"IN THE YEARS WHEN MURDER WORE THE MASK OF LAW": DIARY OF A CAPITAL APPEALS LAWYER (1983-1986)

Michael Mello*

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The title comes from the English poet Seigfried Sassoon. *See* SEIGFRIED SASSOON, *A Footnote on the War* (1926), *in* SEIGFRIED SASSOON, THE WAR POEMS (1983).

This essay is dedicated to Emily Kucer, the Author's pro bono partner-in-crime on this project and on the "Crazy Joe" Spaziano book.

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I. ACOUSTIC SHADOW

> *More than once during the Civil War, newspapers reported a strange phenomenon. From only a few miles away, sometimes a battle made no sound, despite the flash and smoke of cannon, and the fact that more distant observers could hear it clearly. These eerie silences were called "acoustic shadows."*
>
> Ken Burns, *The Civil War*[1]

I have never witnessed an execution. I have had many opportunities—if that's the right word for it—to do so. I've been in the execution chamber; I've seen the electrical apparatus; I've seen where the executioner stands; I've even sat in the chair. But I've never witnessed an execution.

When I was a Florida capital public defender in the 1980s, my office decided that we needed to have a lawyer witness the execution of our clients. It was important that the client see at least one friendly face among the designated witnesses (reporters, police, prison personnel, and victim's family members). We discussed at length which of us should go: ought it be the front-line litigator who knew the client best, or ought it be the office's chief administrator? After agonizing discussions, we decided that the litigators ought not witness the execution of our clients. That might annihilate them emotionally. So the administrator went because he could afford to be destroyed for a few weeks or months.

The closest I came to violating this office policy came in 1986, in the case of Ronnie Straight. Straight was a con's con, a stone killer, whose *nom de row* was "Frog," because he was always jumping on people. Straight and I became close in the two weeks before his scheduled execution. Days before his time—when we both knew a stay was unlikely—I asked him whether he wanted me to witness it. He did—desperately—but he told me not to come, because "It would fuck you up, and other guys need you." We agreed that I wouldn't witness Ronnie's execution, but I would attend his funeral, I would be there for his mother.[2]

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1. EPISODE FIVE: THE UNIVERSE OF BATTLE (1863), THE CIVIL WAR: A FILM BY KEN BURNS (Warner Home Video, Florentine Films and WETA-TV 1997); *see also* STEPHEN CUSHMAN, BLOODY PROMENADE 160 (1999).

2. I discuss Ronnie Straight's case, and my hard reaction to his execution, in MICHAEL MELLO, DEAD WRONG 214-15 (1997) [hereinafter MELLO, DEAD WRONG].

1999 was a banner year for executions. There were ninety-eight executions in the United States that year, up thirty from the year before, and the most since 1951.[3] More people live on America's death rows today than at any other time in our history—over 3,000 people. Thirty-eight states and the federal government authorize executions. Since the U.S. Supreme Court put its constitutional seal of approval on capital punishment in 1976, 600 men and women have been executed as of this writing.[4] The South leads the nation both in numbers on death row and numbers of people executed. The three states with the highest execution rates—Texas, Virginia, and Florida, in that order—are all in the South.[5]

Texas is the undisputed leader in executions, and it has been so for several years. On four consecutive nights in May 1997, Texas executed four men, one per night. This was a modern record. The press reported the executions as if it were reporting the results of a ball game. "At this rate," the *Washington Post* wrote, "Texas will easily shatter its own record of 19 executions set in 1995." Three weeks later it did. "*Texas Puts 2 to Death, Tying Record*," was the June 3, 1997 headline on page A-24(!!) of the *New York Times*: Dorsey Johnson-Bey shot a convenience store clerk, named Jack Huddelston, on March 23, 1986. A little more than an hour later, Davis Losada, a gang leader ordered the murder of Olga Perales, a fifteen-year-old girl who had been repeatedly raped and beaten by Losada and his three fellow gang members before they killed her.

The executions of Dorsey Johnson-Bey and Davis Losada were the third and fourth in Texas that week.[6] They marked the first double execution in the state since January 1997, and the third multiple execution in the nation since executions resumed in 1977.[7] Texas had four more executions scheduled for that week, and at least eleven for that month.[8]

But even by Texas standards, the December 8, 1999, execution of a man requiring oxygen and continuous medical care (following a drug overdose) was notable in its weirdness.[9] Two days prior to his scheduled execution, forty-six-year-old Martin Long was found unconscious in his cell by death

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3. *See* Abraham McLaughlin, *98 Executions in '99 Reignite a Capital Debate*, CHRISTIAN SCI. MONITOR, Dec. 27, 1999, at 1.

4. *See* Jim Yardley, *Texas' Busy Death Chamber Helps Define Bush's Tenure*, N.Y. TIMES, Jan. 7, 2000, at A1 (noting that 598 people had been executed as of January 7, 2000). A Texas man was executed on January 12, and an Oklahoma man was executed on January 13. *See Texas, Okla. Execute Killers*, Associated Press, January 13, 2000, *available in* 2000 WL 33059.

5. *See* Rick Bragg, *Florida's Messy Executions Put the Electric Chair on Trial*, N.Y. TIMES, Oct. 28, 1999, at A14.

6. *See id.*

7. *See id.*

8. *See id.*

9. *See* Yardley, *supra* note 4, at A1.

row guards: Long hoarded and then "ingested an overdose of anti-psychotic drugs."[10] Doctors placed him "in intensive care on a ventilator. . ."[11]

On the day before his scheduled execution by lethal injection—a state-mandated overdose, in a manner of speaking—Long was taken off the respirator and upgraded from critical to serious condition. Long remained in intensive care, or, actually, he would have remained in intensive care for another two or three days, were it not for his scheduled execution.

Long's doctor in Galveston was asked by the state "to sign an affidavit stating that Mr. Long could be safely transported to Huntsville [for execution], a request he said he refused."[12] However, the doctor did sign an affidavit "stating that Long's health had improved, that he suffered no seizures and was responding to questions—but that transporting him could be risky without appropriate medical care."[13]

So Long was transported—on oxygen and with continuous medical care—by airplane from Galveston to Houston, a twenty-five minute trip.[14] He was then executed. Long wasn't even the first person this scenario had happened to recently; something very similar occurred in Oklahoma in 1995.[15] The Long case had no impact on the pace of executions inside or outside Texas. Another Texas execution was scheduled the next night, and two more for the next week.[16] On the night Long was executed in Texas, convicts were also executed in Oklahoma and Indiana.[17] All in all, 1999 was a busy year for the executioner: before the last year in the twentieth century even ended, there had been ninety-two executions in America, the most since 1952.[18]

Twelve days into the twenty-first century, Texas carried out its 200th execution since capital punishment resumed in that state in 1982[19] (this was the first execution of the new century). And it should surprise no one who keeps track of this algebra of blood that Texas planned to herald in the new

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10. *See* Jim Yardley, *Texas Inmate is Executed Despite Overdose*, N.Y. TIMES, Dec. 9, 1999, at A18.

11. *Id.*

12. *Id.*

13. *Id.*

14. *See id.*

15. *See* MELLO, DEAD WRONG, *supra* note 2, at 18, n.58 (discussing case of Robert Bricheen).

16. *See* Michael Graczyk, *3 States Execute Killers*, Associated Press, December 9, 1999, *available in* 1999 WL 28147831. Texas executed Robert Atworth on December 14, 1999. *See* Michael Graczyk, *State Executes Dallas Man in Robbery-Slaying*, Associated Press, December 14, 1999. The next day, Texas executed Sammie Felder. *See* Michael Graczyk, *Texas Executes Man for Killing of Korean Vet*, Associated Press, December 15, 1999, *available in* 1999 WL 28150237.

17. *See generally* Graczyk, *3 States Execute Killers*, *supra* note 16.

18. *See id.*

19. *See Texas, Okla. Execute Killers*, AP Online, Jan. 13, 2000, *available in* 2000 WL 3305954; *Texas Kills 200th Inmate Since '82*, Associated Press, Jan. 12, 2000.

millennium with a string of controversial executions.[20] In January 2000, Texas intended to execute two prisoners (Glen McGinnis and Anzel Jones) who were juveniles at the time they committed their crimes.[21] That same month, Johnny Penry, a convicted murderer who is considered mentally retarded, was scheduled for lethal injection.[22] Larry Robison, whom had been diagnosed with paranoid schizophrenia,[23] and David Hicks, who claims that the DNA evidence that sent him to death row was faulty,[24] were also scheduled to be executed by Texas in the first month of the new millennium.

And it's not just in the South, my South, where I was born and reared. In a front-page news story headlined *Executions Spread From South, Becoming Part of US Landscape, New York Times'* reporter James Brooke wrote in October 1997:

> Canon City, Colo., – Two decades after the United States Supreme Court reinstated the death penalty, states are executing prisoners at a steadily accelerating pace, and executions are spreading out from their traditional Southern base to states around the country.
>
> Here in Colorado, for example, Gary Davis, a convicted murderer and rapist, was wheeled into the execution chamber at Colorado State Penitentiary tonight and put to death by chemical injection in the state's first execution in 30 years.
>
> Within the last year, Oregon and Kentucky have conducted their first executions since 1962. By the end of next year, Connecticut, New Jersey, Ohio and Tennessee may also hold their first executions since the 1960's, according to the Death Penalty Information Center.
>
> Twelve states and the District of Columbia outlaw the death penalty. Of the 38 states that allow it, 29 states have had executions since 1976, when the Supreme Court reinstated the death penalty.
>
> With 59 people executed this year, executions are at a 40-year high. The nation has not seen so many since 65 people were executed in 1957.[25]

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20. *See* Yardley, *Texas Inmate is Executed Despite Overdose*, *supra* note 10.

21. *See* John Aloysius Farrell, *Lethal Dilemma*, BOSTON GLOBE, Dec. 19, 1999, at A1.

22. *See id.* As it turned out, the Fifth Circuit Court of Appeals later stayed Penry's execution.

23. *See id.* On December 15, 1999, the Texas Court of Criminal Appeals found Robison mentally "competent to die." A judge immediately rescheduled the execution for January 21, 2000. *See* Mike Crissey, *Execution Reset for January*, Associated Press, December 16, 1999. The appellate court had stayed the execution on August 17, 1999; the "appeals court granted the diagnosed paranoid schizophrenic a stay of execution 4 ½ hours before he was to die." *Id.*

24. *See* Yardley, *Texas Inmate is Executed Despite Overdose*, *supra* note 10.

25. James Brooke, *Executions Spread From South*, N.Y. TIMES, Oct. 14, 1997, at A1.

Capital punishment as a legal system seems to be poorly administered—inside or outside the South. Take Illinois, for instance. According to a November 1999 *Chicago Tribune* study of all 285 capital convictions in Illinois since capital punishment was restored there twenty-two years ago, Illinois death penalty cases have been riddled with faulty evidence, incompetent lawyers, and unscrupulous trial tactics.[26]

Of the 285 cases studied by the *Chicago Tribune*, 259 had completed at least one round of appeals. In almost half of those cases—127—new trials or resentencing were ordered: twelve of the defendants were completely exonerated, and seventy-four others received something less than a death sentence.[27] In at least thirty-three cases where a defendant was sentenced to death, he was represented by a lawyer who had been disbarred or suspended.[28] In at least forty-six cases, prosecutors depended on jailhouse informants, an unreliable form of evidence, because they often receive reduced sentences in exchange for testifying.[29] In at least thirty-five cases, the person sent to death row was African-American and the jury was all white.[30]

A library of books (I have published three of these) and Law Review articles (I have written two dozen of these) have been published about capital punishment. There have been philosophical and religious treatments of the morality of death as a punishment. There have been memoirs of death row prisoners and their keepers and counselors. There have been social science studies of virtually every aspect of capital punishment that can be studied. There have been uncounted law review articles and notes analyzing the legal doctrine of capital punishment. There has even been a book-length bibliography collecting the books and articles of capital punishment.[31]

Still, there remain "acoustic shadows"[32]—pockets of silence in the vast literature of death as a punishment. One such pocket of silence is the day-to-day reality of death row representation.

The diaries presented in this essay are my attempt to begin filling that gap in the literature. From New Year's Day, 1983, to the present, I have kept a private diary. Until recently, I kept it in *War Resistor's League* calendars which allowed me only a tiny space per day in which to record the day's events. Any more space would have been too intimidating and therefore

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26. *See* Ken Armstrong & Steve Mills, *Death Row Justice Derailed*, CHI. TRIB., Nov. 14, 1999, at 1, *available in* 1999 WL 2932178. Illinois has since placed a moratorium on capital punishment.

27. *See id.*

28. *See id.*

29. *See id.*

30. *See id.*

31. *See, e.g.*, MICHAEL RADELET & MARGARET VANDIVER, CAPITAL PUNISHMENT IN AMERICA: AN ANNOTATED BIBLIOGRAPHY (1988).

32. *See* BURNS, *supra* note 1.

paralyzing. No matter how chaotic my daily life became, I always found time to jot down a few daily notes in my *War Resistor's League* calendar. The calendars became my memory book—usually in shorthand form, which I retain here whenever possible.

I began keeping a diary because, even in the best of circumstances, my memory needs a nudge. Doing deathwork was hardly the best of circumstances; during my time in the deathwork trenches, "life was too rapid for memory."[33] And I knew I would want to remember. I understood that in Florida, I was going through the fundamental experience of my life: if I hoped to remember it later, I'd need to take notes at the time—names, words, and phrases to trigger memories.

These journals are about memory—what Lincoln called "the mystic chords of memory"—and memory has its own story to tell. The diaries worked, they served their intended purpose as memory triggers: preparing them for this essay, the memories came flooding back, I felt like I was hemorrhaging memories, drowning in them. One thing in particular struck me: in my journals, I refer to dozens of death row prisoners (often only in passing) by their last name only—yet, in virtually every single case, I remembered their first names as well, and I was able to add that information from memory to the diaries presented here. Reading back through the journals, I kept thinking of a passage from Stephen Vincent Benet's 1928 epic poem, *John Brown's Body*:

> He touched a rent in his dirty sleeve,
> That was the place that the bullet tore
> From the blue-chinned picket whose belt he wore,
> The man who hadn't been quick enough,
> And the powder-burn on the other cuff
> Belonged to the fight with the Yankee scout
> Who died in Irish when he went out.
> He thought of these things as a man might think
> Of certain trees by a river-brink,
> Seen in a flash from a passing train,
> And, before you could look at them, gone again.
> It was more important to eat and drink
> Than give the pain or suffer the pain
> And life was too rapid for memory.
>
> There are certain things that will cling to me,
> But not the things that I thought would cling,
> And the wound in my body cannot sting

33. STEPHEN VINCENT BENET, JOHN BROWN'S BODY (1928).

Like the tame black crow with the bandaged wing,
The nervous eye and the hungry craw
That picked at the dressing-station straw
Till I was afraid it would pick my eyes
And couldn't lift hand to beat it off.

I can tell the ladies the usual lies
Of the wild night-duels when two scouts clash
And your only light is his pistol-flash;
But I remember a watering-trough
Lost in a little brushwood town
And the feel of Black Whistle slumping down
Under my knees in the yellow air,
Hit by a bullet from God knows where . . .
Not the long, mad ride round the Union lines
But the smell of the swamp at Seven Pines,
The smell of the swamp at Gaines's Mill,
And Lee in the dusk before Malvern Hill,
Riding along with his shoulders straight
Like a sending out of the Scaean Gate,
The cold intaglio of war.
'This is Virginia's *Iliad*,'
But Troy was taken nevertheless—
I remember the eyes my father had
when we saw our dead in the Wilderness—
I cannot remember any more—[34]

I am publishing these journals because they capture qualities about the day-to-day life of deathwork I have not seen expressed in the library of materials already published about capital punishment. The journals also capture characteristics of doing deathwork that are missing even from the narratives of individual cases: chaos, uncertainty, and the loss of hope.

Hope—or, more precisely, the loss of hope. I was such a kid in Florida. In 1983, I was twenty-six-years-old. I naively believed that we lawyer/abolitionists had a chance of winning this fight to convince the courts to declare capital punishment unconstitutional per se. By 1987, I knew that the war was over: important battles remained, but the war was over, and we had lost.[35]

Shelby Foote, in Ken Burns' magnificent film series *The Civil War*, reminds us of a passage from Faulkner's novel *Intruder in The Dust*. Faulkner writes that every Southern person can think back and imagine himself as a

34. *Id.* at 252-53.

35. *See generally* MELLO, DEAD WRONG, *supra* note 2, at 200-72.

member of Lee's army at the dawn of the third day of Gettysburg, shortly before Pickett's doomed charge, when it was still possible to *imagine* a Southern victory in the war. The outcome of the Civil War was decided that morning. The outcome of the campaign to use the federal courts and the federal Constitution to abolish capital punishment—piecemeal, if not outright—was decided in 1983-86, the period covered by my journals, and it was decided in Florida. Going into the new millennium, Florida remains at the center of capital punishment; in two weeks in 1998, four people (three men and a woman) died in Florida's electric chair. The constitutionality of the chair itself is now before the Supreme Court.[36]

Chaos and uncertainty. Although my reflections were written in isolation from the chaotic world of post-conviction litigation within which they occurred, they nevertheless reveal the chaotic daily life of capital litigation during the mid-1980s, when Florida was the capitol of capital punishment.

One of the agendas in presenting my journals as I do in this essay is the desire to defy the pressures to produce a nice, neat story. Because it wasn't a nice, neat story.

In these journals, I'm not just trying to tell a story; I'm trying to describe a world.[37] It's a world that is long since dead; today, when I discuss with my law students whether they want to do deathwork in Florida (and several students have done just that over the years), I stress the differences between then and now. Then, we were the first office of its kind in the nation; we were flying by dead reckoning.[38] Today, the delivery of legal aid to death row has become systematized, regularized, bureaucratized; the ferocious brilliance of Scharlette Holdman and Mark Olive have been replaced by the nine to five bureaucrats.[39]

The historian Michael Bernstein refers to something he calls "foreshadowing"—the feeling of historical inevitability, the tendency to read the past in terms of the future, and seeing our history as moving toward a predetermined goal or as controlled by fate. [40] Foreshadowing distorts the haphazardness, randomness, and contingency of human life.[41] The stories and

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36. *See* Bill Dedman, *Supreme Court to Review Use of Electric Chair*, N.Y. TIMES, Oct. 28, 1999, at A24.

37. A couple of worlds, actually: the world of a "death clerk" and the world of a capital public defender.

38. "Dead reckoning" is a primitive method of aircraft navigation, where one navigates using a map and a stopwatch (Charles Lindbergh navigated the Atlantic by dead reckoning). Although pilots today navigate by instruments, dead reckoning is still taught in flight school. It's how one navigates when the instruments go out.

39. *See* MELLO, DEAD WRONG, *supra* note 2, at 167-69, 194-95, 197.

40. MICHAEL ANDRE BERNSTEIN, FOREGONE CONCLUSIONS: AGAINST APOCALYPTIC HISTORY 1-3 (1995).

41. *See id.* Bernstein suggests an alternative way of looking at the past—"sideshadowing"—which

the litigation artifacts presented in my previous writings were written long after the events they describe had occurred.[42] Because I knew the outcome, an essential quality of those events was compromised in the telling. That essential quality is uncertainty.

The journals, by contrast, were written without knowledge of the future. The singular characteristic of Florida deathwork in the mid-1980s, along with chaos and randomness, was uncertainty. In the mid-1980s, no other state with a large death row had a counterpart to Florida's state-wide capital post-conviction public defender office. We were pioneers because we had to be. We had no models to follow, no maps to guide us—we were making it up as we went along. This uncertainty hangs over every page of my journal. Reading back on them now, I'm struck by the freshness and shock of experience immediately recorded.[43]

I see these journals as raw historical artifacts of sorts—first drafts of history, or perhaps as "prehistory," since I am trying for "a deeper sense of the wild unsettledness of the present before it becomes past,"[44] a "prehistoric rawness of eyewitness accounts written during or just after"[45] the events being described. I have previously published litigation documents, including a handwritten pleading I filed in court.[46] Such artifacts record the names of people you probably will not recognize who were executed in Florida. The stories of the high-profile cases are important, and I have written about some of them.[47] This project—which tells the stories of condemned people who are not household names—is closer to my heart than the high-profile cases about which I've written. As the poet Sam Hazo has noted, obscurity has its own story to tell.

Looking back on all this now, there is a strong temptation for me to superimpose some measure of coherence upon the random stories told in my

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reminds us that every present is dense with possible futures, which emphasizes the variety and openness in even the most ordinary moments in life. *See id.* at 3-4.

42. *See, e.g.*, MELLO, DEAD WRONG, *supra* note 2; Michael Mello, *Death and His Lawyers*, 20 VT. L. REV. 19 (1995) [hereinafter Mello, *Death and His Lawyers*] (discussing my representation of "Crazy Joe" Spaziano).

43. It is this quality that, to my mind, makes Walt Whitman's simple journal entries some of the most powerful writing to emerge from the Civil War. *See, e.g.*, WALT WHITMAN, *Specimen Days*, *in* WALT WHITMAN, THE PORTABLE WALT WHITMAN 473-692 (1945). I am not, of course, comparing my own journals with Whitman's.

44. STEPHEN CUSHMAN, BLOODY PROMENADE: REFLECTIONS ON A CIVIL WAR BATTLE 88 (1999).

45. *Id.* at 86.

46. *See* Michael Mello, *Outlaw Judiciary*, 1 N.Y. CITY L. REV. 259 (1997).

47. *See, e.g.*, MICHAEL MELLO, THE UNITED STATES OF AMERICA V. THEODORE JOHN KACZYNSKI: ETHICS, POWER AND THE INVENTION OF THE UNABOMBER (1999) [hereinafter MELLO, INVENTION OF THE UNABOMBER ; Michael Mello, *The Non-Trial of the Century: Representations of the Unabomber*, 24 VT. L. REV. 417 (2000) [hereinafter Mello, *Non-Trial of the Century*]; Michael Mello, "*Cold as a Lizard and Ambitious as Lucifer*," 36 CRIM. L. BULL. (forthcoming 2000) [hereinafter Mello, *Cold as a Lizard*].

journals. But an important point in presenting the journals is to "show that events did not occur in well-ordered sequence, as though one mind controlled the outcome."[48] I have to "constantly remind myself . . . that none of the events that were acted out [in the journals] was inevitable. They were the end results of politics, personalities, and the individual actions of [people]. All must be seen in their intertwining totality for the epic struggle to be told."[49] Finding some order, some reason, would comfort me, I believe: locating reasons and explanations would mean that these deaths—and these lives—*meant* something. But the simple fact is that they don't mean anything, because all the reasons are superficial and incomplete. The only "lesson" is that there is no lesson.

I have not deleted those relatively few journal entries that do not refer to deathwork. There are depressingly few of them in the four years covered by these entries in the essay because I am trying to chronicle how people "lived as well as how they fought—playing games, telling stories, chewing tobacco, foraging for food, feeling homesick, experiencing dread, coming under fire, watching comrades die."[50]

I have avoided lengthy biographical descriptions of the protagonists in the story told by my journals. "The reader learns about the principal characters throughout the text. This, after all, is how we meet people in life; everything is not learned at first acquaintance."[51]

I don't suggest my journals are the final word on any aspect of the events they describe. One great disadvantage of relying on journals as sources of history is the limited vantage points of their writers. A diary is only as broad as the experiences its writer is chronicling. During the period covered by my journals, I was in a fairly good perch from which to observe (and record) the experience of full-time deathwork in Florida. Still, you must keep in mind that my journals obviously were written from my own perspective and from my own experience; others undoubtedly perceived these events differently. My diaries do no more than record my own perceptions; they are at best the truth as I saw at the time. And there was an awful lot to see.

In her classic diary of the Civil War, the incomparable Mary Chestnut wrote that she had, by chance or design, been present during what she called the "real show."[52] By that she meant the events that, in historical hindsight, were ones crucial to meaningful understanding and appreciation of the historical moment covered by her diary.

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48. LARRY J. DANIEL, SHILOH 14 (1997).

49. *Id.*

50. JAMES MCGREGOR BURNS, *Forward* to RICHARD MOE, THE LAST FULL MEASURE: THE LIFE AND DEATH OF THE FIRST MINNESOTA VOLUNTEERS at vii (1993).

51. *Id.*

52. *See generally* MARY CHESTNUT, MARY CHESTNUT'S CIVIL WAR (C.V. Woodward ed., 1981).

By similar fortuities, I happened to be present during what (looking back on it now with more than a decade of hindsight) was a critical—I would argue the most critical—period of America's modern experience with capital punishment as a legal system. I was there for capital punishment's "real show." From summer 1982 to summer 1983, when I was "death clerk"[53] to Eleventh Circuit Judge Robert Vance, that appellate court (composed of three active capital punishment states: Florida, Alabama, and Georgia) was receiving its first wave of federal habeas appeals from prisoners condemned in state court. Because the cases and the constitutional issues they raised were matters of first impression in the Eleventh Circuit (in all federal courts, in fact), those judges took death cases deadly seriously. My diary from the clerkship is not as capital-punishment intensive as the journals that follow it; still, the clerkship journals provide a useful window into how a leading federal appellate court dealt with its first wave of capital habeas cases.

Similarly, when I was a Florida capital appellate public defender (from summer 1983 to early January 1987), the Sunshine State, and the nation as a whole, were, for the first time in my lifetime, being forced to come to terms with the reality of capital punishment as a legal system—and with the realities of executions actually being carried out.[54] During that time, executions went from being major media events to non-events. While Florida led the nation in numbers of people on death row and numbers of executions, it also became the first serious capital punishment state to create a statewide public defender office to represent death row in state post-conviction and federal habeas corpus proceedings. That new office, called the Office of the Capital Collateral Representative (CCR), was created in 1985.[55]

Several cases discussed in my journals went on to become landmark U.S. Supreme Court cases: Alvin Ford's case ruled that the Constitution forbids execution of the insane;[56] David Washington's case set out the standard for judging whether capital defense lawyers rendered ineffective assistance of

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53. *See generally* MELLO, DEAD WRONG, *supra* note 2, at 42-55.

54. *See generally* DAVID VON DREHLE, AMONG THE LOWEST OF THE DEAD (1995) (describing Florida's Death Row during the 1980s).

55. *See generally* MELLO, DEAD WRONG, *supra* note 2, at 166-98.

56. *See* Ford v. Wainwright, 477 U.S. 399 (1986). I learned in Thurgood Marshall's papers that *Ford* began as a Marshall dissent from denial of cert and evolved into a majority opinion written by the justice. *See* Michael Mello, *Adhering to Our Views: Brennan and Marshall and the Relentless Dissent Against Death as a Punishment*, 22 FLA. ST. U.L. REV. 591 (1995) (discussing *Ford*) [hereinafter Mello, *Relentless Dissent*].

One of my first assignments as a capital public defender was to research and write a legal memo on executing the insane. That memo became the basis of the constitutional arguments in Alvin Ford's case when the governor signed Ford's death warrant. Ford's application for stay of execution was my first oral argument in federal court, before District Judge Norman ("Stormin' Norman") Roettger. I worked on *Ford* when the case was in the Eleventh Circuit.

counsel;[57] "Crazy Joe" Spaziano's case[58] and Robert Parker's case[59] addressed the constitutionality of Florida's (and three other states') practice of allowing judges to impose capital punishment notwithstanding a jury's verdict of life imprisonment; Willie Darden's case set out the rules governing prosecutorial misconduct in capital cases;[60] Johnny Witt's case articulated the standard for determining when a prospective juror may be excluded because of his/her views on capital punishment;[61] Dennis Adams' case refined the law of procedural default;[62] Elwood Barclay's case set out the constitutional consequences of a capital jury's consideration of nonstatutory aggravating circumstances.[63] And in Jim Hitchcock's case— the only one that removed large numbers of people from Florida's death row, but which was decided by the Supreme Court too late for the Florida prisoners whose executions are set out in my journals—a unanimous U.S. Supreme Court held that Florida's pre-1978 standard jury instructions unconstitutionally limited juries' consideration of mitigating circumstances.[64] A couple of cases discussed in my journals had already been to the Supreme Court. Charlie Proffit's case upheld the abstract constitutionality of Florida's modern capital punishment statute[65] while Ernest Dobbert's case had made important double jeopardy law.[66]

Other cases covered in my journals raised constitutional issues that went on to become landmark Court decisions in other cases. Paul Magill's case challenged the legality of executing people who were juveniles at the time of their crimes;[67] James Dupree Henry's attacked racial discrimination in capital

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57. *See* Strickland v. Washington, 466 U.S. 668 (1984).

58. *See* Spaziano v. Florida, 468 U.S. 447 (1984). I wrote the certiorari petition and the jury override portion of the merits brief in *Spaziano*.

It should go without saying that I intend no disrespect toward my friend and former client Joe Spaziano by referring to him as "Crazy Joe." Actually, I used to refuse to allow others to refer to him in that way. But then he took me aside and told me that he really didn't mind—it had been his nickname since he was a teenager, and I should lighten up. So, in recent years, he signs his letters to me "Crazy Joe." And I sign mine to him "Crazy Mike."

I discuss Joe's case in MELLO, DEAD WRONG, *supra* note 2, at 19; MICHAEL MELLO, THE WRONG MAN: A TRUE STORY OF INNOCENCE AND DEATH ROW (forthcoming, Univ. Minn. Press 2000) [hereinafter MELLO, WRONG MAN].

59. *See* Parker v. Dugger, 498 U.S. 308, 310 (1991).

60. *See* Darden v. Wainwright, 477 U.S. 168 (1985).

61. *See* Wainwright v. Witt, 469 U.S. 412, 423-26 (1985).

62. *See* Dugger v. Adams, 489 U.S. 401 (1989).

63. *See* Barclay v. Florida, 463 U.S. 939 (1983).

64. *See* Hitchcock v. Dugger, 481 U.S. 393 (1987). One of my first assignments as a capital public defender was to research and write a legal memo on the constitutional issue that landed *Hitchcock* in the Supreme Court. My memo formed the basis of Jim Hitchcock's argument in the Eleventh Circuit and, eventually, in the Supreme Court.

65. *See* Proffitt v. Florida, 428 U.S. 242 (1976).

66. *See* Dobbert v. Florida, 432 U.S. 282 (1977).

67. *See* Thompson v. Oklahoma, 487 U.S. 815 (1988).

Paul Magill's case was one of the first cases to present a federal circuit court of appeals with the

punishment as a legal system;[68] Davidson James' case challenged the use of

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claim that it was unconstitutional to execute a person who had been a juvenile at the time he committed a capital crime. I briefed that issue to the Eleventh Circuit, along with several narrower, case-specific issues.

At the oral argument in *Magill*, Judge Frank Johnson was clearly interested in the juvenile execution issue. But because there was also an extremely conservative judge on the *Magill* panel—and because I wanted a unanimous win in *Magill*—I kept trying to shift the argument back to the narrower, case-specific issues in the case. Somewhat frustrated with my efforts to evade the issue that would have made *Magill* a landmark case—and a case likely to go to the Supreme Court, where I feared reversal—Judge Johnson explained to me why the court should resolve the juvenile issue first: If Paul Magill won on that issue, he would be per se ineligible for the death penalty (no resentencing, no chance of another death sentence); if he won on a narrow, case-specific ground, he'd only get a resentencing, and thus might be sentenced again to death.

Judge Johnson was right, of course. But I answered that I wanted the court to resolve the case-specific issues first, even though that would give my client less relief than if he won on the juvenile issue. I think I saw a hint of a smile on the face of the conservative judge when I said this.

The Eleventh Circuit decided *Magill* on a case-specific claim, ordering a resentencing. The opinion was unanimous. The en banc court denied the state's rehearing motion. The Supreme Court denied the state's cert petition. At the resentencing in 1988, I was second-chair counsel (during the resentencing, I stayed in Paul Magill's mother's house; actually, I slept in Paul's old bed, in his old room). The jury sentenced him to life imprisonment.

Later in 1988, the Supreme Court granted cert to decide the juvenile issue. The vehicle was the Georgia case of Jose High. I was invited to write the brief for *High*. After the brief had been filed, and after it was decided that I would do the Supreme Court oral argument in *High*, the state filed a motion claiming that Jose High was in fact older than age 17 at the time of the crime—an argument not easily disproved, since where Jose was born in Texas, no accurate records were kept on the births of Hispanic Americans. I visited Jose in prison to sort out the factual problem the state had introduced into the case. But the Court sidetracked the *High* case, granting cert in Kevin Stanford's case to decide the juvenile issue. In 1989, the court held in *Stanford* that executing juveniles does not violate the Constitution—exactly the outcome I had feared in Paul Magill's case. The Eleventh Circuit ruled our way on the juvenile claim. (I was also afraid the other issues in *Magill* would have gotten lost in the shuffle, eclipsed by the landmark juvenile issue).

To this day, I wonder if I made the right judgment call during the *Magill* oral argument. Things ended well, but they could easily have ended otherwise for Paul Magill. He—and I—were lucky.

I am still in touch with Paul Magill and his mother.

68. *See* McCleskey v. Kemp, 481 U.S. 279 (1987).

Actually, I raised the race discrimination issue in virtually all of my Florida cases. I single out James Dupree Henry because he was the first, and because his case presented me an excruciating ethical dilemma.

In 1983, my public defender office had received, through informal back channels, a pre-publication copy of a crucial study by Sam Gross and Robert Mauro of racial patterns in capital sentencing. We knew our client, James Dupree Henry, would get a death warrant soon, and, because he was an African-American, we litigated the Gross/Mauro study in his case.

But Bob Sullivan got a death warrant first. Sullivan wasn't my office's client; he was represented by a large New York law firm. Sullivan's lawyers didn't have the Gross/Mauro study. We did.

Thus the ethical dilemma: Should we give the study to Sullivan's lawyers? There were arguments against doing so. Bob Sullivan wasn't our client; James Dupree Henry was; if Sullivan litigated the Gross/Mauro study, and lost, that would hurt Henry when his warrant was signed. Also, because Henry was African-American and Sullivan was white, Henry's case was the better vehicle for raising the study; technically, the race of the defendant didn't matter for the study, since it focused on race of the victim; still, atmospherically, it was better for African-Americans, not whites, to raise claims of racial discrimination.

Notwithstanding these reasons for not giving the study to Sullivan's lawyers, I argued that we should. We couldn't play God. It was only luck that we, and not Sullivan's lawyers, had the study. And how would we feel if the roles were reversed?

In the end, my argument carried the day. We gave the study to Sullivan's lawyers. They litigated it,

an arguably-invalid prior conviction as the predicate for a death sentence;[69] Butch Sireci's case questioned the legality of a death sentence based on an incompetently administered psychiatric exam done by a court-appointed defense psychiatrist;[70] James Hill's case questioned the legality of executing the mentally retarded;[71] Robert Preston's case presented the issue of execution for felony murder;[72] Robert Sullivan's case questioned whether execution by electrocution violates the Constitution;[73] Robert Waterhouse's case challenged whether there is a constitutional right to counsel in capital post-conviction proceedings;[74] "Crazy Joe" Spaziano's case asked whether execution of an innocent person violates the Constitution;[75] Ed Kennedy's case claimed that

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and it won their client a 24-hour stay. Then Bob Sullivan was executed, and the law of the Eleventh Circuit was that the study alone was insufficient to justify a stay.

Six months later, our client, James Dupree Henry, got a death warrant. We litigated the study, along with case-specific evidence of racism, but to no avail.

When the Eleventh Circuit denied the stay in *Henry*, the Court cited the *Sullivan* precedent.

69. *See* Johnson v. Mississippi, 486 U.S. 578 (1988).

70. *See* Ake v. Oklahoma, 470 U.S. 68 (1985).

71. *See* Penry v. Lynaugh, 492 U.S. 302 (1989).

72. *See* Tison v. Arizona, 481 U.S. 137 (1987).

73. On October 26, 1999, the Supreme Court granted cert in a Florida case to consider, for the first time ever, this issue. Bryan v. Moore, 120 S. Ct. 394 (1999); Bill Dedman, *Supreme Court to Review Use of Electric Chair*, N.Y. TIMES, Oct. 28, 1999, at A24; Rick Bragg, *Florida's Messy Executions Put the Chair on Trial*, N.Y. TIMES, Nov. 18, 1999, at A14. As discussed, *infra* at Part III.A., in January 2000, the Florida legislation replaced the electric chair with legal injection.

74. *See* Murray v. Giarratano, 492 U.S. 1 (1989); *See also* McFarland v. Scott, 512 U.S. 849 (1994) (capital defendant has right to counsel in post conviction proceeding and need not file a formal habeas petition).

75. *See* Herrera v. Collins, 506 U.S. 390 (1992).

Opinions written and issued by the U.S. Supreme Court often are difficult to decipher, even—*especially*—by attorneys and legal commentators who follow closely the Court's evolving law of death. One of the Court's most astute watchers, Anthony Amsterdam, once compared court-watchers to the emissaries of ancient Greece. When the citizens of ancient Greece wanted to know the will of the gods, they sent emissaries to the temple at Delphi, where the priestess Pythia sat on a tripod making ambiguous pronouncements calculated to obscure the truth and confuse the Greeks; when citizens in America want to know how to conduct themselves in accordance with the Constitution, they must send emissaries to consult another Delphic oracle: the nine justices of the U.S. Supreme Court.

Sometimes, however, the Court's commands are explicit. One such clear directive was handed down in 1992, and involved the ways in which death row claims of factual innocence were to be treated by the federal courts.

"The execution of a person who can show that he is innocent comes perilously close to simple murder." Supreme Court Justice Harry Blackmun wrote those words in 1992 about Leonel Herrera, a Texas death row prisoner whom was attempting to persuade the Supreme Court to consider his newly-discovered evidence proving his innocence.

A majority of the justices said no to Leonel Herrera and, by implication, to Joe Spaziano as well. The Court held that executing an innocent person does not violate the Constitution. Electrocuting or hanging or gassing or shooting a totally innocent man does not violate the Constitution's guarantees of "due process of law" and "equal protection" of the law. Hanging or injecting or gassing a totally innocent woman does not constitute "cruel and unusual punishment."

In other words, to the federal courts innocence is constitutionally irrelevant. Factual innocence is just

another legal technicality, like a cop's failure to read a suspect his *Miranda* rights or to search a supsect's apartment without a valid search warrant. If you're innocent, the justices reasoned in Mr. Herrera's case, then the state courts and the state governors and pardon boards can sort it out. Leonel Herrera did just that; he took his innocence claim to the Texas governor and courts. The Texas executive and judiciary did what any sentient observer must have expected them to do: they ignored Herrera's evidence. He was put to death a few months after the Supreme Court ruled that Herrera must stop wasting the justices' valuable time.

One chapter of the Leonel Herrera story is not widely known, and it is a chapter that occurred in the days and hours leading up to the United States Supreme Court justices' decision to grant full review to Herrera's case. Shortly before Herrera was scheduled to be put to death, his attorney, Mark Olive—my boss from the old days of CCR in Florida, and a leading protagonist in my journals —asked the United States Supreme Court to stay Herrera's execution and grant plenary review to his innocence claim. Granting certiorari requires the votes of four justices; a stay requires *five* votes. One might think that a vote for certiorari would imply a stay of execution—otherwise, the prisoner would be killed before the justices would have time to receive briefs and oral argument on the constitutional claims upon which the Court had granted certiorari. If the prisoner is dead, the court won't decide his constitutional claims. In the Court's nomenclature, those claims would be "moot." The claims are moot because the client is moot—execution is the ultimate mootness.

Herrera had four votes for certiorari, but he didn't have a fifth vote for a stay. In effect, the court was telling Olive: your client's innovative claim is important enough to warrant our full review. But we're not going to allow your client to remain alive long enough to give us the time to give him that review. Since your client will be dead by the time we even consider the merits of his innocence claim, your certiorari petition will be dismissed as moot.

Olive asked the justices to reconsider. They refused.

By now it was late into the night, and Herrera had a certiorari grant by the Supreme Court (which only requires four votes, recall) but no stay (which requires five votes). So Olive went off in search of a *lower court* willing to stay Herrera's execution long enough to give the *United States Supreme Court* time to hear his innocence claim. Close to dawn, Olive found one: a Texas Court of Criminal Appeals judge was willing to grant the stay. Herrera would live long enough for the Supreme Court to receive briefs and hear oral argument in his case—a process that ended up taking several months. In the meantime, Olive recruited "Sandy" D'Alemberte to represent Herrera in the Supreme Court. In the end, of course, Herrera lost 5-4, and soon thereafter he was executed.

Susan Bandes, writing in the *Buffalo Law Review*, observed:

> In 1960, Charles Black wrote an elegant, witty and powerful response to critics of *Brown v. Board of Education*, particularly addressed to Herbert Wechsler's famous article *Toward Neutral Principles of Constitutional Law*. Wechsler had lamented that although he believed the desegregation decisions would make an enduring contribution to the quality of our society, he had serious doubts whether the decisions rested on neutral legal principles, in the absence of which the decisions could have no legitimacy.
>
> Black responded that indeed these decisions could be justified, through reasoning which might be difficult to accept because it was so unsubtly, unfashionably simple. The equal protection clause forbids using the laws of the States to significantly disadvantage blacks. Segregation is a massive intentional disadvantaging of blacks by state law. How do we know this? His words bear repeating:
>
> > [I]f a whole race of people finds itself confined within a system which is set up and continued for the very purpose of keeping it in an inferior station, and if the question is then solemnly propounded whether such a race is being treated "equally," I think we ought to exercise one of the sovereign prerogatives of philosophers-that of laughter.
>
> Black was describing the situation in which a startlingly obvious principle

> can't seem to find legal recognition. In Black's words, it is obvious to everyone, including the Justices as individuals, that segregation intentionally fosters inequality for blacks. If there is no ritually sanctioned way in which the Court, as a Court, can learn this, "legal acumen has only one proper task—that of developing ways to make it permissible for the Court to use what it knows; any other counsel is of despair."
>
> Upon reading *Herrera v. Collins*, I was struck by the aptness of Black's response, and by its relevance to the question posed by Herrera. Another startlingly obvious principle, which has difficulty finding legal recognition, is that the judicial system should not participate in the execution of innocent people. When a doctrine permits a result so far removed from our collective sense of justice, it is time to re-examine that doctrine.
>
> At this point, of course, numerous complications, limitations and hedges begin to crowd in. Much depends on the way the proposition is phrased, and, however it is phrased, there are those who will take issue with it. But Charles Black slightly overstated his proposition too.
>
> All hedging aside: the question presented in Herrera was whether the Eighth and Fourteenth Amendments to the United States Constitution prohibit the execution of a person who is innocent of the crime for which he was convicted. If a negative answer to this question is solemnly propounded, I suggest that laughter is an appropriate response.

Susan Bandes, *Simple Murder: A Comment on the Legality of Executing the Innocent*, 44 BUFF. L. REV. 501, 501-02 (1996).

The Court in Leonel Herrera's case instructed the lower federal courts how to analyze death row claims of factual innocence. The Court in *Herrera* did pay some desultory lip service to the idea of executing the innocent. The justices assumed for the sake of argument "that in a capital case a truly persuasive demonstration of actual innocence made after trial would render the execution of a defendant unconstitutional and warrant federal habeas corpus relief if there were no state avenue open to process such a claim." The key word here is "process," as in rubber stamp.

Notwithstanding the justices' desultory reference to claims of innocence, the rhetorical thrust of the *Herrera* decision is that federal courts are to treat such claims with the skepticism associated with radioactive nuclear waste. A claim of innocence does not in and of itself provide a basis for ordering a retrial. As the Court explained, a claim of innocence "would have to fail unless the federal habeas court in itself convinced that those new facts [suggesting innocence] unquestionably establish (the prisoner's) innocence." Innocence is not totally irrelevant, however. For instance, if a death row prisoner's trial lawyer didn't object in exactly the right way at exactly the right time, such procedural technicalities won't bar federal court review of the claim if the prisoner is actually innocent. Thus, the justices explain, a claim of total innocence is "not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise [procedurally] barred constitutional claims considered on the merits."

This is crazy, of course. But it's what a majority of the United States Supreme Court did and said. The federal Constitution does not forbid the government from electrocuting, gassing, hanging, shooting, or injecting men and women who are *totally innocent* of the crime for which they pay with their lives. Unless the innocence claim can "unquestionably establish" the prisoner's innocence, the federal courts cannot intervene to stop the execution. "Unquestionably establish." That's not my phrase. It's the Supreme Court's phrase, which makes it the law of the land—a law that children of an enlightened and decent epoch will in time condemn as pornographically unjust, much as today we condemn the 19th Century Supreme Court's handiwork in *Dred Scott* and *Plessy v. Ferguson*.

During the oral argument in Leonel Herrera's case, Justice Harry Blackmun presented the lawyer representing the state of Texas with a hypothetical situation. Blackmun asked: What if the new evidence of innocence included an alibi videotape—an alibi videotape proving beyond dispute that the death-sentenced prisoner was somewhere else at the precise moment of the murder? Was the government really arguing that the federal courts could not even *consider* this piece of evidence that definitively proved the inmate's innocence, Blackmun wanted to know? The answer the state's lawyer gave was yes. The federal

courts couldn't intercede. The federal judiciary must rely upon the state executive clemency process to identify and correct death row claims of actual innocence.

Justice Blackmun's *Herrera* hypothetical materialized in a case that the court decided in 1995. Lloyd Schlup had the piece of evidence that Leonel Herrera lacked: an alibi videotape proving he was somewhere else at the precise moment of the murder. Easy case, one might think; the unanimous justices would at least order a new trial for Mr. Schlup, if not order his immediate release from death row. One would be wrong.

Like Leonel Herrera before him, Lloyd Schlup wasn't asking for immediate release. He wasn't even really asking for a retrial based on the alibi videotape. All Lloyd Schlup expected was a *hearing* in federal court. The federal district court and circuit court of appeals refused to give Schlup his hearing, as they were required to do according to the binding precedent of Leonel Herrera's case.

A bare majority of the Supreme Court decided to give Schlup his hearing. The justices split 5-4 even on this. Justice John Paul Stevens' opinion for the majority spoke of "the paramount importance of avoiding the injustice of executing one who is actually innocent" and explained how:

> the individual interest in avoiding injustice is most compelling in the context of actual innocence. The quintessential miscarriage of justice is the execution of a person who is entirely innocent. Indeed, concern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system.

Schlup v. Delo, 513 U.S. 298, 324-26 (1995).

Maybe once upon a time, but not under the regime of the Rehnquist/Thomas/Scalia Court. With this Court it's more important to watch what the justices *do* as well as what they say. What the Court did—by the razor thin margin of 5-4—was give Lloyd Schlup his hearing—and he had a *videotape*. What the Court did was empower the state of Texas to kill Leonel Herrera without a hearing, which the state promptly did.

Ditto in Jesse Jacobs' 1995 case in Texas. As described by Justice Stevens, the prosecutor admittedly made inconsistent arguments at Jacobs' capital trial and at his sister's trial about whether Jacobs or his sister actually committed the capital murder, and "if prosecutor's statements at the [sister's] trial were correct, then Jacobs is innocent of capital murder." Justice Stevens and Justice Ruth Bader Ginsburg thus wrote that Jacobs' case presented a "self-evident" and "deeply troubling" instance of "injustice." Those two justices said they would have stayed Jacobs' execution to consider his claim of innocence. The Court majority was not deeply troubled. No stay. No reason for the federal courts to prevent the state of Texas from mainlining lethal chemicals into Jacobs' veins. Texas obliged, and he was executed on schedule.

The message the Supreme Court sent in Leonel Herrera's case was that the lower federal courts should deny most death row innocence claims without holding a hearing on the newly discovered evidence of innocence. The lower federal courts got the message: if the condemned prisoner doesn't have an alibi videotape, then he doesn't get a hearing.

Whenever I think of *Herrera* or *Schlup*—or "Crazy Joe" Spaziano, for that matter—I think of a passage from Abby Mann:

> "Judge Haywood," said Janning.
>
> It's coming, thought Haywood. Now it comes.
>
> Janning looked at him, finally blurting out the words.
>
> "The real reason I asked you to come. I want to know. I want to hear from a man like you. A man who has heard what happened. I want to hear—not that he forgives, but that he understands."
>
> Haywood looked at Janning, sympathy welling up in him. He felt impotent, wanting to say something to this man but unable to. Understand, said Haywood to himself. I understand the pressures you were under. From my own experience here I understand that. But how can I understand the death of millions of men, women, and children in gas ovens, Her Janning? How can I understand that? How can I tell you I understand it?
>
> Janning looked at Haywood, sensitive to what he must be feeling. He spoke finally. It seemed almost as though he were reading Haywoods's mind.
>
> "I did not know it would come to that. You must believe it. You must believe

the process of "death qualifying" capital juries resulted in juries unnaturally, and thus unconstitutionally, prone to convict;[76] Ivon Ray Stanley's case attacked, as constitutionally void-for-vagueness, the "heinous, atrocious and cruel" aggravating circumstance.[77]

Still other cases explored in my journals were high profile: Ted Bundy;[78] David Funchess (the first Vietnam veteran with Post Traumatic Stress Disorder to be executed); "Crazy Joe" Spaziano (who was innocent);[79] James Adams (who was executed in spite of evidence of his innocence);[80] Jesse Tafero (ditto;[81] his electrocution was also botched in a spectacularly fiery way when the electric chair malfunctioned[82]); Velma Barfield (the first woman executed in modern times).

The journals also discuss some legendary deathworkers and judges: Anthony Amsterdam,[83] Sharlette Holdman,[84] Craig Barnard,[85] Mark Olive,[86] Henry Schwartzschild, Millard Farmer, Joseph Nursey, George Kendall, Clive Stafford-Smith, Michael Radelet, Margaret Vandiver, Karen Gottlieb, Elliot Scherker, Gary Caldwell, Marie Deans, Justice Thurgood Marshall,[87] Justice William Brennan,[88] Justice Harry Blackmun, Justice Lewis Powell, Justice

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it."

Haywood stood staring at the man before him. Then, almost without thinking, he said the words, as though he were speaking to a child.

"Her Janning. It came to that the first time you sentenced to death a man you knew to be innocent."

Janning stared at Haywood, unable to take in the enormity.

ABBY MANN, JUDGMENT AT NUREMBERG: THE TRIAL OF FOUR NAZI EX-JUDGES (1961).

76. Lockhart v. McCree, 476 U.S. 162 (1986).

77. *See* Espinosa v. Florida, 505 U.S. 1079 (1992).

78. *See* MELLO, DEAD WRONG, *supra* note 2, at 112-25.

79. *See id.* at 219-42; MELLO, THE WRONG MAN, *supra* note 58.

80. *See* MICHAEL L. RADELET ET AL., IN SPITE OF INNOCENCE: ERRONEOUS CONVICTIONS IN CAPITAL CASES 5-10 (1992).

81. *See* Michael Radelet et al., *Prisoners Released From Death Row*, 13 T.M. COOLEY L. REV. 907, 941-42 (1996) (discussing case of Sonia Jacobs, Tafero's co-defendant, as well as Tafero).

82. *See id.*

83. *See generally* MICHAEL MELTSNER, CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT (1973) (discussing Amsterdam's role in death penalty defense work).

84. *See* VON DREHLE, *supra* note 54, at 138-42.

85. *See id.*

86. *See* MELLO, DEAD WRONG, *supra* note 2, at 39.

87. *See* MICHAEL MELLO, AGAINST THE DEATH PENALTY: THE RELENTLESS DISSENTS OF JUSTICES BRENNAN AND MARSHALL AGAINST DEATH AS A PUNISHMENT (1996) [hereinafter MELLO, AGAINST THE DEATH PENALTY].

88. *See id.*

John Paul Stevens, Justice Rosemary Barkett, Judge Frank Johnson,[89] Judge Elbert Tuttle,[90] Judge Robert S. Vance[91] and others.

It's probably because I was a Southern American history major in college, but I've always felt I was litigating capital cases for the historians, the anthropologists, and the sociologists, in addition to litigating for the courts.[92] Even when I was writing legal briefs, petitions, and stay applications, and with judges and their law clerks as the main audience, I remained conscious of the fact that our litigation work products were also making a record for future students of state-sanctioned killings. The idea of using litigation as a means of leaving footprints in the historical sand reminds me that the best-known single sentence to come out of America's part in World War II was not from a general's dispatch or a politician's speech. It was three words from the common soldier whose name stood for every soldier: "Kilroy was here." Nobody knows for sure if there was a Kilroy, but it doesn't matter; he was the universal American soldier, and the *here* where he declared himself to have been was any place where Americans fought, or waited to fight. Kilroy's self-commemorating inscription, written on any flat surface available, was his response to an impulse that other GIs satisfied by scratching their initials on foreign monuments, or by having their pictures taken with helmet and rifle in some war zone; he was placing himself in history, recording that once in his life he had been present where great public events were happening.

Which brings me to war. Yale professor Robert Burt wrote: "Capital punishment is warfare writ small."[93] Well, no. Unless it is writ *very* small. Of course, capital litigation is not a war, and I'm no warrior. Still, the images of certain wars captivate me.

Ever since seeing old daguerreotype photographs from the Civil War, and ever since first reading in high school Stephen Vincent Benet's epic poem, *John Brown's Body*—which is surprisingly historically accurate—I have been

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89. *See generally* JACK BASS, TAMING THE STORM: THE LIFE AND TIMES OF JUDGE FRANK M. JOHNSON, JR., AND THE SOUTH'S FIGHT OVER CIVIL RIGHTS (1993) (discussing the work of federal judge Johnson who Dr. Martin Luther King Jr. called "a man who gave true meaning to the word justice").

90. *See* JACK BASS, UNLIKELY HEROS (1981).

91. *Id. See generally* RAY JENKINS, BLIND VENGEANCE (1995).

92. I learned in college the historical value of trial transcripts. As discussed later in this essay, in college I researched and wrote an honors paper on the shootings at Kent State University. Of the mountains of material on the shootings, the most valuable to my history paper were the transcripts of the 1974 criminal trial and the 1975 civil trial of the Ohio National Guardsman who fired at Kent State.

The Guardsman won both the criminal trial and the civil trial. The Sixth Circuit Court of Appeals reversed the civil trial verdict and remanded for a new trial. After a jury had been selected for the retrial, the parties settled. I believe a prime reason the plaintiffs agreed to the settlement was because the trial had already made the historical record: Although the lawyers for the slain and wounded students had "lost" the cases at trial, they had created an invaluable factual and historical record for historians, like me in college. I've never forgotten this lesson.

93. Robert Burt, *Disorder in the Court*, 85 MICH. L. REV. 1741, 1764 (1987).

fascinated by the Civil War. I firmly believe that one cannot begin to understand America in the twentieth century without understanding—and I mean really *understanding*—the national convulsion that tore us apart, then put us back together again, changed, forever changed, in the middle of the nineteenth century. I grew up not far from Harpers Ferry, and I went to college in Fredericksburg, Robert E. Lee's headquarters for much of the war. I have a substantial library on the Civil War, and on slavery, and I've spent time at the battlefields of Fredericksburg, Gettysburg,[94] Sharpsburg (Antietam), and Harper's Ferry. I own 123 volumes of the 128-volume *Official Record of the War of Rebellion*. I'm not a Civil War "buff," a term I find mildly offensive, as if studying the Civil War was somehow akin to collecting bottle caps or baseball cards.[95]

There is, for me, a visceral connection between the Civil War and capital punishment, although I can't articulate it well. Both the Civil War and capital punishment have at their core matters of race; in my view, the Civil War was caused by slavery—the most evil social institution ever devised by guilty man—and death as a punishment is warped by race and the legacy of slavery. In both the Civil War and capital punishment, one side has vastly superior resources, while the other side has the better leaders and the more ingenious strategies. Both involve the South—my South, where I was born and reared, a place which I love—and, although capital punishment is now a national phenomenon, it has always seemed to me a peculiarly Southern phenomenon. I don't really understand it well. It's just that when I first encountered capital punishment in the South . . . I seemed to *recognize* it, and somehow that recognition was rooted in my connection to the Civil War.

My interest in Civil War combat tactics and strategy—how a small force can defeat a much larger one—dates from childhood and was reinforced by the years I spent in capital post-conviction litigation, which is the law-world counterpart of guerrilla warfare. I was fascinated by the tactical and strategic insights of those who had studied how a small force might defeat a much larger and better equipped one, particularly Stonewall Jackson in the Valley ("always mystify"), Robert E. Lee (at Chancellorsville, the Seven Days,

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94. Gettysburg holds a special fascination for me, even apart from its obvious historical importance. I'm from Virginia, and Pickett's three divisions on the third day of the battle were Virginians. (Pickett had 4600 men, "every one a Virginian, from the division commander down." II SHELBY FOOTE, THE CIVIL WAR 531 (1963)). I now live in Vermont, and Stannard's Vermonters crashed into Pickett's southern flank, causing Abner Doubleday to cheer, "'Glory to God! Glory to God! . . . See the Vermonters go it!'" *Id.* at 561 My wife is from Minnesota and, on the second day of the battle, the First Minnesota stopped the attack on the center of the Union line. *See id* at 511. I spend as much time as I can on the coast of Maine, and Joshua Chamberlain of the 20th Maine held Little Round Top and prevented Oates' Alabamians from flanking the Union army from the South on the second day of the battle. *See id.* at 504.

95. I also have fairly extensive volumes on the Holocaust and the Vietnam War. Does that make me a Holocaust buff? A Vietnam War buff?

Second Manassas, Spotsylvania Courthouse, Fredericksburg, and Cold Harbor), Nathan Bedford Forrest[96] and John Singleton Mosby (everywhere), James Longstreet (offensive in strategy; defensive in tactics), and Albert Sidney Johnston (at Shiloh). I mourn the fact that such military genius was in aid of a nation that seceded from the union rather than give up slavery—I can think of no worse cause to fight for—but the fact remains that the South needed such genius and the North did not: Lincoln, Grant, and Sherman understood what Lincoln called "the arithmetic," the reality that the North could always replace their fallen, while the South could not. And I also studied the tactics and strategy of Frederick Douglass, Harriet Tubman, the Underground Railroad, and even John Brown, whose raid on the federal arsenal at Harper's Ferry, Virginia, never seemed to me impossibly unsound, but whose successful conclusion required rapid extrication of his raiding party from Harper's Ferry once the job was done.

Since leaving Florida and its culture of the condemned, I find myself drawn more and more to memoirs, histories, and novels of very different wars, never of much interest to me previously: the Vietnam War and World War I, examples of *pointless* slaughter. Dalton Trumbo's *Johnny Got His Gun*; Pat Barker's World War I trilogy; the Vietnam memoirs of Tim O'Brien (*If I Die in a Combat Zone, The Things They Carried*), Philip Caputo, (*A Rumor of War*), Tobias Wolff (*In Pharaoh's Army*), and Michael Herr (*Dispatches*) ring true to me; so do the accounts, and the poetry, of nurses and doctors, like Ronald Glasser's *365 Days*.

And I miss high-velocity deathwork. I retired in 1996 from the direct representation of condemned people,[97] and I'm nostalgic for my time in Florida. I think that is why Philip Caputo's memoir of Vietnam, *A Rumor of War*, resonates with me. "In spite of everything," Caputo writes, in Vietnam "we felt a strange attachment to Vietnam and, even stranger, a longing to return . . . [t]hough we were civilians, again, the civilian world seemed alien. We did not belong to it as much as we did to that other world, where we had fought and our friends had died."[98] He goes on to explain:

> I was involved in the antiwar movement at the time and struggled, unsuccessfully, to reconcile my opposition to the war with this

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96. I am painfully aware that Forrest was a rabid racist: a cold-blooded racist murderer at Fort Pillow, and later, a founder of the Ku Klux Klan. But I took a perverse pleasure in taking his strategic insights and applying them in aid of my African-American clients.

97. As it turned out, "Crazy Joe" Spaziano was my first and my last capital client (I don't count the Unabomber, because I was never his attorney). In my 1997 book, I tried to articulate my reasons why I no longer could, in good conscience, continue to participate as a lawyer in capital punishment as a legal system. *See* MELLO, DEAD WRONG, *supra* note 2.

98. PHILIP CAPUTO, A RUMOR OF WAR xiv (1977).

nostalgia. Later, I realized a reconciliation was impossible; I would never be able to hate the war with anything like the undiluted passion of my friends in the movement. Because I had fought in it, it was not an abstract issue, but a deeply emotional experience, the most significant thing that had happened to me. It held my thoughts, senses, and feelings in an unbreakable embrace. I would hear in thunder the roar of artillery. I could not listen to rain without recalling those drenched nights on the line, nor walk through woods without instinctively searching for a trip wire or an ambush. I could protest as loudly as the most convinced activist, but I could not deny the grip the war had on me, nor the fact that it had been an experience as fascinating as it was repulsive, as exhilarating as it was sad, as tender as it was cruel.

This book is partly an attempt to capture something of its ambivalent realities. Anyone who fought in Vietnam, if he is honest about himself, will have to admit he enjoyed the compelling attractiveness of combat. It was a peculiar enjoyment because it was mixed with a commensurate pain. Under fire, a man's powers of life heightened in proportion to the proximity of death, so that he felt an elation as extreme as his dread. His senses quickened, he attained an acuity of consciousness at once pleasurable and excruciating. It was something like the elevated state of awareness induced by drugs. And it could be just as addictive, for it made whatever else offered in the way of delights or torments seem pedestrian.

I have also attempted to describe the intimacy of life in infantry battalions, where the communion between men is as profound as any between lovers. Actually, it is more so. It does not demand for its sustenance the reciprocity, the pledges of affection, the endless reassurances required by the love of men and women. It is, unlike marriage, a bond that cannot be broken by a word, by boredom or divorce, or by anything other than death. Sometimes even that is not strong enough. Two friends of mine died trying to save the corpses of their men from the battlefield. Such devotion, simple and selfless, the sentiment of belonging to each other, was the one decent thing we found in a conflict otherwise notable for its monstrosities.

And yet, it was a tenderness that would have been impossible if the war had been significantly less brutal. The battlefields of Vietnam were a crucible in which a generation of American soldiers were fused together by a common confrontation with death and a sharing of hardships, dangers, and fears. The very ugliness of the war, the sordidness of our daily lives, the degradation of having to take part in body counts made us draw still closer to one another.

> It was as if in comradeship we found an affirmation of life and the means to preserve at least a vestige of our humanity.[99]

I am not, of course, attempting to equate my years in Florida with Caputo's experiences in Vietnam. My only point here is to say that Caputo's and others' memoirs of Vietnam, and of World War I, resonate with my Florida time in particularly acute ways, in ways qualitatively different from memoirs of other wars, including the Civil War. I'm not sure why this is so, but I think it has to do with pointless and essentially random killing by the government, combined with my own youthful age when I encountered such killing up close and personal. I grew up fast. Caputo came to Vietnam a boy and left a man; I came to Florida a boy and left something else, I'm still not sure what, but something fundamentally different from those around me today, especially those lawyers and academics here in Vermont's Green Mountains.

> Most of all, we learned about death at an age when it is common to think of oneself as immortal. Everyone loses that illusion eventually, but in civilian life it is lost in installments over the years. We lost it all at once, in the span of months, passed from boyhood through manhood to a premature middle age. The knowledge of death, of the implacable limits placed on a man's existence, severed us from our youth as irrevocably as a surgeon's scissors had once severed us from the womb. And yet, few of us were past twenty-five. We left Vietnam peculiar creatures, with young shoulders that bore old heads.[100]

Like capital punishment as a legal system and political phenomenon—I'm thinking specifically of the dueling gubernatorial campaigns in Florida and Texas a few years ago over which candidates would, if elected, execute more people[101]—the

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99. *Id.* at xiv-xvi.

100. *Id.* at xii-xiv.

