of his audiences."[10]

Numerous other studies link speaker credibility, audience interest, and language choice.[11] The idea here is to use vivid language in order to appeal to listeners' perceptions and keep their attention on the speaker's message.

[6] McGuire, W.J. (1960). Cognitive Consistency and Attitude Change. *Journal of Abnormal and Social Psychology, 60*, 345-353.

[7] Littlejohn, S.W. (1989). *Theories of Human Communication* (p. 88). Belmont, CA: Wadsworth.

[8] Taylor, K. P., Buchanan, R. W. & Strawn, D. W. (1984). *Communication Strategies for Trial Attorneys* (p. 83). Glenview, IL: Sco-Forsman.

[9] Mills, G.E. Unpublished and undated information on legal argument, 205-207.

[10] Conley, J.M. (1979) Language in the Courtroom. *Trial, September*, 35.

[11] Baker, E. E. (1965). The Immediate Effects of Perceived Speaker Disorganization on Change in Perceived Speaker. *Western Speech, 29*, 148-161; Giles, H. & Powesland, P. F. (1975). *Speech Styles and Special Evaluation.* New York, NY: Academic Press; Harms, L. S. (1959). Social Judgments of Status Cues in Language. Unpublished Ph.D. dissertation. Ohio State University; Miller, G. R. & Hewgill, M. A. (1964). The Effects of Variations in Nonfluency on Audience Ratings of Source Credibility. *Quarterly Journal of Speech, 50*, 36-44; Mulac, A. (1976). Assessment and Application of the Revised Speech Dialect Attitudinal Scale. *Communication Monographs, 43*, 238-245; Rosenthal, P. I. (1971). Specificity, Verifiability, and Message Credibility. *Quarterly Journal of Speech, 57*, 393-401; Sereno, K. K. & Hawkins, G. J. (1967). The Effects of Variations in Speaker's Nonfluency Upon Audience Ratings and Attitudes Toward the Speech Topic and the Speaker's Credibility. *Speech Monographs, 34*, 58-64.

Vivid language causes humans to think and deal in mental pictures. The opposite of vivid language—abstraction—is not likely to elicit the mental pictures you desire. The words *book, relative,* and *insect* are abstract; the words *paperback novel, father,* and *killer bee* are more concrete and vivid.

Vivid words evoke feelings. Consequently, word choice has much to do with persuasion. Note the difference between saying "a wound that is oozing pus" and "a lesion that is suppurating." The first version captures attention. Writers on style urge the use of vivid words to evoke sensory images.

Sensory Appeal

Vivid words evoke feelings. Consequently, word choice has much to do with persuasion.

In closing argument, you have occasion to choose vivid words for pain, suffering, anguish, worry, fear, grief, embarrassment, shame, and the like. Words such as *hearty laugh, glowing health, smash-up, mangled* and *pounding* evoke images more effectively than words such as *satisfactory, negligent, incident* and *direct result*. Why? Because they *appeal to the senses.*

Sensory language is to the lawyer what the rainbow of colors is to the painter.[12] The lawyer who says, "Joe heard a piercing screech followed by a loud crash" appeals to our auditory sense. The lawyer who says, "Jane saw a green Volvo run the red light and hit the small brown Toyota broadside" appeals to our visual sense. The lawyer who says, "Jack felt scared to death and helpless when he realized he was trapped in his car" appeals to our kinesthetic (internal feeling) sense. Attorneys who use sensory language in closing arguments will appeal to the sensory channels of the jury.

Notice how visual imagery is used in this portion of a closing argument concerning the accidental blinding of a man with five children. Visual imagery is used in the first paragraph; kinesthetic in the second; auditory in the third; and then the visual mode is again stressed—in a more personal way—in paragraph four.

When we came to this court today, on this *beautiful springtime morning,* the *profusion of flowers* was *radiant* and *breathtaking.* Each *bloom* seemed to be vying with its neighbor, and altogether they almost outdid themselves. What a *sight* to gladden our hearts, sooth our spirits: Longfellow spoke of the *flowers* thus: "*Stars* of the earth, these *golden flowers; emblems of the bright* and *better land.*" But the *flowers* and their message of inspiration were for you and me; not for John Demmons. He could not, and did not, see a *flower* as he came to court today. He will never *see a flower* again…

In *happier times,* when John Demmons came home from work, his youngest children met him at the gate of his *humble* rented cottage, and he would *hold them close,* then *throw them into the air* and *catch them* as they came down, *holding them close* so that he *felt their little heartbeats—flesh of his flesh, blood of his blood, bone of his bone:* For all fathers this *feeling* is about as great a boon as God can grant unto you. But now John cannot have the *ecstasy* and *happiness* he formerly knew. He might not be able to catch the child, so he *dare not throw it into the air.* How much is the loss of that *privilege worth?*

Go with me now inside the little rented cottage at mealtime. Seven people sit around a table: the father, the mother, and five little children. Before the meal begins, each one clasps the hand of another and forms a family circle. John *tells* one of them to say grace, to "*ask the blessing.*" And he carefully *listens* to the child as he prays: "God is great, God is good…"

John used to *peek to see* if all the children had *closed their eyes*—a father's privilege. He cannot *peek now*; he cannot see them. The meal is eaten, but somehow things have changed, and it will never be as it once was.[13]

[12] Swanson, S. L. & Wenner, D. (1981-1982). Sensory Language in the Courtroom. *Trial Diplomacy Journal, Winter*, 14.

[13] Evans, Jr., R. (1978). *Opening and Closing Arguments: The Law in Georgia* (pp. 42-48). Norcross, GA: Harrison.