101. In the 1990 Texas Democratic primary for governor, two candidates, former Governor Mark White and former State Attorney General Jim Maddox, bragged in their respective campaign ads about how many people they had executed. White's campaign ad: "These hardened criminals will never again murder, rape, or deal drugs. As governor, I made sure they received the ultimate punishment – death. And Texas is a safer place for it." Maddox's campaign ad: "Mark White carried out the death penalty one time. I carried it out 32 times." This sort of "I-can-top-this" use of capital punishment might become a feature of the 2000 presidential campaign. All six Republican candidates, and both leading Democratic candidates, support the death penalty. *See Lethal Dilemma*, BOSTON GLOBE, Dec. 19, 1999, at A1. The two leading Democratic contenders, Al Gore and Bill Bradley, "in the last gubernatorial elections [both] sought to show that they were tough on crime by enthusiastically endorsing the death penalty." *Id.* There is precedent for this. When the 1992 presidential primary campaign heated up for Bill Clinton, the Arkansas governor denied clemency for Ricky Ray Rector, a self-lobotomized African American prisoner who was then executed.

See generally Marshall Frady, *Death in Arkansas*, NEW YORKER, Feb. 22, 1999. Rector did not finish his last meal, because he said he'd finish it later—after his execution.

But it will be difficult for any other 2000 candidates to "top" George W. Bush. Bush, as Governor of Texas, has "overseen the execution of 113 death row inmates, more than any other governor of any other state since the death penalty was reinstated in 1976." *Lethal Dilemma, supra.* As of this writing, Bush has not said much about his record on capital punishment. The inestimable Molly Ivins noted one exception:

> Probably the best known of the "whoa" moments with W. Bush comes from an interview with Tucker Carlson printed in *Talk* magazine, concerning the execution of Karla Faye Tucker. Bush has now signed more than 100 warrants of execution, but, as you may recall, the born-again Tucker drew attention both for being female and for having an extensive prison ministry.
>
> In the weeks before the execution, Bush says, Bianca Jagger and a number of other protesters came to Austin to demand clemency for Tucker. "Did you meet with any of them?" I asked. Bush whips around and stares at me. "No, I didn't meet with any of them," he snaps, as though I've just asked the dumbest, most offensive question every posed. "I didn't meet with Larry King either when he came down for it. I watched his interview with [Tucker], though. He asked her real difficult questions like, "What would you say to Governor Bush?"
>
> "What was her answer?" I wonder.
>
> "Please," Bush whimpers, his lips pursed in mock desperation, "don't kill me."
>
> I must look shocked—ridiculing the pleas of the condemned prisoner who has since been executed seems odd and cruel, even for someone as militantly anticrime as Bush—because he immediately stops smirking.
>
> Tucker also reported that the exchange mimicked by Bush never took place; Bush made it up.
>
> Well, that was a moment.

Molly Ivins, *Shrubwatch*, NATION, Jan. 3, 2000.

Capital punishment has been an issue in the gubernatorial elections in Florida, New York, California, Massachusetts, in addition to Texas. *See, e.g.*, Robert Connolly, *Governor to Ask Legislature to Restore Death Penalty*, BOSTON HERALD, Mar. 9, 1995; Doris Sue Wong, *Governor Refiles Bill for Death Penalty; Says 'Moral Consensus' Favors Its Reinstatement*, BOSTON GLOBE, Mar. 11, 1995, *Wisconsin Tries Again on Death Penalty with a Narrow Bill*, NEW YORK TIMES, Mar. 19, 1995; Mike Blecha, *Is It Time for Death Penalty?: Push Is On in Wisconsin for Capital Punishment*, GREEN BAY PRESS-GAZETTE, Mar. 19, 1995; James Baraniak, *It's Morally Wrong to Use Violence to Fight Violence*," GREEN BAY PRESS-GAZETTE, Mar. 19, 1995; Editorial, *Tougher Laws Should Be First Option*, GREEN BAY PRESS-GAZETTE, Mar. 19, 1995; *About Wisconsin's Death Penalty Legislation*, GREEN BAY PRESS-GAZETTE, Mar. 19, 1995; Allen Lassee, *Sponsor: Killers Deserve Same Fate; It's Only Justice in Heinous Crimes*, GREEN BAY PRESS-GAZETTE, Mar. 19, 1995; Dave Hutchison, *Killing Doesn't Teach a Lesson: It's Also Not a Deterrent to Crime*, GREEN BAY PRESS-GAZETTE, Mar. 19, 1995; Harold Compton, *Bring Balance Back into Justice System*, GREEN BAY PRESS-GAZETTE, Mar. 19, 1995; *People's Forum–On the Death Penalty*, GREEN BAY PRESS-GAZETTE, Mar. 19, 1995; Ian Fisher, *Clamor over Death Penalty Dominates Debate on Crime*, N.Y. TIMES, October 9, 1994; Ian Fisher, *Cuomo's Crime Plan: Longer Terms, Treatment Efforts*, N.Y. TIMES, October 13, 1994; Patricia Nelson, *Life Terms for Murderers Favored in New State Poll*, BOSTON GLOBE, October 13, 1994; Editorial, *Cross-Fire over Public Safety*, BOSTON GLOBE, October 11, 1994; David Nyhan, *Election '94 Comes Down to a Battle of the Bucks*, BOSTON GLOBE, October 7, 1994; Frank Phillips, *Trooper's Dad Blasts Kennedy in Romney Ad*, BOSTON GLOBE, October 5, 1994; B. Drummond Ayers, *In Race for California Chief, No Candidate is Favorite*, N.Y. TIMES, Sept. 19, 1994; Don Aucoin, *Democrats Questioned on Capital Punishment*, BOSTON GLOBE, September 11, 1994, at 33; Doris Wong, *At State House Rally, Weld Renews Call for Death Penalty*, BOSTON GLOBE, Sept. 9, 1994; Don Aucoin, *Roosevelt Says He Misspoke on Death Penalty*, BOSTON GLOBE, Aug. 25, 1994; Peter Howe, *Bachrach:*

Weld Playing Politics with Cooper's Death, BOSTON GLOBE, Sept. 8, 1994; Editorial, *How to Honor a Fallen Trooper*, BOSTON GLOBE, Sept. 8, 1994; Michael Matza, *Ted Kennedy Faces Biggest Fight of His Life*, SUNDAY RUTLAND HERALD, Oct. 9, 1994; Todd Gillman, *Nightbeat, Students' Chant Make Executions Surreal*, DALLAS MORNING NEWS, Sept. 20, 1994; Todd Gillman, *Lott Executed for Two Killings*, DALLAS MORNING NEWS, Sept. 20, 1994; Selwyn Crawford, *Lott Set to Die Tuesday for Court House Deaths*, DALLAS MORNING NEWS, Sept. 16, 1994; Wayne Slater, *New Bush Ad Assails Richards on Crime: Governor's Campaign Calls TV Spot a 'Lie,'* DALLAS MORNING NEWS, Aug. 23, 1994; AP, *One in Three State Legislators Favor Death Penalty*, GREEN BAY PRESS-GAZETTE, Oct. 2, 1994; California for Huffington, paid Political Ad, *Feinstein v. Huffington: Here Are the Facts in a Real Murder Case: See if You Agree with the Judge's Decision*, LOS ANGELES TIMES, Sept. 22, 1994; Amy Chance, *Kathleen Brown's No-No on Death Penalty: Criticizes Five Demos for Shift in Position; Retracts Comment about Feinstein*, SAN FRANCISCO EXAMINER, Sept. 27, 1994; Sean Schultz and Kathleen McGillis, *Death Penalty Is An 'Answer': The Families of Kora, Jones and Amy Breyer Pushed for Capital Punishment*, GREEN BAY PRESS-GAZETTE, Sept. 22, 1994; Ronald Poppenhagen and Brian Kerhin, *Candidates Debate Death Penalty at a Distance*, GREEN BAY NEWS CHRONICLE, Sept. 29, 1994; Leslie Boellstorff, *Crime Fuels Iowa Death Penalty Debate*, OMAHA WORLD HERALD, Sept. 11, 1994; Richard Tapscott, *Sauerbrey Attacks Bentley on Death Penalty: Targeting Certain Minor Drug Dealers Is 'Unrealistic,' Says Candidate for Maryland Governor*, WASHINGTON POST, Sept. 7, 1994; Michelle McPhee, *Slaying Renews Debate on Executions*, BOSTON GLOBE, Sept. 5, 1994; Maura Leveritt, *Rites to Kill: A Behind-the-Scenes Account of the First Triple Execution in Recent U.S. History*, ARKANSAS TIMES, Aug. 11, 1994, at 15; Bob Egelko, *Lawyers, Scholars Agree: Wealthy Are Able to Escape Death Row*, FRESNO BEE, Aug. 14, 1994; Ken Chavez, *Political Fur Flies at Wilson AntiCrime Rally*, SACRAMENTO BEE, Aug. 9, 1994; Gary Siegel, *Defending Killer Who Seeks to Die*, LOS ANGELES TIMES, July 31, 1994; Gary Siegel, *Lawyers Take Offense at Peer's Unorthodox Defense: Utah Public Defender Elliott Levine Faces Possible Disbarment for Respecting His Client's Wish to be Executed*, LOS ANGELES TIMES, Aug. 1, 1994; Letter to the editor from Alan Walker, *Past Time to Restore Iowa Death Penalty*, CEDAR RAPIDS GAZETTE, Sept. 4, 1994; Ronald Brownstein, *Death Penalty Debate Roils Campaign: Seldom-Used Punishment a Potent Symbol*, SAN FRANCISCO CHRONICLE, Aug. 31, 1994; Jane Harper, *One for the Books – Six Death Cases in a Week*, HOUSTON POST, Sept. 11, 1994; Editorial, *A Death Penalty, Now*, BOSTON HERALD, Sept. 12, 1994; Tom Held, *Kunicki to Push Death Bill: Says Killing of Girl, Officer Changed Views*, MILWAUKEE SENTINEL, Sept. 16, 1994; Phil Nero, *Racial Bias Is Among Reservations of Three Law Makers to Death Penalty Bill*, MILWAUKEE JOURNAL, Oct. 5, 1994; Tom Still, *Death Penalty Being Used as Major Political Issue*, SHEBOYGAN PRESS, Sept. 10, 1994; Kent Biffle, *Women Don't Often Meet the Executioner*, DALLAS MORNING NEWS, Nov. 13, 1994; Robert Scheer, *Death Penalty: Fashionable Idea for the '90s*, LOS ANGELES TIMES, Nov. 6, 1994; Editorial, *Of Punks and Old Sparky*, HARTFORD COURANT, Nov. 6, 1994; Denis Horgan, *Capital Punishment: A Capital Idea for Today's Candidates*, HARTFORD COURANT, Nov. 2, 1994; Editorial, *The Phony Use of Genuine Grief*, N.Y. TIMES, Oct. 28, 1994; Ellen Goodman, *Political Hobgoblins*, BOSTON GLOBE, Oct. 27, 1994; AP, *TV Ads in Governor's Race Focus on Crime: Is Jeb Bush Borrowing from His Father's Willie Horton Tactic?*, N.Y. TIMES, Oct. 27, 1994; Antony Flint, *Voter's Fear of Violence May Decide Senate Race*, BOSTON GLOBE, Oct. 24, 1994; Russell Baker, *Howl from the Jungle*, RUTLAND DAILY HERALD, Nov. 9, 1994; Kevin Sack, *Pataki, Backing Executions, Assails Cuomo at Murder Site*, N.Y. TIMES, Nov. 5, 1994; Sean Loughlin, *Candidates Duel over Anti-Crime Credentials, the Death Penalty: A Hot-Button Issue*, SARASOTA HERALD TRIBUNE, Oct. 29, 1994; Derrick Z. Jackson, *Susan Smith's Other Crime . . . The South Carolina Tragedy: Victims of Stereotypes*, BOSTON GLOBE, Nov. 9, 1994; Tim Cornwell, *. . . And One of Her Victims*, BOSTON GLOBE, Nov. 9, 1994; Gary Trudeau, *Doonesbury*, Nov. 8, 1994; Lantz McClain, *Criminal Appeals Judge Should Not Be Retained*, OKLAHOMA GAZETTE, Oct. 27, 1994; Steve Daley, *Bush Sons Whip Up Execution Fever: Texas, Florida Voters Rally around Capital Punishment*, SAN FRANCISCO EXAMINER, Oct. 30, 1994; Bob Minzesheimer, *Executioner's Song Heard in Governor Races*, USA TODAY, Oct. 27, 1994; Editorial, *Mr. Pataki's Odd Attack*, N.Y. TIMES, Nov. 7, 1994; Dan Wasserman, Editorial Cartoon, N.Y. TIMES, Nov. 6, 1994; Robert Yoakum, *Everyspeech*, N.Y. TIMES, Nov. 2, 1994; Diego Ribadeneria, *Like Father, Like Son–Jeb Bush Ad Evokes Willie Horton*, BOSTON GLOBE, Oct. 30, 1994. The politicization of capital punishment continued after

success of the Vietnam firefights was measured solely in terms of the body count. Caputo:

> General Westmoreland's strategy of attrition also had an important effect on our behavior. Our mission was not to win terrain or seize positions, but simply to kill: to kill Communists and to kill as many of them as possible. Stack 'em like cordwood. Victory was a high body-count, defeat a low kill-ratio, war a matter of arithmetic.[102]

And, like capital punishment—which is now a case-by-case fistfight, rather than grand litigation strategies designed to remove large numbers of people from death row in one fell swoop—in Vietnam:

> there were no Normandies or Gettysburgs for us, no epic clashes that decided the fates of armies or nations. The war was mostly a matter of enduring weeks of expectant waiting and, at random intervals, of conducting vicious manhunts through jungles and swamps where snipers harassed us constantly and booby traps cut us down one by one.[103]

Even beyond the uniqueness of Vietnam, I feel parallels between war in general and capital punishment. In both war and capital punishment the state, through its elites, uses, *as an instrument of social policy*, the deliberate and premeditated killing of otherwise healthy adult human beings. The rhetoric offered to justify the two enterprises is strikingly similar—self-defense of country, orderly society, and punishment of enemies, both internal and external. Many a capital prosecutor invokes the metaphor of the "war on crime."

Both capital punishment and war are carried out under the rule of law. This is a two-way street. Positive law thus confers some measure of legitimacy upon soldiers who kill and prison personnel who execute. On the other hand, in my view, both capital punishment and war diminishes, debases, warps, and corrupts the integrity of the rule of law itself as well as the fallible human beings whose job it is to implement the rule of law. In both instances the law is the loser.

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the election, of course. *See* Doris Wong, *AG Rejects Death Penalty Ballot Item*, BOSTON GLOBE, Sept. 9, 1995; Editorial, *Debating Death to Death*, BOSTON HERALD, Sept. 7, 1995; Editorial, *Harshbarger's Patriotic Decision*, BOSTON GLOBE, Sept. 7, 1995; Stuart Taylor, *The Politics of Death: Governing by Tantrum*, TEXAS LAWYER, Sept. 11, 1995; Frank Phillips, *Massachusetts House Votes Down Death Penalty*, BOSTON GLOBE, June 29, 1995.

102. CAPUTO, *supra* note 98, at xvii.

103. *Id.* at xii.

Both in war and capital punishment the dissonance—the gap—between the justificatory rhetoric and the reality on the ground is extraordinarily wide. As for World War I and Vietnam, one need only compare the rhetoric of England's rulers with the poetry of Wilfred Owen or the prose of Enrich Marie Remarque, or the daily press briefings in Saigon with the writings of Tim O'Brien, Philip Caputo, or Michael Herr, to discern the yawning chasm between rhetoric and reality. As to capital punishment, the justificatory rhetoric describes an extremely careful and painstaking system of judicial review, all designed to ensure that only the clearly guilty and the most horrible offenders are selected for execution. But, as this essay and others suggest, that selection process isn't much more than a lottery, and a badly designed lottery at that; it's not really a legal system at all, although it is run by judges and lawyers. And to paraphrase a quip popular during the American Civil War, capital punishment is a rich man's war, a poor man's fight.

Both war and capital punishment as a legal system share an essential quality of brutalization and dehumanization—brutalization of the killers and dehumanization of the killed. This twin-bladed effect may be seen perhaps in the use of language. The women and children of My Lai weren't humans, and they weren't killed by Rusty Calley and his colleagues in C Company: the Vietnamese were gooks, slopes, and dinks who were "offed" by America's children. "Crazy Joe" Spaziano isn't a human being whom the state of Florida is trying to kill; he's an outlaw biker, a scumbag who will be executed by the legislatively-proscribed method (electrocution) and pursuant to detailed execution guidelines promulgated by the prison, practiced repeatedly by the corrections department execution detail, and all carried out to the bureaucratic letter.

Law as war—that's how it felt to me in Florida. The masters of our game, people like Millard Farmer and Mark Olive, are pros at audacity, surprise, and an uncanny ability to read their opponents' minds. And they're pros at waiting, at patience. You have to *watch* your opponent and learn what he is going to do before *he* knows what he is going to do, and long before he actually does it. You have to recognize, and be willing to wait for, that one moment in a fight when either you win or your lose. The trickiest part is being patient and waiting for it.

And you must be willing to risk everything, not to risk your own life—that would be comparatively easy—but rather the life of someone else you have come to know. Self-sacrifice is easy; it's sacrificing someone you love that puts your convictions to the test. On some existential level, therefore, you must not care whether your charge lives or dies on the field. If you fear death, you may move forward when you should move rearward. The hardest thing to do is to do nothing, when your world is exploding with activity and when all other voices are calling upon you to *do* something, to do

anything. It's not hard to know where the danger lies if you are looking for it.

The metaphor of war typically sees the law as the battleground, the medium through which the warfare rages and in which the antagonists fight. I have come to believe, however, that the law itself is more than the field of battle; the law is one of the sides, and it is not the side that is winning. Much of the scholarly doctrinal analysis of capital punishment can be seen as describing the warping effect of the death penalty *upon* the law. In my experience, capital punishment poisons all it touches, but perhaps its most enduring victim is the law itself. The law has lost.

I am not a pacifist when it comes to war or capital punishment.[104] I'm not for war (can any thinking person be "for" war?), but I do believe that sometimes the state has the moral right—if not the moral duty—to wage war, in self-defense or in defense of values and ideas worth dying (and killing)for. Similarly, I know of no persuasive moral argument against the death penalty. If the government has the moral right to kill foreigners, and to send Americans to their deaths, in self-defense, then it has the moral right to kill Americans in self defense. When I was a capital public defender, I felt I was at war.

My war against the death penalty is personal. Judges like Lewis Powell and Ed Carnes would tell you, and would tell my clients, that nothing they did was personal. They would say that they were just doing their jobs; they were just following orders—the orders of the positive law and the doctrine of precedents, *stare decisis*—even though they might *personally* disagree with the "law," it was their sworn duty to uphold and enforce.

No. It's personal as hell. When those black-robed gods judged, men and women died. Those men and women were strangers to their judges/executioners, but they were not strangers to me. Their lives mattered. Yes, they were murderers, but they also were human beings with parents, brothers, sisters, children, and friends. Some of them were *my* friends. They were flawed human beings, to be sure, just like the rest of us. Powell and Carnes and their fellow travelers would say they *were* different from the

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104. Actually, I was a pacifist for a few years in high school. The Yom Kippur attack on Israel in 1973 ended that for me. I would have killed in defense of Israel. I tried to enlist in the IDF, but my parents refused permission. Just as well, in retrospect—I was no warrior.

It was clear from the outset that the 1973 war was different from its recent predecessors, the Six Day War in 1967 and the Suez War in 1956. During those first few days of the 1973 Yom Kippur War, it looked like Israel might really be defeated by Syria and Egypt. And, while Israel was fighting for her life, Nixon and Kissinger dithered and delayed sending crucial military aid.

I remember attending a civil air patrol party at a friend's house during the early days of the war. Restless, I walked out to a parked car, turned on the radio, and listened to the reports coming out of Israel. I put my head on the steering wheel and cried and prayed for the Jewish state. One after another of the other partyers drifted out to the car to listen with me. Soon, there were a dozen people milling around the car, listening with me to the radio.

people whose killings they ordered: Powell and Carnes never killed anyone. But they *do* kill people, and not just a few. Powell and Carnes would say they never killed *innocent* people. But neither did Joseph Spaziano.[105] And none of the judges were inflamed by the heat of passion or crack cocaine. Powell and Carnes killed in ice cold blood, the coldest I've seen up close. I've never had a client who premeditated his killing for twenty years. Twenty years—that's how long "Crazy Joe" Spaziano lived under sentence of death for other men's crimes.[106]

Twenty years is a long time. Twenty years ago I was in high school. And time in prison is different from time in the world. Prison time is slow time. Death row time is the slowest, at least until a death warrant comes. In the world of prison, death row is a separate country. People there share a time reference that is unique, a calendar that disobeys the rule of nature. Imagine knowing the precise day, hour, minute you are scheduled to die. If you get lucky in court, you'll be permitted to live a little while longer, until another date and time is set for you. Joe Spaziano has had five dates set. Five dates; five stays, over a period of twenty years. Twenty years is a long time.

So it's *very* personal. On April 14, 1993, I received a handwritten letter from Edward Kennedy, whom I represented during the period covered by these journals.[107] "Ed"—that's how he signed his paintings— had been my client. He was an African-American man. His crime was bad. While serving a sentence for murder, he had escaped from Florida's maximum security

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105. *See* Mello, *Death and his Lawyers*, *supra* note 42, at 19; *See generally* Mello, THE WRONG MAN, *supra* note 58.

106. *See id.* The judicial opinions in *Spaziano* are not worth citing, because they are not worth reading. The media's coverage of the case—with the exception of the *Orlando Sentinel*—comes far closer to the truth than anything written yet by a judge or a law clerk. *See, e.g.*, Bruce Shapiro, *Not for Burning Probability of Habeas Corpus Reform*, NATION, July 17-24, 1995, at 79; James Kilpatrick, *Florida May Execute Innocent Man*, MIAMI HERALD, June 8, 1995; *ABC World News Tonight, Hypnotized Witness Recants Story*, Transcript no. 5130-5 (June 30, 1995), at 21; William Booth, *Gov. Chiles Halts Execution after Witness Recants*, WASHINGTON POST, June 17, 1995; Larry Rother, *A Witness Says He Lied, but the Execution Is On*, N.Y. TIMES, Oct. 1, 1995; Linda Gibson, *Court Gives "Crazy Joe" 11th Hour Reprise*, NAT'L L.J., Sept. 25, 1995, at A10; Bryan Marquard, *Lawyer Stretches the Ethics Envelope*, VALLEY NEWS (Lebanon, N.H.), Oct. 8, 1995; Editorial, *Time Is Running Out*, ST. PETERSBURG TIMES, June 15, 1995; Editorial, *Too Much Doubt in Spaziano Case*, TAMPA TRIBUNE, June 17, 1995; Editorial, *Chiles Spared Florida from a Capital Crime*, PALM BEACH POST, June 16, 1995; Editorial, *Less "Panic" for Spaziano*, MIAMI HERALD, Sept. 13, 1995; John McKinnon, *Spaziano Lawyer: Hearing a "Sham,"* MIAMI HERALD, Sept. 10, 1995; Lori Rozsa, *"Crazy Joe" Is Granted a Reprieve*, MIAMI HERALD, Sept. 13, 1995; Larry Kaplow, *Legal Gamble Wins Spaziano Stay*, PALM BEACH POST, Sept. 13, 1995; Jackie Halifax, AP, *Court Hears Spaziano's Death Appeal*, TALLAHASSEE DEMOCRAT, Sept. 12, 1995; Diane Rado, *Justices Grant Stay to Spaziano*, ST. PETERSBURG TIMES, Sept. 13, 1995; Lori Rozsa, *For Death Row Inmate, Another Day in Court*, MIAMI HERALD, Sept. 9, 1995; Diane Rado, *Spaziano's Lawyer Says State Lied*, ST. PETERSBURG TIMES, Sept. 1, 1995.

107. The Kennedy case is discussed in Michael Mello & Nell Joslin Medlin, *Espinoza v. Florida: Constitutional Hurricane, Lambent Breeze Or Idiot Wind?*, 22 STETSON L. REV. 907, 997-1001 (1993).

prison ("The Rock"), and he had killed two white peace officers, Deputy Floyd Cone and Florida Highway Patrol Trooper Robert McDermon, with their own weapons. He had done it in Union County, only a few miles away from the building that houses Florida's electric chair. His case never had any real constitutional issues to speak of, and he wrote to me a few days before he knew he was to be electrocuted. He was executed on schedule. Mr. Kennedy's letter arrived while he was on Phase II of Deathwatch, which means that he mailed it from the very lip of the grave. This is what he wrote:

> Dear Mr. Mello
>
> I received your letter the other day and it was very nice to hear from you again.
>
> I appreciate your concern very much and I know that you can see what the Federal Courts are doing with my appeal.
>
> I know that you are angry about this but the best way that you can use that anger is to use it in a way that will turn into a positive force rather than a negative one.
>
> I would like to see you teach your law students what they are doing to me and others like myself, I believe the best thing that you can do is make people aware of just what these Courts are doing, this is the best thing that I believe that you can do to fight this thing.
>
> Take Care
> Your Friend
> Ed

This journal project had its genesis in a project undertaken by Michael Radelet in the summer of 1986. Michael had been asked to edit a collection of essays about capital punishment's impact on the people whose professional and personal lives were touched by the death penalty as a legal system. It was not really a scholarly or academic project, and the contributors included several condemned prisoners, their counselors and their advocates. At the time I was working as a capital public defender in Tallahassee, Florida. During a six-week period in spring 1986, three of my office's clients had been executed: David Funchess, Dan Thomas, and Ronald Straight. Mike Radelet suggested I write about Ronnie Straight—not the case, but the man, and what the execution of the man had meant to me, not as Straight's attorney, but as a person.[108]

When Mike Radelet invited me to write a personal essay for his collection, I thought I could knock it out in an afternoon at Juno Beach. After all, I had been writing about capital punishment—in court papers and articles

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108. I discuss the *Straight* case in MELLO, DEAD WRONG, *supra* note 2, at 206-17.

published in scholarly law journals—for three years. But this turned out to be the hardest writing project I had undertaken up to that time, and I said so in the essay. I hated writing it. I hated editing it. And when the collection was published in 1989 by Temple University Press (entitled *Facing the Death Penalty*), I hated reading it. It was too close to the bone, too personal.

I read somewhere once that the two principal qualities of a public citizen were experience and reflection. Oddly, for me, my pre-reflective experience was far easier than reflection. I had the good luck to practice as a capital public defender in Florida during the crucial moment in its (and the nation's) modern experience with capital punishment: 1983-87.

When I left Florida deathwork in 1987, and again, when I left full-time law practice for full-time law teaching and writing, in 1988, I thought my pre-reflective time was over and, in a superficial sense, it was. Now that I was a full-time school teacher, I certainly had the opportunity to reflect on the time I had spent in the Florida death wars.

When I'd been in the thick of the fight in Florida, I'd always thought that the first thing I'd do, when I finally had *time* to think and write, would be to go back through the journals, correspondence, and other primary materials I'd been keeping like a packrat since beginning deathwork in 1983. However, my early teaching career was devoted to learning to teach and writing fairly traditional law review articles. When I get tenure, I thought, then I'd begin to draw upon my old journals and letters. I was granted tenure in 1990. My "tenure piece" was a traditional piece of legal scholarship exploring the historical and jurisprudential dimensions of the relentless dissents of Justices Brennan and Marshall in capital cases. It was a safe and essentially trivial project, which Northeastern University Press published as a book in 1996.

During all these years, between 1988 and 1994-95, I had (with three minor exceptions) managed to avoid writing any sort of interior memoir about my earlier time in Florida. Of course, my Florida experience influenced and drove my decisions about the subjects I *had* chosen to write about—beginning with the choice of subject matter. I was writing about legal doctrine, theory and history—everything except the source of why I cared about and wrote about capital punishment in the first place: my time in Florida.

For reasons not germane to this essay, in the mid-1990s a series of personal and professional crises (two car wrecks six weeks apart, unexplained seizures, depression, and difficulties with a school dean) essentially obliterated my life as I knew it. Most importantly for me, these events forced me, at the old age of thirty-seven, to re-appraise the ways I had chosen to live my life which, for me, meant my work. Deathwork had been the emotional center of my life, for so long, that any re-examination of my life meant revisiting my relationship with capital punishment as a legal system.

That, in turn—along with the transformative effect that discovering Tim O'Brien's book, *The Things They Carried*, had on my writing[109]—meant a return to my old corpus of primary source materials: the journals and correspondence from my time in Florida in the 1980s. Now, finally, I was forcing myself to reflect on capital punishment as the system I had seen up close and personal. Also, in a fortuity of timing, in the early 1990s, the Thurgood Marshall papers became open to the public. Many of Marshall's papers concerned death cases, including my own cases.

Dozens of condemned people are covered in my journals. But "Crazy Joe" Spaziano[110] and Theodore Bundy[111] are the twin polarities of my life as a lawyer. Bundy and Spaziano also emblemize the twin polarities of capital punishment today: the hated serial killer versus the innocent man. These metaphors represent both the person whom we most want to execute and the person whom we are most afraid of killing under color of law. Along the temporal cord linking Bundy and Spaziano hang the politics, the events, and the personalities of one long, cold season of legal homicide—a backsliding in the evolving standards of decency that mark the progress of a maturing society. The legal system that let us kill Ted Bundy also let us come perilously close to killing "Crazy Joe" Spaziano.

Ted Bundy makes some capital punishment abolitionists squeamish, and he should. If you think executions are wrong or immoral or indecent or unconstitutional, then you must deal with Bundy. It is too easy to oppose capital punishment for an innocent or sympathetic man. We abolitionists must deal with Bundy precisely *because*, at least on the surface, he is such a hard case for us. We have a duty to listen to the Bundy case.

Conversely, capital punishment supporters must confront the Joe Spaziano case. Given human fallibility, any legal system that allows you to kill the Bundys also creates the risk of executing the Spazianos. Perhaps it is worth the risk of killing the Spazianos to get the Bundys. But only someone hopelessly naive could deny that the risk is there, that it is real, and that limiting the capital appeals process will, as inexorably as the law of averages, increase that risk. Joe Spaziano was my first and my last capital case.[112]

"What a fine balance between too much fear . . . and too much forgetting."[113] This project is partly about my ongoing attempts to keep promises to—or, perhaps better, contracts with or covenants with—Edward

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109. *See id.* at 38-39.

110. *See* MELLO, WRONG MAN, *supra* note 58.

111. *See* MELLO, DEAD WRONG, *supra* note 2, at 88-125.

112. I don't count the Unabomber. *See generally* Mello, *Non-Trial of the Century*, *supra* note 47. (describing Author's relationship with convicted killer Theodore Kaczynski); Mello, *Cold as a Lizard*, *supra* note 47.

113. Stephen Dobyns, *Dead Curtain*, 108 SALMAGUNDI 91, 93 (Fall 1995).

Kennedy and Ronald ("Frog") Straight, two men, one African-American and one white, who were former clients of mine, and who were friends, and who were executed for committing murder. Ronnie Straight was a stone cold killer, and Ed Kennedy shot two law enforcement officers during a prison escape. Both became unlikely friends of mine. They asked me to keep on telling the true war stories from Florida's machinery of death. "Stories held in common make and remake the world we inhabit," wrote Marina Warner.

Every deathworker has his or her Ronnie Straight and Ed Kennedy. No one involved in fighting the death penalty does so without the constantly insistent, haunting, painful memories of too many friends who aren't here in body anymore. They, more than anyone or anything else, have provided all the fuel my energy requires.

I heard somewhere about a comment made by a mountain climber after he reached the summit of Everest. The effort nearly killed the climber; his oxygen ran out, the weather was awful, and an observer was amazed that he kept going. The observer asked the climber, "Why did you climb Everest to die?" The climber replied, "I didn't climb Everest to die. I climbed Everest to live."

In doing deathwork in Florida, I lived. I've never felt more alive. In writing about that work, and the people who do it, I've lived. With my few real friends—all deathworkers in one way or another, whether they know it or not—I've lived. With some of these friends I've shared holy moments, and the bonds created in those moments are love and friendship, which I now believe are the same thing. These people offer me true company because they hold dear the things I hold dear, they fight for those things by any means necessary, and they understand that some things *are* worth dying for. They also understand that death isn't the worst thing that can happen to a person.

For me, deathwork had about it an alluring magic[114] and a darkness and a mystery. This, I think, is why I call what I did "deathwork," rather than "lifework," although the latter term might be more precisely accurate and certainly more upbeat-sounding. Naming it "deathwork" captures the immersion in that moment of mystery that straddles existence and oblivion.

The fragility of life and the mystery of death. It's not a *fear* of death. Far from it. The closer my proximity to my own death—in 1994 and early 1995, health problems, car wrecks, pneumonia, and a mistaken diagnosis of tongue cancer put me, up close and personal with the clear and present actuality of my own death—the more serene I felt about having never really feared death. The taste of my own death in my mouth gave me perspective,

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114. I tried to articulate why I did deathwork in MELLO, DEAD WRONG, *supra* note 2, at 126-99.

and it gave me courage, and both of those gave me the voice I needed to write this essay.

Death is unknown to me. Why fear an unknown? Why fear *the* unknown?

I read somewhere that one must die at the right time. Live when you live, and die when it is your time to die. Death loses its terror if one dies after consummating one's life. If one doesn't live at the right time, then how can one choose to die at the right time?

Even though I've published three books and a couple of dozen law journal articles, I still don't feel comfortable thinking of myself as a "writer." But I guess I am, because I write.

I've always written. I was flunking out of high school, yet I still got A's and B's in English, and I never turned in a late paper when it was a writing assignment. Reading back through my Florida diaries now, I'm surprised I managed to find time, in the madhouse of deathwork, to write and publish law review articles. As a public defender, I wrote; as a private practitioner at a big-city law firm, I wrote; as a law professor, I write.

I'm not sure from where this compulsion to write comes. I only know that writing—for law reviews and elsewhere—has been the one constant in my life in the law. Perhaps the existentialist poet Ranier Marie, in his *Letters to a Young Poet*, put it best: "Acknowledge to yourself whether you would have to die if it were denied you to write. This above all—ask yourself in the stillest hour of your night: *must* I write?"[115]

Sixteen years ago this fall, I published my first law review article on capital punishment, a doctrinal analysis of the "heinous, atrocious or cruel" factor listed in Florida's capital statute as an aggravating circumstance authorizing death as a possible punishment.[116] At that time, in 1984, I was a Florida capital public defender. In the years since, I left Florida and full-time deathwork; I have been a full-time law teacher in Vermont since 1988, representing a handful of condemned clients and various organizations appearing as *amici curiae* in capital cases. Also, during the past sixteen years, I have written or co-authored two dozen articles and essays published in law journals: federal and state constitutional and doctrinal analysis,[117] legal

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115. RANIER MARIE RILKE, LETTERS TO A YOUNG POET 18-19 (M.D. Herter Norton trans., 1934).

116. *See* Michael Mello, *Florida's Heinous, Atrocious or Cruel Aggravating Circumstance: Narrowing the Class of Death-Eligible Cases Without Making It Smaller*, 13 STETSON L. REV. 523 (1984) [hereinafter, Mello, *Florida's Heinous, Atrocious or Cruel Aggravating Circumstance*; *See also* Mello & Medlin, *supra* note 83, at 920.

117. *See, e.g.*, Michael Mello, *The Jurisdiction to Do Justice*, 18 FLA. ST. UNIV. L. REV. 923 (1991); Michael Mello, *Taking Caldwell v. Mississippi Seriously: The Unconstitutionality of Capital Statutes that Divide Sentencing Responsibility Between Judge and Jury*, 30 B.C. L. REV. 283 (1989); Michael Mello, *Is There a Federal Constitutional Right to Counsel in Capital Post-Conviction Proceedings?*, 79 J. CRIM. L. & CRIMINOLOGY 1065 (1989).

history,[118] cultural theory,[119] jurisprudence,[120] legislative policy,[121] ethics,[122] story-telling,[123] even a few pleadings,[124] and, once, a letter.[125]

Actually, for me, writing and publishing in law reviews was one of the two constants in my professional life. The other constant was direct representation of death row prisoners. In 1996, I decided that I no longer could, in good conscience, continue to serve as post-conviction counsel to death row prisoners.

In my 1997 book *Dead Wrong: A Death Row Lawyer Speaks Out Against Capital Punishment*, I attempted to explain my reasons for this decision. The precedents defining the landscape of present capital litigation form the closed universe within which the zealous advocate must operate "within the bounds of the law." It is a world within which state-sponsored killing is accepted as legally permissible. Legalistic resistance to executions therefore becomes paradoxical. The system is attacked, but this attack becomes institutionalized and thus, to some extent, domesticated. We're not lapdogs (or potted plants), but we're not arsonists or bomb throwers, either. We're lawyers. We're only lawyers. We make mistakes. Those mistakes ought not kill people. But they do.

My *Dead Wrong* book—and a subsequent law review article on executing rapists[126]—were not well-received by some of my (now) former friends and colleagues from my Florida deathwork days, particularly Stephen Bright, the self-appointed high priest of the One True Church of Capital Punishment Abolition. In a recent essay, I explored my understanding of the duties of scholarship to pursue inquiries even when they lead down avenues we would prefer not to travel.[127]

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118. *See* Mello, *Relentless Dissent*, *supra* note 56; Michael Mello, *Facing Death Alone*, 37 AM. U.L. REV. 513, 567-600 (1988). *See also* MELLO, AGAINST THE DEATH PENALTY, *supra* note 87.

119. *See* Michael Mello, *On Mirrors, Metaphors and Murders*, 18 N.Y.U. REV. L. & SOC. CHANGE, 887, 918-36 (1990/91) [hereinafter Mello, *On Metaphors*]; *see also* MELLO, DEAD WRONG, *supra* note 2.

120. *See* Mello, *Relentless Dissent*, *supra* note 56.

121. Mello & Robson, *Judge Over Jury*, 13 FLA. ST. U. L. REV. 31 (1985); Michael Mello & Donna Duffy, *Suspending Justice: The Unconstitutionality of the Proposed Six-Month Time Limit On The Filing of Habeas Corpus Petitions by Death Row Inmates*, 18 N.Y.U. REV. L. & SOC. CHANGE 451 (1990/91).

122. *See* Michael Mello, *Legal Ethics*, 33 CRIM. L. BULL. 168 (1997); MELLO, INVENTION OF THE UNABOMBER, *supra* note 47; Michael Mello, *Representing Death Row: An Argument for Attorney-Assisted Suicide*, 34 CRIM. L. BULL. 48 (1998); Mello, *Death and His Lawyers*, *supra* note 42, at 19.

123. *See* Mello, *On Metaphors*, *supra* note 119, at 918. *See also* MELLO, DEAD WRONG, *supra* note 2.

124. *See* Michael Mello, *Outlaw Judiciary*, 1 N.Y. CITY L. REV. 259 (1996).

125. *See generally* Michael Mello, *A Letter on a Lawyer's Life of Death*, 38 S. TEX. L. REV. 121 (1997).

126. *See generally* Michael Mello, *Executing Rapists: A Reluctant Essay on the Ethics of Legal Scholarship*, 4 WM. & MARY J. WOMEN & L. 129 (1997) (examining the constitutionality of statutes providing the death penalty for rapists).

127. *See generally* Michael Mello, *Dead Reckoning*, 35 CRIM. L. BULL. 478 (1999).

At the very time when death row most needs lawyers, increasing numbers of experienced capital appeals lawyers are deciding to become conscientious objectors in the deathwars. I am one.

The conscientious abstention argument set out in *Dead Wrong* did not seem to me as being terribly radical. As I note in the book, the same idea had been expressed already by capital defense warriors as diverse as Charles Ogletree and William Geimer. Nor was it even very original. In the mid-1980s, I first heard the notion that we risked being co-opted by the very system we were fighting, when Millard Farmer asked, during a speech at an Airlie conference, whether we were becoming the "masks of the executioner." Not even Preacher Steve Bright or his cult followers would accuse Farmer of cowardice.

Nor, I hope, would Preacher Steve charge the Texas Criminal Defense Lawyers Association with treason. In June 1998, concluding after years of bitter firsthand experience that capital appeals in Texas had devolved into "just a procedural nicety to go through before you execute people,"[128] the Association passed a resolution urging its 1,850 members not to take appointments to represent death row inmates until the Texas Court of Criminal Appeals provided "meaningful review" of capital appeals. For years, death has walked an assembly line in Texas. One member of the Texas capital defenders bar was quoted as saying: "I won't have anything to do with what that death factory [Texas] has set up."

Dead Wrong was a memoir in the sense that it is based on my own experience as a death row lawyer. As I said early on in the book, it was neither a polemic against capital punishment, nor was it a call for others to share my view. *Dead Wrong* was also not a plan of action. I was writing about personal conscience, not strategy. It was simply an attempt to tell the truth as I have experienced it—while acknowledging, always, that other people, with different experiences, will likely see different truths.

That experience, however, led to the thesis that, after thirteen years of working as a lawyer within the machinery of death, I could not longer, in good conscience, continue to do so. Lawyers and academics have compiled a mass of data demonstrating that our legal system decides who dies based on chance, class, and race. If the system really is as unjust as we said it is—and my experience leaves no doubt in my mind that it is, and that it will continue to remain so regardless of what we post-conviction defense lawyers do—we are faced with several questions and with a choice. We must decide whether the costs of our participation outweigh the benefits of saving a few lives here or

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128. Mary Alice Robbins, *Lawyers' Group Says Members Shouldn't Represent Inmates Until 'Meaningful Review,'* MORRIS NEWS SERVICE, June, 12, 1998 (quoting Gerry Morris, past president of the Association).

there (in Texas, *very* few). We are participants nonetheless. Are we therefore serving to legitimize the system by providing sanitized executions, executions with the aura of legalism and therefore the appearance—but no more than the appearance—of fairness?

Those are the questions, and they are hard ones. This is the choice, and it is even harder: Ought we death row lawyers continue to participate in a system so rigged against our clients? Death row demographics are such that more and more people are going to be executed in the years to come, especially in Texas. We post-conviction attorneys might be able to use litigation to influence the timing of these executions, but, regardless of what we do, the killing will increase in frequency, especially in Texas. The question posed by my book *Dead Wrong* was whether marginal victory justifies the aura of legitimacy with which our participation infuses the system. That (and increasingly, not much more than that, especially in Texas) is within our power to control.

Actually, my excommunication from some quarters of the deathwork defense family has been a blessing in disguise. Nietzsche once remarked that his being fired from his university position was the best thing that ever happened to his intellectual growth and development. My excommunication has liberated me to think outside the deathworkers' box.

The choice is whether to try to speak, or write, or remain silent. "I wanted most of all . . . to tell you—with what words, with what silence?—that you must not believe words like yours can remain unheard," wrote Paul Celan. "With what words, with what silence": The phrase sharply divides in half, with the second element almost, but never entirely, undoing the first. There is all the difference in the world between being silent and being silenced. That is why I did deathwork. And it's why now I write about it.

Doing deathwork was hard. Writing about it is harder. When doing the work, the jobs and the goals were relatively discernable and straightforward: the job was to litigate, and the goal was to keep our clients alive. But, when it comes to writing, nothing is straightforward and little is discernable.

I've never seen my writing as "therapy," and I don't now. But the process of writing—putting pen to paper, literally, in my case—about the past helps me sort out that past. And writing brings the past present and brings the dead back to life. Writing allows me to capture certain truths and disregard others. I never really understand how I really feel about something, on some level, until I've written about it.

This essay is a love letter. It is a millennium love letter to those death workers with whom I have been privileged to work, sometimes in close quarters: Mark Olive, Scharlette Holdman, Craig Barnard, Anthony Amsterdam, Henry Schwartzschild, Millard Farmer, Michael Radelet,

Margaret Vandiuer, Richard Jorandley, Marie Deans, and others. This essay tries to describe your world—our world.

II. "CERTAIN BLOOD FOR UNCERTAIN REASONS": THE SUNSHINE STATE AND THE LAW'S MACHINERY OF DEATH

[B]ut the War in Vietnam Drifted in and out of Human Lives, Taking Them or Sparing Them like a Headless, Berserk Taxi Hack, Without Evident Cause, a War Fought for Uncertain Reasons. . . . Certain Blood for Uncertain Reasons. No Lagoon Monster Ever Terrorized like This.

Tim O'Brien, *If I Die in a Combat Zone* (1969)

In this section I want to situate the journals into a historical narrative context. The history traces three intertwined strands: the campaign to use the courts to challenge the legality of capital punishment, the right to counsel, and *habeas corpus*.

My journals focus on Florida more than any other single state. Partly because of Florida's periodically malfunctioning electric chair and partly because of high-profile cases like Ted Bundy[129] and Paul Hill,[130] Florida is, in public consciousness, virtually synonymous with the death penalty. More importantly, for the purposes of this essay's overarching themes, Florida is typical, representative, and just plain interesting.

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129. *See* MELLO, DEAD WRONG, *supra* note 2, at 89-90 (citing the Bundy books).

130. *See* Roger Parloff, *When Worlds Collide*, AMERICAN LAWYER, June 1, 1995, *available in* 1995 AMLAW 77. The Florida Supreme Court upheld Hill's death sentence. *See* Associated Press, *Death Sentence Upheld for Abortion Clinic Killer*, Mar. 6, 1997.

Paul Hill, a former minister, opened fire with a shotgun on July 29, 1994, outside the Ladies Center in Pensacola, where he had been protesting against abortion for six months, killing a doctor, Dr. John Britton, and his escort, retired Air Force Lt. Col. James Barrett. At trial Hill represented himself and attempted to argue that the killing of Britton and Barrett constituted "justifiable homicide." Following Hill's conviction of first degree murder, his sentencing jury rendered a unanimous recommendation of death as the appropriate penalty. He was sentenced December 6, 1994, to die in the electric chair. Initially Hill and his family wished me to represent him on his appeal to the Florida Supreme Court. I drafted an appellate brief focusing on two issues: (1) the bearing of Hill's motives for killing Dr. Britton and Col. Barrett—Hill's belief that in killing his victims he was preventing them from committing the greater evil of destroying more than two "unborn human beings;" (2) whether Hill's reasons for killing meant that he was acting under a "*pretense* of moral or legal justification" such that he did not deserve to die. Although personally pro choice, I drafted a brief making these arguments on Hill's behalf. Unfiled Draft Initial Brief of Paul Jennings Hill, Hill v. State, No. 84,838 (Fla. Jan. 1995).

Hill fired me as his appellate attorney, *see* Parloff, *supra*, and his case was handled by others. In October 1996, the court rejected Hill's arguments and unanimously upheld his murder convictions and death sentences, reasoning, "As a practical matter, permitting a defendant to vindicate his or her criminal activity in this manner would be an invitation for lawlessness."

When it comes to capital punishment, Florida is a bellwether state. Wherever the rest of the nation is headed on capital punishment, Florida seems to get there first. Florida was the first of the United States to enact a "modern" capital punishment statute in the wake of *Furman v. Georgia*'s invalidation of all extant capital statutes in 1972.[131] Florida has led the nation in the implementation of the death penalty since then. Florida was the first state to commit a nonconsensual[132] execution in a decade.[133] Florida is third in the number of persons on death row (361 men and four women, as of January 6, 2000),[134] and until 1986 Florida led in the number of executions since the modern resumption of capital punishment. And Florida had executed more people (forty-four) than only two other states, Virginia (forty-seven) and Texas (194).[135]

Equally important, the demographics of Florida's condemned population in the mid-1980s made it one of the first states where the lack of post-conviction counsel for the condemned became a recognizable crisis of epidemic proportions. Moreover, Florida became a pioneer of sorts by crafting a legislative solution to its counsel crisis by setting up a publicly funded state agency to provide direct representation for the state's condemned. Before that, Florida experimented with the creation of a resource center to provide litigation support for members of the private bar who represented death row inmates *pro bono*.[136] As of August 1995, twenty states had created resource centers although Congress zero-funded these centers, effective October 1, 1995.[137] In addition, Florida's jury override system invites unique comparison between how judges and juries understand the same evidence and apply the same sentencing criteria.[138]

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131. *See* ROGER ROSENBLATT, THE MAN IN THE WATER: ESSAYS AND STORIES (1995).

132. Gary Gilmore and Jesse Bishop volunteered for execution by waiving legal challenges to their death sentences. Gilmore was executed in 1977, Bishop in 1978. *See* Victor Streib, *Executions under the Post-Furman Capital Punishment Statutes*, 15 RUTGERS L.J. 431, 447, 451 (1984).

133. John Arthur Spenkelink was executed at Florida State Prison on May 25, 1979. *See* WELSH S. WHITE, THE DEATH PENALTY IN THE EIGHTIES 55 (1987). *See also* Von DREHLE, *supra* note 54, at 113. For views of the Spenkelink execution, see Robert A. Burt, *Disorder in the Court*, 85 MICH. L. REV. 1741, 1805-13 (1987); Victor Streib, *supra* note 132, at 449-51 (1984); Ramsey Clark, *Spenkelink's Last Appeal*, NATION, Oct. 27, 1979, at 385.

134. Sara Rimer, *Florida Uses Special Legislative Session to Open a Drive to Speed the Death Penalty*, N.Y. TIMES, Jan. 6, 2000, at A1.

135. *See generally* Rick Bragg, *Florida's Messy Executions Put the Electric Chair on Trial*, N.Y. TIMES, Nov. 18, 1999; Bill Dedman, *Supreme Court to Review Use of Electric Chair*, N.Y. TIMES, Oct. 28, 1999.

136. Subsequent to the creation of the agency, a resource center was created to take some pressure off CCR and to help private, mostly *pro bono*, attorneys represent death row prisoners.

137. Curtis Wilkie, *Mississippi Debates Shortcuts To Death Penalty*, BOSTON GLOBE, Aug. 22, 1994, at 3.

138. *See, e.g.*, William Geimer and Jonathan Amsterdam, *Why Jurors Vote for Life or Death*, 15 AM. CRIM. L. REV. 1 (1988).

The state and federal courts in Florida take capital punishment—and the constitutional conundrums raised by capital punishment—seriously. These judges, for the most part, really struggle with these cases. Eleventh Circuit Judge Frank Johnson said in 1990, "We're overwhelmed with death cases."[139] So is the U.S. Supreme Court; I did not really appreciate the massive amount of time the Supreme Court Justices and their staff devote to death penalty cases before I worked through the 567 cartons of raw materials in the Thurgood Marshall papers, made public in 1993.[140]

In part because the state courts treat death cases so seriously, Florida has one of the most fully developed bodies of capital punishment jurisprudence in the nation. Between January 1, 1973, the effective date of Florida's current death penalty statute, and August 31, 1999, 1,214 death sentences were imposed in Florida; 721 people have been condemned (many condemned prisoners have more than one death sentence, due to either multiple charging counts or multiple sentencing proceedings). By August 1999, the Florida Supreme Court had rendered more than 1,900 capital decisions, usually issuing one or more each week.[141] The U.S. Supreme Court regularly uses Florida cases as vehicles for fine-tuning its constitutional jurisprudence of death; in recent years the High Court usually has granted plenary review to at least one Florida case each term.[142]

Other states look to Florida's capital sentencing system as a model. Three other states, two with large death rows (Alabama and Indiana), also permit judges to impose death sentences notwithstanding a jury recommendation of life imprisonment. Mississippi may follow suit. In the

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139. BASS, *supra* note 89, at 454.

140. These papers may be found at the Manuscripts Division of the Library of Congress.

141. For discussions of the quality of the Florida Supreme Court's review of death cases, see generally George E. Dix, *Appellate Review of the Decision to Impose Death*, 68 GEORGETOWN L.J. 97, 123-41(1979) (1 J. CRIM. L. AND CRIMINOLOGY 979). For the most comprehensive and critical comment, see Neil Skene, *Review of Capital Cases: Does the Florida Supreme Court Know What It's Doing?*, 15 STETSON L. REV. 263 (1986).

142. *See, e.g.*, Espinosa v. Florida, 505 U.S. 1079, 1080 (1992) (challenge to aggravating circumstance); Sochor v. Florida, 505 U.S. 1079 (1992) (same); Parker v. Dugger, 498 U.S. 308, 308-09 (1991) (jury override); Hitchcock v. Dugger, 481 U.S. 393 (1987) (holding that sentencing jury and judge's refusal to consider evidence of nonstatutory mitigating circumstances rendered death sentence invalid); Darden v. Wainwright, 477 U.S. 168 (1986) (upholding prosecutor's inflammatory closing argument and approving exclusion of prospective juror because of prospective juror's moral opposition to the death penalty); Wainwright v. Witt, 469 U.S. 412, 423-26 (1985) (setting standard for exclusion of prospective juror based on venireperson's death penalty views); Spaziano v. Florida, 468 U.S. 447 (1984) (upholding constitutionality of judge overriding jury's recommendation of life imprisonment); Strickland v. Washington, 466 U.S. 668, 687 (1984) (articulating standard for claim of ineffective assistance of trial counsel); Barclay v. Florida, 468 U.S. 939 (1983) (holding that capital sentencer's consideration of nonstatutory aggravating circumstances does not violate Constitution); Enmund v. Florida, 458 U.S. 782, 801 (1982) (reversing death sentence of accomplice who did not kill, attempt to kill, or intend to kill victim); Gardner v. Florida, 430 U.S. 349 (1977) (precluding death sentences based on secret evidence).

August 1994 special legislative session discussed earlier, Mississippi's Governor Kirk Fordice took on issues of crime generally and the death penalty specifically. At the close of the special session, the *Jackson Clarion-Ledger* observed that Governor Fordice was "optimistic that he eventually will get judge-only sentencing in death-penalty cases. The provision died in the Senate Judiciary committee. 'It passed the House and 27 senators signed on to a jury-advised, judge-only sentencing law. So I feel sure it's not over,' Fordice said."[143] Indeed.

Florida has also been a leader of sorts on the politics of death. In the period covered by my journals (1983-1986), then-Florida governor Bob Graham showed his Democratic colleagues nationally how supporting executions can be used to diffuse arguments that a politician is soft on crime. When Bob Graham was first elected governor, he was viewed as a liberal and a political wimp ("Governor Jello" was his moniker). But after signing death warrant after death warrant, Graham became a political powerhouse who hardily won re-election as governor, and who then parlayed this into a successful run for the U.S. Senate.[144] In 1992, Graham was on Bill Clinton's short-list for Vice President. Graham has played the politics of death with perfect pitch and others have followed his lead.[145]

And Florida is . . . well . . . *Florida*. For reasons not really clear to me, the Sunshine State generates compelling death row characters who have fascinating stories. Perhaps more telling than the numbers cited above is the raw, visceral enthusiasm with which many Floridians, at least many Florida politicians, embrace capital punishment. When Atlanta capital defense attorney Millard Farmer referred to Florida as the "buckle of the death belt,"[146] he was not talking about statistics. The Bundy execution in January 1989 resembled a tailgate party in its revelry.[147] The festivities did not begin in the 1980s. Historian Richard Kluger described the scene of a 1952 Florida capital trial:

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143. Mac Gordon, *Governor Fordice Signs on Prison Construction Bill*, JACKSON CLARION-LEDGER, Aug. 25, 1994.

144. *See* Von DREHLE, *supra* note 54, at 325.

145. *See, e.g.*, First name Guskind, *Hitting the Hot Button*, NAT'L L.J., Aug. 4, 1990; *Ad Features Bundy*, ADVERTISING AGE, Mar. 12, 1990, at 23; Spears, *Bob Graham Criticizes Ads for Martinez*, TALLAHASSEE DEMOCRAT, Mar. 8, 1990; Minzesheimer, *Campaign '90 Notebook*, Gannett News Service, Mar. 5, 1990, Dan Balz, *New Campaign Ads: Grim Focus on Fear of Crime*, WASH. POST, Mar. 4, 1990, at A1.

146. The journalist Ann Rule that in 1977 Millard Farmer "called the State of Florida 'the Buckle of the Death Belt.'" ANN RULE, THE STRANGER BESIDE ME 336 (1986). This evocative metaphor has been appropriated by others to refer to other parts of the South. *See, e.g.*, DEATH PENALTY INFORMATION CENTER, CHATTAHOOCHIE JUDICIAL DISTRICT: BUCKLE OF THE DEATH BELT (1991).

147. *See* MELLO, DEAD WRONG, *supra* note 2.

> [Thurgood] Marshall and Jack Greenberg were greeted by a Saturday (sic) night torchlight parade of the Ku Klux Klan upon their arrival in Orlando, Florida, to defend a young black originally charged, along with three others, with beating up a white man, leaving him on the side of the road near Groveland, and kidnaping and raping his wife. Marshall stayed at the home of a black resident and Greenberg at a white hotel, out of deference to local custom. Klan members circled Greenberg's hotel with trucks and torches throughout the night.... [T]hough Marshall gave one of his finest courtroom performances, the all-white, all-male jury found the defendant guilty and doomed him to the electric chair. Marshall, stunned by the verdict, came out of the courtroom fighting back tears, and promised the convicted man's mother, "Don't worry, darling, we're going to stick by you. We're going to keep on fighting." And he did. Twice the NAACP appealed the so-called "Groveland case" to the Supreme Court, which declined to hear it. Eventually, the governor, LeRoy Collins, commuted the death sentence.[148]

Tax paying Floridians appear willing to foot the bill for their death penalty despite economic recession. A 1988 *Miami Herald* study done by David Von Drehle, relying on the most conservative estimates available, calculated that Florida had spent at least $57 million on a capital punishment system that had executed eighteen people—an average cost of $3.2 million per execution (this did not include the millions spent by volunteer defense lawyers, described in Part V.). This is *six times* more than the average cost of keeping a person in prison until his natural death.[149] Special cases can cost extra. A Florida prosecutor estimated that it cost the state $6 million to execute Theodore Bundy; Bundy's law firm estimated that it spent $1.4 million in the first two years the firm handled Bundy's post-conviction case. In late 1992, Florida inaugurated what one journalist described as a "state-of-the-art death row." State officials "ordered a new death row built to accommodate more condemned prisoners and to isolate them from other inmates."[150] The "new $15 million building is solely for those sentenced to death. Death row will have its own medical and dental area, its own

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148. RICHARD KLUGER, SIMPLE JUSTICE 561 (1976). Thurgood Marshall, architect of the 1954 *Brown v. Board of Education* school desegregation case, was appointed by President Johnson to the Supreme Court in 1967. As a justice, Marshall, along with William Brennan, consistently voted against imposition of the death penalty. *See* MICHAEL MELLO, AGAINST CAPITAL PUNISHMENT (1996).

149. *See* Von DREHLE, *supra* note 54, at 318.

150. Hatcher, *Florida Builds State-of-the-Art Death Row*, SAN FRANCISCO JOURNAL, Dec. 16, 1992, at 11.

basketball courts and its own room for inmates to receive visitors on Sundays."[151] Visiting clients scheduled to be killed in this high-tech theme park can become surreal.

A. 1769-1922: The Bad Old Days of the Hangman's Noose and the Firing Squad

> *The presiding judge told me in bizarre language that I was to have my head cut off in a public square in the name of the French people.*
>
> Albert Camus, *The Stranger*

The framers of the United States Constitution clearly contemplated the validity of capital punishment; the fifth amendment spoke of deprivations of "life or limb" by the federal courts without "due process of law," a requirement extended to the state courts when the Fourteenth Amendment was enacted during Reconstruction.

Although the recorded history of capital punishment in Florida prior to the twentieth century is incomplete,[152] the available statutes, records (and in particular the extensive archives compiled in Headland, Alabama by Watt Espy), and commentaries do make it possible to sketch the early historical development of Florida's use of the death penalty. The first recorded execution in Florida occurred in January, 1769, when a convicted murderer was hanged in St. Augustine. From this time until 1924, there were 191 recorded executions in the state. Of these, 173 were hangings carried out under local authority, since executions in Florida during this period were controlled at the local level by cities or counties. Over the same period, eighteen other executions in Florida were carried out by military authority, and thirteen of them were by firing squad.

In 1822, when Florida became a Territory, it became necessary to enact a criminal code. The First Legislative Council of Florida, meeting in Pensacola, passed "An Act for the Apprehension of Criminals, and the

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151. *Id.* I have written elsewhere about various dimensions of Florida's death penalty. *See, e.g.*, Mello & Medlin, *supra* note 107, at 919 (citations omitted); Ruthann Robson and Michael Mello, *Ariadne's Provisions: A "Clue of Thread" to the Intricacies of Procedural Default, Adequate and Independent State Grounds, and Florida's Death Penalty*, 76 CAL. L. REV. 87 (1988) (exploring the refusal of federal courts to grant habeas corpus review to state death penalty decisions where the state court has refused to review based upon discretionary or haphazardly applied state procedural rules).

152. *See* Michael L. Radelet & Glenn L. Pierce, *Choosing Those Who Will Die: Race and the Death Penalty in Florida*, 43 FLA. L. REV. 1, 3 (1991).

Punishment of Crimes and Misdemeanors."[153] This act, which provided for the first sanctioned death penalty under Florida's territorial or state authority, designated three offenses as capital: murder, rape, and arson. The act used mandatory language, providing that any person committing the specified offenses "*shall* suffer death."[154] Six years later, the legislature added twelve crimes to the list of capital offenses and, apparently for the first time, distinguished between crimes committed by white citizens and crimes committed by black slaves or freed people. Death was mandatory upon conviction of any one of five of these twelve offenses; the other seven were

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153. *See generally* A MANUAL OR DIGEST OF THE STATUTE OF THE STATE OF FLORIDA, tit. I, ch. I, ¶ 1, at 489 [hereinafter DIGEST]; An Act relating to Crimes and Misdemeanors, Feb. 10, 1832 § 1 [hereinafter "1832 Act"].

The cover page of the *Digest* states that the compilation included the "Statute Law of the State of Florida, of a General and Public Character, in Force at the end of the Second Session of the General Assembly of the State, on the Sixth Day of January, 1847." However, it was authorized by an act of the general assembly in 1845, and none of the capital offenses cited here were amended between 1845 and 1847. Some changes were made in the general criminal provisions between 1845 and 1847, and they were included in the *Digest*. *See e.g.*, DIGEST, *supra*, tit. I, ch. VII, ¶ 19, at 501; 1846 Act, ch. 91, § 1 (liquor licenses required); DIGEST, tit. I, ch. VII, ¶ 20, at 502; 1846 Act, ch. 91, § 2 (take-out liquor sales permitted); DIGEST, *supra*, tit. I, ch. XII, ¶ 16, at 510; 1846 Act, ch. 75, § 2 (selling liquor to slaves); tit. I, ch. XIV, ¶ 1, p.518; 1846 Act, ch. 118, § 1 (certain rivers declared navigable); DIGEST, *supra*, tit. II, ch. I, § 3, ¶¶ 1-4, at 536; 1846 Act, ch. 104, §§ 1-2 (duties of jailors with respect to federal prisoners); DIGEST, *supra*, tit. II, ch. III, § 3, ¶¶ 1-3, at 526; 1846 Act, ch. 76, §§ 2 & 3 (judgments for costs); DIGEST tit. III, ch. IV, ¶¶ 1-4, at 536; ;1846 Act, ch. 104, §§ 1-4 (addressing the migration of Florida persons of color to Key West).

Because none of the 1846 changes appeared to affect any capital offense statute, the *Digest* seems to be an accurate compilation of the statutory law of death as of 1845.

Some crimes were made applicable to "any person" who committed the offense; however, some crimes and misdemeanors were made applicable only to "slaves, free negroes, and mulattoes." DIGEST, *supra*, tit. IV, ch. I, § 3; An Act Relating to Crimes and Misdemeanors Committed by Slaves, Free Negroes, and Mulattoes [hereinafter "1828 Act"].

Regardless of this different treatment under the substantive crimes, the same "rules and regulations" were to be applied at slave trials as were applied at the trials of free persons. *See* DIGEST, *supra*, tit. IV, ch. I, § 3, ¶ 1, at 542; 1828 Act § 60. It was also the duty of the court to assign and appoint counsel to defend any slave being tried before it. DIGEST, *supra*, tit. IV, ch. I, § 3, ¶ 5, at 542; 1828 Act § 57. Thus, in 1845 the jury trial was given great—arguably *more*—protection than some people (read slaves) received generally in the legal system.

In Luke, a Slave v. State, 5 Fla. 185 (1853), the court discussed—and with abhorrent language approved—the statutory difference in penalties for crimes committed upon "any person" and upon "slaves, free negroes, or mulattoes." However, the court made clear that the "humanity of the law" can be preserved only by securing for the "degraded rase" the same procedural protections claimed by whites—expressly including the right to trial by jury.

The legislature did allow a judge to override the automatic imposition of death upon conviction of a slave for commission of one of five crimes. Because slaves were not full citizens, and because the racially bifurcated development of the relevant statutory law stopped after the Civil War, there is no need to explore the statutory development as applied to these five crimes.

154. 1832 Act § 21 (emphasis added).

punishable, at the court's discretion, by death or a "lesser" penalty involving torture—whipping, branding, or nailing of ears.[155]

Review of the statutory law extant in 1845 suggests that a jury decision for death was in effect a necessary condition for the imposition of the death penalty. Capital punishment was for the most part mandatory upon conviction of specified offenses. Capital sentencing was the jury's exclusive domain in the sense that jury consent was a condition precedent to death sentences. The court in no instance possessed the discretion to *increase* a jury's "recommended" lesser conviction/sentence to death.

In 1845, Florida had ten crimes imposing a mandatory death penalty applicable to any person regardless of race. See Table 1.

TABLE 1
Mandatory Capital Offenses in 1845:
Applicable to Any Person Regardless of Race

Crime	Digest Citation	Statutory Citation
Insurrection	*Digest*, tit. I, ch. II, ¶ 2, at 490	1832 Act § 10.
Attempting to Excite an Insurrection or Revolt of Slaves	*Digest*, tit. I, ch. II, ¶ 2, at 490	1832 Act § 10.
Murder	*Digest*, tit. I, ch. III, ¶ 1, at 490	1832 Act § 2.
Rape	*Digest*, tit. I, ch. III, ¶ 1, at 490	1832 Act § 2.
Arson	*Digest*, tit. I, ch. IV, ¶ 1, at 491	1832 Act § 2.
Slave Stealing	*Digest*, tit. I, ch. IV, ¶ 6, at 492	1845 Act § 1.

155. *See, e.g.*, Session Laws of Florida, Act of November 21, 1838, §§ 19, 23, 24, 25, 34, 35, 36, 38, 39 & 56.

Crime	Digest Citation	Statutory Citation
Wilful Perjury Which Causes the Life of Another to be Taken Away	*Digest*, tit. I, ch. V, ¶ 1, at 493	1832 Act § 17.
Sodomy	*Digest*, tit. I, ch. VII, ¶ 11, at 500	1842 Act § 1.
Wilfully Burning or Making a Hole in Any Ship Valued Above $200	*Digest*, tit. I, ch. XI, ¶ 7, at 506	1832 Act § 60.
Assisting in Making a Hole in Any Ship Valued Above $200	*Digest*, tit. I, ch. XI, ¶ 7, at 506	1832 Act § 60.

There were also twelve crimes imposing a mandatory death penalty on any slave, free Black, or mulatto. See Table 2.

TABLE 2
Mandatory Capital Offenses in 1845:
Applicable to Slaves, Free Blacks and Mulattoes

Crime	Digest Citation	Statutory Citation
Conspiring to Insurrection	*Digest*, tit. IV, ch. I, § 1, ¶ 2, at 537	1828 Act. § 34.
Conspiring to Murder	*Digest*, tit. IV, ch. I, , § 1, ¶ 2, at 537	1828 Act. § 34.
Assault and Battery of a white Person with Intent to Kill	*Digest*, tit. IV, ch. I, , § 1, ¶ 3, at 537	1828 Act. § 35.
Poisoning With Intent to Kill	*Digest*, tit. IV, ch. I, § 1, ¶ 4, at 537	1828 Act. § 36.
Manslaughter of a white Person	*Digest*, tit. IV, ch. I, § 1, ¶ 5, at 537	1840 Act. § 1.

Crime	Digest Citation	Statutory Citation
Burning Any Dwelling-House, Store, Cotton-House, Gin, Mill, Outhouse, Barn, or Stable	*Digest*, tit. IV, ch. I, § 1, ¶ 5, at 537	1840 Act. § 1.
Accessory to Burning Any Dwelling-House, Store, Cotton-House, Gin, Mill, Outhouse, Barn, or Stable	*Digest*, tit. IV, ch. I, § 1, ¶ 5, at 537	1840 Act. § 1.
Assault of white Woman or Child with Intent to Rape	*Digest*, tit. IV, ch. I, § 1, ¶ 6, at 538	1840 Act. § 1.
Accessory to Assault of white Woman or Child with Intent to Rape	*Digest*, tit. IV, ch. I, § 1, ¶ 6, at 538	1840 Act. § 1.
Shooting at a white Person With Intent to Kill	*Digest*, tit. IV, ch. I, § 1, ¶ 7, at 538	1828 Act. § 55.
Wilful or Malicious Wounding of a white Person While Attempting to Kill Another Person	*Digest*, tit. IV, ch. I, § 1, ¶ 7, at 538	1828 Act. § 55.
Aiding and Abetting the Wilful or Malicious Wounding of a white Person While Attempting to Kill Another Person	*Digest*, tit. IV, ch. I, § 1, ¶ 7, p.538	1840 Act. § 55.

Additionally, five crimes imposed a mandatory death penalty upon any slave, free Black, or mulatto, but allowed the court discretion to impose alternate penalties if death was deemed inappropriate. See Table 3.

TABLE 3
Mandatory Capital Offenses in 1845:
Jury's Death Verdict Subject to
Judicial Override at Court's Discretion
Applicable to Slaves, Free Blacks and Mulattoes

Crime	Digest Citation	Statutory Citation
Robbery of the Person	*Digest*, tit. IV, ch. I, § 1, ¶ 8, at 538	1828 Act. § 56. The alternate penalty was having one's ears nailed to posts and standing for one hour while receiving thirty-nine lashes on the bare back.
Burglary	*Digest*, tit. IV, ch. I, § 1, ¶ 8, at 538	1828 Act. § 56. The alternate penalty was having one's ears nailed to posts and standing for one hour while receiving thirty-nine lashes on the bare back.
Maiming of a White Person	*Digest*, tit. IV, ch. I, § 1, ¶ 9, at 538	1828 Act. § 38 (as amended by the 1840 Act § 3). The alternate penalties available were (a) being whipped thirty-nine stripes and standing for one hour with one's ears nailed to posts, or (b) having one's hand burnt with a heated iron in open court.
Attempt to Commit any Capital Offense	*Digest*, tit. IV, ch. I, § 1, ¶ 9, at 538	1828 Act. § 38 (as amended by the 1840 Act § 3). The alternate penalties available were (a) being whipped thirty-nine stripes and standing for one hour with one's ears nailed to posts, or (b) having one's hand burnt with a heated iron in open court.

Crime	Digest Citation	Statutory Citation
Accessory to Attempt to Commit any Capital Offense	*Digest*, tit. IV, ch. I, § 1, ¶ 9, at 538	1828 Act. § 38 (as amended by the 1840 Act § 3). The alternate penalties available were (a) being whipped thirty-nine stripes and standing for one hour with one's ears nailed to posts, or (b) having one's hand burnt with a heated iron in open court.

Thus, at the time that Florida's first constitution was ratified, a jury's verdict of guilt of a capital crime meant that a death sentence—or in limited circumstances a lesser penalty—was mandatory. A jury's verdict of death was a necessary, and usually a sufficient, condition of imposition of capital punishment. This was the functional equivalent of jury sentencing for capital offenses, at least for purposes of state constitutional doctrine.

The nexus between the jury's verdict of guilt and its determination of sentence was recognized by the Florida legislature in 1868, when it enacted a statute providing that "no person whose opinions are such as to preclude him from finding any defendant guilty of an offence punishable with death shall be compelled *or allowed* to serve as a juror on the trial of such an offence."[156] The Florida Supreme Court applied this statute in *Metzgar v. State*, holding that it was proper to exclude from the jury in capital cases any person who, "from scruples of conscience . . . or some reason other than that of a the want of sufficient proof," would refuse to find a verdict of guilty.[157]

Indeed, the fact that mandatory capital punishment was a jury matter led to the demise of mandatory capital punishment systems in the United States. Mandatory sentencing obviously meant that the jury could avoid the death penalty only by acquitting the defendant or finding him or her guilty of a lesser offense. This threat of jury nullification encouraged the states to replace their mandatory death penalties with discretionary capital punishment laws. Some twenty-four jurisdictions, including Florida, moved from mandatory to discretionary capital sentencing between the end of the Civil War and the turn of the century.[158]

Capital punishment in Florida became discretionary during the 1870s—apparently in 1872. By 1884, the Florida Supreme Court was able to

156. The statute is quoted in Metzgar v. State, 18 Fla. 481, 1881 WL 3317, at *4 (1881) (emphasis added)

157. *Id.*

158. *See* Woodson v. North Carolina, 428 U.S. 280, 291-92 (1976).

state that "the law is positive. If a majority of the jurors recommend to mercy, by whatever motives they may be actuated (and these motives are not circumscribed) the court is bound to heed their verdict and pronounce sentence accordingly."[159] This remained the law of Florida until *Furman v. Georgia* invalidated every jurisdiction's capital statute, including Florida's.

B. 1923-1962: The Advent of the Age of the Electric Chair, of Executions "Without a Hitch" (Except for the Lynchings), and Early Legal Challenges to Capital Punishment

People who wish to commit murder better not do it in Florida, because we might have a problem with our electric chair.

Florida Attorney General Bob Butterworth, following the March 25, 1997 fiery botched execution of Pedro Medina.

If you really want the least painful, most accurate method, it would be the guillotine.

Rep. Victor Christ, Chair, Florida House Justice Council, the next day.

The only electrical appliance older than the electric chair is the lightbulb.[160] Indeed, electrocution has a strange history. In 1745, just after the invention of the leyden jar, the Dutchman Pieter van Musschenbroek tried passing a current through himself: "I thought I was done for . . . I would not take another for the entire kingdom of France." The first official electrocution (or "electronasia" or "dynamort," as it was almost called) had to wait until 1890, when William Kemmler was executed in Albany, New York. His fate was decided by a state commission which had been asked to apply science to death. The blood shed by the guillotine did not accord with the temperament of the American people, it said, and was persuaded to recommend electricity as the most humane method.

How this was done puts two of the greatest engineers of the nineteenth century into an interesting historical light. Thomas Edison had introduced electricity in 1882, using direct current (DC) to illuminate Wall Street.

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159. Newton v. State, 21 Fla. 53, 101 (1884); *see also* Garner v. State, 9 So. 835, 847(Fla. 1891).
160. *See* STEPHEN THAYER, THE WEATHERMAN 334 (1995).

However, the voltage was too low to travel more than a mile from the power station. Soon, George Westinghouse inaugurated alternating current (AC), which was transmitted at higher voltages and went further. Immediately, the "battle of the currents" began, a battle won, of course, by AC. Edison's main card was that AC was more dangerous than DC. But how was he to persuade the public? Although he himself opposed capital punishment, the search for a scientific method of execution gave him an irresistible opportunity. If AC was used to kill, who would allow it into their homes? He wrote to the Death Commission, pointing out the lethal potential of the Westinghouse system. Public demonstrations on dogs, funded by Edison, showed how true this was, and his lobbyists enthusiastically pressed for the electric chair to be powered by AC, "executioner's current."

Westinghouse was furious. He funded Kemmler's appeal and fought his execution all the way to the United States Supreme Court.[161] The Court, though, felt that electrocution was "a step forward . . . based on grounds of mercy and humanity."[162] In spite of Westinghouse's last-minute attempts to obtain an injunction to prevent the dynamos from being used, the execution went ahead. Edison himself showed how to wire up a pair of generators to ensure that a lethal voltage was available.

The experiment was a disaster, not least of all for William Kemmler. The current was passed for seventeen seconds—but Kemmler started breathing again. Horrified, the executioners used a second jolt, and he died, literally roasted to death. There were dark claims that Westinghouse engineers had sabotaged the equipment to ensure that the job was botched. So revolting was the sight that the press demanded that electrocutions be banned.[163]

Edison, though, was not discouraged. He used his knowledge of physics to recommend that the current be passed into jars of salty water in which the condemned man's hands dangled. This, too, failed. In one case, a young man stood up after electrocution, only to be reprieved for a week until the equipment was improved. Today, as more and more people are legally killed, the battle against electrocution has been rejoined. Deborah Denno, a law

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161. *See In re* Kemmler, 136 U.S. 436 (1890). The Kemmler case did not decide whether electrocution violated the Eighth Amendment's prohibition against "cruel and unusual" punishments. The *Kemmler* Court held that the Eighth Amendment did not apply to the states through the Fourteenth Amendment. The Court did not incorporate the Eighth Amendment into the Fourteenth and apply the Eighth to the States until 1962. *See generally id.*

In 1999, the Court, for the first time, granted certiorari to consider whether the electric chair–Florida's electric chair, in fact–violates the Eighth Amendment. *See* Bryan v. Moore, No. 99-6723 (U.S. Oct. 26, 1999) (order granting certiorari).

162. *See In re* Kemmler, 136 U.S. 436 (1890).

163. *See* Deborah Denno, *Getting to Death: Are Executions Constitutional?*, 82 IOWA L. REV. 319, 327 (1997).

professor at Fordham University, is an expert on this history and argues that electrocution is a cruel and unusual punishment that should be banned.[164]

"It was 1923, just eight years before Hollywood made 'Frankenstein,' about the use of giant blasts of electricity to jolt life from the dead, that the state of Florida began to electrocute people who had been tried and sentenced to death."[165] Thirty-three years after New York botched the electrocution of Mr. Kemmler, the electric chair was first presented in Florida as a "humane" alternative to hanging as a method of execution.[166] During the 1923 session of the Florida legislature, a bill advocating the use of the electric chair was supported by the Florida Federation of Women's Clubs, and it was endorsed by the Florida sheriffs at their annual convention. The bill passed the legislature, and as a result electrocution was substituted for hanging as the method of capital punishment in Florida for all executions occurring after January 1, 1924.[167]

The first five executions were all of African-American men, and so were five of the next six. For nearly two decades county sheriffs acted as executioners, until a 1941 law created the position of executioner, for which compensation was available up to $300 per electrocution. The executioners were hooded white men.

The Florida capital sentencing statute allowed juries uncontrolled discretion to impose death or permit mercy.[168] Under this so-called "mercy

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164. *See id.* at 327.

165. Dudley Clendinen, *The Long Search For a Civilized Way to Kill*, N.Y. TIMES, Nov. 7, 1999, at A14.

166. For an interesting discussion of the competition between the Westinghouse Company and General Electric Company and the relative merits of alternating current and direct current, see DAVID NYE, ELECTRIFYING AMERICA 196 (1990).

167. The new law provided:

> On and after January 1st A.D. 1924, death by hanging as a means of punishment for crime in Florida is hereby abolished and electrocution, or death by electricity substituted therefor. Punishment of death shall in all cases be inflicted by causing to pass through the body of the convict a current of electricity of sufficient intensity to cause immediate death, and the application of such current must be continued until such convict is dead, and the sentence of death, at the time directed by the warrant, be executed within the walls of permanent death chamber, which the Commissioners of State Institutions are hereby authorized and required to provide at the State Prison Farm or such other place in the state of Florida, as such Commissioners of State Institutions, shall establish. . . .

1923 FLA. LAWS ch. 9169, § 1

168. The version of the statute in existence at the time of the *Furman* decision provided that:

> A defendant found guilty by a jury of an offense punishable by death shall be sentenced to death unless the verdict includes a recommendation to mercy by a majority of the jury. When the verdict includes a recommendation to mercy by a majority of the jury, the court shall sentence the defendant to life imprisonment. A defendant found guilty by the court of an offense punishable by death on a plea of guilty or when a jury is waived shall be sentenced by the court to death or life

statute" all defendants convicted of capital offenses were to be sentenced to death unless the jury recommended mercy. A jury recommendation of mercy was binding on the trial court. The statute made no attempt to structure or guide the jury's process of deciding whether or not to recommend mercy; the jury could give or withhold their recommendation of mercy for any reason. The Florida Supreme Court interpreted the "majority" language of the statute to mean that at least seven members of the jury were required to vote for mercy.[169] At least one man, an African-American man from Columbia County named E.C. Daniels, died in the electric chair in 1959 because his jury deadlocked at six votes to six on a mercy recommendation.[170]

While the Florida Supreme Court heard appeals as a matter of right from judgments imposing the death penalty,[171] capital cases did not receive automatic review by any appellate court; and appeals were restricted to challenges to the conviction rather than to the death sentence.[172] There was no provision for appellate review of the sentencing decision.[173] The Florida Supreme Court did not hear appeals for mitigation of the sentence, reasoning that that court was "not a proper forum in which to seek a mercy commutation."[174]

The capital punishment procedure created by the 1923 statute was fairly straightforward. Following conviction of a capital crime without a jury recommendation of mercy, the circuit court clerk prepared a certified copy of the record and sent it to the county sheriff, who then forwarded it to the governor.[175] When the governor was assured that all was in order, he signed a death warrant setting the execution date for a specified period of time, usually a week.[176] As soon as practicable following the signing of the warrant, and no later than five days prior to the week of the execution, the condemned was delivered to the state prison system, where he would be held in a special death cell next to the death chamber. The law provided that "the sheriff of the

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imprisonment.

FLA. STAT. ANN. § 921.141(West 1971).

169. *See* Southworth v. State, 125 So. 345, 349 (Fla. 1929).

170. *See* Ken Driggs, *A Current of Electricity Sufficient in Intensity to Cause Immediate Death: A Pre-Furman History of Florida's Electric Chair*, 22 STETSON L. REV. 1169, 1182 (1993) (citing Governor's Death Warrant Files; *Two Negroes Executed at State Prison*, FLA. TIMES-UNION (Jacksonville), Aug. 29, 1959, at 20). By contrast, under current practice a jury vote of 6-6 is treated as a recommendation of life imprisonment. *See* Patten v. State, 467 So. 2d 975, 980 (Fla. 1985); Rose v. State, 425 So. 2d 521, 525 (Fla. 1982).

171. *See* Joseph A. Boyd Jr. & James J. Logue, *Developments in the Application of Florida's Capital Felony Sentencing Law*, 34 U. MIAMI L. REV. 441, 444 n.16 (1980).

172. *See* Davis v. State, 123 So. 2d 703, 707 (Fla. 1960).

173. *See* Boyd & Logue, *supra* note 171.

174. Johnson v. State, 61 So. 2d 179, 179 (Fla. 1952).

175. *See* Driggs, *supra* note 170, at 1180.

176. *See id.* at 1180-81 (citing 1923 FLA. LAWS ch. 9169, § 1).

county wherein the conviction was had shall be ex-officio deputy executioner of such sentence of death and shall be present at the execution unless he be prevented by sickness or other disability."[177] As witnesses, the statute required the presence of "a jury of twelve respectable citizens."[178] However, the statute limited the ability of the public to view executions by providing that "all other persons other than such jury, the counsel for the criminal, such ministers of the gospel as the criminal shall desire, officers of the prison, deputies, and guards shall be excluded during the execution."[179] For almost twenty years from the time the statute was passed, it was customary for the electric chair to be activated by the local sheriff or by a deputy. Following the execution, the statute required that the body be turned over to the dead person's family, but if the body remained unclaimed it would be "delivered to such physicians as may request the same for dissection, or shall be buried or disposed of as convicts dying in the State Prison are buried or disposed of."[180] The superintendent of the state prison certified that the execution had taken place by returning the death warrant to the governor. Shortly after the enactment of the new statute, the Florida Board of Institutions oversaw construction of the electric chair at the Florida State Farm near Raiford. In August, 1924, the state engineer reported to the Board that the electric chair was operational. Within two months, the device would be put to use.

The first person to die in Florida's new electric chair was an African-American man from Jacksonville named Frank Johnson, who was also known as Luther Dorrill. In December, 1923, Johnson shot and killed a white Jacksonville railroad engineer during the course of a burglary. Both Johnson and his companion in the burglary were convicted of first degree murder, but the jury recommended mercy for the partner, who had apparently not been armed. Not having received a mercy recommendation, Johnson was electrocuted on October 7, 1924. Following the execution, the prison superintendent wrote Governor Cary Hardee that the "execution was carried out yesterday without a hitch," and that there had been "a splendid representation of citizens as witnesses."[181]

Despite the official endorsement of the electric chair, the 1923 statute apparently did not cut down the gallows entirely. At least one, and perhaps two, state-sanctioned hangings occurred in Florida after 1924. Charles Browne was sentenced to death after fatally shooting a man during a 1923

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177. *See id.* at 1181 (citing 1923 FLA. LAWS ch. 9169, § 3)

178. *See id.*

179. *See id.*

180. *See id.*

181. *See* Driggs, *supra* note 170, at 1183. (citing Letter from J.S. Blitch, Florida State Farm Superintendent, to Cary A. Hardee, Governor of Florida (Oct. 8, 1924) (contained in the Governor's Death Warrant Files, Frank Johnson)).

robbery.[182] The Florida Supreme Court reversed Browne's conviction,[183] but the high court affirmed the death sentence that the jury handed down following a second trial.[184] After the sentencing judge ordered him to die in the electric chair, Browne challenged the manner of his execution.[185] The Florida Supreme Court then remanded Browne's case to the trial court, holding that "[t]he sentence should have been death by hanging as provided by the statutes as of October, 1923, when the crime was committed, and not by electrocution under the statute that became effective January 1, 1924."[186] Browne was hanged in Deland in April, 1927.[187] The final official hanging in Florida apparently took place on August 17, 1929, when James Alderman was executed in Fort Lauderdale following a federal conviction for the murder of three people aboard a Coast Guard ship.[188]

Although state-sanctioned hangings were abolished by the 1923 statute, this did not stop private persons from continuing the practice by means of self-help. According to statistics compiled by the National Association for the Advancement of Colored People, 178 people were lynched in Florida between 1889 and 1918. In the first two decades of the twentieth century, Florida's lynching rate was higher than that of any other state, and it was twice as high as the rates in Georgia, Mississippi, and Louisiana. While lynching and other modes of private killings by vigilantes and mobs continued between the 1920s and 1940s,[189] not a single person was convicted of lynching in Florida between 1900 and 1934.[190]

It was not until the *Scottsboro* case in 1932 that the Supreme Court recognized a constitutional right to court-appointed counsel in capital trials in state court.[191] This state of affairs possessed the virtue of consistency. Since, pre-*Scottsboro* there was no right to court-appointed counsel, there was no need for a procedural mechanism, like habeas, to enforce that nonexistent right to counsel. No right, so no remedy.

When the Supreme Court decided *Scottsboro*, it looked to the history of the right to counsel and court-appointed counsel from the English common

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182. *See id.* at 1188.

183. *See* Browne v. State, 102 So. 546, 547 (Fla. 1924).

184. *See* Browne v. State, 109 So. 811 (Fla. 1926).

185. *See* Driggs, *supra* note 170, at 1188.

186. *Ex parte* Browne, 111 So. 518, 519 (Fla. 1927).

187. *See* Driggs, *supra* note 170, at 1188 (citing *Browne Dies upon Gallows at Deland*, FLA. TIMES-UNION (Jacksonville), Apr. 19, 1927, at 12).

188. Radelet & Pierce, *supra* note 152, at 3 (citing N.Y. TIMES, Aug. 18, 1929, at 10).

189. *See id.* at 5.

190. *See* JAMES MCGOVERN, ANATOMY OF A LYNCHING: THE KILLING OF CLAUDE NEAL 12 (1982)).

191. *See* Powell v. Alabama, 287 U.S. 45, 60 (1932).

law to 1932.[192] In 1836, England granted felony defendants the right to counsel in all matters.[193] Before that, however, England granted the right only to those accused of misdemeanors. This anomaly was defended by Lord Coke in writings prescient of the *Scottsboro* judge's rationalization used to deny the nine young men a lawyer—that in felonies, the court itself was counsel for the defendant.[194] While the English rule was still in practice, most colonies in America recognized the defendant's right to counsel in all criminal matters.[195] And even those that did not expressly recognize the right in their charters or constitutions, or both, either implicitly recognized the right as consistent with the English Declaration of Rights or expressly recognized it by statute.[196] Yet in the colonies, except New Jersey and Connecticut, the right to counsel meant only that criminal defendants had the right to hire or retain lawyers. When the First Congress convened, James Madison proposed that one amendment that should be added to the Constitution was the guarantee that "in all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defence."[197] Yet, there was little debate about this proposed amendment in the House and in the Senate,[198] which raises the inference that the right to counsel expressed in the Sixth Amendment grants the very same right to retain an attorney in criminal prosecutions that was recognized by the majority of colonies in their own charters and constitutions.[199] Thus, when the Bill of Rights was ratified, United States citizens who could not retain or hire a lawyer had no real right to counsel unless they lived in New Jersey or Connecticut where counsel was granted even to those who could not afford it.

The United States Supreme Court did not limit the actions of the states in criminal procedural matters for the next eighty years after the Constitution was ratified. Even after the Fourteenth Amendment was added to the Constitution in 1868, the Court showed in a number of decisions that it would not intervene in state criminal procedure matters for the next sixty years.

One such decision seemed to prevent the Court ever from reasoning that the Sixth Amendment's guarantee of the right to counsel applied to the states. In *Hurtado v. California*, the Court held that the right to indictment before a grand jury, although expressly contained in the Fifth Amendment, did not

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192. *See generally id.* at 60-66.

193. *See id.* at 60.

194. *See id.* at 61.

195. *See id.*

196. *See id.* at 65.

197. Note, *The Right to Counsel Clause*, 26 AM. CRIM. L. REV. 1599, 1604 (1989), *quoting* B. SCHWARTZ, THE ROOTS OF THE BILL OF RIGHTS 1027 n.41 (1980).

198. *See id.*

199. *See id.*

apply to the states.[200] The Court reasoned that although the Fifth and Fourteenth Amendments contain a due process clause, only the Fifth Amendment expressly grants the right to indictment before a grand jury; therefore, since due process itself does not require the grand jury procedure, the Fourteenth Amendment could not be read to require that states recognize the right of their citizens to receive a grand jury indictment.[201]

Such reasoning clearly would prove an obstacle to the argument that indigent criminal defendants had a cognizable right under state and federal law to the assistance of counsel. The Fourteenth Amendment only provided for due process. Hence, the argument would go, since due process itself does not require that counsel be provided to criminal defendants, and since the Fourteenth Amendment contains no express provision for the right to counsel, defendants indicted under color of state law would not even be entitled to counsel, let alone have it provided for them.

Then came *Scottsboro*.[202] Nine young black men (Charlie Weems, Ozie Powell, Clarence Norris, Olen Montgomery, Willie Roberson, Haywood Patterson, Andy and Roy Wright, and Eugene Williams, ages thirteen to twenty-one), were arrested on March 3, 1931, for allegedly raping two white women (Ruby Bates and Victoria Price). Accused and accusers had all been riding the rails.

Professor Frances Allen describes the case as starting in a freight train "slowly moving across the countryside of northern Alabama."

> It was a time of economic distress and social unrest. As if in response to some common impulse, thousands of young people—no one knows how many—left their homes and communities to drift across the land by train and on foot, presumably in search of work, but, in reality, often without any defined or definable objective. In a gondola car of the train rode two groups of youths, one composed of Negroes, the other whites. Among the latter were two white girls. What occurred has ever since been the subject of sharp controversy. It is at least established that a dispute broke out between the Negroes and the whites. There was a fight and all but one of the white boys were thrown off the slow-moving train. Word was sent ahead, and when the freight train approached the village of Scottsboro, the Negroes were met by the sheriff and a posse. The charge was rape of the white girls. Fearing the violence of the community, the sheriff moved the defendants to the neighboring town of Gadsden. The militia was called to Scottsboro

200. *See* Hurtado v. California, 110 U.S. 516, 535 (1884).
201. *See id.* at 534-35.
202. *See Powell*, 287 U.S. at 45.

> to maintain order. A few days later the defendants were tried in three separate proceedings. Each of the three trials was completed in the space of a single day. All the defendants were convicted of rape, and the juries imposed the sentence of death on each.[203]

The *Scottsboro* defendants appealed to the United States Supreme Court, arguing that they had received ineffective assistance of counsel. They were put on trial only six days after their indictment. And for all practical purposes they had no lawyer during their capital trial. The Alabama trial judge had "appointed all members of the bar" for purposes of arraigning the defendants, and he expected them to represent the Scottsboro Boys—as they were called—at the trial if no one else turned up to represent the accused. What this meant, of course, was that no lawyer had responsibility for the defense.

The United States Supreme Court opinion voiding the convictions and sentences and ordering a retrial was written by Justice George Sutherland, one of the "Four Horsemen" on the Court who were anathema to President Roosevelt's New Deal. For the Court he explained why the right to counsel was a fundamental constitutional element of "due process of law":

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.[204]

The 1932 *Scottsboro* decision did not require court-appointed counsel in *all* felony trials in state court. *Scottsboro* was a capital case, and although a fair reading of the Court's opinion limited it to trials where death was a possible punishment, it wasn't clear that *Scottsboro* required counsel in all

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203. Francis Allen, *The Supreme Court and State Criminal Justice*, 4 WAYNE L. REV. 191, 191 (1958).

204. *See Powell*, 287 U.S. at 68-69.

capital cases. The Court expressly limited its holding to cases involving capital defendants who could not afford to retain counsel and who could not be expected to carry out their own defenses:

> All that is necessary now to decide, as we do decide, is that in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him . . .[205]

The uniquely hideous facts of the *Scottsboro* trial had clearly made an impression upon Justice Sutherland: the farcical appointment of "all members of the bar" as counsel and the summary trials. "The defendants [were] young, ignorant, illiterate, surrounded by hostile sentiment, haled back and forth under guard of soldiers, charged with an atrocious crime regarded with especial horror in the community where they were to be tried," and were thus put in jail.[206] Take away any one or more of these special conditions, and it became unclear whether the Supreme Court would still have regarded counsel as "fundamental" to "due process of law."

In 1942, the Supreme Court finally resolved the issue left open since *Scottsboro* and held that the right of counsel did not exist in all felony trials.[207] Smith Betts, a farm hand in rural Carroll County, Maryland, was charged with robbery, a non-capital offense.[208] Because he lacked the funds to hire a defense lawyer, Betts asked the court to appoint one. The Maryland trial judge refused, explaining to Mr. Betts that in Carroll County attorneys were appointed only in capital cases—rape and murder. At Betts' trial, the main dispute involved eyewitness identifications. Mr. Betts did the best he could acting as his own lawyer, but the judge who presided at the trial (there was no jury) disbelieved Betts, found him guilty, and sentenced him to eight years in prison.[209]

The Supreme Court decided in Smith Betts' case that there was no generalized right to counsel in noncapital trials. If "special circumstances" were present, however, then there *was* a right to counsel. Circumstances deemed "special" by the Court included "the age and education of the defendant, the conduct of the court or prosecuting officials, and the

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205. *Id.* at 71.
206. *Id.* at 57-58.
207. *See* Betts v. Brady, 316 U.S. 456 (1942).
208. *See id.*
209. *See id.* at 457.

complicated nature of the offense charged, and the possible defenses thereto."[210] And, of course, the "gravity of the crime."[211]

These elements seemed to have been lifted, somewhat, from the facts of *Scottsboro*. The Court's behavior seemed an aberration—appointing all members of the bar to represent the defendants.[212] Although the charges and defenses thereto did not seem complicated, the gravity of the crime, rape, was substantial, for at that time it was a capital offense.[213] Yet the Court in *Scottsboro* had been explicit about the limit of its holding; it applied only to capital defendants who could not provide for their own defenses. The Court did not delineate the elements of the circumstances in its holding sufficiently to make the *Betts* decision its natural extension. Nor could it, for the *Powell* Court was explicit that its holding only applied to capital offenses.[214]

Betts threw the continued validity of *Scottsboro* into doubt, by raising the question; if a capital case did not present "special circumstances," then did the *Scottsboro* decision apply (requiring court-appointed counsel) or would *Betts* apply (not requiring counsel, because no "special circumstances" were present, even though it's a capital case)? In other words, did *Scottsboro* establish a per se rule of right to counsel in capital trials where the defendants could not provide for their own defenses? Or was the *Scottsboro* rule limited to cases with facts as howlingly unfair as *Scottsboro*? Furthermore, did the *Betts* "special circumstances" requirement apply equally across the board, to capital and noncapital cases alike?

In the years following *Betts*, the Court always found that capital trials did present "special circumstances." As a practical matter, the fact that the trial was *capital* represented a per se "special circumstance" requiring the appointment of counsel. In 1945, two capital cases reached the Supreme Court raising "special circumstances" issues, and in both cases the Court, 7-2, held that such circumstances were present.[215] In 1961, the justices made clear that they were drawing a line between capital and non-capital cases: "When one pleads to a capital charge without benefit of counsel, we do not stop to determine whether prejudice resulted."[216] The *Scottsboro* decision lived.

The bright-line distinction between capital and non-capital cases, however, was artificial. In case after "special circumstances" case, the justices struggled to fashion a coherent definition of "special circumstances." This effort was not a happy one, as Justice Hugo Black, who dissented in

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210. ANTHONY LEWIS, GIDEON'S TRUMPET 113 (1964).
211. *Id.*
212. *See Powell*, 287 U.S. at 49.
213. *See id.* at 50.
214. *See id.* at 71.
215. *See* Williams v. Kaiser, 323 U.S. 471 (1945); Tomkins v. Missouri, 323 U.S. 485 (1945).
216. Hamilton v. Alabama; 368 U.S. 52, 55 (1961).

Betts, seldom lost an opportunity to remind his brethren. By the early 1960s, the justices' frustration with *Betts*' "special circumstances" rule had increased to the point where overruling *Betts* became a distinct possibility. All the Court needed was the right case to use as a vehicle to reconsider *Betts*.

Enter Clarence Earl Gideon, a small time Florida criminal who had been convicted of breaking into a Pensacola pool hall and stealing the money from the pool hall's coin machine. At his felony trial, Gideon had asked for a lawyer. Because Gideon's was not a capital case, the trial judge refused. The Florida Supreme Court affirmed.

At this point Clarence Gideon's case becomes the stuff of legends, best told by Anthony Lewis' book *Gideon's Trumpet*.[217] Gideon wrote and filed a petition in the U.S. Supreme Court asking the justices to throw out his felony conviction because he had been denied the right to counsel at trial. Gideon was wrong, of course; under *Betts* he *wasn't* entitled to counsel unless he could show "special circumstances." He probably couldn't. Gideon wasn't regarded as illiterate, and, in fact, he didn't do so bad as his own trial lawyer, especially since the presiding judge did the best he could to help Gideon make his case of innocence. But the very apparent *absence* of special circumstances made Gideon's case a good vehicle with which the justices could revisit the *Betts* rule itself. Here was a case lacking in special circumstances. If *Betts* remains the law, then Gideon loses; for Gideon to win, *Betts* must be overruled.

The Court invited Abe Fortas, of the D.C. superfirm Arnold, Fortas and Porter, to serve as Gideon's lawyer. The justices told Fortas to address the question whether *Betts v. Brady* should be overruled. It was an invitation to Fortas (and his partner Abe Krash and his summer associate John Hart Ely) to take part in constitutional history.

In autumn 1962, Fortas' hand was strengthened significantly by the publication of a definitive article written by law professor Yale Kamisar, published in the *Chicago Law Review*. The article would appear too late to use in Fortas' brief, but Kamisar, knowing about the Gideon case, telephoned Krash in September and offered to send him a copy of the manuscript. The offer was gladly accepted.[218]

Kamisar's article filled an important empirical hole in Gideon's argument: What would be the practical, real world consequences of overruling *Betts*? Rhetoric about "constitutional revolutions" notwithstanding, the U.S. Supreme Court has never been packed with revolutionaries. Only a few years earlier, in *Brown v. Board of Education*, the Court had sparked a social

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217. LEWIS, *supra* note 210.

218. *See id.* at 132.

upheaval still very visible in 1962, when the Court granted review in Gideon's case.[219] The justices might well have felt squeamish about doing it again.

Kamisar's article demonstrated that the consequences of overruling *Betts* would not be momentous. Kamisar showed that thirty-seven states already formally provided court-appointed counsel as a matter of right in all felony cases. Of the remaining thirteen that didn't, in eight states a rule of court-appointed counsel existed de facto, notwithstanding the absence of statute or court rule. That left only five states that would have been affected by overruling *Betts*.

In its landmark ruling in *Gideon v. Wainwright*, the Supreme Court scrapped *Betts* altogether, including the capital/noncapital distinction that had proved so vexing.[220] Justice Hugo Black, the *Betts* dissenter, wrote the Court's opinion in *Gideon*, deciding that Clarence Earl Gideon did indeed have a Sixth Amendment right to court-appointed counsel in his noncapital trial for breaking into and robbing the coin machine in a Pensacola pool hall.[221] Henceforth, all felony prosecutions in state court required the appointment of counsel. Clarence Gideon's case did not affect the *Scottsboro* rule that counsel must *always* be appointed in capital trials; Gideon's case simply extended *Scottsboro's* per se rule to include non-capital felony trials.

The right to counsel recognized in *Scottsboro* was not the only federal constitutional right the Supreme Court extended to both state and federal criminal trials. *Scottsboro* was emblematic of what some have termed the Court's "revolution" in constitutional criminal procedure—the application of the procedural rights enumerated in the Constitution to state criminal trials. Meanwhile, as the range of available constitutional criminal procedure rights expanded, so did the availability of *habeas* to provide a federal judicial forum for vindication of those rights. According to a treatise on *habeas corpus*,[222] the Court's decision in *Brown v. Allen* reaffirmed the cognizability in *habeas* of all federal constitutional claims presented by state prisoners, including of course, the constitutional right to court-appointed counsel in capital cases recognized in *Scottsboro*.[223] As the Court recognized new rights, *habeas* kept pace and remained as a mechanism to vindicate those rights in federal court.

Many scholarly treatments of *habeas corpus* in the twentieth century begin with the infamous Leo Frank case. Leo Frank, a New York Jew, had gone to Georgia to manage a pencil factory, and had been indicted for the rape and murder of a fourteen-year-old child. The brutal nature of the

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219. *See* Brown v. Board of Education, 347 U.S. 483 (1954).

220. *See* Gideon v. Wainwright, 372 U.S. 335 (1963).

221. *See id.* at 342-45.

222. *See generally* JAMES LIEBMAN & RANDY HERTZ, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 2.4d (1994).

223. *See* Brown v. Allen, 344 U.S. 443 (1953).

killing—along with his religion and northern origin—aroused violent local prejudices.[224] Justice Oliver Wendell Holmes described the atmosphere of terror and violence that permeated the courtroom and jury deliberations:

> The trial began on July 28, 1913, at Atlanta, and was carried on in a court packed with spectators and surrounded by a crowd outside, all strongly hostile to [Frank]. On Saturday, August 23, this hostility was sufficient to lead the judge to confer in the presence of the jury with the Chief of Police in Atlanta and the Colonel of the Fifth Georgia Regiment stationed in the city, both of whom were known to the jury. On the same day, the evidence seemingly having been closed, the public press, apprehending danger, united in a request to the Court that the proceedings should not continue on that evening. Thereupon the Court adjourned until Monday morning. On that morning when the Solicitor General entered the court he was greeted with applause, stamping of feet and clapping of hands, and the judge before beginning his charge had a private conversation with [Frank's] counsel in which he expressed the opinion that there would be "probable danger of violence" if there should be an acquittal or disagreement [i.e., a hung jury], and that it would be safer for not only [Frank] but his counsel to be absent from Court when the verdict was brought in. At the judge's request they agreed that [Frank] and they should be absent, and they kept their word. When the verdict was rendered, and before more than one of the jurymen had been polled there was such a roar of applause that the polling could not go on till order was restored. The noise outside was such that it was difficult for the judge to hear the answers of the jurors although he was only ten feet from them.[225]

The jury convicted Leo Frank, of course, and the trial judge sentenced him to death. When the Georgia Supreme Court affirmed, Frank filed a petition for writ of habeas corpus in federal court. Ultimately, a majority of the United States Supreme Court refused to second-guess the Georgia state courts.

Holmes dissented in a blunt opinion:

> Mob law does not become due process of law by securing the assent of a terrorized jury. We are not speaking of mere disorder, or mere irregularities in procedure, but of a case where the processes of justice are actually subverted. . . . Any judge who has

224. *See* Frank v. Mangum, 237 U.S. 309 (1915).

225. *Id.* at 345-46.

> sat with juries [as Holmes had] knows that in spite of forms they are extremely likely to be impregnated by the environing atmosphere.[226]

Leo Frank almost certainly was innocent of the rape and killing for which he was convicted and, in the end, lynched.[227]

In 1923, however, in another case involving capital juries intimidated by the threat of mob violence, the Court reviewed the convictions of five African-Americans. African-Americans had been systematically excluded from both grand and petit jury panels. The trial, which had lasted about forty-five minutes, was a mask for lynch law, with all major players swept along by an "irresistible wave of public passion."[228] Justice Holmes, writing for the Court, observed, "No juryman could have voted for an acquittal and continued to live in [the county]."[229] The Court decided that federal relief was available:

> [I]f the case is that the whole proceeding is a mask—that counsel, jury, and judge were swept to the fatal end by an irresistible wave of public passion, and that the State Courts failed to correct the wrong, neither perfection in the machinery for correction nor the possibility that the trial court and counsel saw no other way of avoiding an immediate outbreak of the mob can prevent this Court from securing to the [defendants] their constitutional rights.[230]

The year *Gideon v. Wainwright* was decided (1963), also marked the high-water mark of the Warren Court's expansion of habeas.[231] In 1966, however, Congress stepped in and scaled back the availability of habeas to state prisoners. It limited the discretion of federal judges to entertain habeas petitions "only on the ground that [the petitioner] is in custody in violation of the Constitution, laws, or treaties of the United States."[232] Congress also created a presumption that any issue of fact determined by a state court after a hearing on the merits is correct, and required the petitioner to establish by convincing evidence that the state court's ruling was erroneous. The post-Warren Court contracted the scope of habeas further, as did Congress in the 1990s.[233]

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226. *Id.* at 347, 349.

227. Wendell Rawls, Jr., *After 69 Years of Silence, Lynching Victim is Cleared*, N.Y. TIMES, Mar. 8, 1982, at A12.

228. Moore v. Dempsey, 261 U.S. 86, 89 (1923).

229. *Id.* at 89.

230. *Id.* at 91.

231. *See* Fay v. Nola, 372 U.S. 391 (1963).

232. 28 U.S.C. § 2254 (1994).

233. LIEBMAN & HERTZ, *supra* note 222, § 2.4d.

Into this history comes the history of capital punishment. For nearly a century and a half, few seriously questioned the constitutionality of capital punishment. But on August 27, 1927 Massachusetts executed Nicola Sacco and Bartholomew Vanzetti, two Italian immigrants, who were also considered political radicals. Caught up in the Palmer Raids and the first Red Scare following World War I, Sacco and Vanzetti were likely innocent of the South Braintree robbery and murder for which they were executed (another man had confessed to the crimes). Sacco and Vanzetti lived on death row for six years, while their claims of innocence and prejudice by the trial judge worked their way through the courts. The final United States Supreme Court opinion, written by Justice Oliver Wendell Holmes, stated that in *habeas corpus* proceedings judicial prejudice is not a specific violation of the Constitution, and that absent such a constitutional violation the federal courts could not intervene in a state criminal trial.

The Sacco and Vanzetti execution caused some thinking Americans to wonder, not about the abstract wisdom of capital punishment, but rather about the way in which the penalty was applied. Capital punishment was becoming a civil rights issue. It thus perhaps is understandable that the two preeminent national civil rights organizations—the ACLU, founded in 1920, and the NAACP, founded in 1939, began taking a hard look at who was being executed and under what circumstances.

Burton Wolfe, in his fascinating history *Pileup on Death Row*, writes that the national protest demonstrations against the Sacco and Vanzetti executions led the Federal Department of Prisons, a division of the Department of Justice, to begin for the first time keeping track of executions in America.[234] Americans first got a realistic picture of death row demographics. The first six years of the record-keeping, 1930-1935, revealed that the South executed four times as many people as any of the three regions of the United States and that the South sentenced twice as many African-Americans to death as whites.

These government statistics provided quantitative and disinterested support for facts that any Southerner worth her salt knew all along. Capital punishment was predominately a Southern phenomenon and capital punishment in the South was disproportionately applied against African-American men—especially African-American men accused of raping white women.

The racial demographics of executing rapists led the Legal Defense Fund (LDF), in 1950, to take on the defense of African-American men accused of raping white women. Death wasn't the only issue on LDF's plate, of course. By the early 1950s LDF's legal challenges to the *Plessey v. Ferguson*

234. *See* BURTON WOLFE, PILEUP ON DEATH ROW 80 (1973).

"separate but equal" doctrine and segregated public schools was chugging along towards the landmark 1954 decision in *Brown v. Board of Education.* Under the leadership of LDF's Thurgood Marshall, the organization and its allies crafted a brilliant strategy of undermining *Plessey* before finishing it off.[235] Rather than waging a frontal attack on *Plessey*'s "separate but equal" doctrine, Thurgood Marshall brought a series of cases to the Supreme Court arguing, in various factual settings, that "separate" could *never* be "equal." These early cases prepared the justices to overrule *Plessey* when the frontal attack did arrive, in *Brown v. Board of Education.* The cases prepared the justices—psychologically and emotionally, as well as legally and doctrinally—to accept Marshall's coup de grace to *Plessey* in *Brown.* "Look," Marshall in effect said, "over the past few years we've been proving, in case after case, that in a wide variety of factual settings, 'separate' means 'unequal.' What we've been proving is that 'separate but equal' is a doctrine that isn't applied fairly. It just doesn't work. The court should reject it."

By the 1950s, the Florida legislature clarified portions of the capital punishment statute. In 1941, the legislature provided the Board of State Institutions with the authority to promulgate regulations that permitted representatives of the press to witness executions.[236] Additionally, the revisions to the capital punishment statute relieved the local sheriffs of their duty to perform executions. Instead, the legislature established that it was the responsibility of the first assistant engineer of the Florida State Prison "to execute and carry out the sentence of death by operating the switch or mechanism necessary to send the electric current through the body of the condemned person." In October of 1941 the first executions under the new regime took place. Four men were electrocuted within fifty-five minutes of each other, and a newspaper reporter observed that the men were put to death by an executioner who, for the first time in the state's history, wore a hood to conceal his identity.

The Florida legislature again refined the capital punishment statutory procedures in 1959. Until that time, condemned inmates typically remained in county jails until the governor signed a death warrant, at which point they were moved to the death house at Raiford to await execution. Although condemned prisoners were sometimes turned over to the state prison system earlier, there was no express statutory provision governing the procedure. A bill passed in 1959 required that "the convicted person shall be delivered by the sheriff of the county to the superintendent of the state prison to await the death warrant." The current process of capital punishment in Florida still substantially reflects this aspect of the execution procedure.

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235. *See generally* KLUGER, *supra* note 148.

236. *See* Driggs, *supra* note 170, at 1184 (citing 1941 Fla. Laws, ch. 20520 § 1).

Between 1924 and 1964, 197 men were executed in Florida, forty-three of these were for rape, while 154 prisoners were executed for murder. Since this is the first period for which reliable information and statistics are available, it is also the first period during which the racial characteristics of Florida's capital punishment system may be identified. For example, despite their minority status in the population (approximately 11%), African American men constituted 95.3% of those executed for rape between 1924 and 1964 and 76.7% of those executed for murder during the same period. Similar disparities existed with respect to those awarded executive clemency between 1924 and 1964. During this period, the state provided clemency to fifty-nine prisoners. Of these, 44.3% of the clemency awards were given to persons convicted of crimes against African-Americans, while only 15.2% were given to persons convicted of crimes against whites. Additionally, among African-American offenders who received clemency, 41.1% of the cases involved crimes with African-American victims while only 3.4% of them involved crimes with white victims. Subsequent studies have consistently confirmed the correlation between race and Florida's imposition of capital punishment.[237]

Concern about the racist application of Florida's capital punishment system manifested itself in various ways during the late 1950s and early 1960s. In several cases attorneys contended, unsuccessfully, that Florida's use of the death penalty was racially discriminatory in its application to African-American defendants charged with crimes against white persons.[238] Additionally, a commission established in 1963 to study the death penalty and to recommend its retention or abolition noted the evidence of racial discrimination.

As these concerns about Florida's capital punishment system grew during the late 1950s and early 1960s, the execution rate declined. Only two executions occurred in 1960, and both of the condemned were African-American men convicted of crimes against whites. Ralph Williams was executed for the rape of a seventeen-year-old white woman, and James Brooks was put to death for killing a white clerk while robbing a Western Union office. In 1961, Florida executed two white men. One, a decorated veteran of the Second World War, was electrocuted for the murder of a police officer during the robbery of a hotel in Miami Beach. The other, Robert Wesley Davis, was the last person that Florida put to death for rape. Florida executed five men in 1962. Three were black: Lee Jefferson, Johnnie Hill, and Samuel Johnson. The other two, Joe Smith and William Leach, were white men who

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237. *See* Radelet & Pierce, *supra* note 152 (compiling statistics and summarizing the results of the various studies).

238. *See, e.g.*, State v. Mayo, 69 So. 2d 307 (Fla. 1954); State v. Mayo, 87 So. 2d 501 (Fla. 1956); Thomas v. State, 92 So. 2d 621 (Fla. 1957); State *ex rel.* Thomas v. Culver, 253 F.2d 507 (5th Cir. 1958).

were put to death for murdering a cell mate in the Union County State Prison. Florida executed only one person in 1963, a white man named Charles H. Lee who had murdered his estranged wife and his father-in-law.

C. 1963-1972: The Road to Furman v. Georgia

> *According to Pär Lagerkvist, the role of the Pythia or priestess of the Oracle at Delphi was of incomparable grandeur and futility. This young maiden was periodically lashed to a tripod above a noisome abyss, where her god dwelt and from which nauseating odors rose and assaulted her. There, the god entered her body and soul, so that she thrashed madly and uttered inspired, incomprehensible cries. The cries were interpreted by the corps of professional priests of the Oracle, and their interpretations were, of course, for mere mortals the words of the god. The Pythia experienced incalculable ecstasy and degradation; she was viewed with utmost reverence and abhorrence; to her every utterance, enormous importance attached; but, from the practical point of view, what she said did not matter much.*
>
> *On its tripod atop the system of American criminal justice, the Supreme Court of the United States performs in remarkably Pythian fashion. Occasional ill-smelling cases are wafted up to it by the fortuities of litigation, evoking its inspired and spasmodic reaction. Neither the records nor the issues presented by these cases give the Court a comprehensive view—or even a reliably representative view—of the doings in the dark pit in which criminal suspects, police and the functionaries of the criminal courts wrestle with each other in the sightless ooze. It is not surprising, then, that in these cases the Court should be incapable of announcing judgments which respond coherently to the real problems of the pit. No matter. The significance of the Court's pronouncements—their power to shake the assembled faithful with awful tremors of exultation and loathing—does not depend upon their correspondence with reality. Once uttered, these pronouncements will be interpreted by arrays of lower appellate courts, trial judges, magistrates, commissioners and police officials. Their interpretation of the Pythia, for all practical purposes, will become the word of god.*[239]

239. Anthony Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785, 786 (1970).

If Thurgood Marshall was the grand architect of *Brown v. Board of Education*, Anthony Amsterdam[240] was the architect of *Brown*'s capital punishment counterpart, the 1972 decision in *Furman v. Georgia* outlawing capital punishment as then administered in America and clearing every death row in every state. As the pre-*Brown* cases set the stage for *Plessey*'s eventual overruling in *Brown*, so the pre-*Furman* cases set the stage for the *Furman* court's rejection of capital punishment as then applied.

Sometimes individual justices of the Supreme Court send signals to the legal world outside the Court—lawyers and lower court judges—indicating that, although a majority of the Court wasn't quite ready to hear and decide particular constitutional questions, the justices were interested in those issues and the attorneys should persevere and keep on asking the Court to decide those constitutional questions.[241] One such method of telegraphing this message is dissenting from the denial of petition for writ of certiorari (plenary review). In 1963, such a "dissent that telegraphed" galvanized the nascent legal campaign to outlaw capital punishment.

In an Alabama rape case, Justice Arthur Goldberg, along with Justices William O. Douglas and William Brennan signaled that the Court might be receptive to constitutional challenges to capital punishment for rape.[242] Six justices voted against hearing the Alabama rape case, but Goldberg's dissent suggested that in the future the Court might be receptive to considering whether, in light of the worldwide trend against the death penalty for rape, executing rapists violates the "evolving standards of decency that mark the progress of a maturing society."[243] Also, the three dissenters wrote that the questions of disproportionality and "unnecessary cruelty" of death for rapists deserved the Court's full consideration.

Herbert Haines, in his indispensable book, *Against Capital Punishment*, writes that the Goldberg dissent was an intentional signal to the lawyers considering using the courts to abolish capital punishment for rape.[244] That signal was received loud and clear at LDF and ACLU. Borrowing a page from Thurgood's playbook in *Brown v. Board of Education*, LDF capital litigators, now led by Jack Greenberg, reasoned that the Court was not likely to strike down capital punishment on constitutional grounds "in one judicial stroke." Thus, LDF "chose to attack the death penalty *indirectly*." They began working on a strategy that would attack the *process* by which convicted criminals were sentenced to die.

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240. *See generally* MELTSNER, *supra* note 83.
241. *See* MELLO, AGAINST THE DEATH PENALTY, *supra* note 87, at xii.
242. *See* Trop v. Dulles, 356 U.S. 86, 101 (1958).
243. *Id.* at 101.
244. *See* HERBERT HAINES, AGAINST CAPITAL PUNISHMENT (Oxford University Press ed., 1996).

There would be two parts to this strategy. One involved a concerted assault on racial discrimination in death sentencing and the other pertained to selected trial procedures in capital cases. The latter attack focused on three common features of capital trials at the time: (1) the exclusion of "death scrupled" jurors from sitting on capital juries, thus depriving capital defendants of the right to a jury composed of a "fair cross section of the community;" (2) the simultaneous determination by the jury of guilt and sentence in a single, unified trial; and (3) the absence of clear and objective standards to guide the jury's process of deciding who dies.

These challenges and the appeals they generated, proved to be a successful strategy for convincing courts to put executions on hold until the lower courts, and eventually the United States Supreme Court, had a chance to consider and decide the various constitutional issues LDF was asserting in individual capital cases all across the country. By the mid-1960s, Amsterdam and LDF had won a virtual moratorium on executions in the United States. If a death row prisoner had a lawyer to file the legal papers mass-produced by LDF—called "Last Aid" kits—the condemned prisoner was entitled to a stay of execution. Amsterdam explained the strategy to Wolfe:

> As papers came across my desk, I kept seeing cases of blacks sentenced to death in the South. I was constantly confronted with the fact that in dealing with the death penalty, we were not merely dealing with a barbaric relic of civilization in its most savage days, but also with discrimination against blacks, the poor, the pariahs and outcasts of society. At the same time, as I looked at all the violence going on in our society, the death penalty came to symbolize to me the tendency to resort to violence instead of reason in seeking the solution to problems. This insight came to me while I was handling attacks on the death penalty on a case by case basis, on specific issues such as exclusion of black people and poor people from juries, loss of rights to counsel, and so on. This larger insight came together with a case by case study of discrimination against blacks in the South, often involving the death sentence. When I pulled all of that together, I knew that abolishing the death penalty altogether was the major job to be done.[245]

But what if the death row prisoner didn't *have* a lawyer? LDF might be able to find him one. But what if LDF didn't even know of that prisoner's existence? What if LDF didn't know a person with a pending execution date even needed a lawyer?

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245. WOLFE, *supra* note 234.

Such was the situation in Florida in 1966: the second largest death row population in the nation (fifty-two condemned men) and not enough lawyers to file LDF's form papers to stay the executioner. Until 1966, Florida's death row population was not at risk of imminent executions. The state had been governed, in succession, by three adversaries of capital punishment: Leroy Collins, Faris Bryant, and Haydon Burns. In 1966, however, Claude Kirk was elected governor. Governor Kirk was elected following campaign promises to enforce the death penalty. Kirk was determined to keep his promise.

Thus, Florida became one of the principal crises states for Amsterdam and LDF. If Florida began executing people, the entire, shaky national moratorium on execution was in jeopardy of coming apart. Much of the moratorium's power was grounded in perception: Amsterdam and LDF had persuaded various judges and governors in the capital punishment states that the United States Supreme Court would countenance no executions until the United States Supreme Court had sorted out the challenges to the legality of capital punishment as a legal system. The moratorium thus was in part a self-fulfilling prophecy. If Florida broke ranks, then other states might as well.

The Florida Supreme Court would let those executions proceed, even though those people electrocuted by "Old Sparky" lacked lawyers to raise the very constitutional claims that were getting stays in many other states. This was, after all, the same Florida Supreme Court that had refused to give Clarence Earl Gideon a lawyer in his felony robbery trial. It wasn't until the United States Supreme Court reversed in *Gideon v. Wainwright* that the Florida Supreme Court joined the rest of the nation in providing court-appointed lawyers to citizens on trial for non-capital felonies.[246] Since the Florida Supreme Court didn't think lawyers were a fundamental right at felony *trials*, the justices could hardly be expected to extend *Gideon* to require counsel for *habeas corpus* proceedings in federal court.

Thus, the capital counsel problem in Florida was as follows: a large (and undefined) death row population, no lawyers for each individual prisoner, a governor intent on signing death warrants on an unknown quantity of those prisoners, and a state supreme court willing to let those unrepresented people to be executed. That was the problem.

Florida had carried out its final two pre-*Furman* executions on May 12, 1964. Emmett Clark Blake was a white man who was electrocuted for a murder committed in 1962. The case of the other man executed on that day, Sir Dawson, vividly illustrated the potential for the seriously weird in Florida's pre-*Furman* capital punishment system. Dawson was an African American man with one leg and an IQ of sixty-four who had allegedly murdered the wife

246. *See generally* LEWIS, *supra* note 210.

and child of his white employer. After police officers threatened to turn him over to a lynch mob, Dawson confessed to the slayings. Afterward, however, Dawson consistently maintained that he had been present when his employer committed the killings. Despite the fact that the state had no eyewitnesses and premised its case on inconclusive circumstantial evidence, and notwithstanding that Dawson recanted his confession at trial, a jury comprised exclusively of white males convicted him of the murders and sentenced him to death.

Similarly disturbing was the case of Freddie Pitts and Wilbert Lee, two African- American men sentenced to death for a murder that took place in Port St. Joe in 1963.[247] Although Pitts and Lee confessed to the murder and pled guilty, it later came to light that the police had obtained their confessions with threats and beatings. After a white man admitted committing the murders, the local sheriff responded that "I already got two niggers waiting for the chair in Raiford for those murders." The case remained in court for many years, and the two men were ultimately granted a new trial. Although they pled innocent, Pitts and Lee were convicted and sentenced to death by an all-white jury in March, 1972. Their death sentences were reduced to life later in 1972 by the *Furman* decision, but they remained in prison for three more years until Governor Askew granted them a full pardon in 1975. The *New York Times* editorialized that many observers felt that the Pitts and Lee case was "the saddest, most blatant miscarriage of justice in Florida's history.... For some, it has embraced all that was notoriously and traditionally grievous in Southern society—the racism, the poverty, the bigotry given silent but forceful sanction by government and law."

Capital punishment was a politically contentious issue in Florida during the middle 1960s, as it was nationally. Governor Haydon Burns, whose tenure lasted from 1965 until 1967, refused to sign death warrants during his administration. By 1967, Florida had fifty-two prisoners awaiting execution, the second highest number of condemned persons in the country, and capital punishment was part of the "law and order" debate in that year's gubernatorial election. During his successful campaign for governor, Claude Kirk, Jr. made an issue out of his predecessor's failure to employ the death penalty as a deterrent to crime. During the campaign, Kirk visited the Florida State Penitentiary at Raiford, shook hands with the death row inmates there, "and with a courteous smile told them, 'If I'm elected, I may have to sign your death warrant.'" Governor Kirk made good his campaign promise by signing several death warrants and by ordering fifteen Black condemned prisoners to

247. *See generally* GENE MILLER, INVITATION TO A LYNCHING (1975).

prepare for clemency hearings as a step toward the resumption of executions.[248]

As Governor Kirk attempted to resume executions, Miami attorney Tobias Simon worked to stop them for good. Simon, a cooperating attorney with the NAACP Legal Defense and Educational Fund, Inc. and the chairperson of the state chapter of the American Civil Liberties Union, prepared a creative lawsuit that ultimately ground executions to a halt in Florida for ten years.[249]

Skeptics called it "Simon's Frolic."[250] Concerned for death row inmates who lacked legal representation, Simon filed a class action lawsuit in *habeas corpus* on their behalf. Simon argued that "deathrow inmates represented a class of persons whose constitutional objections to death case procedures and execution itself could be joined and resolved in one proceeding." Nevertheless, using *habeas corpus* in conjunction with a class action to simultaneously overturn a large number of illegal convictions or sentences was highly unusual, and it surprised many observers when United States District Judge William McRae ruled on April 13, 1967, that the argument was compelling enough to warrant a temporary stay of all executions in Florida.[251] Four months later, Judge McRae decided that the propriety of a class action depended on whether or not death row inmates had effective access to the courts, and he consequently ordered a full factual inquiry to examine that question.

As a result of Judge McRae's order, Simon worked with Anthony Amsterdam, principal architect of the federal constitutional challenges to the death penalty, to interview death row inmates at Raiford and compile a statistical profile of them. Of the thirty-four inmates who had already lost their direct appeals to the Florida Supreme Court, half had no lawyers or means to hire counsel. [248] Of the forty inmates interviewed, thirty-seven were entirely destitute and the other three reported financial assets of less than one hundred dollars. Additionally, IQ tests on the group clearly revealed that their mean intelligence was below average. Apparently persuaded by these findings, Judge McRae continued the prohibition on executions in Florida while he considered arguments that the State's capital punishment system was unconstitutional.[249]

The situation in Florida was substantially replicated at the national level. By 1967, litigation over the constitutionality of capital punishment in the

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248. *See* MELTSNER, *supra* note 83, at 127.
249. *See generally id.*
250. *Id.* at 130.
251. *See* MELTSNER, *supra* note 83, at 130-31.
248. *See id.* at 132.
249. *See id.* at 133.

United States had created a national moratorium on executions. Similarly, the essential effect of Judge McRae's ruling was to prevent "the execution of any death sentence in Florida pending the outcome of the Supreme Court litigation testing the constitutionality of capital punishment."[250] Observers in Florida and across the United States would wait five years before the United States Supreme Court attempted to resolve that question.

LDF's strategy resulted in the 1967-1977 moratorium on executions in America while the courts sorted through the legal challenges to capital punishment. Also, on the road to the 1971 and 1972 cases in which the Supreme Court squarely addressed, for the first time, the legality of capital punishment itself, the Court revolutionized the death-deciding process in state capital trials. In 1968, the Court struck down the "Lindbergh Law" which made defendants subject to capital punishment only if they exercised their right to jury trial. The Court, in the 1968 case of *Witherspoon v. Illinois*, sharply limited the States' ability to exclude from capital cases potential jurors with moral doubts about the death penalty.[251]

In June 1968, the Supreme Court decided *Witherspoon v. Illinois* and in April 1969, the Court decided *Boulden v. Holman*.[252] The Florida Supreme Court was left scrambling in an attempt to bring the Florida system within constitutional bounds.