Analogy

Nothing allegedly moves jurors more convincingly than an apt comparison to something they know to be true from their own personal experience.[14] For instance, a lawyer for a plaintiff burned in a nuclear power plant accident might liken the facility to a volcano erupting out of control. Or a counsel might refer to a chameleon that changes color when it gets frightened as an analogy to describe the other side when it changes its story.

Analogies are vivid and persuasive because they provoke and then reward your audience's intellect and emotions.[15] Knowing what they do about erupting volcanoes or chameleons, the judge or jury can then reach their conclusion before the speaker does. Analogies have intense persuasive impact if they are aptly chosen, filled with detail, and never abandoned.[16] As long as they do not violate the "golden rule" by requesting that the jury put themselves in the shoes of one of the parties, analogies are one of the most powerful forms of argument we know.[17]

Metaphor

A metaphor is a referent that takes a term out of its habitual association and places it in another, more emotional, association. For example, "abortion is legalized *murder*" is a death metaphor. "Allowing this water polluter to freely pollute means the *rape* of our environment" is a sex metaphor. Upon experimenting with discourse both with and without metaphors, one linguistic researcher concluded that a metaphor *nearly always* communicates a stronger attitude than does a conventional expression.[18]

RECOMMENDATIONS FOR THE USE OF EMOTIONAL APPEAL

Note: Emotionalism in the forms of dramatic presentations, visual aids, psychological appeals, and vivid language use is advised for the summation *when used in moderation.* Since the jury is already informed about the case, and since the judge will ask them to look at the "facts," the effect of emotionalism may be expected to be less than in a different sort of persuasive setting. Nevertheless, some emotionalism should be used during your closing arguments.

- Make dramatic presentations only when they feel natural for you
- Use visual aids during your summation
- Aim certain appropriate psychological appeals (justice, pride, love of family) directly at the attitudes and values of your audience
- Use vivid language in order to persuade
- Develop clear and convincing analogies and metaphors

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[14] Spangenberg, note 1, p. 13, 16.
[15] Peters, note 5, p. 404.
[16] Crawford, R. J. (1982-1983). Closing Argument: High Noon at the Penthouse Corral. *Trial Diplomacy Journal, Winter*, 15.
[17] McElhaney, J. W. (1980). Analogy in Final Argument. *Litigation, Winter*, 37.
[18] Bowers, J. W. (1964). Some Correlates of Language Intensity. *Quarterly Journal of Speech, 50*, 415-420.

Jury News

By Joe Custer, J.D.

Are juries informed about the possibility of parole when deciding death penalty cases?[1]

The tide may be turning. It used to be the law in almost all states that courts denied parole information to a capital sentencing jury. There were two major grounds for this denial. First, it was considered to be a separation of government issue. The function of the court, or of the jury in this instance, was to determine the term of sentence for the defendant. It was the separate function of the executive to grant a pardon or probation. Second, it was believed that parole information in the hands of a jury would cause the jury to become prejudiced against the defendant.

Findings:

1. Although the rule is still prevalent in many states, there is a movement toward the recognition of a court notifying the jury of a defendant's possibility of parole in capital cases.
2. A majority of states now provide a life of imprisonment without parole sentencing option.
3. In *Simmons v. South Carolina*, 512 U.S. 154 (1994), Judge Blackmun, writing the court's plurality opinion, stated that the 14th Amendment's Due Process clause required that the capital sentencing jury be informed of a defendant's ineligibility for parole. In Simmons, the jury believed the defendant could have been released on parole if he were not executed. To the extent that this was the case, it had the effect of creating a false choice for the jury of sentencing the defendant to death or sentencing him to a limited period of incarceration.

States since *Simmons* have taken a broader approach to permitting jury consideration of post-sentencing contingencies in capital sentencing cases.

Are jurors being predisposed by popular television shows in regard to consideration of forensic evidence?[2]

This appears to be the case. Some prosecutors actually refer to the phenomena as the "CSI Effect." The "CSI Effect" references what jurors' expectations might be regarding what forensic science can and cannot do based on crime shows they watch on television.

Findings:

1. Sixteen states still retain the standard set out in *Frye v. United States* (54 App.D.C. 46). The *Frye* rule states that expert testimony can only be admitted if based on well-recognized scientific principles or general acceptance in its field. Significant is the fact that five of the 16 states happen to have very active criminal law jurisdictions: California, Florida, Illinois, New York and Pennsylvania.
2. Fourteen states have dropped the *Frye* test in favor of the test established in *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.* (509 U.S. 579). The *Daubert* test has proven to

[1]Based on: Morril, C. Lindsey (2002). Informing capital juries about parole: The effect on life or death decisions." *Kentucky Law Journal. 90,* 465-493.

[2]Based on: Hansen, Mark (2005). The uncertain science of evidence. *ABA Journal*, *91,* July 48-53.

be more rigorous than the *Frye* test. Under *Daubert*, a previously accepted forensic standard, which has been challenged through publication or testing or through some other significant method, may be subject to stricter scrutiny by the courts.

3. DNA testing has created a very high standard against which all other forensic science evidence is measured. It has even led some courts to question almost universally accepted forensic evidence regarding bullet-lead and finger print analysis.
4. The *Frye* and *Daubert* standards may pale when compared to the "CSI Effect." Some jurors have even expressed disappointment when they have not seen in their case the fictional forensic tests performed on television shows.

The "CSI Effect" is having an effect on jurors even where there are eyewitnesses. In one recent case, a man charged with first-degree murder was acquitted because of the lack of forensic evidence. This was the outcome despite the testimony of two eyewitnesses to the crime.

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