At issue in *Witherspoon* was an Illinois statute that provided: "In trials for murder it shall be a cause for challenge of any juror who shall, on being examined, state that he has conscientious scruples against capital punishment, or that he is opposed to the same."[253] The Court granted *certiorari* to decide "whether the Constitution permits a State to execute a man pursuant to the verdict of a jury so composed."[254] The State's only justification for the challenged jury selection technique was that "individuals who express serious reservations about capital punishment cannot be relied upon to vote for it even when the laws of the State and the instructions of the trial judge would make death the proper penalty."[255] The Court noted, however, that, as in Florida, the jury is given "broad discretion" to decide whether death is the proper punishment and that jurors' views on the death penalty "play an inevitable role in any such decision."[256] Justice Stewart explained:

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250. Charles W. Ehrhardt & L. Harold Levinson, *Florida's Legislative Response to Furman: An Exercise in Futility?*, 64 J. CRIM. L. & CRIMINOLOGY 10, 11 (1973).

251. *See* Witherspoon v. Illinois, 391 U.S. 510 (1968).

252. Boulden v. Holman, 394 U.S. 478 (1969).

253. *Witherspoon*, 391 U.S. at 512 (quoting ILL. REV. STAT. C. 38, § 743 (1959)).

254. *Id.* at 513.

255. *Id.* at 518.

256. *Id.* at 519.

> A man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State and can thus obey the oath he takes as a juror. But a jury from which all such men have been excluded cannot perform the task demanded of it. Guided by neither rule nor standard "free to select or reject as it (sees) fit," a jury that must choose between life imprisonment and capital punishment can do little more—and must do nothing less—than express the conscience of the community on the ultimate question of life or death. Yet, in a nation less than half of whose people believe in the death penalty, a jury composed exclusively of such people cannot speak for the community. Culled of all who harbor doubts about the wisdom of capital punishment—of all who would be reluctant to pronounce the extreme penalty—such a jury can speak only for a distinct and dwindling minority.[257]

Witherspoon, therefore, has been said to stand for "the limited proposition that the state cannot challenge a venireman for cause merely because he said he was 'opposed to capital punishment' or indicated that he had 'conscientious scruples against inflicting it'."[258] "No defendant can constitutionally be put to death at the hands of a tribunal so selected."[259]

Early the next year, the Court further clarified its decision in *Witherspoon.* In *Boulden v. Holman,* the Court, *sua sponte*, addressed an Alabama statute providing that a fixed opinion against capital punishment was sufficient to support a challenge for cause by the State.[260] *Boulden* effectively eliminated any assumption about the potential jurors' abilities to consider the

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257. *Id.* at 519-20.

258. Barlow v. Wainwright, 323 F. Supp. 829, 830 (N.D. Fla. 1971) (quoting Williams v. Wainwright, 427 F.2d 921, 923 (5th Cir. 1970)). In defining the scope of the issue before the Court, Justice Stevens specifically stated that the issue being addressed in *Witherspoon*:

> [Did] not involve the right of the prosecution to challenge for cause those prospective jurors who state that their reservations about capital punishment would prevent them from making an impartial decision as to the defendant's *guilt*; [n]or [did] it involve the State's assertion of a right to exclude from the jury in a capital case those who say that they could never vote to impose the death penalty or that they would refuse even to consider its imposition in the case before them.

Witherspoon, 391 U.S. at 513-14 (emphasis added).

259. *Witherspoon,* 391 U.S. at 522-23.

260. Boulden v. Holman, 394 U.S. 478 (1968). While the issue was not raised in the appellant's petition for *certiorari*, the question was raised in both his brief and at oral argument. *See id.* at 481. The statute at issue read in pertinent part: "On the trial for any offense which may be punished capitally, . . . it is a good cause of challenge by the state that the person would refuse to impose the death penalty . . . ." ALA. CODE § 12-16-152 (1975). The Court initiated the review of this statute because the record indicated that the statute had been the basis for the exclusion of at least fifeteen prospective jurors. *See Boulden,* 394 U.S. at 481.

imposition of the death penalty regardless of their opinions. Justice Stewart, quoting from his opinion in *Witherspoon,* makes it quite clear that "[u]nless a venireman states unambiguously that he would automatically vote against the imposition of capital punishment no matter what the trial might reveal, it simply cannot be assumed that that is his position."[261]

The rule after *Witherspoon* and *Boulden* appeared to be that a challenge for cause will not be supported unless the venireman unambiguously states that he is opposed to the death penalty and will under no circumstances vote for its imposition. Anything less is insufficient and the execution of a person pursuant to a jury so composed is unconstitutional. It would seem to follow, that in a capital case, because of the possibility the accused may be sentenced to death, exclusion of jurors in a manner that violates *Witherspoon* and *Boulden* at the outset would be unconstitutional. To reason otherwise would be to select the jury, conduct the trial, and if the defendant is found guilty and sentenced to death, only then to find a constitutional problem for which the whole process will have to be repeated. The accused whose jury fortuitously recommends life would have the identical procedure deemed constitutional. Although the former logic may appear to be only the musings of an inexperienced law student, the Florida Supreme Court thought that was just what the United States Supreme Court meant.

During the next two and one-half years, the Florida Supreme Court reviewed twice as many cases challenging juror exclusion based on the venireman's objection to the death penalty. The Florida Supreme Court read *Witherspoon* very narrowly. In response to the rulings by the United States Supreme Court, both judges and prosecutors became more active in their questioning of any prospective juror that expressed distaste for the death penalty until the venireman ultimately fell down the "slippery slope" and answered that he was unwilling to inflict the penalty of death under any circumstances.[262] In so doing, the Florida courts apparently felt they were discharging their constitutional duties under *Witherspoon* and *Boulden.* However, the court continued to retain some of the attitudes that colored their prior decisions. It is important to note that the Florida scheme at this time was for the jury to render verdicts on guilt and sentence in a single phase. The system reviewed by the Court in *Witherspoon* was a bifurcated system, where the issues of guilt and penalty were rendered in separate phases.[263]

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261. *Id.* at 482 (quoting *Witherspoon*, 391 U.S. at 516).

262. *See* Williams v. State, 228 So. 2d 377, 380 (Fla. 1969); Paramore v. State, 229 So. 2d 855, 857-58 (Fla. 1969); Young v. State, 234 So. 2d 341, 349 (Fla. 1970); Grant v. State, 261 So. 2d 519 (Fla. Dist. Ct. App. 1972).

263. The importance of this distinction manifests itself in many of the Florida Supreme Court decisions. Since the Court ruled in *Witherspoon* that only the penalty portion of Witherspoon's trial was to be reversed, the Florida Supreme Court's treatment of this issue within its single stage system was

The first case to appear before the Florida Supreme Court after the *Boulden* decision was *Williams v. State.*[264] In *Williams,* the prosecution successfully challenged three prospective jurors for cause after examining them regarding their views on the death penalty. Two of the venire members thus excused were acquaintances of Mr. Williams and stated that they could not impose the death penalty under any circumstances. The court, it seems, was correct in affirming the trial judge's exclusion of these two prospective jurors. The third, however, responded to questions regarding the imposition of the death penalty with the following: "No sir, I wouldn't know. I just wouldn't know."[265] In affirming this challenge for cause the court failed to apply the Court's direction in *Boulden.* The venireman was not unambiguous in his intention not to consider the death penalty; to the contrary, he did not know how he would vote. The Florida Supreme Court explained that *Witherspoon* required that:

> If, upon questioning, the prospective juror says he doesn't know whether he can vote for conviction if it might mean the electric chair, then the State cannot determine his willingness to consider all penalties; nor can it determine whether or not the venireman's attitude toward the death penalty would prevent him from making an impartial decision as to guilt.[266]

The court's interpretation flew in the face of the clear message sent by the Court in *Boulden* that unless the venireman *unambiguously* declares that he will under no circumstances vote for the death penalty, or that he will be unwilling to vote for guilt, his exclusion for cause renders the jury as empaneled unconstitutional in a capital case.

In *Campbell v. State,* prospective juror Green was challenged for cause by the state after he was "interrogated at length by counsel for the state and for the defense and by the trial judge with respect to his religious scruples against the death penalty."[267] The court declared "[t]he only logical conclusion was that Juror Green would not be able to consider impartially the question of the guilt or innocence of [the] defendant on account of his religious scruples

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inaccurate. When an unconstitutionally empaneled jury decides all of the issues at once, the two issues are intertwined to such an extent that the court would have to remand for an entire trial. The court's practice, however, would be to uphold the verdict of guilty and rule only on the issue of penalty.

264. *See Williams,* 228 So. 2d 377 (Fla. 1969).

265. *Id.* at 381.

266. *Id.*

267. Campbell v. State, 227 So. 2d 873, 876 (Fla. 1969).

against the death penalty."[268] This assumption is the very aspect the Supreme Court denounced in *Boulden.*

In *Campbell,* the Florida Supreme Court also added another touch of judicial gloss to this area of the law. The court concluded that since the state had not exhausted its peremptory challenges, the state *could have* excluded him anyway. Therefore, no error. This off-hand peremptory fall-back argument was to be cited as precedent in other challenges before the court.

Another twist was added in *Hallihan v. State.*[269] Mr. Hallihan was convicted of murder but received a mercy recommendation. During jury selection, however, prospective jurors were excluded who expressed conscientious scruples against capital punishment.[270] The court held that since there was no death sentence, Hallihan's constitutional rights had not been infringed.[271] In *Hallihan,* therefore, the court announced another new rule—if the accused fortuitously receives a mercy recommendation from a jury empaneled contrary to constitutional standards, the fact that his constitutional rights were violated was harmless error.

Barlow v. State gave the Florida Supreme Court headaches until the invalidation of the death penalty in 1972.[272] Mr. Barlow appealed to the court to reduce his death sentence to life imprisonment because of the elimination of a venireman from the panel of prospective jurors on the basis of his objection to capital punishment.[273] In *Barlow,* the court cemented its rule concerning unexhausted peremptory challenges. Relying on *Campbell,* the court stated:

> Florida's statute relating to service by jurors in a capital case (citation omitted), was wholly consonant with the rule evolved in *Witherspoon* and continued further to hold that in any event no reversible error could be predicated upon the exclusion of jurors on voir dire in that case because the State still had remaining unused peremptory challenge.[274]

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268. *Id.* The court makes this assumption with no reference to any unambiguous statements by Juror Green that would have supported a challenge for cause under *Boulden.*

269. Hallihan v. State, 226 So. 2d 412 (Fla. Dist. Ct. App. 1969). This case presents other interesting views on the capital system in Florida beyond the scope of this paper. Suffice it to say that Hallihan was a defendant with a long history of schizoid personality and psychiatric institutionalization. During the trial he was found competent while the psychologists' reports on his condition were held to be inadmissible hearsay. *See id.* at 413.

270. *See id.* at 413.

271. *See id.*

272. Barlow v. State, 238 So. 2d 602 (Fla. 1970).

273. *See id.* at 602-03.

274. *Id.* at 603.

The court further quoted approvingly from a New Jersey case that:

> [W]e think it correct to add that if the prosecution did not use all its peremptory challenges, that fact may be a relevant makeweight, for it is not unreasonable to assume that the remaining challenges would have been used, had the trial court ruled against the State on its objection to a specific juror.[275]

So, at this point the court has stated a "no harm" rule and a "what if" rule that it will apply to cases that may violate rules laid down by the United States Supreme Court.

Mr. Barlow pursued his appeal on habeas to the United States District Court.[276] The State argued that no unfair result was obtained as a consequence of the exclusion of the one juror because they had not yet exhausted their peremptory challenges. Judge Middlebrooks held that the State's argument "overlooks the very design of *Witherspoon*."[277] In a resounding rebuke, the judge stated:

> In this case what was forbidden was done. Respondent claims that this impermissible result could have been negated by the State's exercise of one of its remaining peremptory challenges. This Court will not join in this kind of imprecise speculation and in nowise intimates any view as to the correctness of that argument. The fact remains that a juror was excused for cause because he opposed capital punishment and that this act deprived petitioner of his right to an impartial jury.[278]

In this holding, the federal court held that a systematic exclusion can occur when only one juror is impermissibly excused, and that it will look unapprovingly to the defense of unexhausted peremptory challenges in such cases.

Richardson v. State involved a trial court's excusing fifteen jurors for cause for opposing the death penalty.[279] During *voir dire* examination of the veniremen the court did not have a court reporter present.[280] The *Boulden* court noted the large number of excluded jurors, and remanded the case for a

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275. *Id.* (quoting State v. Mathis, 245 A.2d 20 (N.J. 1968)).

276. *See* Barlow v. Wainwright, 323 F. Supp. 829 (N.D. Fla. 1971).

277. *Id.* at 832.

278. *Id.* at 832. The Judge stated in a footnote that "[t]his Court, however, is unpersuaded by the [case] referred to by respondent." *Id.* at 832 n.1.

279. Richardson v. State, 247 So. 2d 296, 299 (Fla. 1971).

280. *See id.* at 298.

determination of the constitutionality of the exclusion. The court here, however, presumed that the trial judge was aware of *Witherspoon* and its standards that had been followed by the State of Florida and affirmed the ruling below.[281]

Although the Florida Supreme Court was given numerous chances to comply with the principles laid down in *Witherspoon* and *Boulden* the court did not seem to be able to get it right. On the occasion that cases came before it that were clear examples of veniremen stating that they could not reach a verdict of guilty or would under no circumstances consider the death penalty, the court was able to fair somewhat better. However, the supreme court of a state or of the United States is much more often the arbiter of disputes regarding issues that are less "black or white." It is in these cases where the Florida Supreme Court failed in its interpretation of statutes and Supreme Court cases. For all the confidence the Supreme Court and the Florida Supreme Court placed in the State court in affirming the constitutionality of the post-*Furman* capital statute, review by the Florida Supreme Court should not provide, nor has it provided, any solace to those capital litigants that must wage their uphill battles in its courtroom.

These cases set the stage for the U.S. Supreme Court's confrontation with the legality of capital punishment itself.[282] After at least two false starts, *Boykin* in 1969, and *Maxwell* in 1970, the Supreme Court finally decided the big issue.[283] It was the culmination of Anthony Amsterdam's and LDF's constitutional attack on capital punishment, and it seemed that they had lost.

In 1970 the Supreme Court granted *certiorari* review in *McGautha v. California*.[284] Anthony Amsterdam and LDF raised the full range of their procedural challenges to capital punishment, arguing that the unitary trial and the absence of sentencing standards offended the Fourteenth Amendment's guarantee of "due process of law."[285] The Supreme Court issued its decision in *McGautha* in 1971. Amsterdam and LDF had lost—six to three.[286]

The moratorium on executions appeared to be over. Now that the Court had spoken, LDF prepared for a bloodbath. In mid-May, an emergency conference was held at Columbia Law School. Amsterdam told the conferees

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281. *See id.* at 299.

282. *See* MELTSNER, *supra* note 83, at 126. *See generally* WOLFE, *supra* note 234.

283. *See* Boykin v. Alabama, 395 U.S. 238 (1969); Maxwell v. Bishop, 398 U.S. 262 (1970). *Boykin* and *Maxwell* both provided the justices with opportunities to address the larger issue of capital punishment's constitutionality, but in both cases the Court ducked the issue, deciding the cases on narrower, case-specific procedural grounds. *See Boykin*, 395 U.S. at 238.

284. McGautha v. California, 402 U.S. 183 (1971), *reh'g denied*, 406 U.S. 978 (1972), *and reh'g granted, judgment vacated*, Crampton v. Ohio, 408 U.S. 941 (1972).

285. *See McGautha*, 402 U.S. 183, 196 (1971).

286. *See id.*.

"the central conclusion" to be drawn from *McGautha* and its companion cases was that "the Supreme Court could not be expected to take any favorable action on the death penalty anytime soon."[287]

LDF still had its Eighth Amendment "cruel and unusual punishment" angle to present to the Supreme Court; it would be a relatively simple matter for LDF to repackage its "due process" challenges as Eighth Amendment challenges. If the procedural challenges had a chance of persuading the Court to outlaw capital punishment itself, however, it seemed that "due process of law" provided the justices with the best constitutional hook. And LDF had lost the due process claim in *McGautha.*

But then, less than two months after *McGautha* was decided, the Court agreed to hear four cases to decide the Eighth Amendment challenge to capital punishment as a legal system. Two cases involved murder and two involved rape. This package of four cases became known as *Furman v. Georgia.*[288]

The Supreme Court heard oral arguments on *Furman* and its three companion cases on January 17, 1972.[289] Amsterdam argued *Furman* brilliantly. Still, there was little reason for optimism. LDF's best arguments had been shot down in *McGautha.* Two new Nixon appointments to the Court did not help LDF's odds.

Then the constitutional earthquake hit. On June 29, 1972, the Supreme Court announced its decision in *Furman.*[290] Amsterdam and LDF had won, five votes to four. The very procedural challenges to capital punishment that the Court had rejected one year earlier in *McGautha* had carried the day. The legal system of capital punishment as it then existed was history. Every capital statute was invalidated. Every death sentence of every person on death row was to be reduced to life imprisonment. In a stroke, 629 condemned people were no longer subject to execution.

Michael Meltsner writes that the news of *Furman* struck LDF's New York headquarters "like an earthquake .... That evening, while a rock band called 'The Eighth Amendment' played in the library of their headquarters on Columbus Circle, [LDF] staffers celebrated into the wee hours."[291] Meltsner describes the scene as the news of *Furman* first came in:

> Within minutes the story began to appear on every major wire-service ticker. Calls jammed the LDF switchboard. Lawyers and secretaries produced transistor radios. General disbelief. Numbness. Tears in people's eyes. Slowly smiles replaced gaping

287. HERBERT HAINES, AGAINST CAPITAL PUNISHMENT 36 (1996).
288. Furman v. Georgia, 408 U.S. 238 (1972).
289. *See id.*
290. *See id.*
291. HAINES, *supra* note 287, at 33.

> jaws; laughter and embraces filled the halls. "This place looks like we just landed a man on the moon," [staffer Douglas] Lyons shouted into a phone.[292]

June 29, 1972, is a singular date in the history of American jurisprudence. But, although *Furman* marked the end of one era of capital punishment, it also marked the beginning of a new and more complicated era, in many respects. *Furman* did not outlaw capital punishment *per se*; only two justices, Thurgood Marshall and William Brennan, would have gone that far. The three other justices in the five to four *Furman* majority only voted to eliminate the capital punishment legal system *as it was then applied.* Thus, seven justices (the three other than Brennan and Marshall in the *Furman* majority, plus the four dissenters) seemed to leave open the possibility that states could retool and restore capital punishment as a legal system, and that such new statutes would pass constitutional muster. In fact, the primary procedural defects in the death penalty statutes struck down in *Furman* appeared easy to correct: replace the unitary trial with a bifurcated trial, at which guilt and sentence would be tried and decided in two separate proceedings, and provide the sentencing jury with standards (statutorily-listed aggravating and mitigating circumstances, for example) to guide its consideration of whether the particular defendant has lost his moral entitlement to live—whether he deserves to die for his crimes.

The *Furman* holding, which resulted in vacated death sentences for all 629 persons on death row nationally at the time of the decision,[293] was handed down in a short *per curiam* opinion that stated, without elaboration, "the imposition and carrying out of the death penalty in [the cases before the Court] constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments."[294] Each of the nine justices wrote separately, and no justice in the five-person majority joined any other.[295]

Robert Weisberg has written that *Furman* "is not so much a case as a badly orchestrated opera, with nine characters taking turns to offer their own arias."[296] However, "[i]n the manner of literary criticism, one can extract unifying 'themes' in the *Furman* opinions."[297] The individual opinions suggest that the central concern of the three crucial Justices was that the statutes at issue in *Furman* lacked sentencing standards. Justice Douglas

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292. MELTSNER, *supra* note 83, at 290.

293. *See* Jack Greenberg, *Capital Punishment as a System*, 91 YALE L.J. 908, 915 (1982).

294. *Furman*, 408 U.S. at 239-40.

295. *See* Daniel Polsby, *The Death of Capital Punishment?* Furman v. Georgia, 1972 SUP. CT. REV. 1 (1972) (analyzing separate opinions).

296. Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 315 (1983).

297. *Id.* at 317.

wrote that "we deal with a system of law and of justice that leaves to the uncontrolled discretion of judges or juries the determination whether defendants committing these crimes should die or be imprisoned."[298] Given this absence of guidance, it is not surprising that the death penalty is applied "selectively to minorities whose numbers are few, who are outcasts of society, and who are unpopular, but whom society is willing to see suffer though it would not countenance general application of the same penalty across the board."[299] Justice Stewart also stressed the randomness of the penalty:

> These death sentences are cruel and unusual in the same way that being struck by lightening is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, these petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed.[300]

Justice White reached the same conclusion based on his experience as a justice.[301] Because Justice Brennan[302] and Justice Marshall[303] would have declared the death penalty unconstitutional *per se*, the "holding" of the case must be found in the Douglas/Stewart/White opinions. The Court has in subsequent opinions noted that:

> a fair statement of the consensus expressed by the Court in *Furman* is that "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."[304]

298. *Furman*, 408 U.S. at 253 (Douglas, J., concurring).
299. *Id.* at 245.
300. *Id.* at 309-10 (Stewart, J., concurring) (internal citation omitted).
301. *See id.* at 313-14 (White, J., concurring).
302. *See id.* at 291.
303. *See id.* at 358-59.
304. Zant v. Stephens, 462 U.S. 862, 875 (1983) (quoting Gregg v. Georgia, 428 U.S. 153, 189 (1976)).

D. 1972-1976: Modern Times

Merry it was to laugh there—where death becomes absurd and life absurder
For power was on us and we slashed bone
Not to feel guilt or remorse of murder.

Wilfred Owen[305]

Many lawmakers around the nation revisited the capital punishment issue extensively during the months preceding the 1972 *Furman* decision. Florida led the way; indeed, Florida's efforts to rehabilitate its law predated even the decision in *Furman*. At the time, the crimes punishable by death in Florida were premeditated murder, certain felony-murders, bombing or machine-gunning in public places, homicide caused by a destructive device, rape of a female of the age of ten years or more, "carnal knowledge and abuse" of a female child under the age of ten years, and kidnaping for ransom. During February 1972, Governor Rubin Askew issued an executive order that stayed the execution of any death sentence until July 1, 1972, providing time for the resolution of pending litigation and for legislative consideration of the entire capital punishment question. The Governor noted in the order that he had unsuccessfully asked the 1972 Florida Legislature to declare a moratorium on further executions and to authorize the appointment of a commission to examine the entire capital punishment system in Florida.

The following month, perhaps anticipating the United States Supreme Court's imminent *Furman v. Georgia* decision, the Florida Legislature revised the state's capital punishment statute. The amendment, which was to become effective on October 1, 1972, had two significant aspects. First, the amendment provided that if capital punishment were held unconstitutional, then all persons previously sentenced to death were required to be resentenced to life imprisonment with no eligibility for parole. Second, the amendment established a bifurcated trial system in which a defendant convicted of a capital crime was given a separate sentencing trial to determine whether the punishment would be death or life imprisonment. This provision was never used, since *Furman* intervened between the statute's passage and its effective date, and since the Florida Supreme Court later ruled that *Furman* eliminated capital punishment for all extant felonies in Florida.

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305. WILFRED OWEN, *Apologia Pro Poemate Meo*, *in* WILFRED OWEN, THE COLLECTED WORKS OF WILFRED OWEN 39 (1965).

Three months after passage of the statutory amendment, in June 1972, the United States Supreme Court decided *Furman v. Georgia*.[306] As a result, all people then on death row in Florida had their sentences commuted to life imprisonment. At that time there were ninety-eight inmates on death row in Florida. Seventy-three of them had been sentenced to death for murder, while twenty-five had received death sentences for rape.

On July 17, 1972, eighteen days after *Furman* was decided by the U.S. Supreme Court, the Florida Supreme Court held that *Furman* had eliminated capital punishment and capital felonies from Florida law until new legislation might revive them, and until that happened, persons thereafter convicted of "capital" offenses were to be punished by life imprisonment.[307] Two weeks later, the United States Court of Appeals for the Fifth Circuit agreed that *Furman* invalidated Florida's death penalty.[308]

Two months later, in September, 1972, the Florida Supreme Court resolved any lingering question of the status of Florida's death row inmates in the wake of *Furman*. *Anderson v. State* involved forty prisoners whose direct appeals were still pending before the Florida Supreme Court.[309] The *Anderson* court resentenced the forty prisoners to life imprisonment, with the possibility of parole remaining open.[310] Three weeks later, the court, as a matter of equal protection, provided the same resentencing for those inmates who at the time did not have appeals pending.[311] In 1991, a study that traced ninety-seven of these individuals through 1987 found that thirty-six of them (39%) had ultimately been paroled.

Only five months after the *Furman* decision, in November 1972, the Florida legislature met in special session to consider a new capital punishment statute. The Senate bill, passed at the special session by a vote of thirty-nine to one, required the trial judge to impose a life sentence if the jury refused to recommend a death sentence. However, if the jury recommended death, the trial judge had to agree before the sentence could be imposed. The bill passed at the special session by the House of Representatives gave sentencing responsibility to a three-judge panel. Faced with this discrepancy, the House and the Senate compromised and produced a capital punishment statute that created a bifurcated sentencing procedure of the type first recommended by the Special Commission of 1965. The Florida Legislature passed the new Capital Punishment Act on December 1, 1972, and when the Governor signed

306. *See* Furman v. Georgia, 408 U.S. 238 (1972).
307. *See* Donaldson v. Sack, 265 So. 2d 499, 502 (Fla. 1972).
308. *See* Newman v. Wainwright, 464 F.2d 615, 616 (5th Cir. 1972).
309. *See* Anderson v. State, 267 So. 2d 8 (Fla. 1972).
310. *See id.* at 10.
311. *See In re* Baker, 267 So. 2d 331 (Fla. 1972).

the measure into law a week later; Florida became the first state in the country to reinstate the death penalty after *Furman*.

Florida's post-*Furman* statute attempted to guide the capital punishment decision by establishing a procedure to be followed in determining what penalty should be imposed upon a conviction for first degree murder. The statute provides that the court shall, unless waived, conduct a separate sentencing proceeding before the jury.[312] This proceeding constitutes a trial on the issue of penalty, and many trial procedures have been imported into the penalty phase. The statute provides that evidence probative of sentence may be presented "regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements."[313]

The statute enumerates aggravating and mitigating circumstances to guide the jury in its deliberations. The jury then renders an "advisory sentence to the court."[314] The statutory language is clear that the jury's recommendation is not binding: "Notwithstanding the recommendation of a majority of the jury, the court after weighing the aggravating and mitigating circumstances" enters a sentence of life or death.[315] If the sentence is death, or if the judge imposes a life sentence despite the jury's recommendation of death, the court must set forth in writing its findings as to the aggravating and mitigating circumstances.[316] Death sentences are subject to automatic review by the Florida Supreme Court.

The Florida capital punishment scheme enacted in 1972 has survived to the present day at least in part because it survived the initial legal challenges to its constitutionality. On July 26, 1973, the Florida Supreme Court upheld the constitutionality of the new capital punishment statute by a seven to two vote.[317] The court read *Furman* as allowing some degree of discretion in the capital sentencing process, and concluded that the discretion allowed in the Florida statute was sufficiently reasonable and controlled to withstand

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312. *See* FLA. STAT. ANN. § 921.141(1) (West 1971) (historical notes).

313. *Id.*

314. *See id.* § 921.142(2). Although the statute speaks in terms of a recommendation by a "majority" of the jury, a split vote of six-six is treated as a recommendation of life imprisonment. *See* Patten v. State, 467 So. 2d 975, 980 (Fla. 1985); Rose v. State, 425 So. 2d 521, 525 (Fla. 1982), *cert. denied*, 461 U.S. 909 (1983).

315. FLA. STAT. ANN. § 921.141(3).

316. The statute requires written findings if the judge imposes death, regardless of whether the jury recommended life or death. *See id.* The Florida Supreme Court has required, pursuant of its power to regulate practice and procedure, that judges imposing life sentences where the jury has recommended death must also support the sentence by written findings. *See* State v. Dixon, 283 So. 2d 1, 8 (Fla. 1973), *cert. denied*, 416 U.S. 943 (1974).

317. *See Dixon*, 283 So. 2d. at 1.

constitutional scrutiny.[318] Three years later, on July 2, 1976, the United States Supreme Court agreed, holding that the Florida capital sentencing statute complied with the guidelines of *Furman* and did not violate the Eighth Amendment. With the major legal obstacles removed, it seemed that Florida was once again free to execute prisoners convicted of capital homicides.[319] But because there were still a few constitutional bugs in the system, executions have occurred in fits and starts in the nearly two decades since 1976. As of this writing, there are still a few bugs in the system.

E. Postmodern Times: Capital Punishment Today

> *So Eichmann's opportunities for feeling like Pontius Pilate were many, and as the months and years went by, he lost the need to feel anything at all. This was the way things were, this was the new law of the land, based on the Führer's order; whatever he did he did, as far as he could see, as a law-abiding citizen. He did his duty, as he told the police and the court over and over again; he not only obeyed orders, he also obeyed the law.*
>
> Hanna Arendt[320]

Congress and President Bill Clinton rode into the capital habeas maelstrom as discussed above. The result of their intervention was the 1996 Antiterrorism and Effective Death Penalty Act (AEDPA).[321]

The direct, linear history of the counsel dimensions of the 1996 AEDPA actually began in 1988. Congress enacted and President Bush signed a bill authorizing capital punishment for drug "kingpins." A little-noticed provision of the 1988 Act authorized the federal courts to appoint counsel for death row prisoners in *habeas corpus* proceedings and in advance of the actual filing of

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318. *See id.* at 6-7.

319. In 1977, the Supreme Court precluded execution for non-aggravated rape of an adult woman. *See* Coker v. Georgia, 433 U.S. 584 (1977) (Then Professor (and now United States Supreme Court Justice) Ruth Bader Ginsburg wrote an amicus brief in *Coker*.); *See also* Enmund v. Florida, 458 U.S. 782 (1982) (precluding execution in 1982 and 1987 for certain kinds of felony murder); Tison v. Arizona, 481 U.S. 137 (1987); Ford v. Wainwright, 477 U.S. 399 (1986) (precluding execution in 1986 for prisoners insane at the time of execution). *See generally* KENT MILLER & MICHAEL RADELET, EXECUTING THE MENTALLY ILL (1993); Dennis D. Dorin, *Two Different Worlds*, 72 J. CRIM. L. & CRIMINOLOGY 1667 (1987); Note, Coker v. Georgia, 78 COLUM. L. REV. 1714 (1978); Note, *The Death Penalty for Rape*, 38 LA. L. REV. 868 (1978); Note, *Insanity of the Condemned*, 88 YALE L.J. 533 (1979); Barbara A. Ward, *Competency for Execution: Problems In Law and Psychiatry*, 14 FLA. ST. U.L. REV. 35 (1986); Note, *Medical Ethics and Competency to be Executed*, 96 YALE L.J. 167 (1986).

320. HANNA ARENDT, EICHMAN IN JERUSALAM: A REPORT ON THE BANALITY OF EVIL (1963).

321. Antiterrorism and Effective Death Penalty Act (AEDPA), Pub.L 104-132, 110 Stat. 1214 (1996) (codified in various sections of 18 and 28 U.S.C.).

a habeas petition.[322] The Supreme Court held that the 1988 Act meant exactly that. When the Texas counsel crisis reached the Court in *McFarland v. Scott* (1994), the Court upheld the counsel provisions of the 1988 Act.[323]

The 1988 Act only solved one part of the counsel conundrum, however: it provided lawyers for capital prisoners in federal habeas court. It did not provide counsel for state habeas. Completion of state habeas was a necessary precondition to seeking federal habeas. Congress addressed the question of state post-conviction counsel in the AEDPA .

The AEDPA's intent was to "streamline" capital habeas, to "curb the abuse of the statutory writ of habeas corpus" by lawyers for death row prisoners and to "address the acute problems of unnecessary delay and abuse in capital cases."[324] Among other reforms, the Act sets a one-year limitation period on application for the habeas writ, sets time limits within which the federal district court must act on habeas petitions, limits the issues properly brought in a habeas petition, and sharply limits a prisoner's ability to receive meaningful federal judicial review of successive habeas petitions.[325]

However, there is a catch, and the catch concerns counsel. For states to receive the benefits of these restrictions on the availability of habeas, those states must first opt into the new habeas regime by establishing, in a statutorily specified way, "a mechanism for the appointment and compensation and reimbursement of [state post-conviction] counsel" that satisfies certain statutory standards.[326] In essence, the states that "opt in" receive certain advantages in the way of restricted federal habeas corpus review of their capital prisoners as a *quid pro quo* for having provided the affected capital prisoners with certain procedural advantages during state post-conviction proceedings.[327]

Thus, for example, for Florida to obtain the procedural goodies of restricted habeas review for its death row prisoners—time limits and the like—Florida must opt in by providing those prisoners with counsel in the state post-conviction process. Florida gets to kill them faster, but only by giving them lawyers first.

To qualify for the opt-in provisions, a state must establish a system to provide post-conviction counsel for death row prisoners. The state must "create a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in state post-conviction

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322. *See* McFarland v. Scott, 512 U.S. 849, 858-59 (1994).

323. *See id.* at 849

324. JAMES LIEBMAN & RANDY HERTZ, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE, § 2.7(a) (2nd ed. Supp. 1997), *quoting* H.R. Conf. Rep. 104-518, 94th Cong., 2d Sess. 111(1996).

325. *See* AEDPA, 28 U.S.C. §§ 2261-2266 (Supp. 1999).

326. *Id.* § 2261(c).

327. *See id.*.

proceedings brought by indigent prisoners whose capital convictions and sentences have been upheld on direct appeal" by the state's highest court.[328] In addition, the state must "provide standards of competency for the appointment of such counsel."[329] As of this writing, no state has qualified for opt-in status.

The AEDPA creates the possibility that competent and reasonably well-funded post-conviction legal aid will be provided to capital prisoners. However, it is difficult to be optimistic. Ultimately, the same U.S. Supreme Court that decided and continues to enforce *Strickland v. Washington* will do to the AEDPA. What it did to *Gideon v. Wainwright*: recognize a formalistic "right to counsel," but allow the states to administer that "right" however they like, with virtually no federal judicial oversight of how meaningful the "right" is in the real world, reality of capital post-conviction litigation. The Rehnquist Court might well gut the AEDPA counsel requirements as it gutted *Gideon* in *Strickland v. Washington*.[330]

After all, as the Rehnquist Court has put it, the trial is the "main event." *Strickland v. Washington* sets out the "counsel" to which one is entitled at that main event. It is hard to imagine that a court that gives so little to capital defendants at the main event would give them anything *more* than that in the sideshow of post-conviction review. Thus, when you are on trial for your life, *Strickland v. Washington* is all you get at trial and, at the most, all you get in capital post-conviction as well. In either arena, it is not much.

Before *Gideon* in 1963, there was no constitutional right to court-appointed counsel in non-capital felony trials except when due process required it in cases presenting "special circumstances." After *Gideon*, there was a right to counsel in capital and non-capital felony trials, but the cases following *Gideon* have made it increasingly clear that the "right to counsel" does not mean the right to an attorney who is any good. In the early 1960's, death row prisoners had no right to counsel in habeas, but, as a practical matter, LDF and other groups usually managed to find the necessary lawyers. Today, as in Florida in 1966 and 1967, large numbers of condemned inmates around the nation have no lawyers.

There is one difference between then and now. In the 1960's, a death row prisoner with a habeas lawyer meant he likely would not be executed. Today, even having a good habeas lawyer will not likely save him. But that is for another essay.

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328. *Id.*, § 2261(b).

329. *Id.*

330. *See* Strickland v. Washington, 466 U.S. 668 (1984); *see also* Gideon v. Wainwright, 372 U.S. 335 (1963).

F. The Capital Assembly Line: An Overview of the Steps in the Appellate and Post-conviction Process

> *My seven years studying the death penalty taught me, however, that the guts of our American death penalty are not to be found in prison. Death row—with its prisoners and wardens and pastors—is a dull, slow hell of waiting and despair. The real death penalty enterprise is a bustling, frantic mill of investigation, litigation, brief drafting, strategy, oral and written argument, a Rube Goldberg contraption kept clanking perpetually by the fuel of caffeinated lawyers and their cousins, the poll-driven politicians. It is a madhouse.*
>
> David von Drehle[331]

In Florida, the litigation stages, from imposition of death sentence to execution, can be diagramed as follows:

A	B	C
Trial and Sentence in Florida State Trial Court STEP 1	State Post-conviction Motion in State Trial Court (Rule 3.850 motion) STEP 4	Federal *Habeas Corpus* Petition in Federal District Court STEP 7
Affirmance of Conviction and Sentence on Direct/Plenary Appeal to Florida Supreme Court STEP 2	Appeal to Florida Supreme Court of State Post-conviction Motion (Rule 3.850 motion); Filing of Original Proceedings STEP 5	Appeal to Eleventh Circuit Court of Appeals STEP 8
Request for Plenary Review (*cert.*) in U.S. Supreme Court STEP 3	Request for Plenary Review (*cert.*) in U.S. Supreme Court STEP 6	Request for Plenary Review (*cert.*) in U.S. Supreme Court STEP 9

Executive Clemency (STEP 10)

331. DAVID VON DREHLE, *Forward* to MELLO, DEAD WRONG, *supra* note 2.

As set out in the diagram, the capital appeals assembly line can be divided into three columns, three clusters of stages: the trial/direct appeal column ("Column A," in the diagram), the state post-conviction column ("Column B"), and the federal habeas corpus column ("Column C").

At the beginning of the Column A cluster of steps, there is a traditional trial to determine guilt or innocence (Step 1). This is followed by a penalty phase which constitutes, in essence, a separate trial on the issue of sentencing (Step 1). Following conviction of a capital offense and imposition of the death penalty, the condemned person in Florida has a right to a direct (plenary) appeal to the Florida Supreme Court (Step 2). On direct appeal, the inmate argues that legal errors at trial require a retrial or resentencing. Only legal issues appearing within the four-corners of the trial record can be raised on direct appeal.

If the Florida Supreme Court rules against the prisoner on direct appeal, he or she may attempt to convince the U.S. Supreme Court that his case is worthy of the Court's consideration by filing a certiorari (cert.) petition (Step 3) and then, if unsuccessful, to seek post-conviction relief in state court (Step 4).

The prisoner then moves into Column B, the state post-conviction cluster of steps. Filing a state post-conviction motion (Step 4)–in Florida called a "Rule 3.850 motion"–provides a procedural mechanism for raising claims which were not or could not have been raised at trial or on the direct appeal. These Rule 3.850 motions typically raise claims that are outside the four-corners of the trial record (such record-based claims must be raised earlier, on direct appeal). The quintessential Rule 3.850 motion claim is a claim of ineffective assistance of trial counsel—an argument that trial counsel should have conducted a more thorough pretrial factual investigation into the defendant's background and life history. Since presentation of evidence that trial counsel did *not* investigate (and therefore did not present at trial) requires post-conviction counsel to go *outside* the trial record, such extra-record-based claims of ineffective assistance of trial record are properly presented in a Rule 3.850 motion.

These motions must be initiated in the state trial court and, if denied, appealed to the Florida Supreme Court (Step 5). State post-conviction litigation may also be initiated in the state appellate court (Step 5). Following Florida Supreme Court affirmance of the trial court's denial of the Rule 3.850 motion, and denial of any litigation initiated directly in the Florida Supreme Court, the prisoner may seek cert in the U.S. Supreme Court (Step 6).

Following exhaustion of state post-conviction litigation and denial of cert in the U.S. Supreme Court, the Florida inmate moves into Column C and is entitled to petition the Federal District Court for a writ of habeas corpus mandating retrial or resentencing (Step 7). Think of a federal habeas corpus

petition as a combination of all direct appeal (Column A) issues and state post-conviction (Column B) issues (or, Step 7 equals Column A trial-record-based issues and Column B outside-the-trial-record issues). If the habeas petition is denied in Federal District Court, the prisoner then appeals to the Eleventh Circuit Court of Appeals (Step 8).[332] Then, if the inmate loses in the appellate court, he may seek cert in the U.S. Supreme Court (Step 9). At any time following direct appeal, a condemned prisoner may file an application for executive clemency or pardon (Step 10). In Florida, a grant of clemency requires the votes of the Governor and a majority of the Executive Cabinet.

At any point beyond the plenary direct appeal, an execution date may be set by the Governor. In most states, Louisiana and Texas, for example, execution dates are set by the state courts. In other states, such as Florida and New Hampshire, execution dates are set by the Governor. Once a date is set, the condemned inmate must obtain a stay of execution in order to remain alive to pursue post-conviction remedies in state and federal courts.

My journals describe many cases that were litigated "under death warrant." Such litigation is fairly rough-and-tumble, with the defense lawyers flying from court to court in search of a stay, as the case moves down the assembly line of the capital appeals process from state trial court, to Florida Supreme Court, to the U.S. Supreme Court, to Federal District Court, to the Eleventh Circuit, to the U.S. Supreme Court, sometimes in a matter of days. The Ted Bundy case, for example, was decided by three different courts in one day.[333]

The logistics of litigating cases under warrant—where cases can go from the state trial court in Miami, to the Florida Supreme Court in Tallahassee, to the Federal District Court, to the Eleventh Circuit in Atlanta, to the U.S. Supreme Court in Washington, D.C., all in the space of a few days—led to some unique procedural customs and practices. For instance, we "lodged" stay papers in courts well in advance of when the cases reached those courts. Then, if a court in the assembly line denied a stay, we would place a phone call to "activate" the papers we had previously lodged.

The best way to illustrate how the various steps in this assembly line work is to describe one case traced in my diary—the Stephen Todd Booker case.[334] As discussed in more detail in the next section of this essay, no principle of modern capital punishment jurisprudence is more basic and less ambiguous than the one involved in Sandra Lockett's case in 1978.[335] As the

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332. To appeal, the prisoner must obtain permission to appeal. Such permission is routinely given in first-time *habeas* petitions filed by death row prisoners.

333. *See* MELLO, DEAD WRONG, *supra* note 2, at 103.

334. Booker v. Dugger, 922 F.2d 633 (11th Cir. 1991).

335. *See* Lockett v. Ohio, 438 U.S. 586 (1978).

Supreme Court put it in *Lockett v. Ohio*, "the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any circumstances of the offense that defendant proffers as a basis for a sentence of less than death."[336]

However, prior to *Lockett* in 1978, when Stephen Todd Booker was tried, all the relevant actors—attorney, judge, and jury—assumed that the only mitigating evidence that could be considered before imposing a death sentence was evidence relevant to the seven factors listed in Florida's 1972 capital statute. Thus, in all three cases, although substantial non-statutory evidence favoring a sentence less than death was available, none was affirmatively presented by counsel or considered by either the jury or judge. At every stage of the sentencing process—pre-hearing investigation and presentation of evidence by defense counsel, deliberation and recommendation of sentence by the jury, and consideration and imposition of sentence by the judge—these men on trial for their lives were deprived of the sentencing trial of the scope and depth constitutionally required by *Lockett v. Ohio*.

Booker was tried, convicted, and sentenced to die for the rape and murder of eighty-six year old Dolores Harman in Gainesville, Florida. It was a brutal crime, and Booker confessed to the murder. The most important issue in Booker's capital trial (Step 1 in the diagram) was not his guilt or innocence. It was the degree of the sentence. During Booker's penalty phase trial, Booker himself testified about his personal history and background. A psychologist testified describing Booker's childhood of poverty and abuse.

Booker's sentencers had before them at least ten items of significant evidence that, separately or in some unfathomable combination, *reasonably* could have led to a life sentence: None of these factors was listed in the capital statute as mitigating and therefore none was given independent mitigating weight by the sentencers. All were matters that the Florida courts have recognized, in the years since *Lockett v. Ohio* was decided in 1978, as non-statutory factors reasonably justifying a life sentence:

Psychiatric Institutionalization. Booker had been hospitalized nine times for mental problems, beginning at age thirteen. In Florida this is mitigating. In one case, the Florida Supreme Court ruled that hospitalization for mental problems weighed as mitigating evidence;[337] in another case, the defendant's testimony about time in mental institutions was sufficient to require a penalty phase inquiry into whether "the mental condition of the defendant was less

336. *Id.* at 604.

337. *See* Medina v. State, 466 So. 2d 1046, 1050 (Fla. 1985).

than insanity but more than the emotions of an average man";[338] in another case, institutionalization as a youth and psychological reports of schizoid personality were properly weighed in mitigation.[339]

Paranoid Schizophrenia. There were indications, during one of Booker's psychiatric commitments, that Booker suffered from paranoid schizophrenia. In Florida this is mitigating. The Florida Supreme Court has held that paranoid schizophrenia could reasonably form the basis of a jury's life recommendation, thus rendering a jury override improper;[340] that history of paranoid schizophrenia and other disorders could require setting aside a death sentence;[341] that paranoid type schizophrenia, was a mental illness requiring setting aside a death sentence, on proportionality grounds, notwithstanding a jury's recommendation of death;[342] the fact that the defendant was a "borderline personality with paranoid and schizoid features" was properly considered in mitigation.[343]

Hallucinations. Booker had suffered visual and auditory hallucinations since age six or seven. In Florida this is mitigating. The Florida Supreme Court has held that the non-statutory mitigating circumstances of personality change after returning from Vietnam, as well as the defendant's belief that God spoke to him, should have been considered in mitigation, vacating a death sentence;[344] that trial judges cannot improperly ignore as a mitigating factor mental illness and hallucinations; and that such disregard would require a reversal of a death sentence.[345]

History of Drug and Alcohol Problems. Booker had a history of alcoholism and drug abuse, and there was evidence that he was under the influence of both at the time of the crime. In Florida this is mitigating. The Florida Supreme Court has concluded that "a history of drug and alcohol problems"

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338. Penry v. State, 441 So. 2d 606, 609 (Fla. 1983).

339. *See* LeDuc v. State, 365 So. 2d 149, 150-51 (Fla. 1978), *cert. denied*, 444 U.S. 885 (1979). *See also* Ferguson v. State, 417 So. 2d 631, 638 (Fla. 1982) (trial judge improperly weighted mitigating history of mental disorder and hospitalization); Stone v. State, 378 So. 2d 765, 773 (Fla. 1979), *cert. denied*, 449 U.S. 986 (1980) (institutionalization at various times until defendant was 19 or 20 years old considered in mitigation by trial judge)

340. *See* Ferry v. State, 507 So. 2d 1373, 1376 (Fla. 1987).

341. *See* Ferguson v. State, 417 So. 2d 631, 637-38 (Fla. 1982).

342. *See* Mines v. State, 390 So. 2d 332, 337 (Fla. 1980), *cert. denied*, 451 U.S. 916 (1981).

343. Holsworth v. State, 522 So. 2d 348, 353 (Fla. 1988). *See also* Mann v. State, 420 So. 2d 578, 581 (Fla. 1982), *cert. denied*, 469 U.S. 1181 (1985) (holding that unclear if trial court properly weighed as mitigating psychotic depression and paranoid feelings of rage; resentencing ordered).

344. *See* Moody v. State, 418 So. 2d 989, 995 (Fla. 1982), *cert. denied* 459 U.S. 1214 (1983).

345. *See* Miller v. State, 373 So. 2d 882, 885-86 (Fla. 1979).

properly should be considered by the jury in mitigation of the sentence of death;[346] that one defendant "proffered evidence that he suffered from alcoholism and was under the influence of alcohol on the night of the murder . . . . The jurors should have been allowed to consider these factors in mitigation";[347] then in another case, a judge's override of the jury's life recommendation was improper due in part to defendant's "drinking problems" and history of alcoholism, notwithstanding the defendant's testimony that he was "cold sober" on the night of the crime;[348] the Florida Supreme Court has also "held improper a jury override where, among other mitigating factors, there was some 'inconclusive evidence that defendant had taken drugs on the night of the murder,' along with 'stronger' evidence of a drug abuse problem";[349] that "history of drug abuse" is a factor rendering a jury override improper;[350] that alcoholism and organic brain syndrome justified a jury instruction on statutory mitigating factor of substantial mental impairment;[351] and that history of drug abuse and intoxication and drug dependency are reasonable bases for jury's recommendations of life imprisonment.[352]

Split Personality. Soon after Booker's arrest, he acted, as the Florida Supreme Court put it, in a "bizarre manner," and evidenced a split personality. Booker became glassy-eyed, chanted, clenched his teeth until they cracked, laughed uncontrollably and suddenly cried. The arresting detective testified that in his opinion Booker was sincere, and not faking, during these events. In Florida this is mitigating. In one case, the Florida Supreme Court decided that a personality disorder may be given mitigating weight;[353] in another case that potentially mitigating evidence of schizoid personality was properly admitted and weighed at the trial;[354] that a defendant's refusal to wear civilian clothes at trial, insistence that he was Black when he was actually Caucasian, and insistence on testifying at sentencing only to assert the Fifth Amendment privilege, were properly weighed in mitigation;[355] in another, that a defendant's abnormal appearance and behavior on the night of the shooting

346. *Holsworth*, 522 So. 2d at 353. *See also* Barbera v. State, 505 So. 2d 413, 414 (Fla. 1987).
347. Waterhouse v. Dugger, 522 So. 2d 341, 344 (Fla. 1988).
348. Ross. v. State, 474 So. 2d 1170, 1174 (Fla. 1985).
349. Fead v. State, 512 So. 2d 176, 178 (Fla. 1987).
350. Amazon v. State, 487 So. 2d 8, 13 (Fla. 1986), *cert. denied*, 479 U.S. 914 (1986).
351. *See* Roman v. State, 475 So. 2d 1228, 1235 (Fla. 1985), *cert. denied*, 475 U.S. 1090 (1986).
352. *See* Huddleston v. State, 475 So. 2d 204, 206 (Fla. 1985).
353. *See* Atkins v. State, 452 So. 2d 529, 533 (Fla. 1984).
354. *See* Fitzpatrick v. State, 437 So. 2d 1072, 1078 (Fla. 1983), *cert. denied*, 465 U.S. 1051 (1984).
355. *See* King v. State, 436 So. 2d 50, 55 (Fla. 1983), *cert. denied*, 466 U.S. 909 (1984).

was a matter properly weighed by the jury in deciding whether the defendant deserved to die.[356]

Organic Brain Damage. There was evidence that Booker suffered from organic brain syndrome, secondary to drug use. In Florida this is mitigating. In one case, the Florida Supreme Court has concluded that a new sentencing hearing was required if examinations by court-appointed psychiatrists ignored clear indications of organic brain damage;[357] in another case, evidence of brain damage was held to be one factor requiring an evidentiary hearing on mental competency to stand trial;[358] that alcoholism and organic brain damage justified a jury instruction on statutory mitigating factors of substantial mental impairment;[359] that the trial judge adequately considered the potentially mitigating effect of organic brain disorder and other factors.[360]

Deprived and Turbulent Childhood. Booker had a turbulent childhood, with little structure, stability, or supervision and with no male role model. Left to his own devices, Booker quit school at the eighth grade and became involved in alcohol and drugs. In Florida this is mitigating. In one case the Florida Supreme Court explained that "the jury could have concluded that appellant's psychological disturbance was influenced in part by his difficult childhood. Childhood trauma has been recognized as a mitigating factor";[361] that the jury's life recommendation could reasonably have been based on the fact that defendant "grew up without a father and was reared by his mother and another woman";[362] that shock effects produced by childhood traumas may have mitigating weight;[363] that history of childhood abuse and difficulty of childhood are considered as mitigating circumstances;[364] that suggesting that "deprived upbringing without a father" was proper consideration in mitigation;[365] that it was erroneous for a trial court to exclude testimony of a defendant's mother in testifying at the sentencing phase of a capital trial concerning background and upbringing.[366]

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356. *See* Lucas v. State, 376 So. 2d 1149, 1153-54 (Fla. 1979).
357. *See* State v. Sireci, 502 So. 2d 1221, 1224 (Fla. 1987).
358. *See* Mason v. State, 489 So. 2d 734, 736-37 (Fla. 1986).
359. *See* Roman v. State, 475 So. 2d 1228, 1235 (Fla. 1985), *cert. denied*, 475 U.S. 1090 (1986).
360. *See* Johnson v. State, 442 So. 2d 185, 189 (Fla. 1983), *cert. denied*, 466 U.S. 963 (1984).
361. Holsworth v. State, 522 So. 2d 348, 354 (Fla. 1988).
362. Neary v. State, 384 So. 2d 881, 886-87 (Fla. 1980).
363. *See* Rogers v. State, 511 So. 2d 526, 535 (Fla. 1987), *cert. denied*, 484 U.S. 1020 (1988).
364. *See* Lara v. State, 464 So. 2d 1173, 1180 (Fla. 1985).
365. White v. State, 446 So. 2d 1031, 1036 (Fla. 1984).
366. *See* Perry v. State, 395 So. 2d. 170, 174 (Fla. 1980).

Cooperation with Police. There was evidence that Booker cooperated with the police. The police received an anonymous telephone tip that the crime had occurred; defense counsel argued in closing argument that Booker made that call. The police described Mr. Booker as "cooperative." He voluntarily gave fingerprints and hair samples. In Florida this is mitigating. The Florida Supreme Court has held that "defendant's cooperation with law enforcement officers can be grounds for reducing or suspending a sentence";[367] that a death sentence was not appropriate where there was one valid aggravating circumstance and several non-statutory mitigating circumstances, including a voluntary confession.[368]

Remorse. Booker asked to be sentenced to death. But that "death request" could reasonably have been viewed by the jury and judge as evidencing the sort of remorse that shows openness to rehabilitation. Defense counsel so argued. In Florida this is mitigating. The Florida Supreme Court has explained that, "any convincing evidence of remorse may properly be considered in mitigation";[369] that remorse, among several non-statutory mitigating circumstances, might make a death sentence inappropriate;[370] that remorse, considered by the Florida Supreme Court in its search of the record for possible non-statutory mitigating factors, could justify a life sentence;[371] that "the state of mind of a murderer during or immediately after commission of the crime may be legitimately examined for remorse."[372]

Honorable Discharge from the Military. Booker enlisted in the army during the Vietnam War, and he was honorably discharged. In Florida this is mitigating. The Florida Supreme Court has concluded that the fact that a defendant was a wounded and an honorably discharged Vietnam veteran, was among mitigating factors properly considered, and would have justified a life sentence;[373] and that the trial court properly found the defendant's honorable service in Vietnam to be mitigating.[374]

This was the evidence *presented* to the jury at the penalty phase of Booker's trial by his court-appointed public defender. The problem was that Booker's jury was instructed by the judge not to *consider* any mitigating

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367. Jordan v. State, 478 So. 2d 512, 513 (Fla. Dist. Ct. App. 1985).
368. *See* Caruthers v. State, 465So. 2d 496, 499 (Fla. 1985).
369. Pope v. State, 441 So. 2d 1073, 1078 (Fla. 1983).
370. *See Caruthers*, 465 So. 2d at 498.
371. *See White*, 446 So. 2d at 1036.
372. Magill v. State, 386 So. 2d 1188, 1190 (Fla. 1980), *cert. denied*, 450 U.S. 927 (1981).
373. *See* Masterson v. State, 516 So. 2d 256, 258 (Fla. 1987).
374. *See Pope*, 441 So. 2d at 1076.

evidence that did not fit within the narrowly-circumscribed list of mitigating factors enumerated in Florida's capital statute. Little of Booker's evidence did fit within the statutory list. Thus, in effect, Booker's sentencing jury was instructed to ignore virtually all of the mitigating evidence presented by Booker's defense counsel.

This mitigating evidence seems to me substantial. Whether or not it is sufficient to outweigh the heinous nature of the murder of Dolores Harman—the rape and murder of an elderly woman—is beside the point. The rule of *Lockett v. Ohio* does not command that a capital sentencer be persuaded that non-statutory mitigating circumstances require a sentence less than death. The rule of *Lockett v. Ohio* does require, *however*, that the capital sentencers must be permitted to consider, and to give independent mitigating weight, to all the relevant evidence that the man or woman on trial for their life wishes the sentencer to consider. *Lockett v. Ohio* requires that the capital sentencer *listen* to the capital defendant's case for life imprisonment rather than execution.[375]

Depriving a capital defendant of the right to have his sentencing jury consider evidence of mitigation is the equivalent of denying him the right to defend himself at the sentencing stage of the trial. In Stephen Todd Booker's case, that is what happened. The advisory sentencing proceedings in Booker's case took place on June 19, 1978, and on that date the jury—by a vote of nine to three—recommended death. The U.S. Supreme Court decided *Lockett v. Ohio* on July 3, 1978.

At every stage of Booker's trial—from the beginning of jury selection to the penalty phase jury instructions—the advisory sentencing jury was told unequivocally that in recommending a sentence for Booker it could consider only the mitigating factors set out in Florida's capital statute. That message was hammered home by the judge, the prosecutor, and, at various stages of the proceedings, the defense counsel himself. As a consequence, although substantial nonstatutory mitigating evidence was *introduced* at Booker's trial, the jury and judge *considered* that evidence only in the context of the statutory factors.

At the very beginning of the jury selection process, the trial judge instructed the prospective jurors that at the penalty phase the "jury makes a recommendation of what sentence the judge should pass, *based on factors the law has written down*, aggravating circumstances and *mitigating circumstances*."[376]

Following the jury's finding of guilt of first degree murder, the judge instructed the jury that "at the conclusion of the taking of the evidence and

375. *See* Lockett v. Ohio, 438 U.S. 586, 605-06 (1978).

376. *Id.* at 586.

after argument of counsel, you will be instructed on *the factors* in aggravation and *mitigation you may consider*." This instruction clearly defined the limits of the jury's understanding of the evidence it would hear at the penalty phase and was reinforced by the final jury instructions, discussed below.

The prosecutor's penalty phase evidence consisted of certified copies of Booker's prior convictions. The defense's penalty phase evidence consisted of Booker's testimony, together with the evidence adduced at the guilt/innocence phase—particularly the testimony of a psychiatrist and police detective. As discussed above, that evidence involved almost exclusively matters not included on the statutory list of mitigating circumstances.

The prosecutor's closing argument to the jury stressed that there is a list of aggravating and mitigating circumstances. In his closing argument, defense counsel conceded that only the statutory mitigating factors counted. As a consequence, he tried to fit all of the evidence into the statutory factors.

With the foregoing as context, the judge in Booker's case gave the jury Florida's standard jury instruction on mitigating circumstances: "[t]he mitigating circumstances which you may consider if established by the evidence, are these: [statutory list.]" The jury recommended death. The judge agreed, and Booker was sentenced to die in Florida's electric chair.

Booker took a direct appeal of his conviction and sentence to the Florida Supreme Court (Step 2, in the diagram presented earlier).[377] On this direct appeal, Booker's lawyer was limited to the four-corners of the trial record and he argued that Booker's death sentence violated the requirements of *Lockett v. Ohio*.[378] In rejecting this argument and affirming Booker's conviction and death sentence, the Florida Supreme Court noted: "In light of *Lockett v. Ohio*, the defendant says that Florida's death penalty statute is too narrowly defined in the range of mitigating circumstances which the sentencing authority may consider."[379] This argument was rejected by this Court.[380] The Florida Supreme Court's rejection of Booker's arguments was unanimous, seven to zero.[381]

In 1982, Florida Governor Bob Graham signed Booker's death warrant. Booker's execution was scheduled twenty-eight days later. At that point, Stephen Todd Booker had no lawyer. The Gainesville public defender, who had represented Booker at his trial and on Booker's direct appeal to the

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377. *See* Booker v. State, 1397 So. 2d 910 (Fla. 1981).

378. *See Lockett*, 438 U.S. at 586. Technically, under Florida's appellate practice, Booker was procedurally barred from raising the *Lockett* issue on direct appeal—because his trial lawyer (who was also his direct appeal lawyer) had not made a timely objection at trial. However, the Florida Supreme Court forgave the failure to object at trial and reached—and rejected—the *Lockett* issue on its merits. *See id.*

379. *Booker*, 397 So. 2d at 918.

380. *See* Songer v. State, 365 So. 2d 696 (Fla. 1978).

381. *See Booker*, 397 So. 2d at 918.

Florida Supreme Court, was willing to continue to represent Booker and to attempt to win a stay of Booker's then pending execution.

But there was a problem. The legal issue most likely to win Booker a stay of execution was a claim based on ineffective assistance of trial counsel (Step 4 in the diagram). In order for Booker's lawyer for trial and direct appeal to continue to represent Booker at the post-conviction stage of the legal proceedings, the same post-conviction lawyer would be arguing to the court that the trial lawyer rendered ineffective assistance of trial counsel during Stephen Booker's capital trial. What Booker needed—and needed desperately, given the four week countdown that would culminate with his execution—was a new post-conviction lawyer. He needed an attorney other than the trial public defender who could conduct an independent investigation and, if credible, present to the post-conviction court the argument that trial counsel rendered ineffective assistance. But there were no other lawyers. In 1982, Florida law did not provide legal aid to death row prisoners in the post-conviction stages of capital appellate litigation. A desperate scramble then ensued, inside and outside of Florida, to try to locate and persuade a law firm willing to undertake Booker's representation pro bono.

That attempt failed. With less than two weeks remaining before Booker's scheduled electrocution, it became clear that Stephen Booker possessed only two choices. He could attempt to represent himself in the post-conviction process, which almost certainly would have resulted in his execution as scheduled. Or Booker could agree to accept his trial lawyer's offer, and let the trial lawyer represent Booker in the post-conviction system. But, then Booker would also forever waive any legal challenge to the effectiveness of the lawyer's representation of Booker at the capital trial. The trial attorney told Booker that he had read the trial transcripts and that he didn't think he had been ineffective during Booker's trial. Given this Hobson's choice, Booker reluctantly said "ok," the trial lawyer could represent him.

Over the next two weeks, Booker's trial attorney investigated and filed legal papers asking the courts, state and federal, to stay Booker's execution. The attorney filed a state post-conviction motion (a Rule 3.850 motion) and an application for stay of execution in the state trial court (Step 4) and, when that was denied, he appealed to the Florida Supreme Court (Step 5). When the Florida Supreme Court denied both the Rule 3.850 appeal and the stay application, Booker's counsel filed a *habeas corpus* petition and stay application in the Federal District Court (Step 7). When the Federal District Court denied *habeas* and denied a stay (Step 7), the *Booker* case moved on to the Eleventh Circuit (Step 8), from which Booker's lawyer finally obtained

a stay.[382] In all of these courts, Booker's counsel raised a number of constitutional issues, including the *Lockett* issue.

During part of the time that Stephen Todd Booker's case was pending before the Eleventh Circuit Court of Appeals, I was clerking for Judge Robert Vance in Birmingham, Alabama. In the end, Judge Vance voted against Booker. Although Judge Vance did not write separate opinions in either case, as Judge Vance's "death clerk," I read the trial transcript of the Booker case. It was odd that Booker had not raised a claim of ineffective assistance of trial counsel; such claims are routinely raised in death penalty cases. Also, it did not seem that Booker's trial lawyer had put on much of a case for life at the penalty phase of Booker's capital trial.

My clerkship for Judge Vance concluded in the summer of 1983. When I left Birmingham for deathwork in Florida, I took Stephen Booker's case with me in my mind. I had only been working for a short time as an Assistant Public Defender in the capital appeals division of the State Public Defender's Office in West Palm Beach, Florida, when Governor Bob Graham signed Booker's second death warrant. My bosses in the West Palm Beach Public Defender's Office, Richard Jorand by and his chief assistant, Craig S. Barnard, had been the principal architects of the *Lockett v. Ohio* constitutional challenge to capital punishment as a legal system in Florida.[383] In October 1983, as during Booker's first death warrant in 1982, the West Palm Beach Public Defender's Office could not represent Booker. Our jurisdiction was now limited to raising legal issues contained within those capital cases tried within our limited geographical area. Our jurisdiction did not extend to Gainesville, where Booker had been tried and condemned in 1978.

And now, as in 1982, Booker had an active, twenty-eight day death warrant, and no attorney. But because the Booker case had bothered me since my days as a law clerk for Judge Vance in Birmingham, I did everything I could think to do to find Booker a different lawyer—a lawyer other than Booker's trial/appeal/post-conviction lawyer who represented Booker at trial and during the first death warrant. I called dozens of my old law school classmates, who were working at large law firms throughout the United States, asking them to take on Stephen Booker's case as a pro bono project. They all expressed sympathy, but they all declined. I also called several of my old law school professors, making the same plea. They also declined.

With time running out, I called Jeffrey D. Robinson. Jeff and I had met and become friends during the summer of 1982, the summer after I graduated from UVA and the summer before Jeff began his third year of law school at Yale. In the years since then, Jeff has become my best and closest friend.

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382. *See* Booker v. Dugger, 422 F.2d 633 (11th Cir. 1991).

383. *See Lockett*, 438 U.S. at 586.

When I called him about Steve Booker's case, however, I fully expected him to decline. He didn't. He took my request to James Coleman, a partner at the law firm that hired Jeff upon his graduation from Yale Law School. The law firm, D.C.'s Wilmer, Cutler & Pickering, was perhaps the best law firm in a city well-known for its law firms. To greatly truncate a complicated, albeit fascinating story, Jeff Robinson, Jim Coleman, and another Wilmer associate, Marion Lindberg, persuaded the firm to take the case.

So now, with an imminent execution date, Stephen Todd Booker finally had a lawyer other than his original trial attorney. Hell, Booker had a law firm—one of the best in the world. The firm treated Stephen Todd Booker as it would treat any corporate client—first class. Jeff, Jim, and Marion conducted a massive factual reinvestigation into the claim that Booker had been forced to abandon in 1982 during his first death warrant—the argument that the trial lawyer had rendered ineffective assistance of counsel during Booker's capital trial in 1978. This reinvestigation unearthed massive amounts of additional mitigating evidence that Booker's trial lawyer Bernstein could have found, had he bothered to look, either during the trial in 1978, or during the first death warrant in 1982.

Booker's new lawyers filed a motion for post-conviction relief in the state trial court in Gainesville, Florida (Step 4). The principal claim was ineffective assistance of trial counsel—the claim Booker had waived under duress during the first death warrant. Judge John Crews, the same trial judge who had presided over Booker's original trial in 1978 and rejected the trial lawyer's first motion for state post-conviction relief and stay of execution in 1982, ruled that it was too late for Booker to raise the argument that the trial attorney rendered ineffective assistance of trial counsel. Judge Crews derided the Hobson's choice with which Booker was confronted. He concluded that Booker and his trial/post-conviction attorney had abandoned any claim that trial counsel rendered ineffective assistance of trial counsel by not raising the claim in the first state post-conviction proceeding in 1982.

Then, for reasons murky to me to this day, Judge Crews ordered an evidentiary hearing on the same ineffective assistance of counsel claim that he had found abandoned by Booker and trial/post-conviction counsel in 1982. Booker's new D.C. lawyers brought in a Miami criminal defense attorney to represent Booker at the evidentiary hearing. At the hearing, the trial/post-conviction lawyer testified that he did, in fact, conduct a particular investigation and he also solicited certain expert opinions from a psychiatrist who had examined Booker. Notwithstanding vigorous cross-examination by Booker's brand new Miami attorney, the trial/post-conviction attorney stuck to his story under oath. Following the hearing, Judge Crews denied Booker a retrial or resentencing. Judge Crews also denied a stay of execution.

On to the Florida Supreme Court (Step 5). Booker's Wilmer, Cutler & Pickering lawyers threw together an appellate brief. The court heard oral arguments. The court rejected those arguments and refused to issue a stay of execution.

On to Federal District Court (Step 7). To my great surprise, Federal District Judge Maurice Paul stayed Booker's execution. Judge Paul needed time to study Booker's argument that his 1982 "waiver" of the claim of ineffective assistance of trial counsel against Bernstein was more of a Hobson's choice than it was a knowing and intelligent waiver of a known right or privilege. Rather, Booker's "waiver" was coerced and therefore invalid. After considering the issue, Judge Paul ultimately agreed with the Florida courts that Booker's 1982 waiver was knowing and voluntary. Booker's Wilmer, Cutler & Pickering lawyers appealed that ruling to the U.S. Court of Appeals for the Eleventh Circuit (Step 8). In 1985, the Eleventh Circuit affirmed Judge Paul.

Although Florida Governor Bob Graham's office knew perfectly well that Booker's lawyers intended to appeal the Eleventh Circuit's decision to the U.S. Supreme Court (Step 9), the Governor decided to sign Stephen Booker's death warrant anyway—before Booker's lawyers had an opportunity to file a petition asking the Supreme Court to grant Booker plenary review. Governor Graham's signing the new death warrant, when Booker's case was between courts—between the Eleventh Circuit Court of Appeals and the U.S. Supreme Court—was an obvious ploy designed to rush the federal courts. Governor Graham's transparent attempt to manipulate the dockets of both the Eleventh Circuit and the U.S. Supreme Court offended the sensibilities of the Eleventh Circuit judges.

Many courts do not appreciate being manipulated by politicians. So the Eleventh Circuit, even after deciding that Judge Paul's decision in Booker's case was correct, then decided that Booker had an opportunity to seek U.S. Supreme Court review of the Eleventh Circuit's determination—and to seek that review without the massive, hydraulic time pressures of an active death warrant and a scheduled execution date. Thus, the Eleventh Circuit issued a stay of execution pending Booker's filing and disposition of the petition asking the U.S. Supreme Court to hear his case.

At the time, I thought that was the end of it. In the mid-1980s, the U.S. Supreme Court almost never vacated a lower federal court's decision to grant a stay of execution in a death penalty case. So, when the Florida prosecutors asked the U.S. Supreme Court to dissolve the stay that the Eleventh Circuit had issued, I told my friend Jeff not to worry. That, as it turned out, was not good advice.

To my appalled amazement, the U.S. Supreme Court, speaking through Associate Justice Lewis F. Powell, Jr., dissolved the Eleventh Circuit stay in

Booker's case (Step 9). The Court's unusual action in dissolving the stay sent an unmistakable message to the federal judiciary with jurisdiction over Florida: stay the hell out of the State of Florida's attempts to execute Stephen Todd Booker in one week.

It's over, I thought—Stephen Todd Booker is a dead man. Not only was he scheduled to be executed in one week, but the nation's highest court had *dissolved* a lower federal court's stay of Booker's execution. Thus, not only did Booker not have a stay, he also did not have any apparent legal issues with which to get a stay. The U.S. Supreme Court had sent a strong message that the federal courts are to let this execution proceed as scheduled.

I did not tell any of this to my friends at Wilmer, Cutler & Pickering, of course. I tried to be helpful, optimistic, encouraging. But I didn't believe my own words. I doubt that they believed them, either.

Then lightning struck. Booker's Wilmer, Cutler & Pickering lawyers discovered trial/first post-conviction counsel lied when he testified at the evidentiary hearing before Judge Crews in 1983. If anything might persuade Judge Crews to stay Booker's third death warrant, this would be it. Judges really, really hate it when lawyers lie under oath in their courtrooms. Still, it was a long shot. This was a third death warrant. At that time, no Florida inmate had ever survived a second death warrant, much less a third. The U.S. Supreme Court had already dissolved the Eleventh Circuit stay. It was a long shot.

But sometimes long shots pay off. Judge Crews stayed the execution (Step 4) and ordered an evidentiary hearing to determine whether or not the trial attorney had committed a "fraud on the court" during his testimony in the 1983 evidentiary hearing on ineffective assistance of trial counsel. Following that evidentiary hearing, in 1986, Judge Crews concluded that the trial lawyer had not lied during his 1983 testimony and therefore he had not committed a fraud on the court. Booker's lawyers appealed that decision to the Florida Supreme Court (Step 5).

In January 1987, I left full time death work in Florida and accepted a job as an associate at the Wilmer, Cutler & Pickering law firm in D.C. That is where I was working in May 1987, when a unanimous U.S. Supreme Court decided James Hitchcock's case[384]—another former client of mine whose case is discussed at length in my diaries[385]—and found that the *Lockett v. Ohio* issue in Stephen Todd Booker's case, raised by the trial lawyer at trial and in the first state post-conviction motion filed during the first death warrant in 1983 had, in fact, been right.

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384. *See* Hitchcock v. Dugger, 481 U.S. 393 (1987). *See also* discussion *infra* Part III.

385. I discuss this issue in more detail in the next section of this essay.

Booker had been right all along. The trial lawyer had been right all along. Jim Hitchcock had been right all along. And, those Florida death row prisoners who were still alive to raise the *Lockett v. Ohio* claim again, after *Hitchcock* was decided in 1987, would almost certainly win new sentencing trials based on *Hitchcock*. For those eighteen Florida prisoners executed prior to the *Hitchcock* decision, the case was moot, the ultimate mootness.

The U.S. Supreme Court issued its unanimous *Hitchcock* decision on April 22, 1987, at 10:00 a.m. As soon as I heard the news I dispatched a courier from our law offices on M Street, just up from Georgetown, to the Supreme Court's building. I was reading the Court's opinion in *Hitchcock* by 10:30 a.m. I was, of course, delighted for Jim Hitchcock and Steve Booker and all of my other clients and former clients lucky enough to still be alive when Jim Hitchcock's case was decided.

But mostly I thought about Ronnie Straight and James Adams and Bob Sullivan and James Dupree Henry and Marvin Francois and Anthony Antone and Timothy Palmes and all of the others who had been executed previous to this day. Later that morning, I walked a copy of the *Hitchcock* opinion down the hall to Jim Coleman's office, and we celebrated. That evening, when Jeff Robinson and I got together for drinks and cigars at the Irish Times Pub, I did my best to play the happy victor. But Jeff Robinson knows me too well, and we mostly talked about Ronnie Straight and my other dead clients who also had the *Hitchcock* issue, but who hadn't lived long enough to benefit from the decision.

Steve Booker was alive. Ninety-six days after the Supreme Court's decision in *Hitchcock*, Jim Coleman and I filed a petition for new trial based on the *Hitchcock* decision. We filed it directly in the Florida Supreme Court, since, by that time, we had worn out our welcome in Judge Crews' courtroom (Step 4). The Florida Supreme Court scheduled oral arguments, which I argued, in Tallahassee, in 1987.

In early 1988, a five-judge majority of the Florida Supreme Court ruled that, while a *Hitchcock* error occurred in Stephen Booker's case, that error was harmless beyond a reasonable doubt. Two justices vigorously dissented, but the bottom line was that we had lost. Coleman and I filed a petition seeking U.S. Supreme Court review of the Florida Supreme Court's judgment, which was denied seven to two (Step 6). In June 1988, Jim Coleman, Jeff Robinson, and I filed a petition for writ of habeas corpus, right back in Federal District Judge Maurice Paul's courtroom (Step 7).

In mid-June, 1988, I moved to Vermont to begin my full-time teaching job at Vermont Law School. I was in a relationship with a former legal services attorney who was convinced, not without substantial justification, that my devotion to death work displaced my ability to be a full partner in our personal relationship.

Thus, in August 1988, I persuaded my woman friend that my work for the summer was done, and that we should take some time off and go to the coast of Maine to relax, totally. We left for Ogonquit, Maine on August 8, and during the three hour drive from Vermont to the Maine coast I reiterated that I had not given the phone number of the Colonial Motel, where we would be staying in Ogonquit, to anyone other than my secretary.

This was almost true. I had, also given the Colonial's number to my friend Jeff Robinson, but both Jeff Robinson and my secretary knew not to disturb us in Ogonquit absent a genuine emergency.

Thus, imagine my surprise—and my companion's horror—when, as soon as we identified ourselves at the motel check-in desk, I was handed a telephone message to please call Jeff Robinson as soon as possible. My companion was furious. I was petrified. She didn't know Jeff, but I did. There was only one possible reason Jeff would have called here and left me this message. The Governor of Florida must have signed a fourth death warrant on Stephen Todd Booker. Only one Florida death row prisoner had survived a fourth warrant—Willie Jasper Darden—and he was executed on his sixth warrant.

My companion and I took a long walk on the beach, but at the end of it I was still anxious and my friend was still furious. I telephoned Jeff from a parking lot pay phone near Barnacle Billy's restaurant, in Perkins Cove. Sure enough, the Governor had signed Booker's death warrant—his fourth death warrant. But he and Jim Coleman had everything under control. To our already filed and pending habeas corpus petitions, they would add a short application for stay of execution based upon the same grounds set out in the habeas petition.

In a single stroke, and in a single order, Judge Maurice Paul issued an opinion staying Booker's execution and ordering a resentencing trial, with a new jury, based solely upon the *Hitchcock* decision. Booker had been scheduled to be executed at 7:00 a.m. on September 20, 1988. Judge Paul issued his stay of execution and resentencing order on September 17, 1988.

For the next ten years, the State of Florida filed petition after petition, appeal after appeal, attempting to invalidate Judge Paul's order that Booker must receive a new (and fair) sentencing trial. All of these petitions and appeals by the state were rejected, by court after court, but the State of Florida kept on trying.

After the State of Florida had exhausted all of its repetitive appeals, Stephen Todd Booker had his resentencing trial (Step 1). At that trial, Booker was represented by the local public defender.

Booker's new jury learned that he had become a death row poet. For example, in September 1997, reporter Lise Fisher wrote in the *Gainesville Sun Newspaper*:

"It's harder for the prosecution than it was 20 years ago because Stephen Todd Booker is not the same man he was 20 years ago," said Michael Mello, a lawyer who has represented Booker.

But State Attorney Rod Smith said he still will seek the death penalty.

"In this case where the death penalty was previously given, the (aggravating factors) haven't changed," he said. During the sentencing phase of the trial, jurors weigh so-called mitigating factors vs. aggravating factors in determining life or death.

In 1978, a jury was swayed by evidence showing that Booker broke into Harman's apartment on Nov. 9, 1977. The assistant postmaster, who moved to Florida from Maryland after her husband's death, surprised Booker. According to police reports, Harman was first severely beaten and raped. Then she was stabbed repeatedly in the chest and throat.

"It was a case that had a great deal of community outrage at the time," said Smith. "She met a horrible death."

But, prosecutors realize, the image of Booker as violent killer is now 20-years-old. Many living in Gainesville have never heard of the crime or find it overshadowed by the horror of more recent events, like Gainesville's student murders.

Jurors also will see a man who is now an accomplished poet and whose poetry, for some, evinces a person who has changed in the intervening years.

Booker's poems, categorized as "dark" and "raw," have made their way into literary journals, including distinguished publications like The Kenyon Review, which turn away thousands of writers a year.

"That means that his poetry had to have some strong effect on us to have chosen it out of all the submissions," said James Olney, editor of The Southern Review. Before Booker, the journal had never published a prisoner's work, Olney said.

"What moves me is the content of the poems," said Deborah Tall, editor of the Seneca Review, which has also published Booker's poetry.

In a poem titled "Escape to Kismet" and published by the Seneca Review, Booker writes about Vietnam and the relationship between a man and a prostitute.

"When like the bereaved father of a raindrop, spilling and keeping right on spilling, until the riptide of a zillion unborn tears slams into the beard of your musings what if – you'll one day have to admit to yourself you left her without as much as a fare-thee-well. And leaving means you would if you could have to return to her and love her just as much what she probably still will sell."

> "He is reflecting on the pain that he caused. What I've seen is someone who has tried to grow," Tall said about Booker's work.
>
> Booker "is one of these rarities on Death Row that you see once in a while who use their time in prison to change their lives," said Mello.
>
> "My view is people of talent, even arguably of some limited genius, may be even more responsible for what they do," Smith said. "In my view it is not a factor."
>
> Although realizing Booker's art could be given weight in his sentencing, Smith said that doesn't excuse the aggravating factors of Harman's death, including her age and the crime's brutality, he said.
>
> The federal Eleventh Circuit Court of Appeals said Booker needs to be resentenced, not retried, Smith said.
>
> "No one," said the prosecutor, "is saying he didn't do it."

It didn't matter. In 1998 Booker was again sentenced to death (Step 1). He is appealing that judgment (Steps 2, 3, and so on).

My purpose in presenting the foregoing chronology of the *Booker* epic was to illustrate the various steps in the capital appeals and post-conviction assembly line. In the next Part, I discuss some of the constitutional issues—including the *Hitchcock* issue that saved Steve Booker's life in 1988—that recur in my journals.

III. HOW TO TELL A TRUE WAR STORY: SOME CONSTITUTIONAL ISSUES (INCLUDING THE FLORIDA SUPREME COURT'S TWO BIG FIBS), AND SOME PERSONAL ASPECTS OF DEATHWORK

> *Often in a true war story there is not even a point, or else the point doesn't hit you until twenty years later, in your sleep, and you wake up and shake your wife and start telling the story to her, except when you get to the end you've forgotten the point again. And then for a long time you lie there watching the story happen in your head. You listen to your wife's breathing. The war's over. You close your eyes. You smile and think, Christ, what's the point.*
>
> Tim O'Brien, *How to Tell a True War Story*[386]

My journals refer frequently to several constitutional issues that require some explanation.

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386. TIM O'BRIEN, *How to Tell a True War Story*, *in* O'BRIEN, THE THINGS THEY CARRIED (1990).

A. The Electric Chair

> I note that both the American Veterinarian Medical Association and the Humane Society of the United States prohibit electrocution as a means of euthanizing animals.
>
> Georgia Supreme Court Justice Sears (1999)[387]

> Furthermore, all correspondence referring to the matter [of the final solution] was subject to rigid "language rules" .... It is rare to find documents in which such bold words as "extermination," "Liquidation," or "killing" occur. The prescribed code names for killing were "final solution," "evacuation" and "special treatment."

Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (1963)

My journals discuss the genesis of a macabre issue—the legality of Florida's electric chair—that reached the U.S. Supreme Court only in 1999. In July 1999, Allen Lee Davis, "a 300-pound triple murderer known as 'Tiny,'" was killed in Florida's electric chair.[388] Photos of the execution

> show in graphic detail what happened as the switch was thrown. His body reared back against the chair's restraints, giving witnesses a grotesque glimpse under a black hood designed to hide the faces of the condemned. His round, moon face contorted grossly, the flesh seeming to knot, and colored a vivid purple. Blood poured from his nose, ran down the wide leather strap that covered his mouth, and soaked his white shirt. After the power was turned off, Mr. Davis . . . was still alive. Witnesses said his chest rose and fell about 10 times before he went still.[389]

The Davis execution was only the most recent of several spectacularly botched electrocutions within the past decade.[390]

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387. Wilson v. State, No. S99P0651, 1999 WL 1261458, at *12 (Ga. Nov. 1, 1999) (Sears, J., concurring in part and dissenting in part).

388. Rick Bragg, *Florida's Messy Executions Put the Electric Chair on Trial*, N.Y. TIMES, Nov. 18, 1999, at A14.

389. *Id.* at A14.

390. In 1990, Jesse Tafero's head burst into flames when the execution squad used a synthetic, rather than a natural sponge, to conduct the electricity into Tafero's head. In 1995, Jerry White screamed. In 1997, Pedro Medina's face mask caught fire, and the smell of burned flesh filled the witness room. In July 1999, blood poured from Allen Lee Davis's nose and mouth, covered his chest with blood, and seeped through his shirt and the buckle holes of the chest strap.

The history of botched electrocutions is as old as the chair itself. As discussed earlier in this

essay, the electric chair was the brainchild of Thomas Alva Edison. Prior to its first use — on a man named William Kemmler in New York's Sing Sing prison in 1890—Edison sent his electric chair around the country, to show the dangerousness of his competitor's version of the device used to generate electricity. Dogs, cats, and an orangutan were strapped into Edison's chair and electrocuted, all to show the power of electricity.

Still, the device steadily gained in popularity as a relatively "humane" alternative to hangings. The youngest person killed in an electric chair, who was executed in South Carolina in 1944, was a fourteen-year-old African American boy; his arms were so small, they kept slipping out of the electric chair's restraining straps. "'They could have done it better with an axe,' Westinghouse said." Dudley Clendiner, *The Long Search For a Civilized Way to Kill*, N.Y. TIMES, Nov. 7, 1999, at A14.

In Louisiana, for example, a portable electric chair was carried, on the back of a flatbed truck, from parish to parish, depending on who needed executing where. In the early 1930s, the occupant of Louisiana's portable electric chair was an African American man named Willie Francis. Perhaps the tarp covering the chair on its journeys had sprung a leak, or perhaps the ride over Louisiana's unpaved back roads had jostled loose one of the chair's electrical wiring connections. Whatever the reason, the chair didn't kill Willie Francis, although it shocked him and it scared the hell out of him. After several unsuccessful attempts, the chair was declared broken, and Willie Francis was taken back to jail.

Francis' lawyers argued that another electrocution attempt would constitute "double jeopardy" in violation of the U.S. Constitution. Four justices of the U.S. Supreme Court agreed, but that fell one vote shy of mattering for Willie Francis. With Justice Felix Frankfurter casting the deciding vote, the Supreme Court decided that Louisiana could kill Willie Francis in its now-repaired electric chair. Louisiana did exactly that. This time the chair worked.

Steve Thayer, in his lovely novel *The Weatherman*, describes how a botched execution abolished capital punishment in Minnesota almost a century ago:

> It was a homosexual from England who put an end to capital punishment in Minnesota. His name was William Williams, a twenty-seven-year-old steamfitter who had immigrated to America. By all accounts he was a mean, ugly bastard. Williams and sixteen-year-old Johnny Keller became lovers and traveled about the northland looking for work. But Johnny tired of the travel, and tired of Williams, and returned to his mother's home in St. Paul. Williams soon followed.
>
> On the night of April 12, 1905, Williams went to Johnny's home. Johnny's mother angrily sent him away. Williams returned after midnight with a gun. He was drunk and enraged. First he shot Johnny Keller's mother in the back; then he shot Johnny twice in the head as he slept in bed. Williams reported the killings himself but denied he had done the shooting. The jury didn't believe him. They found him guilty of first-degree murder. The judge sentenced William Williams to hang by the neck until he was dead. At the time of sentencing the judge couldn't know how long that was going to take.
>
> William Williams' last meal was prepared by the sheriff's wife. He was given a shave and a haircut. He prayed with his priest. He shook hands and said good-bye to all of his jailhouse friends. Then at the stroke of midnight on February 13, 1906, William Williams, his hands cuffed behind his back, was led from his cell at the Ramsey County Jail. He took the long walk.
>
> They crept down the iron stairway to the sub-basement, where the scaffolding had been erected. The death chamber was cold and damp and smelled of mildew and fresh dirt. Thirty-two witnesses, mostly reporters, stood in a semicircle below the gallows. The deputies left Williams alone at the foot of the gallows steps. Without hesitation he climbed the thirteen stairs that led to the rope. The Ramsey County sheriff was waiting for him. The sheriff read the sentence. In a soft, almost inaudible voice Williams made a final statement, proclaiming his innocence right up to the end of his rope. "This is legal murder," he said. "I am accused of killing Johnny Keller, he was the best friend I ever had and I hope to meet him in the other

So the Florida Supreme Court, in the summer of 1999, declared a moratorium on executions to determine whether the electric chair was unconstitutionally "cruel and unusual" punishment. As discussed in my journals, this is a constitutional issue I first raised in a Florida case in 1983.[391] I raised it in every case thereafter, notwithstanding sharp criticism from judges that they

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world. I never had improper relations with him. I am resigned to my fate. Goodbye."

A black hood was placed over his head. The noose went around his neck. The sheriff descended the steps to the lever.

Public executions have always been an inexact science. When the sheriff sprang the trap door, the prisoner fell through it all right, but the rope stretched eight inches and his neck stretched four inches, and Williams's toes hit the floor. The knot slipped behind his neck, slowly strangling him as he tiptoed about. After a few minutes of this danse macabre the sheriff ordered deputies to mount the gallows and pull on the rope, lifting the feet off the floor. But ten minutes later Williams was still alive, still thrashing about. So the sheriff climbed back up the thirteen steps and helped pull on the rope while a deputy stood below and pulled on Williams's feet. Williams returned the indignity by emptying his bowels: the last supper. The stench was sickening. Reporters scribbled furiously. Finally, at 12:46 a.m., fifteen minutes after he had dropped through the trap door, the Ramsey County police surgeon declared William Williams was dead. And so was the death penalty in Minnesota.

STEVE THAYER, THE WEATHERMAN 176-78 (1995).

What has this bit of historical trivia from the beginning of the American Century to do with executions at the *fin de siecle*? As it turns out, everything.

"I'm still innocent," were Pedro Medina's last words. The daughter of the woman Medina allegedly murdered was convinced he was innocent. Three justices of the Florida Supreme Court had concluded that Medina's claim of factual innocence was sufficiently substantial to require an evidentiary hearing.

On March 25, 1997, moments after saying those last words, Pedro Medina, strapped into Florida's electric chair, was electrocuted. But, as 2400 volts of electricity surged into his body, blue and orange flames up to a foot long leapt from the right side of his head, filling the execution chamber with smoke. According to AP reporter Ron Ward, who witnessed the Medina execution, "the smell of burnt flesh filled the witness room (separated from the death chamber by plexiglass) and lingered." The *Washington Post* reported that, as witnesses gasped, a maintenance supervisor wearing electrical gloves patted out the flames, while another official opened a window to disperse the smoke.

The state doctor in attendance said he thought the death had been instantaneous and painless. A report of the office of Governor Chiles said that the 2400 volts that killed Medina did so instantly, before the flames appeared, and that he had not suffered from the flames.

An investigation by the Department of Corrections found that the flames engulfing the head of Pedro Medina were caused by a corroded copper screen in the headpiece. But the *New York Times* reported that a report prepared for Governor Chiles by two engineers and made public on April 11, 1997, concluded that the accident occurred because one of the sponges placed under the headpiece, used to offset the heat generated by the electricity, was dry and caught fire. The report recommended using only one sponge, dipped in saline solution.

In other words, human error—much as human error regarding sponges had caused flames and smoke to rise from the head of Jesse Tafero seven years earlier. As discussed earlier, the Tafero fire was caused by the use of a synthetic sponge, a poor conductor of electricity even when dipped into saline solution. The sponge used in Medina's execution appeared to be a natural sea sponge, reported the AP.

For an excellent treatment of botched executions see Deborah Denno, *Getting to Death*, 82 IOWA L. REV. 319 (1997).

were sick of reading briefs containing graphic descriptions of eyeballs popping out and the like. I continued to raise the issue because I *wanted* to remind the robed ones that when they upheld death sentences, that meant a *killing*. On September 24, 1999, a divided Florida Supreme Court rejected a constitutional challenge to the electric chair.[392] According to the court, *per curiam*, the trial court's findings of fact made, following an evidentiary hearing, were supported by "competent, substantial evidence."[393] The trial court's findings included: (1) the electric chair functioned as intended during the execution of Allen Lee Davis; (2) the execution protocol was not deviated from during the electrocution of Davis; (3) Davis did not suffer any conscious pain; (4) the nose bleed suffered by Davis began before the electrical current was administered; and (5) any pain associated with affixing the restraining straps was "necessary to ensure that the integrity of the execution process is maintained."[394] Justice Shaw dissented:

> Execution by electrocution—with its attendant smoke and flames and blood and screams—is a spectacle whose time has passed. The fiery deaths of Jesse Tafero and Pedro Medina and the recent bloody execution of Allen Lee Davis are acts more befitting a violent murderer than a civilized state. The color photos of Davis [which are appended to the dissenting opinion] depict a man who—for all appearances—was brutally tortured to death by the citizens of Florida. Violence begets violence, and each of these deaths was a barbaric spectacle played by the State of Florida on the world stage. Each botched execution cast the entire criminal justice system of this state—including the courts—in ignominy.[395]

As his dissent noted, Justice Shaw put photos of Allen Lee Davis' electrocuted corpse on the court's Internet web site. So many people visited the site to view the ghastly photographs that the site crashed.[396]

The U.S. Supreme Court decided to hear the question.[397] Briefs were filed and oral argument scheduled for February 28, 2000. Then, on January 6, 2000, a special session of the Florida Legislature convened by Governor Jeb Bush voted overwhelmingly (unanimously in the Senate and 102 to 5 in the House) to replace the electric chair with lethal injection.[398] The

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392. *See* Provenzano v. Moore, 744 So. 2d 413 (Fla. 1999).

393. *Id.* at 415.

394. *Id.* at 414.

395. *Id.* at 440.

396. *See* Associated Press, *Rush to Death Photos Crashes Court Site*, Oct. 7, 1999.

397. *See* Bryan v. Moore, 120 U.S. 394 (1999); *See also* Brief of Petitioner, Bryan v. Moore (undated).

398. *See* Sara Rimer, *Florida Lawmakers Reject Electric Chair*, N.Y. TIMES, Jan. 7, 2000, at A13.

Legislature also passed a bill that "reformed" the capital appeals process to speed up executions.[399] Governor Bush's top policy aide on capital punishment was quoted as saying: "I hope that we become more like Texas. Bring in the witnesses, put them on a gurney, and let's rock and roll."[400] The aide later apologized for the remark.[401] Governor Bush signed both bills into law on January 14, 2000.[402]

My first encounter with Florida's method of execution came soon after I began working in the capital appeals division of the West Palm Beach Public Defender's Office. On the eve (literally) of Robert Sullivan's execution, in November 1983, my office drafted an eleventh-hour constitutional challenge to electrocution as cruel and unusual punishment.

Executions in 1983 weren't nearly so commonplace as they are today. The execution guidelines were first issued in preparation of John Spenkellink's execution in 1979. They were revised in 1983, in preparation for the execution of Robert Sullivan. Other than Spenkellink in 1979, Sullivan would be the first Florida execution since 1967.

After Sullivan had been denied a stay by the Eleventh Circuit, at 6:40 p.m. in the evening before his 10:00 a.m. scheduled execution, my supervisors and colleagues in West Palm Beach decided we had to do *something*. So the capital appeals division—"deathbusters"—assembled back at the office around 8:30 p.m. and paced around in circles until one of us came up with the idea of challenging the electric chair itself as unconstitutional. I found a law journal article setting out the constitutional argument. Craig Barnard, the office's chief litigator, word-processed the papers as he, Dick Burr and I drafted and edited them.

At 10:45 p.m., the U.S. Supreme Court denied Sullivan's application for stay of execution. We just kept working, writing, editing and proofing, until around 3:00 a.m.

The legal argument we crafted ran seventeen pages and consisted of three parts. Based on an excellent 1978 Ohio State University Law Review article, we argued (1) that the Constitution guarantees the least tortuous method of execution; (2) there was now, in 1983, a more humane way of executing people (lethal injection) than by electrocution; and (3) the Constitution therefore should require the states to use the more humane method of lethal injection.

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399. *See* Sara Rimer, *Florida Legislature Deals with Death*, N.Y. TIMES, Jan. 6, 2000, at A22; Sara Rimer, *Florida Passes Bill to Quicken Execution Pace*, N.Y. TIMES, Jan. 8, 2000, at A1.

400. Jim Yardly, *A Role Model for Executions*, N.Y. TIMES, Jan. 9, 2000, at A1.

401. *See id.*

402. *See* Jackie Halifax, *Bush Signs Lethal Injection Bill*, Associated Press, Jan. 15, 2000, *available at* 2000 WL 3306854.

Since our law office, in 1983, did not have a fax machine, there was only one way to get our legal briefs from West Palm Beach in South Florida to Federal District Court in Jacksonville, where the lawsuit needed to be filed: drive them. So that's what Dick Burr and I did. With music blasting from the car cassette player (Warren Zevon and Elvis Costello, my choices, and Bonnie Raitt, Burr's), and loaded with supplies of caffeine and snack food, we tore up I-95. Meanwhile, Craig called an attorney friend in Jacksonville, Bob Link, who, once he woke up, said he'd be happy to file our little lawsuit on Bob Sullivan's behalf. Craig detailed our legal arguments, which took a good portion of the night. By the time Link and Craig got off the phone, it was almost dawn, and Burr and I were rolling into Jacksonville.

Actually, *flying* into Jacksonville would be more accurate. The drive from West Palm Beach to Jacksonville usually takes eight hours. We made it in five and a half.

Pumped up with adrenaline, fear, and caffeine, we met Link at his law office at about 8:30 a.m., one and one half hours before Sullivan's scheduled electrocution. We handed the paperwork to him, and the three of us drove to the federal courthouse to file. When we filed the stay application, the clerk's office told us to sit and wait. We did—until around 8:45 a.m. At 9:35 a.m., twenty-five minutes before the scheduled time of execution, the clerk told us that the District Judge wanted us in open court—at once.

The Court did not see us for long. In a mere eleven minutes, the judge ascended the bench, heard argument and denied all relief. Link argued for maybe three minutes before the judge denied the stay. The District Judge asked if we wanted to appeal to the Eleventh Circuit Court of Appeals in Atlanta. Uh, sure. Actually, we had sent the stay papers to the Eleventh Circuit, by plane, but the plane was delayed, circling Atlanta when Bob Sullivan was put to death.

The fact of it was that I hadn't thought that far ahead. I had been a licensed lawyer for only a few weeks; I'd been out of law school for little more than a year. No problem, though. Dick Burr was an old hand at this stuff. We filed the one-paragraph notice of appeal.

But where the hell was Burr? The District Court clerk and the Eleventh Circuit had three judges, in three different states, standing by for a telephone conference call. And, in the dash from the courtroom to the judge's chambers on another floor of the building, somehow we had lost Burr. We reached the clerk's office at 9:50 a.m.—ten minutes before Sullivan was to be electrocuted. As 10:00 a.m. approached, with Link on the phone with the three (increasingly impatient) judges, it became clear to us all that he'd have to wing it. I tried to help, but panic had turned my mouth into a desert. Link did a great job outlining our legal argument. But, while making the oral argument, we didn't even know if Bob Sullivan was still alive: we couldn't

get an open phone line into the death chamber at the prison, so we could not know if the execution had gone down as scheduled. The District Court clerk told us the case was in a "ghost status"—in the absence of a stay, we had to assume the execution had proceeded on schedule; the District Court called the prison, and was told that Sullivan had "probably been executed." At 10:07 a.m., the Eleventh Circuit panel denied the stay, and we decided it was over. By the time the Eleventh Circuit made up its mind, Bob Sullivan was probably dead or dying.

I later heard that our last-minute lawsuit delayed Sullivan's execution until 10:01 a.m.—for about one minute. Maybe; maybe not. It didn't matter to me, when, about 7:10 p.m. Burr and I heard, over the car radio, that Sullivan was dead. A one-minute reprieve was less than worthless; most likely it only upset whatever equanimity and dignity he had been able to muster for his appointment with death.

Shortly after the creation of Florida's statewide capital appeals office (CCR), the office personnel took a tour of Florida's death row and saw Florida's electric chair. Led by a soft-spoken correctional officer, we visited Q wing, where our clients lived: tiers of single-cells connected by catwalks (I waved hello to two of my clients, Bill Elledge and Butch Sireci, as we filed past their homes). Each prisoner was kept in a nine by six foot steel and concrete cell. Each man got a black and white TV, two hours in the exercise yard each week, and one shower. In July and August, temperatures hovered around 100 degrees.

Then the tour headed for the Deathwatch cells and the execution chamber itself. We sat in the folding metal chairs where the witnesses sit, separated from the death squad and the chair by a clear plexiglass partition. Then we toured around the control room for the electrical mechanisms. Finally, we gathered around the solid-oak, three-legged electric chair itself. On impulse, I sat down in it, to the frown of our tour guide. It wasn't a wise idea. I had nightmares about the chair for months afterwards.

The electric chair. When I was working full time as a Florida deathworker, in the 1980s, it seemed that every year someone in the State legislature would raise the possibility of introducing a bill to change Florida's method of execution from the electric chair to the more "humane" method of lethal injection. I never knew whether to support such technological innovations to the chair. On the one hand, I was acutely aware that some of my clients would die by Florida's execution method of choice. Ought I not therefore work for the most painless, dignified, and humane method?

On the other hand, lethal injection felt to me too closely akin to "putting a dog to sleep," as a friend of mine once put it. As Robert Sapolsky wrote in *Measures of Life* :

> The days of the electric chair are almost over; the method of choice among modern executioners is the lethal-injection machine. The cosmetic benefits of this $30,000 contraption are obvious—no smoke, no sudden jolts, no unpleasant smell. But the real reason for the machine's growing popularity, one suspects, is not its effect on the prisoner but its effect on the executioner. The machine, as stipulated by law in some States, is outfitted with dual sets of syringes and dual stations, with switches for two people to throw at the same time. A computer with a binary-number generator randomizes which syringe is injected into the prisoner—and then erases the decision. No one will ever know who really killed the prisoner—not even the computer.
>
> Such rites of execution are part of a subtle cognitive game. When a member of the two-man lethal-injection team goes home on the night of the execution, he does not think, "I am a murderer," or "Today I contributed to a murder." More likely, he will try to frame the issue in terms of statistical innocence; as half the team, he can imagine that he has been responsible for only half of the act. Or, more concretely, he might conclude: "I have a 50 percent chance of *not* having helped kill someone today."[403]

And, as Judge Alex Kozinski wrote in the February 1997 *New Yorker*:

> Lethal injection, which has overtaken the electric chair as the execution method of choice, is favored because it is sure, painless, and nonviolent. But I find it creepy that we pervert the instruments of healing—the needle, the pump, the catheter, F.D.A. approved drugs—by putting them to such an antithetical use. It also bothers me that we mask the most violent act that society can inflict on one of its members with such an antiseptic veneer. Isn't death by firing squad, with mutilation and bloodshed, more honest?

Why, you might ask, did Florida not long ago replace its three-legged solid oak electric chair, built in 1923 by prison inmates, with lethal injection? It's not that simple. Floridians—and Florida politicians—*like* the electric chair as a visible symbol of their toughness on crime. The chair has a "mystique."[404] During the special legislative session convened to consider

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403. Robert Sapolsky, *Measures of Life*, HARPER'S MAGAZINE, July 1, 1994, at 26.

404. Brad Liston, *Electric Chair May Be on Way Out in Florida*, BOSTON GLOBE, Jan. 6, 2000, at A3 (quoting former Florida Senator Edgar Dunn).

replacing the chair with lethal injection, t-shirts popped up proclaiming "Needles Are For Sissies."[405]

Opponents of capital punishment have our own reasons for being squeamish about shifting to the sanitized, pseudo-medical method of lethal injection. Lethal injections can be, and frequently are, botched.[406] This is so because the Hippocratic Oath precludes doctors and other highly trained medical personnel from participating in executions; and *this* means that Florida's medical lobby opposes lethal injection as a method of execution. In fact, no mechanism of execution is close to foolproof, because it just isn't easy to devise a way of killing an otherwise healthy human being that is quick, painless, and not horrible for the state-selected witnesses to watch.

It turns out that Florida has no easy or simple answer to its problem about how to carry out executions. This illustrates an essential fact about capital punishment: *nothing* about it is as easy or as simple as it first appears. Not even the choice of execution method. And that choice is only the beginning.

B. HAC, Grigsby and Legal Ethics

Now we'll see how Professors fight.[407]

My journals refer often to the "HAC" issue—the void-for-vagueness challenges to Florida's "heinous, atrocious or cruel" aggravating circumstance.[408] Actually, I first became interested in this issue in 1982, when I was clerking for Judge Vance, in the context of Georgia's heinous aggravating circumstance (HAC). Virtually all states with capital punishment have some variation of the HAC, and in many states—Florida, for instance—that circumstance has been found in 80% of death cases. Thus, invalidation of the HAC would affect many capital cases.

In 1982 the stakes were even higher. The Supreme Court was considering a case, *Zant v. Stephens*, which presented the question whether a capital jury's finding of an invalid aggravating circumstance rendered the

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405. *Id.*

406. *See* Denno, *supra* note 163, at 319.

407. MICHAL SHAARA, THE KILLER ANGELS: A NOVEL 210 (1974) (Strong Vincent to Col. Joshua Lawrence Chamberlain, on the second day of Gettysburg, describing Maine college professor Chamberlain's stand at Little Round Top).

408. I set out this argument in Michael Mello, *Florida's "Heinous, Atrocious & Cruel Aggravating Circumstance: Narrowing the Class of Death Eligible Cases Without Making it Smaller*, 13 STETSON L. REV. 523 (1984). For an updated version of the argument, see Mello & Medlin, *supra* note 107.

death sentence invalid.[409] Thus, *if* the omnipresent HAC was unconstitutional, and *if Zant v. Stephens* were to hold that an invalid aggravating circumstance rendered the death sentence invalid, large numbers of death sentences would be subject to reversal.

We lost *Zant v. Stephens* in 1983.[410] Still, the challenges to HAC continued, on a case-by-case basis. The Supreme Court, beginning in 1988, took a dim view of HAC's legality.

Another potentially high-impact issue discussed in my diary was the "*Grigsby*" issue and the ethical conundrums (conflicts of interest and the like) the issue raised for me.[411] When I was a CCR attorney in the mid-1980's, and Bob Graham was Governor, he typically signed two twenty-eight day death warrants every two weeks; this meant that at any given time, four of CCR's clients were scheduled to die in the near future. Also at the time, for about five months, the U.S. Supreme Court had considered a constitutional challenge called the "*Grigsby* issue." Because *Grigsby* was a challenge to the way in which capital juries were selected, virtually every capital case raised a *Grigsby* issue, in one form or another. The strongest *Grigsby* cases had several potential jurors removed during the "death qualification" process. The weakest *Grigsby* cases had no venire people removed. In those cases, the argument was that the *process* of death qualification itself (asking the voir dire questions and eliciting the answers) resulted in a jury unnaturally, and therefore unconstitutionally, prone to convict.

Because *Grigsby* claims were based on social science research, the CCR lawyers decided that only one of us really needed to work through the studies. I ended up being that one. During the pendency of the *Grigsby* issue in the U.S. Supreme Court, I argued in the Florida Supreme Court asking for stays of execution based on the pendency of the *Grigsby* issue. In every one of these cases, I argued before the same seven Florida Supreme Court justices.

The problem was that I *knew* which of my cases presented the stronger *Grigsby* claims and I also knew which cases did not. Before every oral argument in every death warrant case, I asked myself what I ought to do when the justices asked me, as they invariably did, whether the case at hand was a strong *Grigsby* claim or a weak one, compared with the case I was arguing last week and the case I'd be arguing next week. I ultimately decided to answer that question, in part because I knew I'd be appearing before the justices in many future cases; I didn't want to imperil my reputation as a straight shooter. But in so doing I was less aggressive in some stay cases than

409. *See* Zant v. Stephens, 462 U.S. 862 (1983).

410. *See id.*

411. This issue reached the Supreme Court in Lockhart v. McCree, 476 U.S. 162 (1986).

I would have been otherwise. Some of those clients did not get a stay. I was laboring under a conflict of interest at the time.

Sometimes the conflict of interest was between my own personal and political beliefs and the arguments I needed to raise on behalf of my clients. Tommy Randolph was one. Randolph was sentenced to death for killing his wife; the Florida Supreme Court affirmed his death sentence, by a razor-thin four to three majority. I was assigned to write a motion for rehearing. Randolph's best argument to the all-male court was that his crime was "only" a domestic murder and death sentences for wife-killing were almost never affirmed on appeal, unless the defendant had previously murdered another of his wives—sort of a one-free-wife-murder rule. I found this argument deeply and personally offensive, a claim that appealed to the worst sexist instincts of an all-male Southern court. Still, I made the argument, and it prevailed: one justice in the original four to three vote switched sides, thus providing a four to three majority for throwing out the death sentence. My boss was thrilled. I wanted to take a shower.

Some of the most intractable ethical conundrums are matters of power. Lawyers are powerful because the law is powerful and because lawyers have a monopoly on access to that power. Kafka called us "gatekeepers," and it's an apt metaphor. If the law is a labyrinth, then we are the only guides with the keys for admittance into, navigation through, and safe return from, the maze. We know the maze because we designed and built it. Only we know the secret language of the maps, because we wrote the maps. Only we know where the land mines and their trip wires are buried, because we buried them—or if not we personally, people whose hieroglyphics we've been trained to translate and to understand. And we mean to keep it that way. Without the labyrinth of our own creation, without our high priests and hermeneutic mysteries, why would the laity pay us guides $200 per hour for our services?

In the United States, lawyers are especially powerful because the law is especially powerful. Ours is a nation under law, which also makes us a nation under lawyers. Social conflicts and disputes that in other countries are resolved within the family or by religious institutions, or by community or political processes, are solved in America by the courts: we sue.

Traditional legal representation involves professional distance and role compartmentalization. Lawyers have their pre-defined role to play in this dance—which was choreographed by lawyers or people trained to "think like lawyers"—and so do their clients. And along with our role differentiation comes a specialized set of moral norms and values particular to members of the profession. Such role morality includes duties of loyalty and confidentiality; lawyers must do things most non-lawyers would deem wrong

or immoral: undivided loyalty to killers they know to be guilty, duties to keep their secrets and confidences.

Capital post-conviction defense representation tends to shorten the professional distance that separates the traditional lawyer from the traditional client. It also tends to blur the lines between advocates and judges. Given the stakes—life itself—and the nature of the litigation, whether a fellow human being has lost his moral entitlement to live, or whether he deserves to die—this blurring of professional lines is perhaps inevitable. Like the 1963 atrocity that is the subject of Phillip Pauldan's superb book *Victims: A True Story of the Civil War*, the stories at the heart of capital post-conviction litigation involve:

> primary emotions that are less a part of a certain moment in history and more a part of the human personality. This is not to say that historical circumstances do not play a major role in helping to create a situation; this book is a study of how they in fact do so. It is only to insist that at the time in which a decision is made to commit a massacre, in an environment in which someone permits it to happen, fears and anxieties that exist throughout history emerge to unleash the tragedy. It has seemed to me that psychologists who studied the Vietnam war have significant things to say about such moments.
>
> My search for angles of vision on this incident has led me beyond modern social science and into the nature of historical writing itself. I have sought to expand understanding of this incident and tried to capture the incident's complexity, by writing about it in a style that calls forth the reader's emotional resources as an aid to understanding. I am trying to appeal to informed hearts as well as minds. I want the reader to empathize with both the victims and the killers, to share the sense of what it was like to live in that place and commit that act. I want the reader not just to gain an understanding of how the act happened and why, but to experience what it felt like to have it happen. These two types of insight will, I believe, mutually inform each other. Readers of serious novels will find no surprise in this assertion.
>
> I respect detached objective observation. I am trying to engage in it. I also am wary of its capacity for vivisection as well as analysis. I do not believe that we can fully understand the experiences of people if we act only as detached analysts, if we neglect or repress our desire to feel the past as well as to analyze it. We do not really have to choose between the two, and I have not attempted to do so in this book. I have tried to use a writing style

> that will enlarge understanding, to use such detached observation as a historian is capable of to analyze that experience.[412]

When a lawyer and a client disagree about certain courses of action, whose choices should prevail? If you are a non-lawyer, you probably would say the clients' views should prevail. If you are an attorney, you probably would say the same thing. If you are a realistic attorney, however, you would also have to acknowledge that, as a practical matter of how things work in the real world, lawyers—especially public defenders with death row clients—pretty much call the shots because they have the education, experience, and communication skills that are essential to navigate the labyrinthine byways of the law. As a law school professor who teaches legal ethics and professional responsibility—a field of study that addresses and attempts to conceptualize the appropriate allocation of decision-making power between lawyers and their clients—I know it is essential to tell my students that such questions in the abstract can not be answered categorically. Some decisions are clearly the client's to make (whether to testify or plead guilty), while other decisions (those under the broad rubrics of "tactics" and "strategy") fall within the attorney's orbit of professional expertise and judgment. Attorneys are, after all, *paid* for their expertise, and *empowered* to advocate. In the midst of war, swift judgments are essential to victory.

My job as attorney was to *empower* my clients so they could make their decisions with their eyes open. My knowledge *is* their power. When I was a capital public defender in Florida, my goal was to provide client-centered representation. By this I mean that the client set the goals, but my role was to provide factual and legal information about the risks and potential benefits involved, so that the client could make informed, life saving decisions.

In capital litigation, you see, feelings are fine, but strategy saves lives. When the two conflict, it is a lawyer's task to bridge the gap. In the end, the client usually follows his lawyer's recommendations. "Crazy Joe" Spaziano, on the other hand, didn't. When we disagreed on issues at the core of my ability to represent him effectively, the subject of strategy was more than a mere academic exercise. The configuration of my client's feelings threatened *his* defense, and his loyalties jeopardized his life.

When an attorney undertakes the post-conviction representation of a death-sentenced person in Florida, two lines of factual investigation are basic. First, the client's history is investigated and documented—from embryo to death row. Second, an experienced mental health and status professional, trained in forensics, evaluates that history, using state-of-the-art techniques.

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412. PHILIP PAULDAN, VICTIMS: A TRUE STORY OF THE CIVIL WAR (1989).

Ideally, both areas of investigation will *already* have been conducted by the client's trial lawyers.

In Joe Spaziano's case, neither his personal history nor his mental status had been investigated by his trial attorney. But it also had something to do with Spaziano. Spaziano didn't think he was crazy and he didn't want any "shrinks" to testify at his trial and question his sanity. Spaziano also didn't want to put his family or the Outlaws through the anguish of testifying at his trial in support of a life sentence rather than the death penalty. Spaziano knew how an aggressive prosecutor would savage his family and friends on cross examination. He'd rather die in Florida's electric chair than put his loved ones through that crucible.

Joe Spaziano was adamant with me as he had been with his trial lawyer: no family and no shrinks. I *tried* to lay out the reasons for my conviction that we *really needed* this information. I pointed out that Governor Bob Graham would likely sign Spaziano's death warrant before I'd be able to investigate and write Spaziano's motion for state post-conviction relief. If the family and psychiatric history wasn't fully investigated and mapped out and documented in that post-conviction motion, the motion wouldn't be strong enough to secure a stay of the death warrant. We'd probably win a stay later on down the capital post-conviction assembly line, in federal court, but by then it would be too late to raise the family and psychiatric evidence. If this information was not in the *first* post-conviction motion filed in *state* court, then that evidence would be forever waived; on this score Florida's procedural rules were clear and were enforced by the Florida courts with a vengeance. Thus it was *now or never*. If, a year or two down the line, Spaziano changed his mind and decided that it *was* okay for me to investigate his family background and psychiatric history, it would be *too late*. Florida's procedural default rules would bar me from raising these matters. It was raise them now or never.

I tried to persuade him by framing the question in terms of keeping his options open. At least let us *investigate* these areas. If you decide later not to let me *present* them in the state post-conviction motion, then that's fine. If I don't do the investigation, we won't know how strong these issues might be—and you need to know and understand exactly how strong an issue you're waiving *before* you decide to waive it. And these kinds of exacting investigations are extremely labor-intensive; they take time—time we won't have if we wait until a twenty-eight day death warrant is signed before we even *begin* to investigate these matters.

I explained, cajoled and argued, but Joe still said no. Even to do the *investigation* would be too hurtful for his family, and Joe was determined to spare his family any more pain. And he was *innocent*, not crazy. Go out and prove my innocence, Joe Spaziano told me. Present *that* to the state post-

conviction courts. Forget this he-had-a-bad-childhood, and forget the even-if-he-did-the-crime-he-was-nuts crap. He was *innocent.* Raising sideshow issues like family history and psychiatric status only muddied the waters. He's innocent, not crazy.

Actually, Joe was both innocent *and* crazy. It didn't take a rocket scientist—or even an MRI or MMPI—to figure out that *something* was broken inside the head of "Crazy Joe" Spaziano. You could see it in his crooked smile and partial paralysis of his face. You could hear it in his speech patterns and in the way he periodically "checked out" of conversations in mid-thought or mid-sentence. Was it fair to him, his family, or his brothers for him to play the martyr?

But Joe was my client, and he had given me clear directions limiting the scope of my investigation. That raised both moral and tactical issues. Would it be wrong for me to disregard the instructions from my client, even if my client was possibly, *really Crazy* Joe? And, as a practical matter, could my investigators possibly conduct the investigation without Spaziano finding out about it? Surely he would hear from his family, if I started asking them intimate questions about Spaziano's family history. It's also fairly impossible to conduct a psychiatric evaluation on a condemned man without his being able to figure out that that's what you're doing.

Joseph Spaziano may have been crazy, but he was by no means stupid; far from it; he could be frighteningly intuitive and perceptive—especially about someone who was "shining him on." If I tried to conduct the investigation behind his back, he'd find out. And his finding out would obliterate his trust in me, which would also obliterate any possibility of a meaningful attorney/client relationship developing between us. Then I'd become just another in the long series of lawyers who had lied to him, and otherwise abused his trust and faith. That would mark the end of my role as Joe Spaziano's defense attorney.

This was the scenario I dreaded most: my investigator manages to conduct the necessary investigation without Joe's detection of it. I get terrific affidavits documenting "Crazy Joe's" horrific family background and his profound mental illness—the kind of evidence that convinces Florida post-conviction courts to grant stays of execution. Against Joe Spaziano's wishes, his lawyers incorporate all this wonderful (for Joe's legal case, that is) information into a kick-butt motion for state post-conviction relief. Assume, however, that I cannot get all this done and filed before the governor signs Joe's death warrant. No problem: the information in the post-conviction motion should be ample enough to convince the state trial judge or the Florida Supreme Court to stay the execution to allow the courts sufficient time to evaluate the claims in a deliberate and careful manner. So I file the post-

conviction motion along with a boilerplate application for stay of execution based on the facts and law set out in the motion. Piece of cake.

Now comes the tricky part of my doomsday scenario. "Crazy Joe" Spaziano must *sign* the post-conviction motion, verifying that to the best of his knowledge the facts set out in the motion are true and accurate. Such motions routinely run 200 pages in length, and I could probably get away with snookering Spaziano into signing the motion without reading it. However, that would be an act of fraud jeopardizing both my license to practice law and Joe Spaziano's life. Probably not a good idea.

On the other hand, if I were straight with him about the content of the motion, he would know that I had lied to him and misled him about the scope of the investigation. He could refuse to sign the motion, and he might even fire me as his lawyer. He might even become so stressed that he could decide to drop his appeals altogether and become a "volunteer for execution." So long as the state trial judge—in this instance Judge Robert McGregor, who presided over Joseph Spaziano's original 1976 murder trial—finds Spaziano sufficiently mentally competent to decide to acquiesce in the state's wish to execute him, neither Spaziano's family nor I could stop the execution. I had no doubt that Judge McGregor would confirm Joe Spaziano's decision to die. He had, after all, already ignored the jury's sentencing recommendation of life imprisonment by sentencing Joe to Florida's electric chair. Why would *he* suddenly be gripped by humanitarian concern?

My clever deception could backfire and result in Joe's execution. He would refuse to sign the verification of the post-conviction motion, so no motion could be filed. There would be no basis for a stay of execution, and he would be killed. Or he fires me, and no stay application or post-conviction motion is filed, so he is executed. Or he fires me and volunteers for execution, so he is executed.

The crush-depth pressure of the death warrant might well have caused "Crazy Joe" to fire me or at a minimum to refuse to sign the essential verification. Or it might have pressured him into signing it, into ratifying *post hoc* and retrospectively, the investigative *fait accomplis* with which I presented him. The investigation had been done. I had already put his family through the emotional wringer—and they did not mind at all, because they loved him and wanted to do everything within their power to help keep him alive, even though they knew he did not want them to go through that horror show. *They wanted to help him.* In any event, the damage had been done. I already had the family's affidavits.

In addition, there was the psychiatric evaluation. It would be even harder to finesse. It was clear that neither Judge McGregor nor "Crazy Joe" would cooperate with a mental evaluation for these purposes. So I lied to Joe. I told Joe that the purpose of the psychiatric evaluation was to explain why he had

no alibi for his whereabouts the day Laura Lynn Harberts disappeared in 1973.

On the basis of my selective communication, Joe agreed to the family history and psychological evaluation. The psychiatric evaluation found that he was mentally incompetent to stand trial or to receive the death penalty. Spaziano signed and verified the state post-conviction motion which included the evaluation. That motion won him a stay of execution.

Although my lying to Joe Spaziano worked, it does not justify my actions. The truth remains that I lied to and manipulated a man who had entrusted me with his life. I only risked having my deception unmasked at the time when my client hardly could have tagged me for it—when his only realistic choices were to ratify my previous actions or die in the electric chair in a matter of weeks for a crime he did not commit. I used the death warrant to strong-arm Joe into endorsing my duplicity. Imminent death concentrates a man's mind, someone wrote. It also makes that man highly susceptible to coercion by his attorney.

I have no doubt that had this investigation not been done in 1984-1985, Joe Spaziano would have been executed years ago. However, I am still uncomfortable with the means I employed to make that end possible. By what right did I override my client's instructions? How could I allow his family to pass through the pain of reconstructing and swearing, under penalty of perjury, to the horror in their lives so long ago? Once I had laid out for Joe the risks and potential benefits, should I not have respected my client's wishes? It was, after all, *his* life. Yes, it was, after all, his life.

Lawyers for death row prisoners possess enormous power over their clients, and given that power imbalance there is a tremendous temptation to make whatever decisions the *attorney* deems to be in the client's best interests. This temptation is strongest when the client suffers from mental or psychiatric impairment, as many condemned men and women do.

Today I teach legal ethics and professional responsibility to my Vermont Law School students. Every year, I pose these questions to them in the context of a Joe Spaziano "hypothetical." My students usually agree with my actions back in 1984-85. (Law school classrooms have their own power dynamics and disparities). On this score, they are more certain than I.

Ethical dilemmas—such as the tangled loyalties discussed above—pervade my journals. But they often go unrecognized as such. When I was a capital public defender in Florida, I was blithely oblivious to ethical matters: they simply did not register on my radar screen. I had taken the required one-credit ethics course in law school. I attended the first and last class, took the exam, and passed. Then I studied about forty-five minutes for the Multistate Professional Responsiblity Exam portion of the Florida bar exam and passed. I am not proud of this fact. During the time I practiced law

in Florida, I was unaware of the ethics rules that applied to my day-to-day practice of law. With the zeal of a late convert, I try to impress upon my students the importance of ethics in real world law practice.[413]

C. The Brown Issue (the Florida Supreme Court's First Big Fib)

> *[Eichmann's prosecutors] knew, of course, that it would have been very comforting indeed to believe that Eichmann was a monster, even though if he had been Israel's case against him would have collapsed or, at the very least, lost all interest. Surely, one can hardly call upon the whole world and gather correspondents from the four corners of the earth in order to display Bluebeard on the dock. The trouble with Eichmann was precisely that so many were like him, and that the many were neither perverted nor sadistic, that they were, and still are, terribly and terrifyingly normal. From the viewpoint of our legal institutions and of our moral standards of judgment, this normality was much more terrifying than all the atrocities put together, for it implied . . . that this new type of criminal, who is in actual fact hostis generis humani, commits his crimes under circumstances that make it well-nigh impossible for him to know or to feel that he is doing wrong.*[414]

My journals refer repeatedly to a couple of fibs told in the 1970s by the Florida Supreme Court: the *Brown* issue and the *Cooper/Lockett/Hitchcock* issue. Both issues reached the Eleventh Circuit in *Ford v. Strickland*.[415]

The Eleventh Circuit took *Ford v. Strickland en banc* for the purpose of resolving "several important issues that repeatedly arise in capital cases."[416] One such issue was the so-called "*Brown*" claim,[417] a constitutional challenge to the Florida Supreme Court's secret, ex parte solicitation of psychological screening reports on Florida death row prisoners. The reports, "prepared by the Florida [prison system] as part of its routine procedures for handling new prisoners, wound up in the [Florida Supreme Court] files of at least twenty-five capital inmates between 1976 and 1978."[418] The information had not

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413. *See* Michael Mello, *Legal Ethics*, 33 CRIM. L. BULL. 168 (1997).

414. HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL (1963).

415. Ford v. Strickland, 696 F.2d 804 (11th Cir. 1983) (*en banc*).

416. *Id.* at 807. Eleven of the twelve active judges participated in the en banc proceedings. *See id.* The twelfth, Judge Joseph Hatchett, recused himself because of his participation in Alvin Ford's case while Hatchett had been a justice of the Florida Supreme Court. *See id.*

417. *See* Brown v. Wainwright, 392 So. 2d 1327 (Fla. 1981), *cert. denied*, 454 U.S. 1000 (1981).

418. Neil Skene, *Review of Capital Cases: Does the Florida Supreme Court Know What It's Doing?*, 15 STETSON L. REV. 263, 286 (1986); *see also Brown*, 454 U.S. at 1000-03 (1981) (Marshall, J., dissenting from denial of certiorari). The practice apparently began as early as 1975. *See Ford*, 696 F.2d at 874 (Johnson, J., concurring in part and dissenting in part).

been disclosed to defense counsel who were appealing the inmates' convictions and sentences to the Florida Supreme Court.

Soon after the court's secret practice came to light—fortuitously during an oral argument before the Florida Supreme Court—all 123 inmates then on Florida's death row, at various stages of their appeals and post-conviction proceedings, filed a class action petition for habeas corpus in the Florida Supreme Court.[419] Prisoners able to prove that information in their cases had in fact been secretly solicited relied upon *Gardner v. Florida*, which recognized a defendant's right to see and challenge information used against her in capital sentencing proceedings.[420] Inmates who could not demonstrate that secret information had actually been obtained by the Florida Supreme Court in their cases argued that the use of the screening reports in some cases tainted the overall fairness of capital sentencing and required the invalidation of all death sentences in Florida.[421] Since Joseph Green Brown was first on the alphabetical list of class members, the case became styled *Brown v. Wainwright*, and the claim became known as the "*Brown* issue."[422]

The Supreme Court of Florida denied the habeas petition on its merits, as a matter of law.[423] The court stated that "the doctrines of constitutional law here argued are singularly unpersuasive."[424] Moreover, the court held that "[e]ven if petitioners' most serious charges were accepted as true," that would

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419. *See Brown*, 392 So. 2d at 1327.

420. Gardner v. Florida, 430 U.S. 349 (1977).

421. *See Brown*, 392 So. 2d at 1328-30.

422. *See id.* Ironically, Joseph Green Brown was most likely innocent of the offense for which he was sentenced to death. *See* Michael Mello, *Facing Death Alone*, 37 AM. U.L. REV. 513, 526-29 (1988); *see also* Blumenthal, *If An Innocent Person Can be Executed, the Death Penalty is Unworkable*, HARTFORD COURANT, May 17, 1987, at D1; Styron, *Death Row*, N.Y. Times, May 10, 1987, at A25; Barry Siegel, *Sentencing the Wrong Man to Die*, L.A. TIMES, May 10, 1987, at A1; Fink, *Given New Life After Death Row, Man Fights Capital Punishment*, HARTFORD COURANT, Mar. 19, 1987, at A1; Bruce Krasnow, *Ex-Inmate Wants Story To Be Told*, TIMES-UNION/JACKSONVILLE JOURNAL, Mar. 14, 1987, at A1; Bob Port, *Freed Prisoner Talks of Brush With Death*, ST. PETERSBURG TIMES, Mar. 14, 1987, at A1. Mr. Brown spent thirteen years on death row and came within fifteen hours of being executed before his attorney obtained a stay of execution from the Eleventh Circuit; Brown had eaten his "last meal" and had been measured for the suit of clothes he would have worn for his funeral. In 1986, the Eleventh Circuit overturned Mr. Brown's conviction due to prosecutorial withholding of exculpatory information from the defense at trial. *See* Brown v. Wainwright, 785 F.2d 1457 (11th Cir. 1987). The state elected not to retry Brown, and he was released from prison in 1987. Mr. Brown presently lives in D.C.

423. *See Brown*, 392 So. 2d at 1333. The court criticized the procedure of joining multiple habeas corpus petitioners in a single petition and said that "[i]n the future, attempts to create a class action habeas corpus proceeding in situations such as this will be rejected summarily." *Id.* at 1330. However, in *Brown* "[t]o avoid absurd technicalities," the court "decline[d] to treat each petition as if it were separately filed and enter a separate order or opinion on each. Rather, [the] disposition of Brown's petition effectively dispose[d] of all claims for relief of those petitioners who have joined with Brown." *Id.* The court's final order was that "[t]he petitions of Brown and the others for writs of habeas corpus and for other extraordinary relief are denied." *Id.* at 1333.

424. *Id.* at 1331.

not change the court's decision.[425] "[A]s a matter of law our view of the non-record information petitioners have identified is totally irrelevant either to our appellate function in capital cases as it bears on the operation of the statute, or as to the validity of any individual death sentence."[426] Drawing a distinction between sentence "review" and sentence "imposition,"[427] the court concluded that

> [s]ince we do not 'impose' sentences in capital cases, *Gardner* presents no impediment to the advertent or inadvertent receipt of some non-record information. . . . [N]on-record information we have seen, even though never presented to or considered by the [trial] judge, the jury, or counsel, plays no role in capital sentence 'review.'[428]

Accordingly, "[a]s we view the case . . . appellate review can never be compromised . . . by the receipt of any quantity of non-record information."[429] All relief was denied to each petitioner.

Because Florida Governor Robert Graham signed his death warrant, Alvin Ford became the first member of the *Brown* class to reach the Eleventh Circuit.[430] By a narrow six to five vote, with Judge Vance casting the decisive sixth vote, the *en banc* Eleventh Circuit found Florida's procedure constitutionally tolerable.[431] It based that determination on *"Alice Through the Looking Glass"* reasoning that the Florida Supreme Court deliberately and regularly obtained ex parte information of an important nature, but then failed to "use" it.

The majority view was expressed in two opinions. The plurality opinion assumed that resort by an appellate court to secret materials in reviewing capital sentences would violate *Gardner v. Florida*.[432] However, the plurality

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425. *Id.*

426. *Id.*

427. *Id.* Nine years after *Brown* was decided, the United States Supreme Court held that appellate courts may, consistent with the Constitution, serve as capital resentencers. *See* Clemons v. Mississippi, 494 U.S. 738 (1990). To date, however, the Florida Supreme Court has not receded from *Brown*. *Cf.* Booker v. Dugger, 922 F.2d 633 (11th Cir. 1991), *cert. denied*, 502 U.S. 900 (Oct. 7, 1991 (No. 90-1778) (Tjoflat, C.J., specially concurring) (arguing that Florida Supreme Court could act as resentencer, *Brown* notwithstanding, but recognizing that court did not do so in Booker's case).

428. *Brown*, 392 So. 2d at 1332-33.

429. *Id.* at 1333 n.16.

430. Ford v. Strickland, 676 F.2d 434 (11th Cir. 1982), *vacated by operation of law for rehearing en banc*, 696 F.2d 804 (11th Cir. 1983) (en banc). A panel of the Eleventh Circuit had temporarily stayed Ford's then-imminent execution to allow for review, but subsequently denied habeas relief. For a full treatment of Ford v. Strickland, see Larry T. Griggs, Note, *Harmless Error, Cause and Prejudice, Comity and Federalism: "Legal Magic" and the Florida Death Penalty*, 13 STETSON L. REV. 83 (1983).

431. *See Ford*, 696 F.2d at 808-11.

432. *See id.* at 809-10.

read the *Brown* opinion as a statement that the Florida Supreme Court did not "use" the materials it had solicited.[433] Judge Tjoflat concurred specially. He determined that the Florida court had read the materials but that it had not relied on them.[434] The concurring opinion then noted that the outcome might have been different had Mr. Ford separately alleged that "as a matter of federal constitutional law, members of the Florida Supreme Court should be forced to step down in this situation on the ground of appearance of impropriety."[435]

Judge Vance's decisive vote for the plurality opinion is curious, not only because the plurality opinion cannot withstand analysis, but also because it defies the common sense that typified Judge Vance's jurisprudence. This view is grounded in my belief that the logic of the plurality would be laughable were it not so vitally important to the lives of six score human beings. At least twenty members of the *Brown* class have since been executed.[436] At least twenty-one others remain under sentence of death without an intervening resentencing proceeding.[437]

The *Ford* plurality's major premise was that the Florida Supreme Court did not "use" the ex parte materials that it solicited. Yet, as Justice Marshall wondered in his dissent from the denial of certiorari in *Brown*, "if the [Florida Supreme] Court does not use the disputed nonrecord information in performing its appellate function, why has it systematically sought the information?"[438] Further, the Florida Supreme Court in *Brown* did not quite say otherwise. Eleventh Circuit Chief Judge Godbold noted (charitably) "the intractable ambiguity" of the Florida court's *Brown* opinion.[439] He observed that a majority of Eleventh Circuit judges inferred that the Florida Supreme Court had not used the secret material; another circuit judge said the Florida

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433. *See id.* at 811.

434. *See id.* at 832-33 (Tjoflat, J., concurring in part and dissenting in part).

435. *Id.* at 833.

436. Carl Shriner, Daniel Thomas, Aubry Adams, David Funchess, James Raulerson, Raymond Clark, Marvin Francois, James Adams, Anthony Antone, Theodore Bundy, Arthur Goode, Timothy Palmes, Robert Sullivan, Buford White, Jesse Tafero, Willie Darden, Ronald Straight, Johnny Witt, Ernest Dobbert, and David Washington. *See* Brown v. Wainwright, 392 So. 2d 1327 (Fla. 1981), *cert. denied*, 454 U.S. 1000 (1981) (listing class members). All have since been executed.

437. Douglas Meeks, Robert Heiney, Marvin Johnson, Bobbie Lusk, Jimmie Lee Smith, Gregory Mills, Raleigh Porter, McArther Breedlove, Roy Stewart, Levis Aldridge, Nollie Lee Martin, Paul Scott, Terry Sims, William White, Gary Alvord, Bernard Bollander, Stephen Booker, Bennie Demps, Carl Jackson, Frank Smith, and Walter Steinhorst. Telephone Conversation between Michael Mello and Dr. Michael Radelet, Professor of Criminology, University of Florida, May 29, 1991. Dr. Radelet's database is the most reliable source of information about the demographics of Florida's death row population. According to Radelet, some of these inmates' cases (Jimmie Lee Smith, Stephen Booker, and Frank Smith, for example) are pending resentencing orders from the Eleventh Circuit.

438. Brown v. Wainwright, 454 U.S. 1000, 1002 (1981) (Marshall, J., dissenting from denial of *certiorari*).

439. *Ford*, 696 F.2d at 821 (Godbold, C.J., dissenting in part and specially concurring in part).

court "actually did consider" the material; and still another judge said the *Brown* opinion raised a "presumption" that the material had been used.[440]

The secret practice itself betrays the hollowness of the plurality's semantic distinction between "use," on the one hand, and "solicit," "receive," "see," "read," "review," and "consider," on the other. Word games aside, the six to five majority's conclusion in *Ford* that the Florida Supreme Court did not "use" the materials was belied by actual experience. The oral argument before the Florida Supreme Court in the capital case that inadvertently revealed the practice to the outside world made the point. Paul Magill had been sentenced to death. At oral argument on direct appeal before the Florida Supreme Court, Magill's attorney urged that a life sentence should have been imposed. She relied, in part, upon psychiatric information presented to the trial court. Counsel was then questioned by a Florida Supreme Court justice about an inconsistent, extra-record psychological evaluation[441] that the Florida Supreme Court had secretly obtained from the prison.[442] That is "use." Res ipsa loquitur.

But maybe not. The United States Supreme Court did after all deny certiorari in *Ford*.[443] We outsiders do not know why. Maybe plenary review was denied in part because the Court relied upon the Eleventh Circuit's local understanding of the Florida practice.

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440. *Id.*

441. The exchange between the Justice and Magill's lawyer was preserved on the audio tape of the oral argument. Florida Supreme Court oral argument tapes are available to the public and may be obtained from the court clerk's office in Tallahassee, Florida. The published opinion resulting from the oral argument is reported as Magill v. State, 386 So. 2d 1188 (Fla. 1980), *cert. denied*, 450 U.S. 927 (1981). The *Magill* opinion sheds no light upon the *Brown* issue. *See id.*

442. *See* Skene, *supra* note 418, at 286 (citing Scott, *Justices Saw Confidential Psychological Profiles of Death Row Inmates*, ST. PETERSBURG TIMES, Aug. 19, 1980, at 1B).

443. *See* Ford v. Strickland, 464 U.S. 865 (1984) (order denying petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit). Mr. Ford became insane while his case was pending at the Eleventh Circuit. *See* Ford v. Wainwright, 477 U.S. 399 (1986). Soon after the Supreme Court denied certiorari in *Ford v. Strickland*, the Florida governor signed a death warrant scheduling Ford's execution. Mr. Ford's lawyers, including myself, sought a stay of execution based on Ford's mental incompetency to be executed. The Eleventh Circuit stayed the execution, see *Ford v. Wainwright*, 734 F.2d 538 (11th Cir. 1984), but ultimately rejected Ford's claim that Florida's procedures for determining mental competency to be executed offended the Constitution. Ford v. Wainwright, 752 F.2d 526 (11th Cir. 1985). The Supreme Court reversed, declaring Florida's procedure for ascertaining execution competency to be "inadequate to preclude federal redetermination of the constitutional issue." Ford v. Wainwright, 477 U.S. 399, 416 (1986). The Court remanded for a factual determination of Ford's mental competency to be killed. *See id.* at 418. Alvin Ford died in prison in March 1991. The circumstances of his death remain unclear as of this writing.

D. The Cooper/Lockett/Hitchcock/Songer/Sireci/Harvard Issue (the Florida Supreme Court's Second Big Fib)

> *It is well that war is so terrible—[if it were not,] we should grow too fond of it.*
>
> Robert E. Lee, December 1862, after the Battle of Fredericksburg[444]

The second Florida Supreme Court fib mentioned repeatedly in my journals is the *Cooper/Lockett/Hitchcock* issue.[445] It is central to the American jurisprudence of death. The idea that capital sentences must be *individualized, i.e.*, grounded in the particular facts and circumstances of that *particular* person on trial for his or her life. In Sandra Lockett's case in 1978, the U.S. Supreme Court ruled that cookie-cutter capital punishment does not pass constitutional muster. For example, death penalty statutes cannot mandate capital punishment for *all* capital killers, or any other category of killers, regardless of any mitigating circumstances that might argue in favor of a sentence of life imprisonment rather than death. In other words, people on trial for their lives have a right to present—and to have their jury consider—*whatever* relevant evidence in mitigation they want the jury to hear and consider. This was the rule of Sandra Lockett's case in 1978, formally called *Lockett v. Ohio*.[446]

There was a catch, however: what to do about people who were tried and condemned *before Lockett v. Ohio* was decided in 1978? Whether a pre-*Lockett* death sentence was lawful or not depended on whether the particular state at hand had managed to anticipate the rule of *Lockett*. If the state courts had anticipated *Lockett* (before it was decided in 1978), then those pre-*Lockett* death sentences were okay. If not, then those pre-*Lockett* death sentences were illegal.

Florida fell into the second category. Prior to *Lockett* in 1978, the Florida courts had utterly failed to require that capital juries be allowed to hear and consider *all* relevant mitigating evidence.

In 1972, Florida enacted its present-day capital statute. The plain language of this statute confined consideration of mitigating circumstances to a narrow statutory list. In Vernon Cooper's case, for example, Mr. Cooper wanted his jury to consider his stable employment record.[447] A good

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444. SHELBY FOOTE, THE CIVIL WAR 37 (1963).

445. *See generally*, Michael Mello, *Rough Justice*, 42 ALA. L. REV. 1197 (1991); Randy Hertz & Robert Weisberg, *In Mitigation of the Penalty of Death*, 69 CAL. L. REV. 317, 351-61 (1981).

446. Lockett v. Ohio, 438 U.S. 586, 605 (1978).

447. *See* Cooper v. State, 336 So. 2d 1133, 1139 & n.7 (Fla. 1976); Hertz & Weisberg, *supra* note 445, at 353-54.

employment record was not listed as a mitigating circumstance in the statute. His jury was not permitted to consider Cooper's good employment record, and he was sentenced to death.

In 1976, in Mr. Cooper's case, the Florida Supreme Court found that the statutory language was clear in using "words of mandatory limitation" to confine the jury's consideration to a non-expandable "list" of mitigating factors, and thus "other matters have no place in [the capital sentencing] proceeding."[448] The *Cooper* court stressed the clarity of the statutory language restricting consideration of mitigating factors to those "as enumerated" in the statute's list, emphasizing that these were "words of mandatory limitation."[449] Accordingly, the court decided in *Cooper*, "the *sole* issue in a sentencing hearing . . . is to examine in each case the *itemized* aggravating and *mitigating circumstances*. Evidence concerning *other matters* have no *place in that proceeding*."[450]

Cooper's case was decided by the Florida Supreme Court in 1976. It was not until the U.S. Supreme Court decided Sandra Lockett's case in 1978 that another view was expressed. Lockett's case posed an obvious problem for the Florida Supreme Court, but the Florida Supreme Court could not admit that three-score Florida death sentences—all those pre-1978—were illegal. So the justices fibbed. The Florida Supreme Court said that Florida law had anticipated *Lockett v. Ohio* and had always been consistent with the rule of *Lockett v. Ohio*. Thus did the justices of Florida's highest court evade the dictates of *Lockett v. Ohio*.

Instead of admitting that its previous "mandatory limitation" on mitigating circumstances conflicted with *Lockett v. Ohio* and resolving that conflict honestly and forthrightly, the Florida Supreme Court simply denied that there had ever been such a limitation on the statute or in its previous judicial decisions. In Carl Songer's case, decided in late 1978, the court said that "[o]bviously" their construction of the capital statute "has been that *all* relevant mitigating circumstances—statutory and nonstatutory—may be considered in mitigation."[451] By performing historical revisionism worthy of Orwell, the court in *Songer* rewrote its prior decisions in Carl Songer's and other cases to make them consistent with the rule of *Lockett v. Ohio*. These cases claimed that Florida's pre-1978 standard jury instructions violated *Lockett*.

Vernon Cooper, Carl Songer, and other condemned prisoners challenged, in federal court, the job of full reconstructive plastic surgery the Florida

448. *Cooper*, 336 So. 2d at 1139.
449. *Id.*
450. *Id.* (emphasis added).
451. Songer v. State, 365 So. 2d 696, 700 (Fla. 1978).

Supreme Court had performed in *Songer* on its pre-1978 cases, including Mr. Cooper's. In 1982, these constitutional challenges reached the U.S. Court of Appeals for the Eleventh Circuit. I began clerking for Eleventh Circuit Judge Robert S. Vance in the summer of 1982. On February 10, 1983, the Eleventh Circuit ruled that it could not say the Florida Supreme Court had been fibbing in Carl Songer's case in 1978: Florida pre-1978 standard jury instructions and other law had not been inconsistent with the rule established in *Lockett v. Ohio*.[452] The Eleventh Circuit was divided on this issue. Judge Vance cast the deciding vote.

Having lost the standard jury instruction issue in 1983, lawyers for Florida's death row population–led by Craig Barnard, my first boss in Florida–reverted to a more complex claim, that even though the jury instructions did not violate *Lockett*, defense lawyers *believed* Florida law precluded them from presenting nonstatutory mitigating evidence.[453] If that erroneous belief was unreasonable, then those lawyers rendered ineffective assistance of counsel. If they were reasonable, then Florida law violated *Lockett* "as applied." Thus the *Lockett* issue morphed into the *Lockett/Cooper/Songer/Hitchcock* issue.

For nine years—from 1978 to 1987—the Florida Supreme Court got away with its fib. In 1987, in Jim Hitchcock's case, the U.S. Supreme Court tagged the Florida Supreme Court for its fib.[454]

Craig Barnard walked up to the Supreme Court podium in the *Hitchcock* oral argument prepared to make the complex "as applied" *Lockett/Cooper/Songer* argument. But he was cut off by a justice who asked, somewhat impatiently, whether Florida's pre-1978 standard jury instructions did not simply violate *Lockett*.

It was one of those rare, defining endless moments that any experienced oral advocate encounters once or twice in a long career—when a question from the bench requires you to re-evaluate your entire position and decide whether to change it—and all within the space of moments. You know that the court's center of gravity has just shifted, that you can win the case if you say exactly the right thing in exactly the right way. When it has happened to me, I have found myself repeating Allan Shepard's prayer, as he sat atop the first Mercury rocket waiting for the count down that would make him America's first man in space (or that would kill him): "Please, dear God, don't let me fuck up."[455]

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452. *See id.*

453. One of my first assignments as a capital public defender in Craig's office was to research and write a legal memo setting out this argument; this memo became the core argument in Jim Hitchcock's case, as it worked its way through the federal courts to the U.S. Supreme Court.

454. *See* Hitchcock v. Dugger, 481 U.S. 393 (1987).

455. TOM WOLFE, THE RIGHT STUFF 206 (1979).

Craig hesitated for a heartbeat–knowing that this very jury instruction had been upheld by the Eleventh Circuit in 1983, and that virtually everyone Florida had executed since 1983 had received the same jury instruction–before arguing, somewhat wryly, that it had always seemed to *him* that the jury instruction violated *Lockett*. In the end, a unanimous Supreme Court agreed.

In *Hitchcock* Justice Scalia, writing for a unanimous U.S. Supreme Court, said that "it could not be clearer" that Florida law pre-1978, including the standard jury instruction, was flatly contrary to the rule of *Lockett v. Ohio*.[456] In the wake of *Hitchcock*, the Florida Supreme Court quickly reversed the death sentences of at least eighteen cases which (1) had been tried pre-1978 and (2) had death row prisoners who happened to still be alive by the time *Hitchcock* was decided.[457]

David Von Drehle captured the importance–and the mortal irony–of *Hitchcock*:

> The courts can change their minds very quickly. That was the message of the second death penalty ruling published on that April day in 1986, *Hitchcock v. Dugger*. Technically, the U.S. Supreme Court had never ruled on whether Florida's death penalty law limited a defendant's right to present evidence in favor of a life sentence. But the Court had been asked repeatedly to take the question under consideration, and repeatedly the Court had refused. And sixteen people had gone to Old Sparky. That suggests the majority had made up their minds. Now they changed them: The justices ruled unanimously—all of them, the conservatives, the moderate, the liberals—that the law had been "authoritatively interpreted by the Florida Supreme Court" to mean that mitigating evidence was limited.
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> Craig Barnard [my boss in Florida] was right. The Florida Supreme Court had denied this for some eight years—eighteen executions—but Barnard had kept at it, kept hammering, despite scoldings and even ridicule from judges and prosecutors. The public complained bitterly about lawyers like him, with their delaying tactics and technicalities. Politicians had proposed all sorts of bills to limit his access, and the access of his colleagues, to the appellate courts.
>
> Now the U.S. Supreme Court said unanimously that Barnard had been right all along. Justice Scalia, the new conservative tiger, wrote the opinion. "We think it could not be clearer," he intoned, in his confident, definitive way, that the judge and the jury believed

456. *Hitchcock*, 481 U.S. at 398-99.

457. *See* Mello & Medlin, *supra* note 107, at 1022-23 and notes.

> they could consider only a few favorable factors. It could not be clearer.
>
> The Court's opinion in *Hitchcock* was brief, scarcely hinting at the years of litigation that had gone into Barnard's victory. In the end, the subtle shift Barnard had made in his argument was the fig leaf the justices grasped to cover their sudden change of heart.
>
> . . .
>
> The opinion was written to make it seem that a very small point had been decided, but Craig Barnard could see that a new generation of appeals had been opened for the men who had been on Florida's death row the longest. What was true for James Hitchcock was at least arguably true for all of them—dozens of them, and they were the men closest to Old Sparky. And *Hitchcock* had an even larger meaning for Barnard. After the ruling, he proudly told his troops: When people ask why we keep appealing, why we raise these issues over and over, why we never give up fighting . . . tell them to look at Hitchcock.[458]

In other words, if you were tried pre-1978, and you happened to still be alive at the time *Hitchcock* was decided in 1987, you won. If you had been tried pre-1978, but you had been executed prior to *Hitchcock*, you stayed dead, even though your death sentence was as illegal as Jim Hitchcock's had been.

All of the condemned men whose stories are told in my journals were tried and sentenced prior to the *Hitchcock* decision in 1987; virtually all were tried and convicted prior to the *Lockett* decision in 1978. All of their death sentences were unlawful under the *Hitchcock* decision in 1987. What *that* meant, in addition to meaning that those death sentences were illegal under *Hitchcock*,[459] was that none of their sentencing juries were allowed to consider their stories in full. Recall, the rule of *Lockett* states that juries must be permitted to consider *all* relevant mitigating evidence.

In the years since *Hitchcock* was decided, at least sixteen Florida death row prisoners have won new sentencing trials based on the legal principles set out in the *Hitchcock* decision: Carl Jackson,[460] Levis Aldridge,[461] David

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458. VON DREHLE, *supra* note 54, at 300-01.

459. Of course, the Florida courts could have deployed procedural devices–procedural default and harmless error–to avoid granting *Hitchcock* relief. However, the Florida Supreme Court held that procedural bars did not apply to *Hitchcock* claims, and that court and the federal courts rarely found *Hitchcock* error harmless. *See* Mello & Medlin, *supra* note 107 (collecting cases).

460. *See* Jackson v. Dugger, 931 F.2d 712 (11th Cir. 1991).

461. *See* Aldridge v. Dugger, 925 F.2d 1320 (11th Cir. 1991).

Meeks,[462] Vernon Cooper,[463] Stephen Way,[464] Johnny Copeland,[465] Robert Heiney,[466] Robert Waterhouse,[467] Raymond Clark,[468] Robert Mikenas,[469] Wardell Riley,[470] William Downs,[471] Stephen Todd Booker,[472] Jimmie Lee Smith,[473] David Ross Delap,[474] Leo Jones,[475] Thomas Knight,[476] Mack Ruffin,[477] Paul Magill,[478] and Lenson Hargrave.[479]

At the time *Hitchcock* was decided, eighteen men had been killed in Florida's electric chair since 1979. Virtually all of these executions were unlawful under the legal rules set out in *Hitchcock* in 1987.

The numbers may not be even—eighteen dead, as opposed to sixteen who would live, at least for a while longer. Still, there is a fearsome symmetry to it. It would be nice for me to be able to believe that some neutral principle divides these living from these dead: the eighteen were more heinous killers than the sixteen alive, or the eighteen had worse lawyers, or the eighteen were more clearly guilty, or their trials were more fair (or less unfair) than the sixteen who lived. That would be nothing more than a post-hoc rationalization: some of the crimes committed by the eighteen were far less horrific than the crimes of the sixteen; the legal assistance received at trial by the eighteen *and* the sixteen was lousy; in some cases the guilt of the eighteen was clearer than the sixteen, but in other cases the opposite was true; ditto as to the fairness of the trials or the reliability of the death sentences.

Soon after Jim Hitchcock won in the Supreme Court, he sent me a letter I cherish:

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462. *See* Meeks v. State, 576 So. 2d 713 (Fla. 1991).
463. *See* Cooper v. State, 526 So. 2d 900 (Fla. 1988).
464. *See* Way v. Dugger, 568 So. 2d 1263 (Fla. 1990).
465. *See* Copeland v. Dugger, 565 So. 2d 1348 (Fla. 1990).
466. *See* Heiney v. Dugger, 558 So. 2d 398 (Fla. 1990).
467. *See* Waterhouse v. State, 522 So. 2d 341 (Fla. 1988).
468. *See* Clark v. State, 533 So. 2d 1144 (Fla. 1988).
469. *See* Mikenas v. State, 519 So. 2d 601 (Fla. 1988).
470. *See* Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987).
471. *See* Downs v. Dugger, 514 So.2d 1069 (Fla. 1987).
472. *See* Booker v. Dugger, 922 F.2d 633 (11th Cir. 1991).
473. *See* Smith v. Singletary, 970 F.2d 766 (Fla. 1992).
474. *See* Delap v. Dugger, 890 F.2d 285 (11th Cir. 1989).
475. *See* Jones v. Dugger, 867 F.2d 1277 (11th Cir. 1989).
476. *See* Knight v. Dugger, 863 F.2d 705 (11th Cir. 1988).
477. *See* Ruffin v. Dugger, 848 F.2d 1512 (11th Cir. 1988).
478. *See* Magill v. State, 824 F.2d 879 (11th Cir. 1987).
479. *See* Hargrave v. Dugger, 832 F.2d 1528 (11th Cir. 1987).

To: Michael Mello 6-4-87

Dear Sir:

I just wanted to drop you a line or two to say thanks for all your help in my appeal. I know your work rarely shows appreciation. But know your efforts are appreciated deeply by me.

Thanks to you and a lot of other people who worked on my case together you gave me a new lease on life.

Even if I get resentenced to Death—It will have bought me valuable time. Which I was nearly out of. And I hold life precious And where there's life and time—there's possibility of change and hopes for things to get better.

So thanks—And take care and keep punching.

Sincerely,
James Hitchcock

In the end, deciding who lived and who died turned on luck; those still alive when *Hitchcock* was decided would live—the fortuity of timing, and the logic of the law of averages. Nothing else mattered much. It came down to being in the wrong place at the wrong time, or not.

E. The Counsel Crisis

A judge yesterday reprimanded a lawyer for claiming that a prosecutor "wants to kill my client."[480]

To understand my journals it is useful to have some history of the counsel crisis in Florida in the early and mid-1980s, a crisis that came to a head in the period covered by my journals. Given the complexity of capital post-conviction litigation and the need for the kind of factual investigation that cannot be done from a death row cell, there would have been a counsel crisis even if execution dates were not set for inmates without lawyers. What elevated the problem in the mid-1980s from abstract crisis to dire emergency is that the execution dates *are* set for such inmates. No inmate was executed without a lawyer, but many condemned prisoners have come perilously close. Far more have been represented by inexperienced or hopelessly overburdened lawyers working desperately against the clock.[481]

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480. *Judge Scolds Lawyer for His Choice of Words*, ROCHESTER DEMOCRAT AND CHRONICLE, Jan. 31, 1997.

481. Marshall, *Remarks on the Death Penalty Made at the Judicial Conference of the Second Circuit*, 86 COLUM. L. REV. 1, 1-2 (1986).

The demographics of Florida's death row population made Florida one of the first states where the counsel problem became acute.[482] This crisis came to a head during the period covered in my journals. Florida pioneered a legislative solution to the problem of post-conviction representation for death row inmates by creating a publicly funded state agency to provide direct representation for the condemned. Further, during the evolutionary process that culminated in the creation of the agency, Florida experimented with another possible solution to the counsel crisis; a resource center to provide support for members of the private bar who represent individual death row inmates pro bono. I have told this story elsewhere,[483] and I will not repeat it here.

The Office of the Capital Collateral Representative (CCR) sounds more like an insurance underwriting outfit than a death row defense agency, a perception not discouraged by our location in the Independent Life Insurance Building on South Pensacola Street (motto on the window: "There's No Substitute For Life Insurance"). Such camouflage was not entirely accidental. The protective coloration was useful because our Tallahassee office was a political lightning rod. It was an easy walk to the Florida Supreme Court, the legislature, the law library at FSU, the Hilton bar, and the Chi Omega Sorority.

When I was at CCR, it seemed as though just about everyone (except our clients) hated us: the public, the media, the prosecutors, the governors and their staff, the judges, the legislators who decided every year how much (or whether) to fund us. I always thought of such universal animosity as a good thing, or at least as a hopeful thing.

"A hungry army's enough to spook the dead."[484] Everyone at CCR in those days worked extraordinarily long hours and shared a deep commitment to the office's mission. But what made the office work in the early years was the presence of two certifiable geniuses: Scharlette Holdman and Mark Olive. Olive and Holdman made the CCR of the mid-1980s a dangerous law firm: dangerous to the powerful, the dishonest, and the deceitful.

It is hard to describe what made CCR dangerous, but I do know that it had little to do with levels of funding or resources. Perhaps it was a matter of attitude; what Olive and Holdman brought to CCR was a fearless will, in addition to skills and experience. I asked Olive once what it was that stopped executions from occurring. He told me that it was not good facts (although those helped); it was not good law (although that helped); it was not even

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482. As of December 1999, 159 of the 555 death row prisoners in California had no lawyer. *See* Rinat Fried, *Fighting Death: A Life's Work*, RECORDER, Dec. 16, 1999.

483. *See generally* MELLO, DEAD WRONG, *supra* note 2.

484. David Mason, *Cobb's Orchard*, HUDSON REV., 191, Summer 1995.

having an innocent client (which did not help at all, it just made the state actors more determined not to admit they had made a mistake). What stopped executions was will—an iron determination that *this killing will not happen.*

Laurie Lee, in his memoirs of the Spanish Civil War, wrote: "There was a fragmented madness about our group, but it seemed to be necessary."[485] And:

> We spend most of our days now just watching and waiting; watching each other and waiting for the war to move. It was a festering time, drenched in doubt and suspicion. The Republic was in peril, and one took no risks with its enemies.... One hoped, yet doubted, that they had a purpose, but as in most wars they were bungled and malevolent jokes.[486]

CCR in its early days always reminded me of the Army of Northern Virginia, best described by Stephen Vincent Benet in his 1928 epic poem *John Brown's Body*:

> Army of Northern Virginia, fabulous army,
> Strange army of ragged individualists,
> The hunters, the riders, the walkers, the savage pastorals,
> The unmachined, the men come out of the ground,
> Still for the most part, living close to the ground
> As the roots of the cow-pea, the roots of the jessamine,
> The lazy scorners, the rebels against the wheels,
> The rebels against the steel combustion-chamber
> Of the half-born new age of engines and metal hands.
> The fighters who fought for themselves in the old clan-fashion.
> Army of planters' sons and rusty poor-whites,
> Where one man came to war with a haircloth trunk
> Full of fine shirts and a body-servant to mend them,
> And another came with a rifle used at King's Mountain
> And nothing else but his pants and his sun-cracked hands,
> Aristo-democracy armed with a forlorn hope,
> Where a scholar turned the leaves of an Arabic grammar
> By the campfire-glow, and a drawling mountaineer
> Told dirty stories old as the bawdy world,
> Where one of Lee's sons worked a gun with the Rockbridge Battery
> And two were cavalry generals.

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485. LAURIE LEE, A MOMENT OF WAR 98 (1986).
486. *Id.* at 104.

Praying army,
Full of Revivals, as full of salty jests,
Who debated on God and Darwin and Victor Hugo,
Decided that evolution might do for Yankees
But that Lee never came from anything with a tail,
And called yourselves "Lee's miserables faintin'"
When the book came out that tickled your sense of romance,
Army of improvisators of peanut-coffee
Who baked your bread on a ramrod stuck through the dough,
Swore and laughed and despaired and sang "Lorena,"
Suffered, died, deserted, fought to the end.
Sentimental army, touched by "Lorena,"
Touched by all lace-paper-valentines of sentiment,
Who wept for the mocking-bird no Hallie's grave
When you had better cause to weep for more private griefs,
Touched by women and your tradition-idea of them,
The old, book-fed, half-queen, half-servant idea,
False and true and expiring.
Starving army,
Who, after your best was spent and your Spring lay dead,
Yet held the intolerable lines of Petersburg
With deadly courage.
You too are a legend now
And the legend has made your fame and has dimmed that fame,
—The victor strikes and the beaten man goes down
But the years pass and the legend covers them both,
The beaten cause turns into the magic cause,
The victor has his victory for his pain—
So with you—and the legend has made a stainless host
Out of the dusty columns of footsore men
Who found life sweet and didn't want to be killed,
Grumbled at officers, grumbled at Governments.
That stainless host you were not. You had your cowards,
Your bullies, your fakers, your sneaks, your savages.
You got tired of marching. You cursed the cold and the rain.
You cursed the war and the food—and went on till the end.
And yet, there was something in you that matched your fable.
What was it? What do you dim, faint voices say?
"Will we ever get home? Will we ever lick them for good?
We've got to go on and fight till we lick them for good.
They've got the guns and the money and lots more men
But we've got to lick them now.
We're not fighting for slaves.
Most of us never owned slaves and never expect to,
It takes money to buy a slave and we're most of us poor,

But we won't lie down and let the North walk over us
About slaves or anything else.
We don't know how it started
But they've invaded us now and we're bound to fight
Till every last damn Yankee goes home and quits.
We used to think we could lick them in one hand's turn.
We don't think that any more.
They keep coming and coming.
We haven't got guns that shoot as well as their guns,
We can't get clothes that wear as well as their clothes,
But we've got to keep on till they're licked and we're independent,
It's the only thing we can do.
Though some of us wonder—
Some of us try and puzzle the whole thing through,
Some of us hear about Richmond profiteers,
The bombproofs who get exempted and eat good dinners,
And the rest of it, and say, with a bitter tongue,
'This is the rich man's war and the poor man's fight.'
And more of us, maybe, say that, after a while,
But most of us just keep on till we're plumb worn out,
We just keep on.
We've got the right men to lead us,
It doesn't matter how many the Yankees are,
Marse Robert and Old Jack will take care of that,
We'll have to march like Moses and fight like hell
But we're bound to win unless the two of them die
And God wouldn't be so mean as to take them both,
So we just keep on—and keep on—"
To the Wilderness,
And the end of the dream.

If CCR was the Army of Northern Virginia, then Mark Olive was our Robert E. Lee – described, again, in Benet's *John Brown's Body*:

For he will smile
And give you, with unflinching courtesy,
Prayers, trappings, letters, uniforms and orders,
Photographs, kindness, valor and advice,
And do it with such grace and gentleness
That you will know you have the whole of him
Pinned down, mapped out, easy to understand—

And so you have.
All things except the heart.
The heart he kept himself, that answers all.
For here was someone who lived all his life
In the most fierce and open light of the sun,
Wrote letters freely, did not guard his speech,
Listened and talked with every sort of man,
And kept his heart a secret to the end
From all the picklocks of biographers.
He was a man, and as a man he knew
Love, separation, sorrow, joy and death.
He was a master of the tricks of war,
He gave great strokes and warded strokes as great.
He was the prop and pillar of a State,
The incarnation of a national dream,
And when the State fell and the dream dissolved
He must have lived with bitterness itself—
But what his sorrow was and what his joy,
And how he felt in the expense of strength,
And how his heart contained its bitterness,
He will not tell us.
We can lie about him,
Dress up a dummy in his uniform
And put our words into the dummy's mouth,
Say "Here Lee must have thought," and "There, no doubt.
By what we know of him, we may suppose
He felt—this pang or that—" but he remains
Beyond our stagecraft, reticent as ice,
Reticent as the fire within the stone.
Yet—look at the face again—look at it well—
This man was not repose, this man was act.
This man who murmured "It is well that war
Should be so terrible, if it were not
We might become too fond of it—" and showed
Himself, for once, completely as he lived
In the laconic balance of that phrase;
This man could reason, but he was a fighter,
Skilful in every weapon of defence
But never defending when he could assault,
Taking enormous risks again and again,
Never retreating while he still could strike,
Dividing a weak force on dangerous ground
And joining it again to beat a strong,
Mocking at chance and all the odds of war
With acts that looked like hairbreadth recklessness

—We do not call them reckless, since they won.
We do not see him reckless for the calm
Proportion that controlled the recklessness—
But that attacking quality was there.
He was not mild with life or drugged with justice,
He gripped life like a wrestler with a bull,
Impetuously. It did not come to him
While he stood waiting in a famous cloud,
He went to it and took it by both horns
And threw it down.
Oh, he could bear the shifts
Of time and play the bitter loser's game,
The slow, unflinching chess of fortitude,
But while he had an opening for attack
He would attack with every ounce of strength.
His heart was not a stone but trumpet-shaped
And a long challenge blew an anger through it
That was more dread for being musical
First, last, and to the end.
Again he said
A curious thing to life.
"I'm always wanting something."
The brief phrase
Slides past us, hardly grasped in the smooth flow
Of the well-balanced, mildly-humorous prose
That goes along to talk of cats and duties,
Maxims of conduct, farming and poor bachelors,
But for a second there, the marble cracked
And a strange man we never saw before
Showed us the face he never showed the world
And wanted something—not the general
Who wanted shoes and food for ragged men,
Not the good father wanting for his children,
The patriot wanting victory—all the Lees
Whom all the world could see and recognize
And hang with gilded laurels—but the man
Who had, you'd say, all things that life can give
Except the last success—and had, for that,
Such glamor as can wear sheer triumph out,
Proportion's son and Duty's eldest sword
And the calm mask who—wanted something still,
Somewhere, somehow and always.

Florida's counsel crisis may or may not be resolved. CCR's early record justified guarded non-pessimism. Although each annual CCR appropriations

debate has the potential to bring back the scramble for counsel that predated the creation of the agency, that potential will be balanced against the bureaucratic inertia of an extant agency that fulfills a genuine need. In 1987 CCR's budget was increased to $1.4 million. At the same time, the governor announced new policies that would greatly increase the number and frequency of death warrants signed. The same political give-and-take occurred in fiscal years 1993-94, 1995-96, and 1996-97.

With Olive as litigation director and Holdman as chief investigator, CCR was the best office of its kind in the nation. But when CCR's director, Larry Spalding, fired Holdman, knowing Olive would be compelled to resign in protest, the quality of CCR's representation began a slow decline until, by 1995, the agency was but a shadow of the original office. CCR complained it was overloaded with cases, but it seemed to me that CCR's "overload" claims could not be substantiated.[487]

By February 1997, many observers had concluded that the CCR experiment had been a failure. On February 13, 1997, a commission created to study CCR concluded that the agency should be abolished and replaced with a model that works. A prime impetus for the commission's formation was a class action civil rights lawsuit—"Simon's Frolic III," if you will—challenging the applicability of the opt-in provisions of the 1996 Antiterrorism and Effective Death Penalty Act.[488] CCR argued that the agency could not provide the quality of state post-conviction counsel required by the 1996 Act. The federal district court agreed.[489]

I have elsewhere critiqued CCR's decline into a hack public defender's office, and I will not repeat it here.[490] I have always hoped I was wrong about CCR's decline and fall, but I do not think I was. In a front-page story published in the *National Law Journal* in December 1998, expert death penalty reporter Marcia Coyle wrote:

> After his state lawyers neglected and misrepresented his case for more than five years, death row inmate Jeffrey Muehleman was ready to go it alone. "These guys," he told a trial judge, "could get me killed quicker than I could get myself killed. That's about the bottom line of it."

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487. *See* MELLO, DEAD WRONG, *supra* note 2, at 194-99.

488. *See generally* Alexander Rundlet, Note, *Opting For Death: State Respones to the AEDPA's Opt-in Provisions and the Need for a Right to Post-Conviction Counsel*, 1 U. PA. J. CONST. L. 661 (1999) (arguing for a right to counsel in state post-conviction review).

489. *See* Hill v. Butterworth, 941 F.Supp. 1129 (N.D. Fla. 1996).

490. *See* MELLO, DEAD WRONG, *supra* note 2, at 194-99, 242-57.

> Agreeing, Florida Circuit Court Judge Crockett Farnell, in a blistering October opinion, lambasted the lawyers for incompetence and deceit and threw them off the case.
>
> Robert Peede also sensed something very wrong about the lawyers the state of Florida had provided to pursue his post-conviction appeals. He turned to his pen pal for a decade, a soft-spoken Virginia woman who discovered that his lead lawyer, a former prosecutor, had been suspended once and publicly reprimanded another time. Of the two assistants who would argue Mr. Peede's case to the Florida Supreme Court on Dec. 2, one had been out of law school one year; the other had earned his license just weeks before argument.[491]

Saddest to me is how far CCR has fallen since the place first opened its doors on October 1, 1985, amidst so much hope and fear. The fear was that CCR could become just another functionary in Florida's legal machinery of death, and the hope was that we–Scharlette Holdman, Mark Olive and the rest, could, by sheer power of will, prevent that devolution from happening. Until Holdman and Olive were forced out by the bureaucrats who came to control CCR, we did. For a brief moment, in the mid-1980s, CCR was the best capital post-conviction defense organization in the world.

Call it the revolt of the lab rats. The Florida legislature and governor created CCR to speed up executions: give 'em lawyers, and we can kill 'em faster, the logic went, because then the capital punishment assembly line will operate more smoothly. We were the grease.

Actually, we were more like lab rats. Today offices like CCR are commonplace in capital punishment states, but back then we were the first, and we were writing the book as we went along. We had no models and no reservoir of experience from other states upon which to draw.

It was all a big experiment, and we were the lab rats. But we were lab rats with law degrees and a mission to make CCR into a dangerous law firm. We altered the experiment.

We altered the experiment by refusing to behave as lab rats. I do not know quite how to describe this, but for me the test pilot phrase "pushing the outside of the envelope" comes close. Tom Wolfe, in *The Right Stuff*, writes that:

> the ['envelope' was a flight test term referring to the limits of a particular aircraft's performance, how tight a turn it could make at such and such a speed, and so on. 'Pushing the outside,' probing

491. Marcia Coyle, *Suit: Death Row Defense Is a Sham*, NAT'L L. J., Dec. 21, 1998, at A1.

> the outer limits, of the envelope seemed to be the great challenge and satisfaction of a flight test.][492]

As I discuss later in this essay, when I was a kid, test pilots like Chuck Yeager, Gus Grissom, Gordon Cooper, Neil Armstrong, Deke Slayton and Alan Shephard were my heroes, along with Clarence Darrow, H.C. Mencken, and Martin Luther King, Jr. I began taking flying lessons as a teenager. As Slayton put it in the movie *Moonshot*: "A test pilot doesn't think, 'I've got 10 seconds until I crash.' A test pilot thinks, 'Hell, I've got 10 seconds; I bet I can save this thing.'"[493]

Needless to say, I am no test pilot. Test pilots risk their lives every day on the job. But at CCR we risked other people's lives–and not stranger's lives, because to us our clients were not strangers–by our tactical and strategic decisions. When test pilots screw up, they die. When I screwed up at CCR, my clients died.

It takes courage to push the outside of the law's envelope every day, day in and day out, and the reason CCR worked in the early days was because of the courage of Scharlette Holdman and Mark Olive.

That was then. Now Michael Minerva is gone from CCR, and former prosecutors run the place.

It was not even clear to all that CCR was as bankrupt financially as it claimed. The majority leader of the Florida Senate told one newspaper that the agency was not broke, and may have had $1 million left of its $5 million 1996-97 budget. Florida's auditor general reported the agency had roughly $169,000 left, and was on line to receive $86,000 in federal reimbursements. The agency could "squeak by" until the end of the fiscal year, the auditor general said.

CCR did not have money for expert witnesses and travel expenses, and the like, but it's staff would receive their pay on time. The agency had money in a separate salary account, and would meet the May and June payrolls, Martin McClain told the *Florida Bar News*.

If ever there was a sparkling metaphor for CCR in the age of Michael Minerva and Martin McClain, that is it.

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492. WOLFE, *supra* note 455.
493. *Id.*

F. "Touched With Fire": A Biographical Sketch, and the Personal Side of Deathwork

> *We have shared the incommunicable experience of war. We have felt, we still feel, the passion of life to its top. In our youths, our hearts were touched with fire.*
>
> Oliver Wendell Holmes[494]

1. The Story of My Life

I probably should not have begun writing this section in the last week of the twentieth century. The end of the year makes me retrospective, and the end of the decade magnifies this impulse. The end of a millennium . . .

I am writing these words at 10:30 p.m. on December 31, 1999. Anyway, here goes.

a. Man on the Moon

> *Zero - G and I feel fine. Capsule is turning around. Oh, the view is tremendous.*
>
> John Glenn, February 20, 1962.

This section is as close to a memoir as I am ever likely to write. Although I worry that this biographical material risks being self-indulgent and self-referential, I think I need to provide some personal archeology here. The events described in this section forged me, they made me who I am, and they influenced my subsequent life and writings. My journals in particular, and the events they describe, were influenced by my personal history and background. Thus, I provide a sketch of my life prior to deathwork in Florida, followed by some thoughts on the personal aspects of deathwork.I am a Southerner (a white, male, Jewish Southerner)—born in D.C. and reared in Virginia. I am now a Professor of Law at Vermont Law School. I am forty-two years old.

In 1985, I was a capital public defender responsible for thirty-five condemned souls. I was twenty-eight-years-old, three years out of law school, with two years experience in the practice of law. This was, of course, insane. But I was working in an insane asylum. I will now briefly chronicle how I came to the madhouse.

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494. Episode One: The Cause, *The Civil War: A Film by Ken Burns.*

My name was a creation of Ellis Island. When my paternal grandfather arrived there from Portugal, the harried clerk at Ellis Island could not spell his Portugese name. So he and his descendants became "Mellos."

Both of my parents were first generation Americans. My father's parents came from the island of St. Michaels in Azores, Portugal, and settled in East Providence, Rhode Island. My mother's people, the Goldbergs, were a study in bad timing. From Minsk (now in Belarus), they supported the Czar in 1917, and fled to Poland, where they settled in Warsaw, only to be exterminated in the Holocaust (probably in the Treblinka death camp, according to my Uncle Pashe). My mother's parents, thankfully, had already immigrated to New York City by that time. My parents met in D.C. My mother was a secretary for the Air Force, and my father was a ticket clerk for Amtrak.

I had a happy childhood. I was an only child, with two loving and devoted parents. We lived in Fairlington Apartments (now Fairlington Villages) in Arlington, Virginia. I sleep-walked through school, and I lived for summer vacation. My mother reminds me that in school I took part in "Duck and Cover" drills—crawling under my desk and assuming the fetal position to prepare for a nuclear attack on our nation's capital–in the wake of the 1962 Cuban Missile Crisis and its lingering chill in the cold war. When I was twelve, my parents separated and, fifteen years later, they divorced. The separation and divorce were amicable—my father simply was not the marrying kind—and I think it was far more traumatic for them than for me. Neither my mother nor my father ever remarried, and they remained close friends until my father's death by drowning in January 1998. My extended families were wonderful as well. Every summer my father and I would spend two weeks with his people in Providence, Rhode Island and Cape Cod. I saw my mother's brothers and sister less frequently, but I was very close to them as well.

Both my father and my uncle Pashe were veterans of World War II. My father was Army (OSS and, later, CIA), and my uncle was Navy (he was one of only a handful of survivors from a minesweeper that was torpedoed by a German U-boat). Their wartime experiences made both men ardent anti-warriors. Had I been of draft age during the Vietnam War (I just missed it—the draft was abolished shortly before my eighteenth birthday), my father would have demanded I resist and flee to Canada (I am not sure I would have had that much courage). My uncle encouraged me to read Dalton Trumbo's *Johnny Got His Gun*—a book my Navy war-hero (and I have his campaign medals to prove it) uncle believed ought to be required reading by every U.S. congressperson and President.

As I have mentioned, during World War II, my father worked for OSS and, afterwards, he worked overseas for the CIA.[495] His travels took him to Africa and Pakistan. During his tour of duty in Dakar, East Pakistan (now Bangladesh), he was able to send for my mother and me. I had never seen Black people before—there were none in the racially segregated Virginia community in which we lived—and, my mother tells me, I was fascinated by them. Upon my first encounter with a child of color near my age, I reached out and tried to wipe the blackness off of his face. My father thought this was a cute story. I did not.

We lived in Dakar for a year (1962), in a walled compound. We had servants (a fact with which none of us were comfortable) who, my mother reminds me, fascinated me by handling large cobra snakes. At the end of my father's tour of duty, we traveled to Naples, Italy, and Calcutta (I'll never forget the night in Calcutta: the poverty, masses of people dressed in rags, families building fires on the streets to cook their food, cows roaming at will.) and Cairo, Egypt (we wanted to visit Israel, but our ship to the U.S. left from Egypt and, because my mother and I were Jewish, had we entered Israel, we would not have been allowed to return to Egypt to board the ship).

We sailed home, through the Suez Canal and then on to New York harbor, aboard the *SS President Polk*, and I was in heaven on the luxurious liner, even though the weather was stormy for much of the voyage. I was the only child on the ship. One night, my father got cabin fever, and he and I went up to the promenade deck to play shuffleboard in the driving rain. I tripped and fell, skidding along the rain-slicked deck, head first, toward the railing. The cross-beams and safety netting of the railing stopped about eighteen inches from where the railing met the deck, and I slid through. By the time my father grabbed my feet, my head and upper body were through the railing, and I was looking down the entire side of the ship, the long gray hull, a very long way down, into the whitecaps far below. My father saved my life that night, and he saved his own as well—had I gone overboard, my mother would have thrown him in after me.

Both of my parents had a strong social conscience, although I don't think they would ever have called it that themselves. For them, concern for those less fortunate than themselves was simply a normal and unremarkable part of their own histories. Both lived through the Great Depression in very different

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497. The short-lived but legendary Office of Strategic Services was formed in June of 1942. Under the leadership of World War I hero William Joseph "Wild Bill" Donovan, the OSS was responsible for collecting military intelligence. After the war, in 1946, President Truman established the Central Intelligence Group, which was chartered to gather foreign intelligence pertaining to national security. A year later, the National Security Act renamed the CIG the Central Intelligence Agency. The Act also broadened the scope of the CIA charter to allow it to conduct counterintelligence activities. *See* TOM CLANCY & STEVE PIEZENIK, TOM CLANCY'S OP-CENTER STATE OF SIEGE 137 (1999).

sorts of hard times: My mother in urban New York City, my father in relatively rural East Providence, Rhode Island. Neither of them ever forgot what it was like to be poor during the Depression, though they seldom talked about it.

I was a Cub Scout and then a Boy Scout. When I was fourteen, I did volunteer work at an orthopedic and rehabilitation hospital, wheeling stroke patients to the occupational therapy department and helping them through repetitive therapeutic routines. Later, I volunteered in the emergency room of an inner-city hospital. I did as much as they would let me, including once taking an EKG. Fridays at the emergency room were the worst and the most interesting: Friday was payday, which meant money for booze, which in turn meant a lot of gunshot and knifing victims in the emergency room. One especially busy Friday night, an unhappy customer held me at knifepoint for a little while. In the emergency room, I watched babies being born. I watched people die.

I can not recall a time when I didn't feel that capital punishment was wrong. For me it began as a matter of gas. I opposed capital punishment when I read that some American states (including the People's Republic of California) still executed by the use of Zyklon B, the same gas used at Auschwitz-Birkenau. This was not a rational connection to make, I know (and knew). I find *any* comparison of capital punishment with the Holocaust deeply offensive; the United States *isn't* Nazi Germany, the people we're killing aren't innocent Jews, and anyway, most states don't kill by gas.

Still, the visceral connection remained, and I am convinced that capital punishment is one of those issues decided in the viscera, not in the head. Either you believe the government should execute people or you don't. The reasons only come later.

My first awareness of capital punishment as a legal system probably occurred in 1972. I was a paper boy, and I recall delivering the *Washington Post* with the headlines about how, in a landmark case called *Furman v. Georgia*, the Supreme Court had abolished the death penalty. I had probably forgotten all about it by lunchtime. I was fifteen-years-old.

I probably didn't give it more than a moment's thought, because I was occupied with other things. Because I was born in 1957—the year of Sputnik—perhaps it was inevitable that I would want to be an astronaut. My childhood heroes were Chuck Yeager, Allan Shephard, John Glenn, Gus Grissom, Edward White, Roger Chaffee, Neil Armstrong, Buzz Aldrin, and Michael Collins. I remember following the news of the space program and building models of the Mercury,[496] Gemini,[497] and Apollo[498] spacecrafts (Lunar

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496. *See, e.g., America's Space Travelers: Able and Baker*, LIFE, June 15, 1959 (original magazine on file with author); *First-Person Reports by the Astronauts*, LIFE, Sept. 1-4, 1959 (original magazine on

Module, Command Module, Service Module, and Saturn V booster rocket), and I remember crying as I watched the televised funerals of the three astronauts killed in the Apollo 1 fire on Launch Pad 34A.[499] I remember at

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file with author); *Astronauts' Wives*, LIFE, Sept. 21, 1959 (original magazine on file with author); *Back From Space: A Confident "Ham"*, LIFE, Feb. 10, 1961 (original magazine on file with author); *Astronaut First Team: Glenn, Grissom, Shepard*, LIFE, March 3, 1961 (original magazine on file with author); *Gagarin Greets Khrushchev*, LIFE, Apr. 21, 1961 (original magazine on file with author); *"AOK!" The U.S. is in Space*, LIFE, May 12, 1961 (original magazine on file with author); *Shepard Relaxes With His Fan Mail*, LIFE, May 19, 1961 (original magazine on file with author); *John Glenn's Personal Album*, LIFE, Feb. 2, 1962 (original magazine on file with author); *The Glenn Story Nobody Saw*, LIFE, Mar. 2, 1962 (original magazine on file with author); *Man's Journey to the Moon*, LIFE, Apr. 27, 1962 (original magazine on file with author); *New Hero for Orbit: Astronaut Scott Carpenter and His Wife Rene*, LIFE, May 18, 1962 (original magazine on file with author); *55 Minutes That Lasted Forever*, LIFE, June, 1962 (original magazine on file with author); *Color Space Photos – An Exclusive Article by Scott Carpenter*, LIFE, June 8, 1962 (original magazine on file with author); *"Boy, That Was a Ride": Bob White, First Into Space on Wings*, LIFE, Aug. 3, 1962 (original magazine on file with author); *The Coopers Reunited*, LIFE, May 31, 1962 (original magazine on file with author).

497. *See Gemini's Journey by Gus Grissom and John Young*, LIFE, Apr. 2, 1965 (original magazine on file with author); *The Space Walk: 16 Pages of Fantastic Color*, LIFE, June 18, 1965 (original magazine on file with author); *Astronaut Conrad at Start of Flight*, LIFE, Sept. 3, 1965 (original magazine on file with author).

498. *See New Apollo Team and Its Skipper, Wally Schirra*, LIFE, May 19, 1967 (original magazine on file with author); *Schirra and Apollo 7*, LIFE, Oct. 25, 1968 (original magazine on file with author); *The Daring Contraption Called LEM*, LIFE, June 6, 1969 (original magazine on file with author); *Off to the Moon*, LIFE, July 4, 1969 (original magazine on file with author); *Our Moon Trip*, LIFE, Aug. 22, 1969 (original magazine on file with author); *Apollo 12 on the Moon*, LIFE, Dec. 12, 1969 (original magazine on file with author); *Jim Lovell and Apollo 13*, LIFE, Apr. 24, 1970 (original magazine on file with author); *On Board Apollo 13*, LIFE, May 1, 1970 (original magazine on file with author); *see generally* ANDREW CHARKIN, MAN ON THE MOON (1994); JOHN WILFORD, WE REACH THE MOON (1969); NEIL ARMSTRONG, ET AL., FIRST ON THE MOON (1970); MICHAEL COLLINS, CARRYING THE FIRE (1974); DOUGLAS MACKINNON & JOSEPH BALDANZA, FOOTPRINTS (1989); ALAN SHEPARD & DEKE SLAYTON, MOONSHOT (1994); KENNETH GATLAND, MANNED SPACECRAFT (1967); MICHAEL LIGHT, FULL MOON (1999); JIM LOVELL & JEFFREY KLUGER, APOLLO 13 (1994); NASA, CHARIOTS FOR APOLLO (1979); NASA, THE KENNEDY SPACE CENTER STORY (undated) (books on file with author).

499. *See The Three Astronauts: Roger Chaffee, Ed White, Gus Grissom*, LIFE, Feb. 3, 1967 (original magazine on file with author); *The Nation's Goodbye to Astronauts Grissom, White, and Chaffee*, LIFE, Feb. 10, 1967 (original magazine on file with author).

Actually, looking back on it now, my childhood in the 60's was punctuated by funerals and social unrest. I was building a model of a Chris Craft pleasure boat when JFK was assassinated, and my baby sitter (I was six) burst into tears; my parents and I were in the throng along Pennsylvania Avenue: my father held me aloft when the cortege went by, because, as he said, "this is history." *See Kennedy is Assassinated; Connolly Shot in Dallas*, HOUSTON CHRONICLE (2nd Extra), Nov. 22, 1963 (original newspaper on file with author); *President is Killed by Sniper in Dallas*, EVENING STAR (Washington, D.C.), Nov. 22, 1963 (original newspaper on file with author); *Kennedy is Killed by Sniper As He Rides in Car in Dallas; Johnson Sworn in on Plane*, N.Y. TIMES, Nov. 23, 1963 (original newspaper on file with author); *President Johnson Takes Over, Kennedy Lies in White House*, EVENING STAR (Washington, D.C.), Nov. 23, 1963 (original newspaper on file with author); *President's Death*, SAN FRANCISCO EXAMINER, Nov. 23, 1963 (original newspaper on file with author); *Kennedy's Body Lies in White House; Johnson at Helm with Wide Backing, Police Say Prisoner is the Assassin*, N.Y. TIMES, Nov. 4, 1963 (original newspaper on file with author); *Nation Mourns as Kennedy Goes to His Final Rest Today*, EVENING STAR (Washington, D.C.), Nov. 25, 1963 (original newspaper on file with author).

10:20 p.m., the hot Virginia night of July 20, 1969,[500] watching a flickering TV set in Doug Smith's basement, as Neil Armstrong took that first human step on the surface of the moon.[501] Along with much of the world, I followed with microscopic interest the fate of the crippled Apollo 13 spacecraft, after the explosion of oxygen tank number two.

At a hobby shop not far from where I lived, I discovered model rocketry (heavy cardboard tubes, with hard plastic nose cones, fins, and parachutes) and rocket engines (gunpowder wrapped in cardboard, open on one end for insertion of the fuse). These rockets, when they worked, flew about 200 feet straight up (well, more or less straight). I soon began experimenting with multistage rockets in order to increase their altitude. As my mother would cheerfully attest, these experiments were, on occasion, spectacularly unsuccessful. Once, when I should have been preparing for school in the morning, the sound of an explosion in my room brought my mom to investigate. When I opened the door, acrid black smoke poured out of the room; my face was black with gunpowder smoke and my eyebrows and eyelashes had been burned away. Another time, my rocketeering experiments caught the window curtains of my room on fire. In a moment of desperate inspiration, I yanked the curtain rod out of its socket and carried the whole flaming mess into the bathroom and dumped it into the bathtub. When my mother saw me round the corner to the bathroom, I was in the middle of two

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When Martin Luther King was assassinated in Memphis in 1968 (I was 11), my mother was working in D.C. when the riots began; when she came home that night, ashen-faced, she said, "Washington is burning," and we went to a park near our apartment, where the plumes of smoke from the burning city rose into the evening sky. *See Martin Luther King, 1929-1968*, LIFE, Apr. 12, 1968 (original magazine on file with author); *America's Farewell in Anger and Grief*, LIFE, Apr. 19, 1968 (original magazine on file with author). A few months later, my mother woke me at night to tell me that Robert F. Kennedy had been shot; the next day at school, I sat on a hill during recess listening to news reports on my transistor radio, waiting for him to die. *See Kennedy Assassination Attempt Fails; Gunman Held By Los Angeles Officers*, DAILY MONITOR (Concord, N.H.), June 5, 1968 (original newspaper on file with author); *Kennedy Lives: Condition "Critical,"* BOSTON EVENING HERALD, June 5, 1968 (original newspaper on file with author); *Mile-Long Line Passes Kennedy Bier*, BOSTON EVENING GLOBE, June 7, 1968 (original newspaper on file with author). Then came the police riot at the Chicago Democratic Convention, where the whole world watched Chicago's finest beat and gas the anti-war demonstrators.

1968 was an ugly year, but it was saved somewhat when, in December, Apollo 8 circled the moon, and the astronauts read aloud from the Book of Genesis.

500. In July and August, it becomes obvious that our nation's capital was built on a swamp—albeit an elegant swamp.

501. *See "The Eagle Has Landed"–Two Men Walk on the Moon*, WASH. POST, July 21, 1969 (original newspaper on file with author); *see also Earth World Joins Astronauts* in *Fantastic Moon Ship Visit*, BOSTON GLOBE, July 18, 1969 (original newspaper on file with author); *Moon Orbit Only Hours Away*, BOSTON GLOBE, July 19, 1969 (original newspaper on file with author); *All is Go for Moon Landing Today*, BOSTON SUNDAY GLOBE, July 20, 1969 (original newspaper on file with author); *Apollo Heads Safety Earthward to World-Wide Sigh of Relief*, BOSTON GLOBE, July 22, 1969 (original newspaper on file with author); *Moon Explorers Return*, BOSTON GLOBE, July 25, 1969 (original newspaper on file with author).

columns of flaming curtains, with shards of burning cloth dropping as I carried them, burning holes in a Persian carpet and the bathroom carpet my father had just finished laying. It's a wonder I lived to puberty.

I did all of this field research to aid my goal of becoming an astronaut. To become an astronaut, one typically needs first to become a pilot, and in 1972, at age fifteen, I began taking flying lessons and attending ground school at National Airport. However, since my paper route wouldn't cover the $100 per hour cost of flight school, I joined the Civil Air Patrol (CAP), the auxiliary United States Air Force. So, while my schoolmates were wearing their hair long and decrying the Vietnam War and the military industrial complex, I wore an Air Force uniform, marched and drilled (and decried the Vietnam War and the military industrial complex), and learned to conduct search and rescue operations for missing aircraft (on the CAP's ground rescue team and on its mobile radio communication center, or AT, Advanced Terminal). Our ground rescue team practiced all manner of search and rescue—from rappelling down the side of mountains in Elizabeth Funace, while carrying a stretcher containing one of us as the mock crash victim (the worst assignment to draw was that of victim, strapped in the stretcher, being lowered down a sheer-face mountain), to actually coordinating air and ground searches for missing aircraft.

I first visited Charlottesville, Virginia (where I ended up attending law school) in 1973, when I was sixteen, on a search and rescue (SAR) mission for CAP. A small private aircraft had gone missing, and our job was to provide communication support for the air and ground searches for the plane and its pilot and passengers. We assembled at our CAP headquarters, at the East Laboratory building at Washington National Airport, loaded our communication gear, camping gear, and food into our squadron's modified Ford Econoline van. For the duration of the SAR mission, we would be dressed in field-green fatigue uniforms with our rank and other insignia sewn onto the collars, arms, and chests of our uniforms. I was also responsible for assembling and maintaining our large stores of medical supplies and equipment (backboards, stretchers, gauze, inflatable and fixed splints, tape, bandages, hemostats, stethoscopes, blood pressure cuffs, plastic airways in assorted sizes, etc.). I carried emergency medical supplies on my webbed belt, along with my canteen, compass, mess kit, and a sheathed WWII bayonet (a present from my Uncle Tony, who used it in WWII).

After driving to Charlottesville, the communications hub of the SAR mission, we set up camp and put up our two principal antenna arrays. Constructing these arrays required a coordinated group effort: After attaching halyard lines to the two main antenna poles on the ground, we would lift the poles into the air and secure the lines. Then we set up the campsite, tents, cooking fire pits, latrine pits, and the like.

The next six days fell into a pattern. We woke before dawn and tested the radio gear for the planes that would take off at dawn. After cooking breakfast, we would receive the day's orders from the mission commander. Then the planes would go up, flying pre-designated search grids. We would coordinate the aircraft until shortly before dark, keeping track of their fuel levels, airspeed, and search coordinates. After the planes landed, we would debrief, light our cooking fires, prepare and eat dinner, unroll our sleeping bags in the back of the van or in the tents or under the stars, talk, go to sleep, and do it all over again the next day.

The Mickey Mouse aspects of pseudo-military CAP discipline never lasted in the field. I never learned to march ("he doesn't work well in groups"), and there was no drill in the field. We simply had a sun-up to sun-down job to do. The starched fatigues became limp with sweat from the tension as well as the heat and humidity. The campfire-cooked meals gave way to McDonald's runs. Artificial distinctions of rank dissolved until we all worked together like a finely-tuned aircraft engine ("he does work well in certain sorts of groups after all").

That week in Charlottesville, the lost plane wasn't located. Had our planes found the target, we would have sent in our Ground Rescue Teams (GRT) to the crash site. Before I worked on the communications team, I worked on my squadron's GRT. In addition to medical training and extrication practice, we learned how to navigate in the woods and mountains and how to conduct systematic search patterns in all manner of rugged terrain.

In the CAP I held my first teaching post: Medical instructor and aerospace education officer. I was our squadron historian and keeper of the archives. Somewhere in my CAP travels, I picked up the nickname "Hawkeye"—from the character in *MASH*. I was also in the first graduating class of Virginians to become certified EMTs.

And I flew. Whenever I could afford it, I would bum a ride (or hitchhike) to PG Airpark in Maryland and take a flying lesson in a Cessna 150. I had the usual close calls. Once, I had to abort a landing at Washington National Airport because I was on a collision course with a DC-9 airliner. Another time, while practicing touch-and-go takeoffs and landings at PG Airpark, I got distracted during a final approach to the runway when I noticed a couple making love in the woods; I got flustered and, rather than decreasing the flaps from fifteen degrees to zero degrees, I increased the flaps to thirty degrees. Without the quick intervention of my flight instructor, we might have crashed into the power lines or woods near the end of the runway (as it was, we missed the power lines by about fifty feet).

I didn't, however, take the parachute training I wanted. My parents drew the line at my jumping out of planes and they refused to sign the requisite parental permission forms.

Meanwhile, I was flunking out of high school. Wakefield High was undergoing the viscitudes of racial integration, and I quickly learned that the administration was too preoccupied with racial unrest to notice that one skinny, quiet, white kid with short (CAP regulation) hair was not showing up to class. I discovered (by conducting field research) that I could skip class for up to six weeks before getting caught. I spent my days reading in the high school library, where I read histories of Vietnam (Bernard Fall and Francis Fitzgerald were the best) and the Holocaust (Raul Hilberg, Emanual Ringleblum's archive[502] of the Warsaw ghetto), racism in America (Dr. Martin Luther King, Malcolm X), the civil rights movement and the anti-war movement, pacifism. Or I would spend my time off from school hitchhiking to Washington National Airport to watch the planes take off and land, or to hang out in the airport control tower (security was fairly lax in those days, and I was a lieutenant in the local squadron and regional wing of CAP).

The first time I was caught skipping school (after six weeks of it), I got a warning. The second time (after another six weeks) I got a sterner warning. The third time (after yet another six weeks) they called in my parents and threatened me with . . . suspension. I looked at my father and he looked at me: My punishment for missing school was to miss *more* school? They came up with something else.

The one course I didn't flunk out of was English. I never handed in a late writing assignment. I wrote papers about the Titanic and the Holocaust, and I wrote really bad fiction about escaping from Nazi prison camps and near disasters in the sky (I must have written a dozen stories that were some variation of the novel and movie *Airport*). I wrote about the Apollo 1 fire, the Kent State shootings, and the anti-war and civil rights movements.

The sixties ended at noon on May 4, 1970. On that date, the Ohio National Guard opened fire on a crowd of anti-war demonstrators, killing four Kent State students and wounding nine others. The Kent State shootings ignited a national firestorm of campus protests and strikes. My fascination

502. In a way, my deathwork diary presented in this essay has its genesis in my reading Ringleblum's archive in high school. I never forgot the power of his descriptions of ordinary, daily life during extraordinary times.

with Kent State began with a photograph I first saw in 1973.[503] The photo was on the cover of *Newsweek*. I still have that *Newsweek*.[504]

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503. By September 1973, I was clipping and saving news accounts of Kent State, and I continued to collect news accounts of the criminal trial and civil trial of the Guardsmen. *E.g.*, Peter Davies, Letter, PLAYBOY, Sept. 1973 (original magazine on file with author); *Kent State Reopened*, TIME, Dec. 24, 1973 (original magazine on file with author); Christine Jindra, *U.S. Trial of Guardsmen in Kent Slayings Begins*, WASH. POST, Oct. 22, 1974 (original newspaper on file with author); *Jury Seated in Trial of Guardsmen for Kent State Shootings*, WASH. POST, Oct. 25, 1974 (original newspaper on file with author); *To Conservatism Kent Jury Leans*, N.Y. TIMES, Oct. 28, 1974 (original newspaper on file with author); UPI, *3 Testify on Shot at Kent*, WASH. POST, Nov. 6, 1974 (original newspaper on file with author); *Kent State Trial*, WASH. STAR-NEWS, Nov. 6, 1974 (original newspaper on file with author); *Two Who Fired*, WASH. STAR-NEWS, Nov. 7, 1974 (original newspaper on file with author); *Kent State Trial*, WASH. STAR-NEWS, Nov. 8, 1974 (original newspaper on file with author); UPI, *Kent State Trial is Told a Defendant Gave Order to Fire*, N.Y. TIMES, Nov. 8, 1974 (original newspaper on file with author); AP, *Judge Acquits Kent Guardsmen*, WASH. STAR-NEWS, Nov. 8, 1974 (original newspaper on file with author); Agis Salpukas, *Judge Acquits Guardsmen at Kent State Trial*, N.Y. TIMES, Nov. 9, 1974 (original newspaper on file with author); John Mackenzie, *Judge Acquits 8 in Killings at Kent State*, WASH. POST, Nov. 9, 1974 (original newspaper on file with author); Bob Downing, *Kent State is Quiet as the News Arrives*, AKRON BEACON-JOURNAL, Nov. 10, 1974 (original newspaper on file with author); *The Guardsmen Go Free*, TIME, Nov. 18, 1974 (original magazine on file with author); *Kent State Five Years Later*, WASH. STAR-NEWS, May 4, 1975 (original newspaper on file with author); Betsy Carter, *Kent State in 1975*, NEWSWEEK, May 5, 1975 (original magazine on file with author); *Kent State*, WASH. POST, July 24, 1975 (original newspaper on file with author); AP, *Guardsman at Kent State Says He Lied*, July 1, 1975 (original newspaper on file with author); *Kent State Case*, WASH. POST, July 8, 1975 (original newspaper on file with author); *Kent State Case*, WASH. POST, July 30, 1975 (original newspaper on file with author); *Rhodes Tells Kent Jury of Neat-War*, N.Y. TIMES, July 30, 1975 (original newspaper on file with author); *Kent State Deaths*, WASH. POST, May 27, 1975 (original newspaper on file with author); *Rhodes Denies Kent State Force Charge*, WASH. STAR, July 30, 1975 (original newspaper on file with author); *Kent Jury to See Film on Shooting*, N.Y. TIMES, Aug. 3, 1975 (original newspaper on file with author); UPI, *Expert Testifies on Kent State Film*, N.Y. TIMES, Aug. 15, 1975 (original newspaper on file with author); *Kent Plaintiffs Rest Their Case*, N.Y. TIMES, Aug. 7, 1975; UPI, *Damages Charges Dropped Against 8 in Kent State Case*, N.Y. TIMES, Aug. 9, 1975 (original newspaper on file with author); *Kent Trial Jury Told of a Pistol Shot*, N.Y. TIMES, Aug. 13, 1975 (original newspaper on file with author); *Kent State Shooting*, WASH. POST, Aug. 15, 1975 (original newspaper on file with author); Allen Richardson, *Kent Recalled*, N.Y. Times, Aug. 7, 1975 (original newspaper column on file with author); *Kent Defense Rests Case*, WASH. STAR, Aug. 19, 1975 (original newspaper on file with author); UPI, *Last Kent State Defense Witness Testifies*, WASH. POST, Aug. 19, 1975 (original newspaper on file with author); *Kent State Jury is Guarded as Suit Trial Nears End*, RICHMOND TIMES-DISPATCH [Virginia], Aug. 22, 1975 (original newspaper on file with author); *Jury Gets Kent Case*, WASH. POST, Aug. 23, 1975 (original newspaper on file with author); *Kent State Trial*, WASH. POST, Aug. 24, 1975 (original newspaper on file with author); *Kent State Jury Ends 2nd Session*, RICHMOND TIMES-DISPATCH, Aug. 24, 1975 (original newspaper on file with author); *Kent State Jury to Try Again in Damage Case*, RICHMOND TIMES-DISPATCH, Aug. 22, 1975 (original newspaper on file with author); *Kent State Film Viewed*, WASH. POST, Aug. 27, 1975 (original newspaper on file with author); AP, *Jurors Eye Governor*, RICHMOND NEWS-LEADER, Aug. 26, 1975 (original newspaper on file with author); *Suit Won By Defense*, WASH. POST, Aug. 28, 1975 (original newspaper on file with author); *Kent State Jury Finds None Liable*, RICHMOND TIMES-DISPATCH, Aug. 28, 1975 (original newspaper on file with author); AP *Kent State Plaintiffs Plan Appeal*, WASH. STAR-NEWS, Aug. 28, 1975 (original newspaper on file with author).

The Guardsmen won both the criminal trial and the civil trial. The Sixth Circuit reversed the civil verdict for the Guardsmen and ordered a retrial. After a jury had been selected for the retrial, the Guardsmen and the families of the students killed and wounded settled the civil case.

504. *Nixon's Home Front*, NEWSWEEK, May 18, 1970 (original magazine on file with author).

The photograph depicts a young woman I had assumed at the time was a Kent State student[505] kneeling beside the dead body of Jeff Miller. Her arms were out-stretched as if in supplication. But it was her face that was unforgettably searing—that combination of stunned surprise and ineffable grief.

This photographic image, and others from the deadly day at Kent, captured my imagination and fascination. Kent State was national and international news, because the students killed and wounded by the M-1 rifles and .45 pistols of the National Guard were white. Much less well-known was a very similar shooting at another college campus ten days after Kent State. On May 14, 1970, elements of the Mississippi Highway Patrol and Jackson City policemen opened fire on demonstrators at Jackson State University. After the twenty-eight seconds of rifle and shotgun fire, two African American youths lie dead and twelve were wounded. Indeed, two *years* before Kent State, police officers opened fire on students of the South Carolina State College at Orangeberg,[506] leaving three young men dead and twenty-seven other students, male and female, seriously wounded. Because the students shot at Orangeberg and Jackson State were African American—and because African Americans had been getting shot in the South forever—those shootings had little of the cultural impact of the shootings at Kent State.

In high school, I got into the habit of writing, in my scrawled penmanship, passages of books I admired into a series of spiral notebooks, which I still have today. I also still have my notebook of press clippings and weekly magazines on Watergate. Watergate was the first political crisis I followed closely, and, each day, I would cut out the day's newspaper stories and scotch tape them into my spiral notebooks. I also tape-recorded much of the Rodino Committee's hearing (I developed an instant crush on Barbara Jordon after her opening speech), along with Nixon's final speech to his staff and his resignation speech.

Then there was the time I talked my way into the national headquarters of the American Nazi Party. I would read histories about the Holocaust and I had heard how the Shoah had annihilated the Goldberg branch of my family. I was strongly affected by Leon Uris' historical novels *Mila 18* and *Exodus*, by the memoirs of Elie Weisel, and by the transcripts of the Nuremburg trials, all of which I had read in high school (while cutting classes). I've always thought of myself as Jewish, even after the local rabbi—a fellow named

505. I learned later that the woman, Mary Ann Vecchio, was in fact a 14-year-old runaway from Opa-locka, Florida. She is six months older than I am.

506. *See* JACK BASS & JACK NELSON, THE ORANGEBERG MASSACRE (1984).

Fink—refused to work with me to be Bar Mitzvahed because my father wasn't Jewish.

I was shocked when I read somewhere in high school that there was a Nazi Party in America. Their headquarters were not far from where I lived—only two bus rides away, in fact. I phoned the Anti-Defamation League of B'nai Brith, but they said they knew little about the American Nazi Party (ANP). Then, on impulse, I decided to visit the Nazis myself.

I got their phone number from Directory Assistance. Calling myself Wilhelm Grass, I phoned them, set up an appointment, and asked for their address. I got directions from the bus company. Then, one Saturday afternoon, I caught the bus to visit the Nazis.

It was surprisingly easy. The bus took me to a block away from the headquarters. The building itself, a squat, gray, nondescript home on a mostly residential street, did not identify itself as home of the American Nazi Party, although its occupants were evidently security-conscious. The windows were barred and the door was constructed of heavy iron. Even the recessed door peephole seemed sturdy and solid.

I walked up the front walk and rang the doorbell. A voice from within asked who I was, and I identified myself as the Wilhelm Grass who had phoned earlier. I heard several deadbolts being released, and the door opened. I prayed they would not ask for ID (I had intentionally left all of mine at home). They did not.

The door was opened by a blond, blue-eyed, extremely white man. He was dressed in the khaki summer uniform of a lieutenant in the German army of the 1940s. On his left arm, equidistant between elbow and shoulder, he wore a bright-red and gloss-black swastika armband. On his belt, he carried a pistol. Without a word, he motioned me inside.

He let me into the building, and then he locked all three deadbolts. He took up a position behind me. Another Nazi—in an equally immaculate Gestapo uniform—stood in front of me. I gave my false name and said I was thinking about joining the Nazis, but I would like a bit more information. The man in front of me gestured toward walls to my left and right, both of which contained racks and tables of "information."

For the next ten minutes or so, I leafed through the literature. There was a lot of it: *The Protocols of the Learned Elders of Zion, Mein Kampf* (which I already owned and had read), the autobiography of the ANP's founder, George Lincoln Rockwell, crude racist and antisemitic bumper stickers, buttons and leaflets, and the like. I selected a sampling of the vile stuff, paid for it with cash, thanked them, provided false information on a card to get on their mailing list, thanked them again. I headed for the door which one of the Nazis opened and then locked after I had left. My purchases were in a plain brown paper bag, and I wondered what my seatmates on the bus ride home

would have thought about what was in my bag. Once home, I mailed all the stuff to the Anti-Defamation League. I didn't want it in my mother's home.

I was sixteen when I visited the Nazis, old enough to have known better. Even at the time, I didn't buy my rationalization that I had done it to get materials to the Anti-Defamation League. I think I did it because I had to see the Nazis for myself—live, in the flesh. I needed that to make them *real* for me. And I don't mean to suggest that I was cool, calm, and collected when I was in that locked room with the armed Nazis. I was terrified, and my main goal, once inside, was to get out without throwing up on their crisply-pressed uniforms.

b. Inherit the Wind

Think of all the hate
There is in Red China,
Then take a look around
To Selma, Alabama
You can leave here
For four days in space
But when you return
It's the same old place –
The pounding of the guns
The pride and disgrace.
You can bury your dead
But don't leave a trace.
Hate your next door neighbor
But don't forget to say grace.
And you tell me
Over and over and over again
That you don't believe
We're on the eve of destruction.

Barry McGuire[507]

In eleventh grade, one of my high school classes took a field trip to Arena Stage, an open-air amphitheater in Maryland, to see the play *Inherit the Wind*. Two characters captivated me: H.L. Mencken and Clarence Darrow. Something clicked in me: People would pay you *money* to write for a newspaper or to defend the likes of John Thomas Scopes? I knew I wasn't a good enough writer to make it as a working journalist, so I opted for the law. I've never looked back.

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507. BARRY MCGUIRE, EVE OF DESTRUCTION (MCA Records 1965).

There was probably more to my instant identification with Darrow as a role model for myself. I had always liked to argue, and that's what the lawyers did in *Inherit the Wind.* Also, Darrow seemed to do it alone—one lone man arguing against the arrayed forces of theistic conformity. I've always been a loner—somewhere in my elementary records there doubtless are notations from my teachers that "Mike doesn't work well in groups." The image of the lone lawyer fighting for social and racial justice, against the mob, resonated with me. Finally, I think there was the matter of empowerment. Probably most high schoolers feel disempowered, but I think mine was more acute (doesn't everyone?) and more long-lasting. Lawyers had access to the power of the law—they were the gatekeepers, as Kafka wrote—and I'd read what radical lawyers like William Kunstler and Clarence Darrow could do for their disenfranchised and marginalized clients. I wanted access to that power.

Anyway, I read everything I could find by or about Clarence Darrow, including his autobiography and a collection of his closing arguments, aptly entitled *Attorney For The Damned.* Darrow had represented everyone from Eugene Debs and other union organizers to Leopold and Loeb. Darrow put capital punishment on trial, labor unions on trial, racism on trial, the law itself on trial. I was hooked.

I talked to my high school guidance counselor about my new career goal. He told me to forget it: With my grades and lack of motivation, I'd never be accepted to college, much less law school. He suggested trade school.

Actually, trade school wasn't such bad advice. My father wanted me to be a surgeon (my mother wanted me to be happy) but medicine, like law, seemed far beyond my reach. Money wasn't plentiful when I was growing up, but books—and love—were. Still, law school seemed unlikely. Neither of my parents, and only one other member of my extended family (my mother's sister, my Aunt Harriet) had gone to college.

My parents and my Aunt Harriet had persuaded me to work on high school. Now I had another incentive: No law school without college, and no college without at least graduating high school. I worked and brought my grades up during eleventh and twelfth grades.

But it wasn't enough, especially when I bombed the SAT (I've never gotten along well with standardized tests). The only college that would let me in was Mary Washington College (MWC), and I only got in there by virtue of their affirmative action program, because I was male. Until 1970, MWC had been the sister school of the University of Virginia. In 1970, the two schools split, and in 1972 both went coed. When I began at MWC, in 1975, the school was still 95% female, and they were letting in pretty much every Virginia resident who was male; I was.

c. Remember Kent State!

Has anybody here
Seen my old friend Martin?
Can you tell me where he's gone?
He's freed a lot of people
But it seems as if they died young.
Can't you tell me
Where they've gone?

Dion,
Abraham, Martin, and John[508]

You want to find out what happened on May 4?
Lots of luck. Talk to 1,000 different people, and
you'll get 1,000 different answers.
Everyone was there, everyone was right up front,
and everyone saw everything that happened.
A Ravenna cab driver, May 3, 1977[509]

If I were the Governor, I'd cover it, too.
A sign in 'tentropolis"
May 1977[510]

My four years at MWC was the only time in my life I've been an externally obvious minority. As one of the very few males in the place, I often was the only male in many of my classes. And many of the women there—students and faculty alike—were none too pleased by we alien invaders, an image we didn't help by converting the male freshman dorm into Animal House. Most folks weren't hostile to us, and many were warm and welcoming, but my sense of "otherness" was unmistakable and unforgettable.

Having gotten into college because of affirmative action, I fell in love with the place. I majored in American history and philosophy. I wrote the constitution of a new campus chapter of Hillel (from which I was drummed out after publishing an essay on why the Nazis should have been allowed to

508. DION, ABRAHAM, MARTIN & JOHN (Laurie Records).
509. This quote is from my contemporaneous notes of May 1977.
510. *Id.*

march in Skokie, Illinois).[511] I founded a campus chapter of the National Organization for the Reform of Marijuana Laws (NORML), the first such campus chapter in Virginia.[512] I helped found, and then I wrote for and edited, an alternative to the weekly college newspaper, *Prometheus*; later, I worked as reporter, features editor, and news editor of the "real" college newspaper, the *MWC Bullet*—the college newspaper best known for a Jesus Christ Wanted Poster. The newspaper was first published in 1968, nine years before I joined the staff in 1977. I wrote articles and editorials[513] on topics ranging

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511. *See* Michael Mello, *Free Speech: In Defense of an Enemy*, MWC PROMETHEUS, Oct. 17, 1977 (original on file with author).

512. From this, the college administration naturally assumed that I was either a dope dealer myself or that I consorted with dope dealers. In fact, the actual dope dealers avoided me like the plague because of my public association with an organization advocating the decriminalization of marijuana. And I would have had to be out of my mind to have been dealing dope—something I would never have done in any case—at the same time I was the most high-profile member (campus President, actually) of NORML.

513. *See, e.g.*, Michael Mello, Guest Commentary, *Amnesty: Bring the Boys Home*, MWC BULLET (The official student newspaper of Mary Washington College), Apr. 19, 1976 (original on file with author); Michael Mello, Guest Commentary, *NORML Sets Guidelines in Battle for Marijuana Decriminalization*, MWC BULLET, Sept. 13, 1976 (original on file with author); Michael Mello, *Senate Vice-President Says Constitution is a Farce*, MWC PROMETHEUS (Mary and Washington College's alternative newspaper), Nov. 11, 1977 (reprinted in MWC BULLET Nov. 15, 1977) (original on file with author); Michael Mello, *Students Discuss Rape Prevention*, MWC BULLET, March 28, 1977 (original on file with author); Mello, *In Defense of an Enemy*,*supra* note 511; Michael Mello, *Dean Rusk: Guilty of War Crimes?*, MWC PROMETHEUS, Nov. 11, 1977 (original on file with author); Michael Mello, *Obeying the Law: Another Opinion*, MWC PROMETHEUS, Jan. 30, 1978 (original on file with author); Michael Mello, Guest Commentary, *Dean Rusk*, MWC BULLET, Nov. 22, 1977 (original on file with author); Michael Mello, Editorial, *The Case for Anonymity*, MWC BULLET, Nov. 30, 1977 (original on file with author); Helen McFalls & Michael Mello, *"Westmorland 4" Accuse Administration of Injustice*, MWC BULLET, Dec. 8, 1977 (original on file with author); Michael Mello, Guest Commentary, *"Westmorland 4": Our Judicial System on Trial*, MWC BULLET, Jan. 20, 1978 (original on file with author); Helen McFalls & Michael Mello, *The December Administrative Hearings: A Closer Look at the Unresolved Issues*, MWC BULLET, Jan. 20, 1978 (original on file with author); Michael Mello, Guest Commentary, *What is a Radical?*, MWC BULLET, Jan. 24, 1978 (original on file with author); Helen McFalls & Michael Mello, Editorial, *Time For a Bill of Rights?*, MWC BULLET, Feb. 21, 1978 (original on file with author); Michael Mello, Editorial, *Due Process of Law?*, MWC BULLET, Feb. 14, 1978 (original on file with author); Michael Mello & Helen McFalls, *SA Presidential Candidates Discuss Campaign Platforms*, MWC BULLET, Feb. 28, 1978 (original on file with author); Michael Mello, *Woodard Approves Student Bill of Rights*, MWC BULLET, Mar. 21, 1978 (original on file with author); Michael Mello, Editorial, *Vote "Yes" on the Bill of Rights*, MWC BULLET, Mar. 21, 1978 (original on file with author); Michael Mello & Helen McFalls, *Special Election Edition: S.A. Presidential Candidates Discuss Campaign Platforms*, MWC BULLET, Feb. 28, 1978 (original on file with author); Michael Mello, Editorial, *Much Accomplished, More to Do*, MWC BULLET, April 4, 1978 (original on file with author); Michael Mello, *Board of Visitors Member Involved in Local Controversy*, MWC BULLET, Mar. 28, 1978 (original on file with author); Michael Mello, *Theater Accident*, MWC BULLET, Apr. 4, 1978 (original on file with author); Michael Mello, *The Function of the Board of Visitors*, MWC BULLET, Apr. 21, 1978 (original on file with author); Michael Mello, *Board of Visitors Rector Opposed to Rules Changes*, MWC BULLET, Apr. 18, 1978 (original on file with author); Michael Mello, Editorial, *Prometheus*, MWC BULLET, Apr. 18, 1978 (original on file with author); Michael Mello, *BOV Adopts Dalton Plan*, MWC BULLET, Apr. 28, 1978 (original on file with author); Michael Mello, *Affirmative Action at MWC*, MWC BULLET, Apr. 25, 1978 (original on file with author); Michael Mello, News Analysis, *New Judicial Court Upholds Due Process: The Impact on Due Process*, MWC BULLET, Apr. 15,

from decriminalization of marijuana; to whether Dean Rusk (the college's 1977 Distinguished Visitor in Residence) was a war criminal for his actions regarding Vietnam when he was Lyndon B. Johnson's Secretary of State; to newspapers' use of confidential sources; to the tension between freedom of the press and individual privacy; to dormitory visitation hours; to amnesty for Vietnam era draft dodgers and war resistors; to the college's disciplinary system; to constitutional issues; to sexism; to the rights of Nazis to march in Skokie; to reform of rape laws to prevent putting the victim on trial; to grammar ("Our Friend the Semicolon"); to "Senior Limbo."

In my junior year, I was my college newspaper's representative to an on-the-record briefing at the White House. The briefing included four segments with senior White House and cabinet staff—and a half-hour question and answer period with President Jimmy Carter.

There were 200 college journalists present for the time with the President (the White House later sent me a group photo of us all, hands raised, Carter smiling from the raised dais). I was lucky: I was the eighth person he called upon for a question. This was my question and his answer:

> THE PRESIDENT: Right on the aisle.
>
> QUESTION: Do you feel that your pardon of Vietnam era Selective Service resistors has been a success, and secondly, is

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1978 (original on file with author); Michael Mello, *Young Alumnus Appointed to Board of Visitors*, MWC BULLET, Sept. 12, 1978 (original on file with author); Michael Mello, *Students Study Dorm Visitation Rules*, MWC BULLET, Sept. 19, 1978 (original on file with author); Michael Mello, Editorial, *Closed Subjects, Closed Minds*, MWC BULLET, Sept. 26, 1978 (original on file with author); Michael Mello, *23 Hour Dorm Visitation: Where Our Leaders Stand*, MWC BULLET, Sept. 19, 1978 (original on file with author); Michael Mello, Editorial, *Privacy vs. The Press*, MWC BULLET, Sept. 19, 1978 (original on file with author); Michael Mello, Commentary, *How Far Will This Path Go?*, MWC BULLET, Oct. 3, 1978 (original on file with author); Michael Mello, Editorial, *In Praise of Logic*, MWC BULLET, Oct. 3, 1978 (original on file with author); Michael Mello, *Preliminary Results: 79% Favor 23 Hour Visitation*, MWC BULLET, Oct. 3, 1978 (original on file with author); Michael Mello, *569 Would Live in 23-Hour Dorm: 80.1% Support Option*, MWC BULLET, Oct. 10, 1978 (original on file with author); Michael Mello, Commentary, *Honor Court and Judicial Court: Where to Draw the Line*, MWC BULLET, Oct. 17, 1978 (original on file with author); Michael Mello, Editorial, *Rape Law on Trial*, MWC BULLET, Oct. 31, 1978 (original on file with author); Beth Innis & Michael Mello, *Virginia Rape Law Called Inadequate*, MWC BULLET, Oct. 24, 1978 (original on file with author); Michael Mello, *Professor Advocates ERA*, MWC BULLET, Feb. 13, 1979 (original on file with author); Michael Mello, *What Bothers Students?*, MWC BULLET, Feb. 13, 1979 (original on file with author); Michael Mello, *Turnout Small at Student Meeting*, MWC BULLET, Feb. 22, 1979 (original on file with author); Michael Mello, *Dean Clement to Resign*, MWC BULLET, Mar. 20, 1979 (original on file with author); Michael Mello, *4 Students Suspended; Arrests Total 5; Campus Investigation Continues*, MWC BULLET, Apr. 3, 1979 (original on file with author); Michael Mello, *Shock Waves*, MWC BULLET, Apr. 3, 1979 (original on file with author); Michael Mello, Editorial, *Senior Limbo*, MWC BULLET, Apr. 3, 1979 (original on file with author); Michael Mello, Editorial, *The Bullet: Sink or Swim*, MWC BULLET, Apr. 17, 1979 (original on file with author).

there any possibility of extending that pardon to include military deserters?

THE PRESIDENT: It is only partially successful because of the constraints placed on that program by Congress. I felt that we needed a much more comprehensive system of pardoning Vietnam veterans and also restoring their rights after the pardon is issued.

We are proceeding as best we can with that program under the constraints that Congress put on the Administration. And I believe that this is something that should have been done.

We have also proposed through the normal or existing legislative authority within the Defense Department to expedite the consideration of both the Vietnam War protesters and also deserters.

This is a matter that is already authorized by law. We have tried to make sure that there was a distinction drawn between different levels of seriousness of desertion. If someone deserted on the field of battle and therefore endangered the lives of fellow warriors, this is a very serious matter and we tried to draw a distinction there between other categories of desertion.

But I don't think it has been adequate yet. We are doing the best we can under the prevailing law that has been in existence for a long time within the Defense Department and we have pursued the Vietnam consideration to the utmost of my ability.[514]

At the time, I believed the college to be semi-fascistic. Today, looking back on my college newspaper writings, I'm amazed at the school's indulgence in, and patience with, my agitation. Still, the college newspaper was a good training ground for my later work as a capital postconviction litigator: It taught me to write on a deadline.

In college, I continued an interest I'd developed in high school in the May 4, 1970 shootings at Kent State University.[515] In

514. Interview with Jimmy Carter, President of the United States, in Washington, D.C. (Mar. 3, 1978) (copy on file with author).

515. *See* John Pekkanen, *Kent State: Four Deaths at Noon*, LIFE, May 15, 1970, at 31 (original magazine on file with author; *see generally* JAMES MICHENER, KENT STATE (1971); REPORT OF THE PRESIDENT'S COMMISSION ON CAMPUR UNREST (1970); ED GRANT & MIKE HILL, I WAS THERE (1974); I.F. STONE, THE KILLINGS AT KENT STATE (1971); THE MIDDLE OF THE COUNTRY (Bill Warren ed., 1970); JOE ESTERHAS & MICHAEL ROBERTS, 13 SECONDS (1970); JOSEPH KELNER & JAMES MUNVES, THE KENT STATE COVER-UP (1980); WILLIAM GORDON, THE FOURTH OF MAY (1990); PETER DAVIES, THE TRUTH ABOUT KENT STATE (1973); THOMAS HENSLEY & JERRY M. LEWIS, KENT STATE AND MAY 4TH (1978) (books on file with author). The best of the books is Peter Davies'. I corresponded with Davies:

Michael Mello
Box 2835 College Station
Fredericksburg, Virginia, 22401
February 10, 1977

Peter Davies
c/o The Noonday Press
19 Union Square West
New York, NY 10003

Dear Mr. Davies,

I would like to first compliment you on your superb book on the incident at Kent State. I was extremely impressed with the work, but even more than that, I have been impressed with your letters to Playboy Forum over the past six years. Unlike so many critics of the Kent tragedy whose attention quickly shifted to other matters, you have persevered in keeping alive the quest for ultimate justice. Consequently, when I decided to do my history honors paper on the Kent affair, yours was the first name that came to mind.

I have already obtained the available secondary sources: Michener's book, the Scranton Commission Report, I.F. Stone's series of essays and the grand jury report under the title The Killings at Kent State, The Middle of the Country, the Grant and Hill presentation of "the Guard's side of the story" and your own work. But I want to go deeper than these resources and get as close to the original sources and their raw information as possible so that my indictment of the Guard's "self defense" claim is irrefutable. The general sentiment on this campus – to say nothing of Fredericksburg – is that the troops were at least partially justified in firing. I hope in my paper to shatter that myth once and for all.

To that end I would profoundly appreciate any guidance and insight that you could possibly give. I am particularly interested in any new information that has come to light since your book went to print. How can I obtain the transcripts of the most recent cases; do you think it would be helpful for me to contact the lawyers involved, and if so, how would you suggest I go about doing it? Would a trip to Ohio be justified, and if so, what would be the most helpful sources to consult there?

I have almost a year and half to devote to this project, as well as an incredible amount of interest. The latter has been fueled by what I believe is the far too short memories of the American people. This point was brought home to me with stunning clarity last year, when a companion of mine, in answer to my inquiry as to her opinion on the progress of the Kent trial, replied, "Kent State? Isn't that the prison where all of those niggers were killed?" After twelve years of primary and secondary education and two years of college (in which she excelled), this person had never heard of Kent State University. Hopefully, my paper will serve in some meager degree to reverse this trend and explode the belief that the senseless and purposeless murder of these four students was somehow inevitable because of their own actions.

Sincerely,
Michael Mello

Michael Mello

March 16, 1977.

162 Fanning Street
Staten Island,
New York 10314

Mr. Michael Mello,
Box 2835 College Station,
Fredericksburg, Virginia 22401

Dear Mr. Mello:

I thank you for your letter and am heartened by your concern and interest. During the past three years several students have written me about their research on Kent State for major papers, one of whom has been at it since 1975 for a thesis. Unfortunately, as you can see from the attached, I no longer have at hand the material accumulated since 1970 so I cannot be very helpful as I have in the past by sending copies of key documents, etc. Nevertheless I will try to be of some service to you.

For anyone planning to devote quite a bit of time to doing a thorough study of what happened on May 4, 1970, a trip to Kent State is mandatory. At the library there you will find a special room which contains a great deal of information that will be most useful to you, and in the archives they have documents that may be examined provided they are not still sealed for various reasons. They also have a copy of the 13,000 page transcript of the 1975 civil trial that lasted over three months. The time to go, if you can, is this coming May 3-4 when, as has been done every year since the killings, The May Fourth Task Force and the Center for Peaceful Change organizes memorial events that begins at midnight on the 3rd with a candlelight procession and 12 hour vigil at the spots where the four students were slain. To attend one of these annual memorials is to experience an emotionally wrenching day that cannot be described in words. I have only been able to expose myself to two of them but may return this year depending on business and other responsibilities.

Next month, beginning April 3 thru April 6, there will be a colloquium at Yale devoted to Kent State and the Nixon Administration. This has been organized by Yale's Political Union to mark the official acceptance of my Kent State Material by the Yale Library. Senator Weicker will start it off on Sunday the 3rd. Other speakers include the Rev. John P. Adams, Anthony Lucas, Dr. Glen Olds (recently resigned president of KSU), Thomas Emerson, Henry Steele Commager, and lead counsel for the appeal in the in the civil case, Sanford Jay Rosen of San Francisco. I will be there with my family, and if it is possible for you to come, please let me know immediately so that I can advise them accordingly. If time or funds require that you choose between Yale in April and Kent in May I unhesitatingly recommend Kent in May. You will find much more data there for your history honors paper, and most importantly of all see the site of the shootings. Distances on paper do not impact the way

physically seeing those distances does. When you stand in the Prentice Hall parking lot and look up the slope toward the Pagoda you will be overwhelmed by the enormity of what happened.

I doubt that contacting the lawyers would be of much use if you can make the trip to Kent. I am, of course, intrigued by your determination to "shatter" the myth of self-defense and wish you every success. We have vigorously sought to do the same without much progress beyond turning around the results of a 1970 Harris poll that pretty much reflected the sentiment you have run up against in Fredericksburg. I can only suggest that you emphasize several established facts that were so cleverly distorted during 1970 and 1971. The major shooters, as opposed to those guardsmen who fired in the air, were not the ill-trained teenagers thrust into uniform that Ohio and AG Mitchell implied so successfully. More than half of the men on the hill never even fired, such was the threat to life and limb, and ironically many of these guardsmen were the greenhorn teenagers. Testimony at the civil trial, along with the statements of the guardsmen right after the killings, proves that there was an order to stop, turn and fire. This fact, of course, has been vigorously denied by the officer corps of the Ohio National Guard. Testimony and photographs prove beyond even the remotest reasonable doubt that there was no mob of students about to fall upon the "frightened" guardsmen when they "individually" fired in "self-defense" as General Canterbury claimed along with scores of other officers and men. This, as the Justice Department said in 1970, was "fabricated subsequent to the shootings." Nevertheless, at the civil trial two years ago defense attorneys not only relied heavily on the self-defense excuse, they actually resurrected the phantom sniper explanation, and the jury bought it in a 9-3 verdict against us! You have set yourself a difficult task, my friend, but someday someone will break through that most stubborn of all the myths surrounding what really happened and why.

Now for a little updating. The civil suit Krause, et al. vs Rhodes, et al. is on appeal in the Sixth Circuit of the U.S. Court of Appeals at Cincinnati. Oral arguments are scheduled for May 3 this year (another reason why I may be in Ohio at that time). A decision is anticipated this Fall. Whatever way that decision goes it will be appealed to the U.S. Supreme Court. On June 24 last year the judge in the federal civil trial, Don J. Young, issued a protective order (gag order) on all material gathered by the attorneys through the pre-trial discovery process that did not become a part of the trial record. That order affects some of the material I have donated to Yale. Consequently I am - tomorrow - filing a motion in Cleveland's federal court, under the Krause v. Rhodes case, to set aside that order on the grounds that it infringes upon my rights as an author, historian (legal jargon) and acknowledged expert on Kent State, etc. In the motion I stress the fact that if Judge Young's order is not set aside prior to April 3 I will be severely inhibited from speaking freely at Yale. I do not expect that my motion will be granted, let alone in time for next month.

Well, that's about all for now. If you have any specific questions

you wish to put to me please write as often as you wish. As for your friend–companion–who had never heard of Kent State do not despair. Those who have not heard have the most open minds I know about. It is those who did hear about in May 1970 and heard nothing since that all too often prove to be the hardest to reason with. They "know" what happened by what they reach back then. Subsequent revelations are of little consequence. Invariably they are to be treated with suspicion. Communists, etc. etc.!!!

Hopefully your paper will indeed serve to reverse this situation. Good luck and write again anytime.

Sincerely,

Peter Davies

I sent Davies a copy of a letter I'd written seeking a $500 grant to help subsidize my research:

7764 Donnybrook Ct T7
Annandale, Va. 22003
16 May 1977

Dr. Joseph Vance
203 Braehead Dr.
Fredericksburg, Va. 22401

Dear Dr. Vance,

I am a rising Junior at Mary Washington, and I hope to graduate with Honors in History. Dr. Tracy has agreed to sponsor me but he suggested that I clear the project through you and Dr. Crawley at this point. In my paper I hope to disprove the notion that the Ohio National Guard was in physical danger when it opened fire on students at Kent State University, killing four, maiming two, and wounding seven. The reason I am beginning the project so early is that the morass of information I must examine is immense, and none of it is available here in Virginia or even in Washington, D.C.

In this project, I will use almost exclusively primary sources (transcripts of hearings before the Scranton Commission, FBI reports and the court records of the various Kent-related cases) supported by such secondary works as James Michener's Kent State, Peter Davies' The Truth About Kent State, Warren's The Middle of the Country and the Report of the President's Commission). I just got back from a three day visit in Ohio, and the raw information is there for a complete and detailed refutation of the National Guard's self-defense assertion. But there is also a mass of irrelevant material (one court transcript is

13,000 pages long, another is 11,500) and for this reason I must start now on this large research task.

I believe that this subject is of great importance for two interrelated reasons. The first is that the Guard's claim of self defense, a claim which was given credence by the media and which has been repeated so many countless times that many today still believe it, is patantly untrue. To go to Kent State and stand on the spots where the thirteen were shot is to be overwhelmed by the lie that has gained credence by repetition: If the guardsmen's claim that a rock-throwing crowd of students were charging them and threatening their lives with rocks and bricks, why were they shooting at students 200, 300, 400 feet away from them. Donald MacKenzie was 730 feet from the soldiers that shot him, and as one stands on the spot where he fell, it is difficult to even see the huge metal sculpture that the Guardsmen were standing under when they opened fire. The self defense claim just doesn't make it, and its time it was shattered once and for all. As Arthur Krause, father of one of those killed on May 4th, 1970, wrote in 1972: "The Kent dead will never, never rest in peace until the truth is known and justice is done."

The second reason is that no one so far as I know has as yet succeeded in exploding the myth. Michener's book came out too early after the shootings to be conclusive; the Scranton Commission Report and the Davies book are in some crucial respects dated. Much critical information that was not available to these writers came out in open court in the past three years and is now available to us. I believe that a detailed analysis of this new information would be a significant contribution to history.

There is perhaps a third reason why I would like to do this inquiry. Kent State on May 4th, Jackson State a week later and Southern University two years later are not as far away from us as we may think. Kent on May 4, 1970 was the very model of a Middle American University: Until 1968, the most vicious outbreak of violence there was a panty raid which resulted in the prompt dismissal of 29 students. Anti-war rallies attracted only about 300 people of the total school population of 21,000. But for this very reason, by virtue of its very conservatism and lack of uniqueness, the volly of gunfire there echoed more loudly than it might have at a Berkeley or a Columbia. Kent State has much more in common with Mary Washington College than it does with those capitols of campus protest in New York and California and Connecticut. To paraphrase James Michener, Kent State could be MWC. The students and National Guardsmen could be us or young people like us or, if you are old

enough, your sons or daughters. Kent could very easily be Fredericksburg. This is why we must know what happened on Blanket Hill seven years ago this month, so that we can prevent it from happening again. I would like to try.

Sincerely,

Michael Mello
162 Fanning St.
Staten Island, NY 10314

May 21, 1977

Mr. Michael Mello,
7764 Donnybrook Ct, T7,
Annandale, Va. 22003

Dear Mr. Mello,

Thank you for your letter. I am glad that you opted for the pilgrimage to Kent State rather than the colloquium at Yale. For anyone seriously interested in the issues raised by May 4, 1970, a visit to the campus is mandatory for the reasons you cited. I well remember my first sight of the area in front of Taylor Hall on a February morning in 1972. Photos and maps do not adequately convey the enormity of the distances nor the commanding height of the Pagoda area from which the guardsmen fired down into the parking lot and football field.

With respect to the transcript of the Scranton Commission hearings at Kent State. I temporarily had it in 1971 whilst working on the Appeal for Justice submitted to the Justice Department that summer. I can only suggest that you write to the Rev. John P. Adams, United Methodist Church, 100 Maryland Avenue N.E., Washington, D.C. 20002, and ask him if he still has it. If so, ask if it would be possible for you to visit there and examine the transcript for your research.

With respect to the transcripts of the two trials. The criminal one, I believe, is U.S. vs Shafer et al., but again I suggest you check this out with Rev. Adams. Since I sent all my papers to Yale I can no longer verify these things as I once could. Transcripts of both trials should be available at the Federal Court House in Cleveland.

If you let me know exactly when you will be passing through Manhattan then it may be possible for me to see

eleventh grade, after I'd decided I wanted to go to college and law school, I read James Michener's book about the Kent State shootings. That book led me to others: Peter Davies' outstanding book, the Scranton Commission Report, and the microfiche of the original newspaper coverage.

The more I read about the Ohio National Guard's killing of four students and wounding of nine others, the more troubled I became about the affair. I was planning to go to college myself. Might I get shot for protesting, as the Kent State students had been shot for protesting Nixon's invasion of Cambodia?

At college, my interest in Kent State only increased. Reading through the newspaper morgue of my college newspaper, I learned that the school had been shut down in the wake of Kent State. I ended up writing an honors paper in history on the shootings at Kent State. The paper tried to answer questions of whether the Guardsmen were in any danger from the crowd or from a sniper when they fired.

I spent the summers of 1977 and 1978 at Kent State researching the honors paper. In 1977, I took part in the occupation of the school's administration building, my first act of civil disobedience.[516] I learned

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you, circumstances permitting, during your layover.

I am just back from Los Angeles where I spoke about Kent State at Occidental College. At the campus there is now a "tent city" in front of Taylor Hall to prevent the planned construction of an annex to the gymnasium that will encroach on part of the site where the shootings occurred. Some sixty tents and 200 protesters were there as of last night, and a National Rally is planned for June 4 at which Kunstler, Gregory, Kovie, myself, and others are scheduled to attend. It is, I fear, a somewhat hopeless cause. They will construct the building no matter what, unless enough national interest was aroused, and extensive media attention inspired, which we have been working at this past week.

Sincerely,

Peter Davies

516. My interest in the theory and practice of civil disobedience—and in what necessary conditions must be present and absent for civil disobedience to be justified—date back to high school. As I neared draft age, I read many books about the resistors of the Vietnam War, along with anthologies and histories of conscientious objection to that war and to war in general. I also read up on the civic resistance of the Martin Luther King, Jr. branch of the civil rights movement. In college, I was a philosophy major and I took a course on civil disobedience. I wrote a paper arguing that eschewing violence, and being willing to accept punishment for one's unlawful acts, were usually strategically wise for civil disobedience to succeed—but that they were not necessary conditions for civil disobedience to be morally legitimate. For example, a partisan's bombing of the railway and lines leading into Auschwitz would have been morally legitimate, even though the means were violent and even though the partisan was not willing to accept

punishment for her unlawful acts. I've always believed that the slave uprisings of Nat Turner, Denmark Vesey, Gabriel Prosser and others were morally justified. I dredged up the old college paper in recent years when I worked on behalf of two homicidally violent civil disobedients: Paul Hill and Ted Kaczynski. Over 20 years ago I committed my first—and until September 1995, in the "Crazy Joe" Spaziano case, my only—act of civil disobedience or, to borrow Andrew McThenia's phrase, "civic resistance." Along with 800 or so students and assorted outside agitators (of which I was one, I guess), I helped take over and occupy an administration building at Kent State University.

I had not come to Kent State in May 1977 to protest; I came to study and to commemorate the shootings in 1970. But following an intensely moving candlelight march and vigil on the night of May 3, 1977, and a tedious day of speeches and marches on May 4, a group of protesters, led by two men in wheelchairs, Dean Kahler (wounded in the 1970 shooting and paralyzed from the waist down) and Ron Kovic (Vietnam war veteran and author of *Born on the Fourth of July*) took over, and for the night hours, occupied Rockwell Hall. I was 20 years old, a sophomore at Mary Washington College in Virginia.

I still have the white armband and the black armbands I wore then, along with the faded flower petals, scotch-taped into a spiral binder. I plucked them from the masses of bouquets piled near the places where the four students fell in 1970. I picked the one marked, "Sandy Scheuer, 1977," a cherry blossom, an eliptical-shape (tear-shape, now that I notice it), on May 4, 1977, during my first visit to Kent. I picked the other one, marked "Jeff Miller, 1978," a buttercup, on May 4, 1978, during my second pilgrimage to Kent.

The memorial events I had come to bear witness began at 8:00 p.m. with a short and thoughtful speech. From 10:00 to 11:00 there was a memorial candlelight march beginning at the commons and ending in the Prentice Hall parking lot where the four students fell. *See* MAY 4TH TASK FORCE, 1977 COMMEMORATIVE BOOKLET (May 4, 1977) (original booklet on file with author); Jim Crowley, *Hundreds Attend Candlelight Vigil for May 4 Victims*, DAILY KENT STATER, May 5, 1977 (original newspaper on file with author); Editorial, *A Challenge*, DAILY KENT STATER, May 5, 1977 (original newspaper on file with author); Roger DePaulo, *Memories of May 4 Won't Go Away*, DAILY KENT STATER, May 5, 1977 (original newspaper on file with author).

During the candlelight vigil in the parking lot, after the march, I met the parents of three of the four students who were killed on May 4, 1970. In my notes, I wrote that the Krauses were "strong, erect, defiant," that the Scheuers were "crushed, she leaning on his shoulder," and that the Millers "seemed to be somewhere else." I wanted to talk to him, to ask him questions, to tell him about my research into May 4, to tell him that some of us remembered and would always remember what happened to his daughter in this place. But no words came. I just shook his hand and moved away, wishing not to intrude into his grief.

The four spots in the parking lot where the four students fell and died were roped off into squares. All night people took turns standing vigil in the squares, one person per square, for an hour at a time. There was a sign-up sheet, and I stood vigil on the place where Jeff Miller and Allison Krause fell. I stood vigil at those spots between midnight and 1:00 a.m., and 2:00 a.m., and 3:00 a.m.

One of my favorite photographs of me appears on the front page of the *Daily Kent Stater*. The caption of the photograph which was taken by *Stater* photographer Doug Mead, reads: "Dean Kahler, one of the students wounded in May 1970, holds hands with Ron Kovic, Vietnam veteran and anti-war activist, as they lead the candlelight procession Tuesday night. The ceremony marks the beginning of May 4 commemorative events." Kahler and Kovic are in wheelchairs, both holding candles. Kahler, a gentle bearded man is looking to the side, either speaking or smiling; what the photograph catches is his profile. Kovic, by contrast, is staring dead ahead, levelly into the camera. His eyes are wide open and his mouth invisible beneath his droopy mustache. The photograph catches me in the second row of the candlelight march. My eyes are closed, and my shoulder-length hair appears not to be combed real effectively. My fleece-lined blue jean jacket is buttoned to my neck. The story in the *Daily Kent Stater* accompanying the photograph was written by Jim Crowley:

> A reverent hush was carried from the Commons, where it all began, to Taylor Hall parking lot, where it all ended. As the 1400 marchers walked along, their faces were familiar and unknown, young and old, but all with one thing in common; they had come to pray. When the quarter-mile-long procession neared Taylor Hall, wounded

> student Dean Kahler and Vietnam veteran and author Ron Kovic, the march leaders, positioned themselves where Jeff Miller's crumpled body once rested. Some Prentice Hall residents displayed candles saluting the hundreds outside. Mr. and Mrs. Martin Scheuer took their places in the roped-off space with Sandy's name on it, the first time they came here since their daughter was killed. Mr. and Mrs. Lewis Schroder stood reflectively where Bill fell seven years previously. Reverend John P. Adams, whose United Methodist Church group had helped fund the lengthy legal proceedings, stood with his wife where Allison Krause died from an M-1 bullet fired 343 feet away. Benton Wolman, head of the Ohio American Civil Liberties Union, instrumental in legal representation, was also there as was KSU President Glen Olds, Vice President David Ambler and Dean Richard Bredemeir. Dr. Jerry Lewis, Associate Professor of Sociology and vigil organizer, said the march was "one of the larger ones" and attributed the bigger turnout since 1971 to a changing emphasis. "It's taken on more appropriate religious meaning rather than a political meaning," he said. The march began on the Commons, wound around in front of the Administration Building and proceeded down Main Street. As the procession reached Verder Hall, students marching shoulder-to-shoulder extended back to Moulton Hall. The monument erected to the four slain students was surrounded by candles. Some people cried, but the stone slab, like those whom it represents, did not hear.

Late at night on May 3, 1977, I wrote a handwritten letter to the college faculty advisor supervising my research into the Kent State shootings:

> May 3, 1977
>
> Dear Dr. Tracey:
>
> I must admit that when I first decided to come here to Kent State, I wasn't sure exactly I was hoping to gain. But now I know. I have met the parents of three of the students who were killed in this place. I have taken part in a candlelight march, in which I walked behind Ron Kovic and Dean Kahler. I wanted to get the mood, the feel of this place; I wanted to settle in mind the *worth* of this mission. I have.
>
> Sincerely,
> Mike Mello

The following day presented a significantly different face of Kent State University. The administration had announced a few months earlier its plans to build a gymnasium annex extension over part of the ground covered by the Ohio National Guard on May 4, 1970. I had been following these events vaguely in the national press, but their meaning and significance did not hit home until I arrived at Kent in late April 1977. But the planned extension to Memorial Gym offended, what seemed to me at the time, my sensibilities as a history major. As I have mentioned, spatial relationships and visual topography had been central to my understanding and appreciation of what happened on May 4, 1970. Before I trucked to Kent State University in 1977, I had read all of the books then published about the shooting; specifically, I had studied dozens of photographs. Yet it wasn't until I was actually there, physically present on the sites where the Guard fired and the students who were killed and wounded fell, that the magnitude of what had happened struck home. The Memorial Gym extension would have destroyed those spatial relationships. It seemed to me a crime against history.

So I didn't put my notebook or my tape recorder or my highlighter away. I took them with me when I set up residence in the dorm room of a friend I'd met the day I'd arrived. I spent my days in the microfiche carrels of the library, reading and photocopying the transcripts of the civil trials against the Ohio National Guard. I spent my evenings and nights in the dorm, talking to people, smoking dope, and wondering what I would do if the shit hit the fan.

It did, very soon after the marches and speeches commemorating the May 4 victims. What began as a polite crowd of marchers ended as a mob storming the campus administration building. A cry rose up: "Rockwell Hall!" I remember thinking: "What the fuck is Rockwell Hall?" It turned out that it was the administration building, and within a half hour 400 or so of the demonstrators, led by Ron Kovic and Dean Kahler, had occupied it. So there I was, an outside agitator, not a Kent State University student or a resident of Ohio, a long-haired outsider that looked a lot like the sort of people that Spiro Agnew and William Saffhire took such glee in scorning. I was a junior in college, I was already preparing essays for law school admission packets, and I was extremely aware of how stupid it was for me to risk all of that by participating in this occupation. Given how slowly my mind works, I decided with frightening speed to stay. By the time I did, the building had been sealed, and the police were happily letting people leave but grimly determined to permit no one to enter or re-enter Rockwell Hall. No food or water. Only two phone lines remained open. *See Protesters Occupy Rockwell*, DAILY KENT STATER, May 5, 1977 (original newspaper on file with author); Paul Shane, *Kunstler Condemns Removal of CPC*, DAILY KENT STATER, May 5, 1977 (original newspaper on file with author); Gene Harbrecht, *Gregory to Begin Fasting*, DAILY KENT STATER, May 5, 1977 (original newspaper on file with author); Editorial, *We Support*, DAILY KENT STATER, May 5, 1977 (original newspaper on file with author); Barbara Gregg & Dan Moreland, *Vet Opposes Gym Plans*, DAILY KENT STATER, May 5, 1977 (original newspaper on file with author); Chris Vasco & Karen Shiuno, *KSU Protest Mood Recalls 1970*, RECORD-COURIER [Ravenna and Kent, Ohio], May 5, 1977; List of Demands (original on file with author); May 4th Coalition–A Position Statement (original on file with author).

At some point early on, it occurred to me that no one in the outside world, no one from my outside world in Virginia knew for sure precisely where I was or what my relationship was with the takeover. People who knew me probably assumed that I was in the middle of it, which I was, but not for the reasons most likely suspected by my extended family of friends. There was a long line at the only two functioning pay telephones, I waited and waited. When I got to the phone, my father was the person I called. It's spooky to think of this now, after his craziness and self-destructiveness of the past few years, but in May 1977 he was one of my best friends, and he was the only person I called. We didn't talk about law school; we didn't talk about arrest records; we didn't have to. He said what I knew he would say: "Do what you think is right." He knew me. He knew why I had to stay. That's why I called him.

The occupation lasted eight hours, and what surprised me was how boring it was for the most part. Without his needing to say a word, Ron Kovic controlled the room, controlled the building, with his fierce quietude. In the first half hour of the occupation, my old Yippie buddies from the Democratic National Convention and the Republican National Convention two summers before tried to seize the moment. Kovic shut them up just by looking at them. We would be quiet; we would be dignified; we would give them no excuse to storm the building. Kovic didn't speak often, and when he spoke at all it was always in a low, gravelly voice slightly above a whisper, but his few words infused whatever he did say with a deadly power. We came up with the obligatory list of demands, all of which of course were "non-negotiable," and all of which, of course, we negotiated away in exchange for "amnesty." When Kovic and Kahler decided that we would leave the building, we did so in neat files that seemed visually at odds with our generally scruffy appearances. My friends in the dorm had not taken part in the takeover, but we hooked up at 2:00 or 3:00 a.m. and went to an all-night diner. The talk around the diner centered around questions of why the police had decided against retaking the building with teargas and bullets. That was a shame, seemed to be the consensus of most of the other customers in the diner. At our table, we didn't talk much. We listened.

The next week, something extraordinary happened. One person pitched a tent on Blanket Hill, on the proposed gym site. The idea spread like wildfire. Within days, a tent city of 50 tents and 150 residents sprang up on the proposed site. *See The Tentropolis Lifestyle*, DAILY KENT STATER, May 18, 1977 (original newspaper on file with author) (noting that the campsite grew "from six to 50 in the past six days").

We came to call the tent city the "tentropolis" or "tent state." I say "we" because I lived informally at the tent city for about a week. It was a gentle place. "No alcohol or drugs [were] allowed in the camp, but sitting in the sun, watching children of parents in classes, and of course sleeping, were frequent activities. News often travel[ed] by word of mouth or through the community bulletin board." *Id.*

The atmosphere in tentropolis was leisurely and relaxed, but the resolve was firm. The tent city's

citizens vowed to stay until the gym site was moved or they were forcibly removed from the tent site. *See "Tentropolites" Facing Forcible Eviction Soon*, DAILY KENT STATER, May 19, 1977 (original newspaper on file with author); *Site Protesters Will Stay*, DAILY KENT STATER, May 20, 1977 (original newspaper on file with author); Gene Harbrecht & Jim Crowley, *Life on the Hill*, DAILY KENT STATER, May 24, 1977 (original newspaper on file with author); Joan Kobosky, *Counsel May Take Action to Halt Gym Construction*, DAILY KENT STATER, May 27, 1977 (original newspaper on file with author).

For me, the importance of what I'd witnessed in Kent was not the tent city or the takeover of Rockwell Hall. What mattered was memory. While researching in Kent, I wrote a handwritten letter to the organizers of the May 4 commemoration (I used my mother's address because I wasn't exactly staying in the Kent dorms legally):

Michael Mello
7764 Donny Brook Ct #T-7
Annendale, Va 22401
May 8, 1977

May Fourth Task Force and
Center for Peaceful Change
Student Center
Kent State University
Kent, Ohio 44242

Dear Friends,

The purpose of this letter is to congratulate you all for the excellent job you did on the May 2-4 commemorative exercises. I don't often cry, but the candlelight march and vigil sent a shiver down my spine and put a dull, cold ache in my heart – and the tears just flowed and flowed. It wasn't just the knowledge that *this* is where it happened; what moved me the most was the fact that 1400 students, the same students that the *Washington Post* and the *New York Times* never tire of accusing of forgetting the blood deed that happened on the Kent campus seven years ago, were there as well. Contrary to popular myth, Kent State has not been forgotten – and for this I offer you all my profound thanks.

It is so easy when one lives in close proximity to something of great importance to lose sight of that importance; how many people I know who live in Washington, DC yet have never been through the National Archives, have never visited the Smithsonian, have never attended a session of Congress. It warmed my heart to see you all working so diligently that Kent State night not go the way of My Lai and Watergate and pass from the national consciousness in a few short years. America wants almost desperately to forget what it did to those thirteen kids, and it will IF YOU LET IT. Please don't. "Don't let it be forgot."

Respectfully,

Michael Mello

The tent city lasted 62 days. On July 12, 1977, the site was forcibly cleared of protesters. 194 people–including parents of the students wounded or killed in 1970—were arrested.

By the time the police action on the tentropolis took place, I had returned home to Virginia. So I had to rely on the accounts of others.

John Kifner of the New York Times—who had been present at Kent State on May 4, 1970, and who covered the shootings for the Times—provided the best of the lot in 1977, as he had in 1970. *See* Michael Mello, "First Word: An Analysis of the Initial Media Coverage of the Shootings at Kent State" (1979) (unpublished manuscript on file with author). Kifner reported that the arrests occurred in a two-hour period. *See* John Kifner, *194 Are Arrested Peacefully at Kent State*, N.Y. TIMES, July 12, 1977 (original newspaper, on file with author).

> The arrests went peacefully, quietly, methodically. Many of the demonstrators put into practice their announced plans to nonviolently resist arrest by linking arms and legs. The campus police had to untangle them. Then the protesters walked or were dragged to waiting busses where they were booked with instant Polaroid forms and secured with disposable plastic handcuffs . . .

Id.

The arrests began at 8:00 a.m. sharp, the time specified in the court injunction the protesters were arrested for violating. "Then campus police gave the seated group of demonstrators folded copies of the court order. They were ripped up and thrown in the air.". *Id.* at A14.

> Martin and Sarah Scheuer, the parents of Sandra Scheuer, and Albert and Anna Canfona. . . [whose son] was wounded in the [1970] shooting, came from the porch of Taylor Hall and sat in the front row of the demonstrators. There was loud applause from the demonstrators and a crowd of several hundred spectators and supporters as the two middle-aged couples walked across the grass.

Id.

"'When you get arrested, keep your head up— proud,' Mr. Scheuer said softly to the Canforas. They were in the first group to be taken off when the arrests began at 8:21 a.m. . . ." *Id*; *see also* Tom Wicker, *Blanket Hill, Again*, N.Y. TIMES, Aug. 19, 1977 (original newspaper on file with author); *Kent State Gym Decision*, WASH. POST, Aug. 23, 1977; UPI, *Court Dismisses Appeal By Kent State Students*, N.Y. TIMES, Aug. 25, 1977; *Kent State Construction Ban Lifted*, WASH. STAR, Aug. 25, 1977; UPI, *Justice Stewart Rebuffs Kent State Protesters*, WASH. STAR, Sept. 4, 1977; *Kent State Protest*, WASH. POST, Sept. 12, 1977; *Police Guard Workmen as Demonstrators Chant At Kent St. Site*, WASH. POST, Sept. 18, 1977; Sara Hazel, Kent State Gym: "What Goes Up Must Come Down," YIPSTER TIMES, Apr./May 1978; Ben Masel, *Kent Won't Forget*, YIPSTER TIMES, June 1977; Editorial, *A Better Memorial at KSU*, AKRON BEACON-JOURNAL, May 18, 1977; Bob Tkacz, *Center Court on Sacred Ground*, NEW TIMES, June 10, 1977; AP, *Kent State Group Holds Ground Against Construction of Gym*, EVENING BULL. (Rhode Island), July 6, 1977; *Kent State Protesters Unmoved by Ultimatum*, PROVIDENCE SUNDAY J., July 10, 1977; AP, *Protesters at Kent State Reject Order to Leave Site of Shootings*, WASH. POST, July 11, 1977; AP, *Kent Trustees Want Court to Evict Protesters*, WASH. POST, July 11, 1977; *Kent State Battle Continues*, Providence Evening Journal, July 11, 1977; AP, *Kent State Protesters Refuse Eviction*, WASH. POST, July 12, 1977; John Kifner, *Judge Orders a Halt to Protest At Kent*, N.Y. TIMES, July 12, 1977; AP, *Kent State Protesters Facing Arrest*, WASH. STAR, July 12, 1977; *Guns and Tear Gas Then . . . Orderly Dispersal at Kent Today*, WASH. STAR, July 12, 1977 (noting that "between 150 and 180" people were arrested); John Kifner, *194 Are Arrested Peacefully at Kent State*, WASH. STAR, July 12, 1977; AP, *193 [sic] Arrested at Kent State Gym Protest*, WASH. POST, July 13, 1977; Bob Greene, *Kent State Lives With Him*, FREDERICKSBURG FREE LANCE-STAR (Virginia), July 20, 1977; *Judge Rules Kent State Can Construct New Gym*, WASH. POST, July 26, 1977; AP, *Kent Protesters Vow "To Reclaim Our Land,"* WASH. STAR, July 27, 1977; *Still More Wounds at Kent State*, TIME, July 27, 1977.

The battle of Blanket Hill was not quite over, although, after the July 12 arrests, the national media lost interest. According to an acquaintance of mine at the time, who was there, the most accurate account of the second round of Blanket Hill arrests was Steve Conliff, *Kent State Diary*, YIPSTER TIMES, Oct./Nov. 1977 (original newspaper on file with author).

According to Conliff, on July 22, the Friday following the July 12 arrests, a Kent State protest meeting garnered 600 people. "Soon there were people numbering in the hundreds dancing in the forbidden

[construction] zone," which was guarded only by a handful of campus police "and a very long piece of string." *Id.* The university countered by erecting a chain-link fence and mounting floodlights in the construction zone. Also, 27 people were arrested for the July 22 protests.

"The imminent presence of bulldozers led, in the early mornings of July 28th, to 62 people climbing the fence and retaking the hill for a few hours before being drug [sic] off to jail. Approximately 150 people stayed outside to protest while some got into the act and tried to block the buses carrying the 62." *Id.* From that point on, the protests changed "from direct, stages of mass confrontation to individual hit and run and harassment tactics." *Id.*

That was not quite right, however. On September 17, construction workers began transplanting trees from the site of the proposed gym annex. "About 25 somber demonstrators opposed to the construction stood in a dawn drizzle and occasionally heckled police or chanted, 'move the gym.' Some of them cried, but there was no confrontation." *Police Guard Workmen as Demonstrators Chant at Kent St. Site*, WASH. POST, Sept. 17, 1977 (original newspaper on file with author). On September 25, about 1,500 demonstrators "tore out a 250-foot portion of a fence surrounding the site and marched around campus amid jeers from unsympathetic students." UPI, *Kent State Demonstration March*, SOUTHWEST TIMES (Pulaski, Virginia), Sept. 26, 1977 (original newspaper on file with author).

One year after my first visit to Kent State, I returned there to continue my research into the 1970 shootings—and to take part again in the memorial services, the candlelight march and nightlong vigil in the parking lot of Prentice Hall. That was May 1978. There was a hard edge to Kent this summer. The music of choice was Warren Zevon (*Send Lawyers, Guns and Money, Roland the Headless Thompson Gunner, Excitable Boy, Werewolves of London*).

The May 3, 1978 march and all-night vigil were moving, but the events that followed made me angry. At the noon rally on May 4, 1978, group after group tried to co-opt the memories of the four slain students for their own political and ideological purposes. Even a uniformed miliary officer, representing the "People's Republic" of Kampuchia (Cambodia)—the genocidal regime of Pol Pot—spoke at the May 4 rally and tried to capitalize on the Kent State students.

The rally was to be followed by a march. Given the rally's disrespect to the four slain students, I almost did not join the march. I was not in a protesting mood.

Then, I decided, what the hell. The march began at the commons and was to end at the student center. However, soon after the march began, some demonstrators—my old pals the Yippies, actually—began ignoring the march leaders and urged the increasingly restless (and hot) crowd to join them in unscheduled demonstrations. "Burn the gym" they shouted into portable bullhorns. Over the past year, I'd learned a bit about the behavioral psychology of crowds. There comes a moment—and sometimes you can smell it when it happens—when a crowd becomes a mob.

The event that transfigured this crowd into a mob occurred in the Prentice Hall parking lot (near where Jeff Miller fell and Mary Ann Vecchio raised her anguished eyes toward the camera and the sky in 1970). The new de facto leaders of the crowd burned an effigy of Ohio Governor James Rhodes. At that point, the demonstrators headed up Midway Drive, toward the chain-link fence surrounding the Blanket Hill gym construction site. The Yippies shouted obscenities at the police, and then they began climbing the fence.

Then a small group of heroes emerged. A band of faculty marshals and a student member of the May 4 Task Force, Mike Sorohan, interposed themselves between the fence and the crowd and begged the crowd to leave. The potential for violence—real violence—from the gas-mask clad riot police, standing in a long, quiet line behind their plexiglass shields, was dangerously high. The faculty marshals and the May 4 Task Force student succeeded in keeping the crowd at bay.

Still, there was no stopping the smaller group of militants. The militants broke from the larger group and assaulted the fence three times. The first was unsuccessful and meaningless. The second was broken up by the faculty marshals.

The last attack had several false starts, as the militants tried and failed to stir the larger group. Finally, the small cadre of ten or fifteen demonstrators (spearheaded by the Yippies) attacked another portion of the fence. They began climbing the fence, and then they managed to snap a portion of the fence protecting the partially-built gym before they were driven back by two rounds of tear gas fired by police.

Two protesters were arrested. *See generally* Chris Vasco & Roger DiPaulo, *Almost Perfect Day* RECORD-COURIER (Ravenna and Kent, Ohio), May 5, 1978 (original newspaper on file with author); Editorial, *May 4 Anniversary*, RECORD-COURIER (Ravenna and Kent, Ohio), May 5, 1978 (original newspaper on file with author); Dennis McEareney, *Protest, Tear Gas Mar KSU Peace*, AKRON BEACON-JOURNAL, May 5, 1978 (original newspaper on file with author); Richard Ellers, *Violence Mars May 4 Ceremony at Kent State*, PLAIN DEALER (Cleveland, Ohio), May 5, 1978 (original newspaper on file with author).

Tear gas is indiscriminate. I was standing near the perimeter chain-link fence surrounding the Blanket Hill gym construction site when the canisters of CS teargas exploded no more than 50 feet to my left. Protesters were rocking the fence back and forth, and then they were gone. It felt like everyone was gone, except me, and the gas all around me, and the police in their gas masks.

For once, I was momentarily glad of my lifelong sinus condition. I took out my omnipresent handkerchief and used it to cover my nose and mouth. It did no good; my face felt like it was on fire, and I could barely breathe. But I could run, and I did. I ran, stumbled, ran, stumbled again, ran. Even when I gulped fresh air, my lungs burned like molten wax had been poured into them. My throat burned, my eyes burned, my nose burned, my ears burned. I made an audio record of all of this. When the gas grenades were launched, I had been talking into my portable tape recorder, describing the scene around me. I had not turned the machine off—the gas had been too much of a surprise—so I had an audio record of my wheezing, panting, babbling dash.

When I returned home to Virginia, I wrote a letter to the Kent State student newspaper:

Michael Allen Mello
7764 Donnybrook Court
Annandale, Virginia 22003
May 8, 1978

Daily Kent Stater
Office 100
Taylor Hall
Kent State University
Kent, Ohio 44242

Dear Editor:

I was an "outsider" at Kent State University during the period of May 3-4, 1978, and as such I would like to remind the *Stater* that not all "outsiders" are hallucinogenic, brick-throwing Yippies determined to turn KSU into a piece of charcoal. I decided to leave my own college immediately after exams and travel to Kent for two reasons. First, I wanted to mourn the untimely deaths of four human beings who, but for the grace of God, could have been my classmates - if not myself. Secondly, as a student of American history, I hoped to increase my knowledge of a national horror, a tragedy which divided America and set brother against brother, mother against daughter.

I had ample opportunity to mourn. The candlelight march and vigil were stately and dignified, a fitting honor to the four students slain eight years ago. But there was little that a student interested in May 4, 1970 could learn from the noon rally on May 4, 1978. A primary purpose of such a rally should be educational, but many of the speeches this year were studies in distortion. These distortions were too numerous and varied to all be recounted here, but I will mention one which I found particularly repulsive: the attempt on the part of several speakers to portray the students killed in 1970 as revolutionaries, freedom fighters, valiant warriors in the struggle against American capitalism or imperialism or whatever. They were students at school who happened to get caught in the crossfire. Period.

Clark Kissinger, when he said at the rally that "these students were fighting an imperialist war . . . they were fighting imperialism" proved that the Left is not

immune to political opportunism and to "waving the bloody shirt." The memory of Allison Krause, Sandy Scheuer, Jeffry Miller and William Schroeder is soiled by such opportunists. The four students are being used by such people.

They are being used whenever anyone says that they died for the Movement, for civil rights, for nuclear disarmament or for anything else. They died for nothing; their deaths were random and pointless; they were victims, not martyrs for a cause. Sandy Scheuer was not "struggling against imperialism" when she was shot in the neck and jugular vein was severed; she was walking to a 1:10 class in Music and Speech. William Schroeder was not "struggling" against the Guard's presence on campus when the steel jacketed bullet entered his back, shattered two ribs and turned his left lung into spaghetti. He had just taken a test on war tactics and was no more than a spectator at the disturbances; photographs show him with books under his arm, and I doubt that Allison Krause or Jeff Miller had revolution in their hearts when they shouted obscenities at the Guard shortly before they were shot.

There is no way to turn Kent State in 1970 into the Bastaille or the Paris Commune, and any attempts to do so are a dishonor to those who spent their last moments of life on the parking lot in front of Prentice Hall.

Sincerely,
Michael Mello

Had the May 4, 1970 shootings happened at Berkeley or Columbia or Michigan or Wisconsin, or at any other of the capitols of anti-war unrest in the 60s, I do not think they would have had the same hold on my imagination. Such shootings were inevitable in those volatile times, police and National Guard troops were generally poorly trained and inappropriately equipped (with M-1 rifles and lethal ammunition, for example), and most everyone expected it to occur at one of the notorious centers of campus unrest. But at *Kent State*? In *Ohio*? If it could happen there, it could happen anywhere—even in my own little college in Fredericksburg, Virginia.

Kent State in 1970 was as unlikely a venue as Oklahoma City in 1995. One of the first books to appear after the shooting—a photo-offset collection by students and others, typed and including handwritten corrections—was, appropriately, entitled *The Middle of the Country*. Michner called KSU a "cow college in a cow town." Scared kids shooting at scared kids–it could happen anywhere.

In 1995—eighteen years after my first act of civil disobedience, I committed my second—in the "Crazy Joe" Spaziano case. In a way, the second time was more frightening than the first. At Kent State, I was responsible only for my own hide. At the Florida Supreme Court I was responsible for the life of a man only days away from being killed for crimes he did not commit. It was then I decided to become a conscientious objector in the deathwars. Maybe I am just a coward. I do not think so, but I can never know for sure. I can never know for sure.

Much has been written about the ethical duties of a criminal defense lawyer whose client is guilty. Little has been written about the converse: the ethical duties of a criminal defendant with a factually innocent client. Like most public defenders, most of my clients were guilty. However, it was an innocent client—"Crazy Joe" Spaziano—whose case finally drove me from the madhouse that is capital punishment as a legal system.

By the spring of 1995, Joe Spaziano had served nineteen years on Florida's death row for another man's crimes. Shortly before Florida's governor signed Joe's fourth death warrant, in May 1995, I did something I had never done before: I took Joe's case to a newspaper, specifically the *Miami Herald*. In August 1995, when the governor signed Joe's fifth death warrant, I did something else I had never done before: I refused to show up at an evidentiary hearing ordered by the Florida Supreme Court. In response to my act of civil disobedience, the Florida Supreme Court stayed Joe's execution. The court also fired me from the case. The stay, and the firing, came on September 12, 1995. In January 1996, Joe's new lawyers participated in the evidentiary hearing. At the end of the hearing, the judge ordered a new trial in the Spaziano case.

An aging French aristocrat was asked one day to describe his most vivid memory of the Reign of

Terror. "I survived," he answered without pause. Whenever it occurs to me that the Florida Supreme Court did not disbar me or worse for my action in late 1995, I think about that Frenchman's head intact.

When the Florida Supreme Court kicked me off Joe's case on September 12, 1995, the justices cited my "flagrant disregard of this court's procedures and directions." The court was correct.

I am not sure I would characterize my actions during Joe's fifth death warrant as a flagrant disregard of the court's procedures and directions, but the label is not unreasonable in this instance. I had consciously disregarded the procedural rule that, as an initial matter, I should have filed in the state trial court, rather than in the Florida Supreme Court. I also had made a conscious decision that I would not allow the court to compel me to accept the Office of Capital Collateral Representative (CCR) as co-counsel—against the reasonable wishes of my client and his family. In addition, I had consciously decided that I would neither show up at the scheduled evidentiary hearing nor send Joe's files to CCR. I believed that under Florida law, Joe's files belonged to him—not to me or the Florida Supreme Court or CCR.

I expected the court to hold me in contempt. In September 1995, I did not need to search the law regarding contempt of court. Years earlier I had worked on Elizabeth Morgan's case. For two years, Dr. Morgan had been incarcerated in the District of Columbia jail for civil contempt, for refusing to produce her young daughter for court-ordered unsupervised visitation with the child's father. Dr. Morgan remained in jail for almost two years, until an act of the United States Congress ordered her freed.

I learned from Dr. Morgan's case that most of the important rules of law don't apply to civil contempt cases: There is no right to trial by jury; there is virtually no due process of law; trial judges' orders of contempt are almost never overturned on appeal. This is why it took literally an act of Congress to get Dr. Morgan released from jail.

Civil contempt is beyond the reach of law because it is civil, not criminal. Its purpose is to coerce compliance with court orders (in Dr. Morgan's case, to produce her daughter for visitation; in my case sending my *Spaziano* files to the Office of Capital Collateral Representative), not to punish. That's the theory, anyway. During Dr. Morgan's two years in the District of Columbia jail, I often wondered whether it mattered that she was there for purposes of "coercion" and not punishment. It seems to me that the District of Columbia jail is pretty much the same in either case.

On September 12, 1995, however, the question wasn't so much whether the Florida Supreme Court would hold me in civil contempt. The question was what would the justices do about it? Would they send marshals to my home in Vermont to search for and seize Joe's files? I half-expected the answer was yes.

By 1995 it had become clear—if it was not clear already—that the expected role of capital postconviction defense lawyers is to enable the legal system to speed up executions. How ought we postconviction defense attorneys respond to this state of affairs? What ought we do—and what ought we not do?

For myself, the question of what we ought not to do is the easiest to answer. To paraphrase the Hippocratic Oath, first, we ought not do any harm. We ought not accept the new rules laid down that require us to enable the state to kill our clients. We should resist. Such resistance can take at least two possible forms. Capital postconviction lawyers of conscience could refuse to participate in the machinery of death, or they could sabotage the smooth operation of the machine. Often acts of civil disobedience appear to violate the ethical regulations governing the conduct of lawyers. Such acts, however, are justifiable for the achievement of a higher priority—such as justice or life itself. We can be the spanner in the works, the steel spike in the tree trunk. We can, with respect to the system, insist on substance over form, or truth over protocol. Any lawyer contemplating such civil disobedience should keep in mind, however, the ultimate fate of the spanner and the steel spike: The tool of repair will suffer more immediate wear and tear than the system it is applied to. The machine may stop for a little while, but eventually it will be repaired. The machine will be fired up again. (Spanners, forced to gap hard, opposing pressures, can be broken.) Spikes, which find a soft entry, may endure. It is not a game, and it is very demanding.

The operational limits of this sort of civil disobedience must be marked out by the moral conscience and strategic prudence of the individual lawyers who choose the path of civic resistance. Some lawyers would limit their civil disobedience to acts of passive resistance and quiet subversion. Other lawyers might resist with more overt but nonviolent means. Still others might choose to disable the machinery of death by any means necessary—including violence.

Mapping out the limits of one's range of acceptable civil disobedience implicates both moral and strategic considerations. For me, in Joe Spaziano's case in 1995, moral and strategic concerns led me to implement civil resistance under the following necessary conditions.

First, delay of execution at any cost was what my client wanted. Not all clients do. Some condemned people decide—not necessarily irrationally, in my view—to acquiesce in their own execution by waiving further appeals. The wait to be killed at some indefinite time in the future can become worse for some people than the actual killing itself, and some condemned souls decide to "volunteer" for execution. How lawyers should respond to such death wishes is hotly contested among lawyers who specialize in deathwork. My own belief is that I should honor my client's decision to volunteer for execution, assuming the client is mentally competent to make the choice. But Joe Spaziano was no such volunteer. He fiercely wanted to live, and he wanted me to fight as hard as I could to keep the state from killing him.

Second, in preventing the state from executing my innocent client, I would limit my civil disobedience to nonviolent means. For me, eschewing violence was a tactical, not a moral judgment call. I do not believe that nonviolence is always a necessary condition for legitimate civil disobedience. I would have applauded the partisans who dynamited the railroad tracks to Auschwitz, even though a German soldier or two might die in the explosion. A state that uses violent killing (the way Florida does) as an instrument of social policy seems to me to lack the moral credibility to demand nonviolence from its civic resistors. Nevertheless, I engaged only in nonviolent civil disobedience, but I did so regardless of whether or not I had to violate civil or criminal law in the process. Because I was pursuing justice, and for other reasons, I did not commit my unlawful acts in silence, or shielded from view. I frankly, openly, and honestly engaged any relevant parties, privately or publicly. Frankly, I was willing and ready to accept punishment and other possible consequences of my unlawful action. I expected to have to do so. At a minimum, I expected to be disbarred. I also expected to be held in civil and criminal contempt of court—offenses that typically are punished by incarceration. Further, I expected to lose my job as a tenured member of the Vermont Law School faculty, especially considering difficulties I had been experiencing with certain members of the administration.

I considered these to have been acts of civil disobedience or civil resistance. My personal belief is that, in virtually all instances of civil disobedience, the disobedient's willingness to accept punishment for the law's violation is a necessary condition for the disobedience to be deemed legitimate.

At the time of my actions in Joe Spaziano's case, in August and September 1995, the Florida Supreme Court had not decided whether accepting punishment is an essential element of legitimate civil disobedience. The court did resolve this issue fourteen months later, when it decided the appeal of Paul Hill, a minister who shotgunned an abortion doctor and his armed escort to death in Pensacola, Florida. Ironically, during my brief stint as Paul Hill's appellate lawyer, I had tried to file a Florida Supreme Court brief arguing that willingness to accept punishment isn't always a condition of legitimate civil disobedience.

Paul Hill asserted that his killings were "justifiable homicide" because he was preventing the greater evil (of abortion) from occurring. The Florida Supreme Court rejected this argument, adopting the reasoning of a Pennsylvania trial judge:

> To accept appellant's argument would be tantamount to judicially sanctioning vigilantism. If every person were to act upon his or her personal beliefs in this manner, and we were to sanction the act, the result would be utter chaos. In a society of laws and not of individuals, we cannot allow each individual to determine, based upon his or her personal beliefs, whether another person may exercise her constitutional rights and then allow that individual to assert the defense of justification to escape criminal liability. We recognize that, despite our proscription, some individuals, because of firmly held and honestly believed convictions, will feel compelled to break the law. If they choose to do so, however, they must be prepared to face the consequences. Thus, such private attempts to circumvent the law with the aim to deprive a pregnant woman of her right to obtain an abortion *will not be tolerated by this Court.*

I agree, at least in the context of my actions in Joe's case. For example, in my handwritten September 8 rehearing motion, I offered to waive extradition and return to Florida in the event the court wished to hold

something important from my research: No matter how many photos or prose accounts one read about an event, there was no substitute for actually visiting the place. I learned more from just standing where the Guard fired and seeing the spacial relationships, than in all the books I'd read before then. In 1978, while researching my honors paper, I was mugged in Cleveland.[517]

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me in contempt. I was more than willing to pay the personal costs of my "unlawful" actions. I strongly believed that both my conscience and the ethical norms and values of the legal profession required me to violate the law in order for me to be able to provide minimally effective representation to an innocent man on the brink of execution on a fifth death warrant.

Thus, when the Florida Supreme Court punished my civic resistance by throwing me off Joe's case, the justices were, in my opinion, justified. Of course, I was saddened at being fired and trashed by a court before which I had practiced respectfully and reasonably for thirteen years. I had hoped—in vain it turns out—that the justices knew me well enough to understand that my extreme actions during Joe's fifth warrant were driven by the extremity of the situation in which Joe and I found ourselves.

The Florida Supreme Court's 1995 opinion sent the unmistakable message that the justices (*all* the justices) thought I was treating the court disrespectfully. In reality, the fact that I was in the court at all—as opposed to federal court, as set out in my "infamous" June 27 memo—evinces my respect for the court as a whole and for the justices individually. I had faith they'd do the right thing in Joe's case. At the end of the day, that faith proved justified: the Florida Supreme Court stayed the execution indefinitely and gave Joe's new lawyers, Holland and Knight, four months rather than seven days to do the right thing.

Yeah, at the end of the day. But September 12, 1995 was one of the longest days of my life. At the end of it, I was never so happy to be living in Vermont rather than Florida, teaching school rather than trying to stay the hand of the Sunshine State's executioner.

517. Bad joke: What's the definition of a conservative? A liberal who's been mugged. (Equally bad joke: What's the definition of a liberal? A conservative who's been arrested.)

After one semester of college, a classmate with whom I would fall deeply in love, was raped at knife point and I decided I didn't want to be Clarence Darrow or any other kind of criminal defense lawyer. That was in January 1976, and rape was still a capital crime in several American states. Sounded good to me.

In the summer of 1978, I was a junior in college in Virginia, researching a paper on the shootings eight years earlier at Kent State University. My research had taken me to Cleveland, Ohio, where I'd located the only copy I could find of the transcripts of the criminal trials of the National Guardsmen who had opened fire on a crowd of students at Kent State on May 4, 1970.

I didn't have much money, so while in Cleveland I stayed at the only place I could afford, the Central YMCA on Prospect Street, in the heart of Cleveland's red light district. After two weeks or so in the city I'd settled into a productive routine. I'd take the morning bus from the Y, down Euclid Avenue, to the federal courthouse downtown, where I'd work all day, reading, photocopying, and taking notes on the trial records until the courthouse closed at 5:00 p.m. Then I'd take the bus back to the Y and spend the evenings organizing that day's research and planning the next day's. At night, I'd wander up and down Prospect Street, chatting with the streetwalkers and hookers camped outside the strip joints. Prospect Street scared me at first, but as its culture became more and more familiar to me, night after hot night, my fear dissipated. I became complacent.

Near the end of the research project, I decided to take myself out to dinner at a Chinese restaurant a few blocks away from the Y, on Euclid Avenue. After dinner and a drink, I was walking back up Euclid Avenue, to the Y. About three blocks from my temporary home, while crossing a side street, I was approached by three men who, as I neared the curb, ranged themselves around me, two in front and one in back. One of the men in front asked me for 75¢, an odd amount. I later figured out that the idea was for me to take out my wallet, rather than fish in my pockets for 75¢, and, while I was taking out a one-dollar bill, they'd grab my wallet and run. Ah, but I had been spending my days photocopying trial transcript pages at the federal courthouse, so I had a pocket full of quarters. I took out three and handed them over with a polite smile.

My wallet stayed safely in my blue jean's pocket, but my three new friends weren't done with me

I attended the Democratic and Republican National Conventions in 1976 as a medic for the Yippies.[518] I served as defense "counsel" for several students

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yet. One said they wanted to use my 75¢ to buy some wine. That's nice, I said. He replied that they wanted to invite me to join them. I said thanks, but I'm in town researching the Kent State shooting, and I had to get back to the Y, etc.

While we were so chatting, my three acquaintances were edging me into an alleyway between two buildings. I wasn't quite terrified yet, until I saw the knife out of the corner of my eye. At that point I spun around, out of knife range, dashed into the middle of Prospect Street, and ran like a demon until I reached the Y, stumbled upstairs, triple locked my door, and opened a bottle of Scotch given to me as a farewell gift by some students I had met at Kent State University.

Of course, my three would-be muggers followed me home. I made it easy for them to do so. I ran straight there.

At a few minutes after 8:00 p.m., there was a knock at my door. I *never* ask who's there before opening a locked door, but that night my mother's years of inculcation paid off. I asked, who's there. No answer; louder and more insistently. I asked again. Louder knocking. I said something like, "Look, I'm not opening this goddamn door until you identify yourself." My answer came in the form of pounding, pressing the door against its frame. I moved the bed and dresser against the door and reached for the phone.

The phone was dead. The switchboard shut down at 8:00 p.m. The blows to the door had become more evenly-spaced and solid-sounding.

I've never been a fighter, and at age 20 I sure as hell wasn't a fighter. Then I was beanpole thin (5'11" tall; 120 pounds) and, although I tried to look like a hippie (shoulder length hair, held in place with a blue and white cotton headband; jeans and t-shirts; footwear only when necessary) in fact I was bookish; in short, I was a nerd.

But at that moment, I was a concerned nerd. Plan A was to keep 'em out. Plan B. I needed a Plan B.

Plan B was coming up short. My room was eight floors up; a window egress was out of the question, as was the possibility of yelling for help from a passerby on Prospect Street. I grabbed the Scotch bottle: I could smash it and ... cut myself to ribbons without any help from my pals in the hallway. Who was I kidding?

So, ever the history major, I turned my handheld Dictaphone to "record," made sure the red light was on and the tape was advancing, and put the recording device under the bed. If I was to die in that room that night, at least there'd be some record when the police showed up.

Plan C involved soap. I wrote a note, asking for help, rolled it up around a cake of soap, opened the window and threw it towards Prospect Street eight stories below. The street was deserted, but no matter. My note-in-soap landed in the gutter.

Looking out the window, down at my pitiful cake of soap, I got an idea. No one would hear me on the street if I yelled, but maybe my three suitors wouldn't know that. So I screamed, "Help! Up here! Yes, *here*! Send the police to room 802 at the Central YMCA! Some guys are trying to kill me! The pounding on the door stopped. Then, a few floors below me, on the roof of an adjacent building, there was a ¼ mile track. And damned if a guy didn't show up and start jogging around it. I yelled; he hears; 10 minutes later, the police arrived at my still-intact door. By the time they did I was packed and ready to head home to Virginia. I left on that night's Amtrak.

Thus, by the time I began law school, two years later, I no longer had much interest in devoting my professional life to defending criminals. By the time I graduated law school, in 1982, I had spent two summers working at two New York law firms. My chosen career path was to work for Wall Street's premier corporate law firm, Cravath, Swaine & Moore.

Of course, then something happened. What happened was my first real job as a law school graduate, a clerkship for a federal appellate judge Robert Vance, in the "death court," the federal court of appeals for the Eleventh Circuit. I described this personally transformative experience in my book, *Dead Wrong*, and I won't repeat it here.

518. In 1976, I worked as a medic for the Yippies at the Democratic National Convention (DNC) in New York City and at the Republican National Convention in Kansas City. I had met the Yippies on

July 4, 1976, at the People's Bicentennial Celebration on the ellipse in Washington, D.C. In New York for the DNC, I slept with the Yippies in a tent city in Central Park and joined in the rallies and marches.

On July 4, 1976, I attended both the "real" Bicentennial celebration and the alternative, the People's Bicentennial Commission celebration. I caught a bus to the Pentagon and then a shuttle to the Capitol. According to my shuttle pass, I arrived at 10:01 a.m.

The "real" Bicentennial party lasted all day, and I spent the morning wandering around. There were nearly a million celebrants in D.C. for the Bicentennial and it showed. The day was brutally hot, but all of America was there that day. People sat along the curb on Constitution Avenue: Children dressed in red-white-and-blue jumpers, blue-haired grandmothers who'd brought aluminum lawn chairs, teenagers in shorts and t-shirts and earth shoes. People waded in the Reflecting Pool in front of the Washington Monument. People sunned themselves on the elipse. The lines for the National Archives wound around the block.

The People's Bicentennial Commission's rally began at 2:00 p.m. on the Mall. The *Washington Post* aptly described the event as "a peaceful, leisurely political protest only faintly echoing the bitter era of anti-war and civil rights demonstration." Stephen J. Lynton & Eugene Meyer, *Peaceful Protest Cover a Wide Range of Issues*, WASH. POST, July 5, 1976 (original newspaper on file with author). The *Post* reporters sounded faintly disappointed by this.

I was not disappointed by the good-natured seriousness of the crowd. The counter-birthday party began at 2:00 p.m. with a speech by PBC founder Jeremey Rifkin calling for the abolition of multinational corporations and calling for a "declaration of economic independence." As Rifkin called for an affirmative vote on his "declaration," the crowd of thousands stood up and waved clenched fists. I remained seated, not because I disagreed with Rifkin, but because I've never been one to stick up my fist as part of a crowd.

The crowd was mostly young people in their teens and twenties–and it was overwhelmingly white. The uniform of the day was blue jeans, t-shirts, tank-tops or tube-tops.

I think I dozed through most of the speeches. Tom Hayden (co-founder of SDS, author of the *Port Huron Statement*, Chicago Seven defendant) exhorted us to work for change from within the system. Jane Fonda gave a fiery address about Watergate and Vietnam. John Henry Foulk, an artist blacklisted during the McCarthy era, spoke about free speech. Flo Kennedy talked about the Equal Rights Amendment.

The music was what got us on our feet. Peter Yarrow (of Peter, Paul & Mary) sang the unofficial anthem of the anti-war movement, "Blowin' in the Wind" and the Woody Guthrie tune, "This Land is Your Land." The Star-Spangled Washboard Band (banjos, bells, drums and, yes, a washboard) gave a thunderous rendition of "Happy Birthday America."

The musicians and speakers stood on a huge stage with twin towers of scaffolding crammed with sound equipment. The stage was donned with flags including the revolutionary Gadsden flag, portraying a curled snake and the legend, "Don't Tread on Me."

While the speakers spoke and the musicians played, representatives that ran the full spectrum of the political left hawked their wares at small tables. The Yippies had a table, and I bought a copy of their newspaper, the *Yippie Times*. The National Council for Universal and Unconditional Amnesty (for Vietnam War draft dodgers and deserters) had a table, and I spent some time chatting with them.

All of this was happening in the shadow of the west front of the Capitol. As the PBC wound down and as darkness fell, I headed back to the traditional Bicentennial party, sat in the dry grass, and watched the best fireworks display I have ever seen.

After meeting the Yippies at the Bicentennial bash, I called them in New York (they were in directory assistance). I took notes on the call and these are they:

YIPPIE: Yippie.

ME: I'm Mike Mello and I'm calling from Virginia. I was wondering if I could be a medic for you at the Democratic National Convention next week.

YIPPIE: Do you know any First Aid?

ME: A little . . .

YIPPIE: Fine. You'll be the medic for about 800 demonstrators. We'll give you your equipment. Be here – our address is 9 Bleeker Street – at 4:00 p.m. on Sunday.

ME: 9?

YIPPIE: 9 Bleeker Street, in the Village. This is the YIP West Coast headquarters.

ME: Your *West* Coast headquarters is in New York City?

YIPPIE: We always have been kind of fucked up here.

In the few days remaining before I headed for New York, I did a little research on the Yippies. By 1976, the group—which comes from the acronym YIP, or Youth International Party—had been around for nearly a decade. I knew that the Yippies had been at the center of the police not at the 1968 DNC in Chicago, and that the party's two most famous co-founders, Abbie Hoffman and Jerry Rubin, had been defendants at the Chicago 8 conspiracy trial (It was really the Chicago 8-1+2 trial).

According to my contemporaneous notes: "Abbie Hoffman once wrote a book in which he attempted to explain the ideology of himself and his fellow Yippies. The book is a couple of hundred pages long, but you need not read all of them. To discover where YIP is coming from, you only need to read the title: *Revolution for the Hell of It*."

To do the Yippie medic gig, I had to get time off from work. My notes:

ME: I need a week off of work.

MY BOSS: Why?

ME: So I can demonstrate at the DNC. And I'm going to be a medic for the Yippies.

MY BOSS: You can't have the time off.

ME: Why not?

MY BOSS: Because I'm not going to be an accomplice to your suicide. Those people are *crazy*. I've read what they did at the '68 and '72 conventions . . .

ME: So have I . . .

MY BOSS: But, if I don't give you the leave, you'll quit, won't you?

ME: Yes

MY BOSS: Then go. But before you do, leave a will. And give me your room number at Bellvue, so I'll know where to send the get-well card.

Actually, my trip with the Yippies was the first time I kept a journal. This is it:

DAY I [Sunday, July 11, 1976]:
Train to Hoboken, then PATH train to Christopher Sreet (uprising of gays in 1969) –Jesus Freaks gave me bad directions to Yippie HQ–had to get cab there–topless chick [sic – sorry] let me in front door–The original Yippie "leadership" (an oxymoron) is long gone: Jerry Rubin's a stockbroker on the NY Stock Exchange where he once burned money, and Abbie Hoffman is off doing new things. Wavy Gravy–a gentle bear of a man who once threw a pie in the face of John Ehrlichman

–seems to be the only link with the Yippies of the 1968 DNC. The Yippies I met in D.C. (AJ Lieberman, David Peel) are all here, along with a bunch of Yippies I didn't see in D.C.. Met Michael and Warran, and we smoked a joint–Mike took me aside and said, "I'm gay." I said, "I'm not, but so what?" –Tried to fix PA system – news of a bust of Ben and Marion while heckling right to life people, yelling "Coathangers can kill"— cops asked Ben for permit for sound system: Cop gave them a summons, then four of them tried to take him into the woods: two cops held Ben and the other two kicked him in the neck and balls: When Marion tried to find out which precinct they were taking Ben to, they arrested her too–Yippies feel betrayed by all this: they can give summonses (can't stop pigs from giving summonses), but the bust broke their side of the bargain": Ben says, [sic—again, sorry, but at least this was a quote] "I'll defend myself, demanding (1) sound permits for the next day (2) pigs who busted me be transferred to Staten Island (3) civilian review board be established" –Warren and I toured the village, stopped into a café, talked about Gay Movement and Stonewall uprising (Warren has been in the Gay Movement since the 1950s although he's only been into radical politics since 1962: He was a Chicago '68, D.C. '69, '70, '71, '72, etc): Warren very different from Yippies: he's a *grownup*, and I mean that in a good way–Back at Nine [Bleeker Street] debate on tactics–more pot–general madness (chick & dude at Nine agree to "ball" later)–At 3:30 a.m., I ride in van to Central Park – after seeing pictures of Flamingo Park (in Miami, at the 1972 DNC) I expected at least a couple of hundred people in Central Park, but there were only 18: mostly under a tarp, some behind a huge rock, some in bandshell–I slept in blanket on bare ground near a couple of other people–people did guard duty in shifts (just like CAP).

DAY II [Monday, July 12, 1976]:

Woke up at 10:00 a.m., out of blanket at 11:30—breakfast of oatmeal and peanut butter from large vat—I got no medical supplies from Yippies, so had to make do with the stuff on my pistol belt—2:00–smoke-in at bandshell: maybe 200 people: I treated a drug overdose and stab victim—they ran out of pot during the concert at the bandshell, and someone announced, "Anybody who has any dope, please pass it up. We're all out up here." —people played frisbee during the speeches— some people had painted their faces, taken off their shirts, etc. —more beer than pot— Yippie slogan: "Nobody for President" — police made no arrests at bandshell (one told a reporter: "I've seen more marijuana at Leonard Bernstein concerts" (I'll bet it was better dope, too) — Poster: "FREE POT: Bandshell 1:00 p.m. Wed: Marijuana March to Convention Hall, Madison Square Garden, Bethesda Fountain Band: Yippie" —marched to convention center and demonstrated all afternoon— sampling of banner and chants: "Ford, Reagan, Carter/Same old shit"; "Free our Brothers and Free our Sisters/ Amnesty for War Resistors"; "Stop the S1 Crime Bill"; "Gay Rights Now" — cops were well-disciplined (many on horseback) and not obviously armed with riot gear–a few arrests, but no bad violence I saw—Evening: went to Yippie counter-convention party: really loud band and sweaty bodies pressed together like cattle: went to 2nd floor balcony and found nitrous oxide party, where guys were filling balloons from a large tank, and then releasing the gas into their mouths: wow . . . this is *great* rush . . . wheeee. . . —straggled back to Central Park and crashed around midnight, after smoking lots of pot.

DAY III [Tuesday, July 13, 1976]:

Another smoke-in at bandshell, then on to Convention Center—this is getting kind of boring, and I'm hot in my white coat and pistol belt full of medical junk–joined in Gay Pride march ("Gay, Straight, Black, White/same struggle, same fight" was our chant) —we were harangued to "Repent! Repent! Pull yourself out of the dope gutter and see the light: Read your bible and become enlightened": I yelled back I'd

read Genesis the next time I light up a joint—Warren, Michael and I were walking down Avenue 2, in the march: I was wearing a button saying "Gay Rights in '76", and at the corner of 72nd and Park Ave., five loitering cops stopped us, and one (badge #3112, name of Fitzmont) asked me if I'd "suck his dick": I politely declined: He asked me "How does it feel to go down on another man's cock," and I said, "I have no idea, but, if you really want to know, there are plenty of male hustlers on 42nd Street": This was a very stupid move on my part: he called me a "mother-fucking cock-sucking queer" and threatened to arrest me for propositioning him: he gave me a look that would curdle cream – later, while wearing the same button, I was spat upon by the driver of a yellow VW bug: I was too stunned to even flip him the bird. Wrote letter to Celeste.

DAY IV [Wednesday, July 14, 1976]:
Another smoke-in at bandshell in Central Park, another march to Convention Center—I treated a drug overdose.

DAY V [Thursday, July 15, 1976]:
Bandshell, marches—In evening, I went to HQ of National Council for Universal & Unconditional Amnesty (NCUUA) to watch Ron Kovic nominate Fritz Efaw as Vice President on TV—Louise Ranom introduced Kovic: He a paraplegic Vietnam vet, she a mother whose son was killed in Vietnam on Mother's Day, 1968—she read a poem—her quiet intensity brought the raucous Convention Center to silence—then Kovic spoke, from his wheelchair—told how he volunteered for second tour of duty in Vietnam—Kent State shootings finally turned him against the war—he talked about being spat upon and thrown out of his wheelchair for protesting the war—then he nominated Efaw for Vice Presiden—a magical moment when Efaw embraced Kovic, as Kovic held his left arm aloft—some reality had intruded into this choreographed show of a convention— bought a *Jimmie Carter Coloring Book*. Letter to Celeste.

I returned home and read all I could find on the gay rights movement. I took perverse pleasure, as a straight man, arguing for gay rights—as I took perverse pleasure in siding with Billy Martin and the African Americans in the racial fights in my high school. I am writing these words on Christmas Eve day 1999. A few days ago, the Vermont Supreme Court became the first court in the nation to recognize a state constitutional right for marriage (or it's functional legal equivalent) for gay partners. *See* Cary Goldberg, *Vermont's High Court Extends Full Rights to Same-Sex Couples*, N.Y. TIMES, Dec. 21, 1999; Michael Crowley, *VT Court Gives Gay Couples a Victory*, BOSTON GLOBE, Dec. 21, 1999; Diane Derby, *Same-Sex Rights Affirmed*, RUTLAND HERALD, Dec. 21, 1999. It's been exactly 12 years—when the U.S. Supreme Court ruled for Jim Hitchcock—since I wept with joy as I read an appellate court opinion. What a wonderful Christmas/Hanukka/Ramadan/Kwansa present the Vermont Supreme Court gave to all of us.

In August 1976, I attended the Republican National Convention in Kansas City, again as a medic for the Yippies. I caught the Amtrak *Broadway Limited* from Virginia to New York, and then the *National Limited* from New York to Kansas City.

I arrived in Kansas City on Sunday, August 15, the same day President Ford arrived to take charge of his convention forces. *See* The President Ford Committee, Delegate Special, *President Arrives Sunday*, August 14, 1976 (on file with author). Although Ford was a sitting President, he had been elected neither President nor Vice President (Nixon had appointed him Vice President upon Spiro Agnew's forced resignation during Watergate), and Ford's pardon of Nixon had been unpopular. Ford faced a fight by Ronald Reagan.

I splurged on a cab from the train station to Penn Valley Park, where the Yippies and other demonstrators were camped out. The campsite was already constructed, and I was given a pup tent, which

I set up and in which I promptly went to sleep for the night.

The campsite was provisioned with food (drums of peanut butter, again) but no toilet facilities. This was the first battle between the demonstrators and the city, and it was in full swing on Sunday. The city had decreed that it would provide no port-a-potties. The Yippies vowed to dig their own and produced a shovel. In the end, the city gave in and gave us seven portable johns.

Here in Kansas City, the Yippies seemed small next to real protesters with real causes. A group of Native-Americans constructed a campsite near ours. They wanted nothing to do with us, and I can't say I blamed them. They were serious and somber and impressive. The Yippies wore clown faces, red noses and beanies, and were protesting the dope laws. The Native-Americans wore customary garb and were protesting Wounded Knee and the Trail of Tears.

The convention lasted five days, from August 15-19, and the routine for the demonstrators was much like at the DNC in New York: A rally at the campsite staging area, then a march to the Kemper Arena Convention Center, then demonstrations and protests. But there was more to the Kansas City adventure than the Yippies. My notes:

> [Monday, Aug. 16, 1976]:
>
> Someone in the park gave a speech: "We are going to turn this park into a liberated zone. We have tents and supplies for some of you, but many more showed up than we'd ever expected. This next week will tax our facilities and ourselves. Tempers will inevitably flare, but I want everyone here to remember that the man sitting next to you is your brother and you damn well better treat him that way if this thing is going to work at all. That's it, right there. Gay, straight, black, white—same struggle, same fight."
>
> Anyway, we rattled around the park and the Yippie campsite for an hour, then walked over to the Crown Center [Ford's hotel] to greet Vice President Rockefeller who was due to arrive at 8:00.
>
> At 7:15, the Secret Service began to clear the way for his Vice Royal Highness. Mark [a *Village Voice* photographer I'd met on the train] shoved our way to the railing and Mark got the idea that if we could stand on one of the heavy marble standing ashtrays, he'd get better pictures of the VP. Problem: The ashtray was three feet *inside* the railing, and the whole place was crawling with Secret Service. So we went under the railing whenever the Secret Service were not looking and inch by inch moved the 400 pound ashtray back to our side of the railing. My first of many brushes with the heat.
>
> We were all ready for the grand arrival when, over behind us, we heard a dude cracking on Ford. We thought: Oh, Oh, a Reagan spy in Ford's hotel. Then he started cracking on Reagan, too (I mean he was *loud* – and getting looks from everyone in the area–or, more accurately, *we* were getting the looks because everyone assumed *we* were doing it because of how we were dressed). Anyway, it turns out the heckler is a Democrat, a local who was just looking around when all the doors were locked by the Secret Service for "security." He and I had a blast: I even changed a sign, from "Keep Ford" to "Keep Ford in Attica." It was a trip.
>
> "And now, the Vice President of the United States," a man in a suit boomed. The band struck up, the crowd screamed, "We Love You Rocky," like they're all reaching communal climax, and Mark mounts his ashtray. I see a finger . . . a wrist . . . an arm . . . some hair . . . a face— and they all belonged to a Secret Service man. I didn't see Rocky for 15 minutes and when I did, I shook his hand and reminded him of the 42 million Vietnam War exiles. I don't think he was too impressed, even though I had taken off my headband. Then the Yippies started chanting, and the whole mob surged forward under the railing, and of all those people, the Secret Service chose *me* to rough up. I could just see the heading now back home: "Yippie/Hippie/Commie Shot to Death in Attempt on Vice President's Life." Would my mother be mad!

We didn't stay to hear Rocky's speech, opting instead for a world-famous Kansas City steak. We picked up our gear from the locker and went by cab to Abner's hotel to pick up his wife and kid (who screamed and threw Jello at me through the entire meal) and then walked to Sidney's Steak House. I ate two steaks, much to everyone's amazement, since I'm thin as a rail.

Then we (Mark & I) headed back to the Crown Center. I did some lobbying on decriminalizing pot, while Mark got bombed at the bar.

It was here I met Jack Ford, the President's son. There he was in a plaid shirt and cowboy boots, and I expected him to say something like, "Howdy, Podner, welcome to the West." We talked about amnesty for Vietnam War resistors and NCUUA, which he said he supported until a lobbyist gave him a high-pressure hassle (and at a social event, yet). I ended up writing him a note, asking him not to give up on the basis of one jerk. He'll probably lambaste us at his press conference this afternoon.

Mark and I went back to the park. Wrote letter to Celeste. I rapped with the Yippies for a while before laying out my blankets and going to sleep under the stars.

[Monday, August 17, 1976]:

The first order of business today was to find a room or someone to crash with –sleeping in the park didn't bother me, but Mark had a bad back. He called around and by the most incredible stroke of luck, we called this hotel just as *Time* magazine was checking out. Not only that, but *Time* had left a $50 down payment which was transferred to our credit. So I pay $4 per night, and Mark pays $5, for a $24 per night room. Not bad, for a pair of broke freaks.

1:00 a.m.: The only thing we did today worth writing about is that Mark, Abner & I went out to KC International Airport to cover the arrival of some Ford delegates. It was a zoo: Ford supporters screaming, "We Love Ford," and Reagan people doing their trip. The Ford people were organized, coherent and polite. The Reagan people were rude, crass, and generally repulsive.

One Reagan jerk had a huge, red, plastic horn. He kept blowing it in my ear. I asked him why he supported Reagan. He said, "Because I'm conservative." I said, "Isn't Ford a conservative too? — I mean, he was *Nixon's* choice." He said, "Ford is a commie."

Actually, there are a lot of similarities between the Republicans and the Yippies. They both dress funny, and they both do it for effect. The true believers in both camps are few, but they dominate the scene with their inane rhetoric and street theater. The rest— 99% — are pretty non-political: just kids out for a good time. For instance:

ME: Why do you support Ford?

YOUNG WOMAN: Uh, Well, I don't really *support* him.

ME: Then why are you here carrying a 'Ford for President' banner and a 'We Love You Ford' sash?

HER: Well, some of my friends from school are really into the campaign and they asked me to come.

ME: If your friends had happened to support Reagan, instead of Ford, would you still have come?

HER: I guess so.

There is one more great similarity between the Republicans and the Yippies. Last night, I walked from the freak's camp in the park to Ford's hotel at least 20 times. Among the demonstrators, I was offered marijuana. Among the Republicans I was offered rum and Coke— with equal vigor. HMMMM. . .

[Wednesday, Aug. 18, 1976]:

I was wrong: Yesterday at the airport wasn't a zoo. Today, in the Kemper Arena Convention Center when Reagan was nominated for President, *that* was a zoo.

Mark and I made a deal: I'd cart his photography equipment around and he'd loan me his convention pass for an hour. As it happened, I was there, with my bootleg press pass dangling on a string around my neck, when Reagan was nominated. I can't begin to describe the teeming chaos. These Reagan people are *nuts*: They screeched like maniacs for what seemed like an hour. I just stood slack-jawed looking at them jump up and down and yell, yell, yell.

According to convention rules, demonstrations of support for candidates were limited to 15 minutes. Fat chance Reagan's people would stop after 15 minutes. They went on and on and on. [According to *Time* magazine, they went on for 46 minutes]. They *love* Reagan, and if emotion could carry the day, Reagan would oppose Carter in November.

It was a close thing: 1,187 votes to 1,070 votes. [*See generally* Henry Gold, *Ford Wins GOP Nomination*, KANSAS CITY TIMES, Aug. 1976 (original on file with author); Kevin Horrigan, *Ford, Reagan Reconciled*, KC STAR, Aug. 19, 1976 (original on file with author); *High Noon*, NEWSWEEK, Aug. 23, 1976 (original on file with author); *The Underdogs*, NEWSWEEK, Aug. 30, 1976 (original on file with author); *Give 'Em Hell*, TIME, Aug. 30, 1976 (original on file with author)]. Still, Ford won the nomination. Three hours after West Virginia gave Ford the last, 1130th vote he needed to clinch the nomination, Mark and I were eating dinner in a dive diner. The black waitress seemed too burnt out to be concerned with the happenings at the Kemper Arena, 500 feet away. "Well," Mark remarked to her, "tomorrow's another day." I wish I could convey the irony in her tired eyes and voice when she signed, "No. I think it's the same day." Letter to Celeste.

[Thursday, Aug. 19, 1976]:

I ended the convention more or less as I began it, with the Yippies: Today's *chant-de jour*:

> Gay Republicans,
> Gay Republicans,
> Where are you?
> Where are you?
> Hiding in the closet,
> Hiding in the closet,
> Shame on you
> Shame on you

Ford picked Bob Dole as his running mate. Now that the media is pulling out, the cops and Secret Service are getting nasty. 30 people busted in the park. A kid with a hash pipe was beaten up badly by a group of city cops in the bus station.

And I had one final encounter with friends in the Secret Service. Mark had

told me to carry a backpack full of cameras and lenses from point A to point B.

Being lazy, I took the most direct route, which happened to run through the lobby of the hotel at which President Ford and his entourage were staying. I happened to walk into the lobby in the midst of some sort of Ford campaign cocktail hour—there were tables of liquor everywhere, along with many, many Ford supporters, all wearing suits and ties and badges and foam-plastic hats. (There also was a two-story waterfall in the lobby of the hotel.)

I must have looked out of place, in my ratty jeans and Army field jacket (my father's during World War II), shoulder-length hair and headband. The Secret Service must have thought so: A dozen of them—they were all large, bull-necked men, dressed in blue blazers and sporting microphones in their ears as well as sidearms—swooped down on me and hustled me over to behind the waterfall. They asked me what I was doing there. I told them. They asked what was in the backpack. I said . . . I didn't know really, photography stuff, I guessed. The men in the blue blazers then put me up against the wall (up against the edge of the waterfall, actually) and searched my person and clothing thoroughly and none too gently.

Then they began taking pieces of photographic equipment out of the backpack, one at a time. They asked me what each piece was as they took it from the backpack. I didn't know what it was. I didn't know what *any* of it was. I explained about how I'd met this *Village Voice* photographer on the train, and that I was just his gopher.

After about 30 minutes, they let the gopher go, with a stern warning *never* to set foot again in the lobby of President Ford's hotel. A Secret Service agent followed the gopher to his intended destination, and watched impassively, from down the hotel corridor, while the gopher delivered the backpack to the photographer. The agent did not see the gopher then head to the photographer's bathroom, where the gopher promptly threw up in the toilet. The gopher never again came within 500 yards of the President's hotel.

On my last day as a medic for the Yippies, I treated two drug overdoses and a stabbing, I helped take down the tent city, and ended up talking with a great cop.

If you're ever in Kansas City and need help, call Sgt. Robert Burns of the Missouri Highway Patrol. He wears a smile and a tie tack with a small pig's head engraved on it. He says the pig stands for Pride, Integrity, and Guts.

Now, I told you that story so I could tell you this one— about the first time I looked down the business end of a handgun. It also was the one time I dropped LSD, ate psilocybin mushrooms, and snorted cocaine.

After my adventures with the Yippies in New York and Kansas City, I kept in touch with a few of them, including Michael. When he invited me to visit him for a weekend in early January 1977, I accepted.

I arrived by Amtrak in Penn Station on the afternoon of a Friday, carrying a duffel bag full of my stuff. Michael didn't meet my train, as we'd planned, and I began to get anxious. Lacking change, I jumped over the turnstile, after looking around for possible observers. I missed the surveillance camera, and, as after I'd jumped the turnstile, a PA system boomed at me, ordering me to "STOP RIGHT THERE. YOU ARE UNDER ARREST."

I ran up the stairs, out of the station, and into the street just in time to see Michael's battered old Chevy careening around the corner. I flagged him down, yanked open the back door, threw my duffel inside and scrambled into the front seat. The car peeled out, and we were away.

Michael told me that, before heading for his house, he needed to stop off to pick up a TV set. He parked the car in an alley and banged on a steel gray door. Watching him from the car, where I'd remained, I saw the door open. A few minutes later, Michael came running out the door, carrying a TV, and soon followed by a fellow with a very large handgun. After Michael's pursuer reached the car, he moved the gun between Michael and I. The hammer was chocked back, the safety was off, and the gunman's eyes were

dead, like a doll's eyes, like a shark's eyes. Michael gave him back the TV set. Michael, non-plussed, got in the car. We headed for his home on Long Island.

His parents' and his sister's home, actually. Michael lived in the attached garage, but to get there, one had to pass through the house. That required running what I've come to call the gauntlet.

Michael's family knew he was gay, and they assumed I was his new lover. From the first moment we walked through the front door, his parents and sister stood on opposite sides of the narrow hallway, facing us and yelling that all us "queers" were going to Hell (for them, the underworld definitely had a capital "H"). I saw no reason to tell them I wasn't gay—it was none of their business, and to deny their homophobic accusations seemed disloyal to Michael, whom, after all, was my host—so I just glared back at them as Michael and I passed between them.

Once in Michael's room, we locked the door. His family banged on the door, screaming that we were damned, on and off for the rest of the night. Somehow, it seemed an appropriate audio track for the weirdness to come.

Michael had planned refreshments. First, we would drop some LSD, which he had on blotter tabs. Then we'd snort cocaine. Then we'd follow it up with a cocktail of psilocybin mushrooms mixed in a blender.

The blender was in the kitchen, however, which meant that we had to run the gauntlet again. We sidled past Michael's family—chanting at us now—into the kitchen, where we retrieved the blender and a small quantity of orange juice.

Back in Michael's garage/room—pound, pound, yell, yell at the door—he unwrapped the mushrooms from their tin foil wrapping. The mushrooms were ugly items, mottled gray and chunky. The idea had been to mix the mushrooms with the orange juice in the blender. The problem was that we didn't have nearly enough juice, and the blended product had the viscosity of oatmeal—and the taste of sand. It was like trying to swallow a beach, with the occasional rock thrown in for texture.

I think we blended and consumed about a dozen mushrooms. We used the foul mixture to wash down the three or four tabs of blotter acid we then consumed, along with some cocaine and pot. Then we waited for the drugs to take hold.

We sat on opposite corners of Michael's bed. There were no chairs in the small room. The space was incredibly cluttered with electronics gear—Michael was the communications expert for the Yippies. The walls were donned with psychedelic posters.

In part to enhance the mood, and in part to drown out the pounding and yelling of his family, Michael put on a record, Pink Floyd's *Dark Side of the Moon*. Michael, the audiophile, had a state-of-the-art sound system, and the music filled the room like a physical presence.

Or maybe the idiotic amounts of drugs I'd consumed were kicking in. The haunting, elegiac music seemed to pulse within the posters. It was like looking at a Christmas tree through a kaleidoscope. I also felt the tide roaring in my ears. I don't think I saw things that weren't there, but everything that *was* there was distorted, pulling apart and coming together. The sensory overload wasn't unpleasant; to the contrary, it was fantastic and exhilarating. I'd read accounts of tripping on acid and mushrooms, and they all said the experience can't be described, only lived. This is correct. It would be like describing a Key West sunset. It would be like trying to describe, in words, the color blue or the combination of cabernet and chocolate, or the taste of the créme brule at the Hurricane restaurant on the coast of Maine.

I don't know how long the light show lasted. Time seemed to stop for a while.

The next thing I remember was rolling over and waking up, in a panic. The coke must have been laced with speed, because I was on edge like I'd never been before.

Michael was passed out on the floor, dead, for all I knew. I became convinced that he *was* dead and I unbuttoned his shirt to listen to his heart. It sounded fine: lub dub, lub dub, lub dub.

Even the banging on the door had stopped. I searched the room for a clock. It was 2:30 a.m. Too early to phone anyone to rescue me the hell out of this place. I didn't have money for a cab. Michael was passed out and snoring. I tried to wake him. I slapped his face. He groaned and turned over.

Now time seemed to move forward not at all. I watched the second-hand sweep past the roman numerals of the clock. A second seemed like an hour, a minute a day, an hour an eternity. I waited and watched that clock turn for four eternities. Then I called the only person I could think of to call, Warren,

accused of Honor Code and Judicial Code violations (to date, these remain the only times I have ever spoken to juries). I wore my hair shoulder-length, tied back with a blue and white headband. I played Barry McGuire's *Eve of Destruction* so often it drove my roommate to find other quarters.

Every academic year, my college brings in a Distinguished Visitor in Residence (DVIR). The DVIR spends two full days in residence at the college, speaking to classes and giving a major speech in the evening of the second day as a capstone of the visit. In my junior year, the DVIR was Dean Rusk, one of the principal architects of LBJ's Vietnam War policy.

I didn't think much of Dean Rusk—and I didn't think much of my college for honoring him in this way—and I was determined to use this opportunity to ask the question I'd always wanted to ask about Vietnam. I wouldn't throw a pie in his face (the Yippie way) or heckle and shout at him during his speech. Rusk was a guest of the college, which meant he was my guest too. I was determined to be polite and respectful, but firm.

In advance of the visit, I read everything I could find about and by Dean Rusk. Among other things, I read the entire five volumes of the Pentagon Papers (the Gravel edition) and re-read Bernard Fall and Francis Fitzgerald.

During the two-day events, I showed up in every class Rusk visited, armed with my books, notes, and hard questions. I threw Rusk's words (before the Fulbright Committee and elsewhere) back in Rusk's face. I peppered him with questions about Agent Orange, the Tonkin Gulf Resolution, the Mai Lai massacre, the Tet Offensive, the carpet bombing, the

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the man I'd met at the Gay Pride march the previous summer. I smacked Michael awake enough to tell me where he had Warren's phone number.

I woke him up (it was 6:30 a.m. on a Saturday morning, after all) and began to explain what had happened. I think my voice trembled, because Warren gently cut me off and told me to wait for him outside Michael's house. He'd be there in 20 minutes.

I grabbed my duffel bag, buttoned up my father's Eisenhower jacket, and opened the door into Michael's family's home, expecting the gauntlet again. The mother, father, and sister were all awake in the living room, but they seemed harangued-out. They only glared at me and I think something in my eyes frightened them. They didn't hold my gaze.

I closed the front door from the outside, and I heard someone inside slide the deadbolt home. It had snowed the night before (had I missed that?), and the Long Island neighborhood looked like something out of a Norman Rockwell painting. Some of the homes still had Christmas lights up, and the scene was really quite beautiful and serene.

Warren arrived on time. We didn't speak for a long while, until after he'd taken me to a diner and ordered me pancakes, eggs, sausage, bacon and orange juice. When I started to tell him why I couldn't drink the orange juice, the whole foolish story of my reckless drug use the night before came pouring out. Warren just listened. Then he drove me to Penn Station and waited until I'd boarded the train home.

That awful night on Long Island was the first and last time I ever did any drug stronger than marijuana. And even my mild interest in pot barely survived. I continued as president of the MWC chapter of NORML, but my heart was no longer in it. I was just going through the motions, and, after a few months, the chapter petered out.

defoliation of Southeast Asia, the body count as the measure of success in Vietnam, and the like.

I found Rusk's answers unacceptable—facile, disingenuous, and evasive. They were a politician's answers, practiced and polished.

I don't know what else I expected. The Quakers have a phrase–"speaking truth to power"—and I guess I'd hoped that power might at least honestly engage the questions I asked him. In the end, I wrote newspaper columns arguing that Rusk was a war criminal.[519]

Rusk's argument that he was simply doing his job remains with me, twenty-two years later. It reminded me too much of the "just following orders" rationale of the Nazis in Nuremberg and of Eichmann in Jerusalem (I've encountered this argument again and again when I was a capital public defender later: from Lewis Powell to justices on the Florida Supreme Court).

I guess that in college I felt I'd been born about a decade too late. I should have been at college in the sixties. By the time I'd graduated college, I'd read virtually every book worth reading about the Vietnam War and the anti-war movement (including the SDS and the weather underground). My views on the war were influenced most strongly by Kent State, the Mai Lai Massacre, and the Pentagon Papers. Then, the summer before I graduated college, I met a former LRRP Marine. The acronym stood for Long Range Reconnaissance Patrol. LRRPs were hunter/killer teams. The Hueys would swing low over the jungle trees whenever they saw pickets of North Vietnamese and quickly insert the LRRP teams, who would then plunge into the bush seeking out targets of opportunity.

The LRRP I'd met was the killer in his hunter/killer team. He told me his experiences in Vietnam. We stayed up all night drinking and talking, just the two of us in my dorm room. Since that night, I've never again felt disappointed that I'd missed the sixties.

I'm glad I didn't go to college in the sixties for another reason. Moderation has never been one of my personal vices, and I expect that during the sixties I would have become a full-time agitator. That would have meant no law school, and law school was the reason I'd wanted to go to college in the first place.

As it was, my college extracurricular activities were never more than a sideshow for me. The untimely death of my Aunt Harriet had made it possible for me to attend college without taking out student loans, and that fact was never far from my mind during those four years at Mary Washington College. My first priority in college was to earn good grades.

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519. *See* Michael Mello, *Dean Rusk: Guilty of War Crimes?*, MWC PROMETHEUS, Nov. 11, 1977; Michael Mello, Guest Commentary, *Dean Rusk*, MWC BULLET, Nov. 22, 1977.

For me, good grades in college required a lot of hard work. Grades in school had never come easy to me, and I studied intensively in college. Being elected to Phi Beta Kappa was wonderful. More wonderful was a class rank that gave me a shot at law school.

d. Heading Into the Deep South: Why I'm Going to Hell

Wearing Buttons Isn't Enough[520]

After college came law school. I didn't do any better on the LSAT than I'd done on the SAT, so I wasn't admitted to my first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, or fourteenth choice of law schools. I ended up going to Case Western Reserve Law School, in Cleveland, which I adored (the law school, not Cleveland). Still, tuition was $8,500 per year, and I couldn't accumulate that sort of debt load and still practice the kind of public interest law I wanted to practice upon graduation. So I worked like a demon during my first year of law school at Case, hoping to transfer to UVA in Charlottesville, Virginia (where, as an in-state resident, tuition would be $1,500 per year). I ended up Fourth in my class at Case, wrote onto the *Case Western Law Review*, and then graded on. Then I applied to, and was accepted by UVA, where I wrote onto the *Virginia Law Review*.

I didn't much like law school at UVA, except for working as an Articles Editor of the *Virginia Law Review*. I was told that I was only the second write-on-transfer-student to serve at that post. My way was paved by the first, Gary Francione, a pioneer then and now.[521] I didn't really understand the reasons for the rigid stylistic conventions of the law review form, other than as a game of "follow the leader" with the *Harvard Law Review*, as Fred Rodell observed in his 1937 essay, *Goodbye to Law Reviews*, the best piece ever published by the *Virginia Law Review*. I didn't understand why law students decided what scholarly articles were worthy of publication, and I didn't understand the obsession with footnotes (a matter Rodell fingered as well).[522]

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520. Slogan printed on Button (on file with author).

521. *See, e.g.*, GARY FRANCIONE, RAIN WITHOUT THUNDER (1996); GARY FRANCIONE, ANIMALS, PROPERTY AND THE LAW (1995).

522.

> Then there is this business of footnotes, the flaunted Phi Beta Kappa keys of legal writing, and the pet peeve of everyone who has ever read a law review piece for any other reason than that he was too lazy to look up his own cases. So far as I can make out, there are two distinct types of footnote. There is the explanatory or if-you-

While a law student at UVA, I met a man I would later come to hate[523]—U.S. Supreme Court Justice Lewis F. Powell, Junior. Powell had a history of hiring one member of each year's *Virginia Law Review* to clerk for him. Several members of the Managing Board and I were invited to have lunch with Powell while he was visiting Charlottesville. Powell was the consummate gentleman during the lunch, although I didn't say much: I remembered Powell's inglorious tenure on the Richmond School Board, where he (ever so gently) opposed racial integration. I came to loathe Powell later, when I was a Florida capital public defender and he was Circuit Justice for the Eleventh Circuit.[524]

> didn't-understand-what-I-said-in-the-text-this-may-help-you type. And there is the probative or if-you're-from-Missouri-just-take-a-look-at-all-this type.
>
> The explanatory footnote is an excuse to let the law review writer be obscure and befuddled in the body of his article and then say the same thing at the bottom of the page the way he should have said it in the first place. But talking around the bush is not an easy habit to get rid of and so occasionally a reader has to use reverse English and hop back to the text to try to find out what the footnote means. It is true, however, that a wee bit more of informality is permitted in small type. Thus: "It is suggested" in the body of an article might carry an explanatory footnote to the effect that "this is the author's own suggestion."
>
> It is the probative footnote that is so often made up of nothing but a long list of names of cases that the writer has had some stooge look up and throw together for him. These huge chunks of small type, so welcome to the student who turns the page and finds only two or three lines of text above them, are what make a legal article very, very learned. They also show the suspicious twist of the legal mind. The idea seems to be that a man can not be trusted to make a straight statement unless he takes his readers by the paws and leads them to chapter and verse. Every legal writer is presumed to be a liar until he proves himself otherwise with a flock of footnotes.

Fred Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38, 40-41 (1937).

Twenty-five years after this essay was published, he "revisited" it. The revisitation closes with a paragraph I will always treasure:

> Not so long ago, I published a book; I had spent better than twenty years collecting the stuff for it casually, a couple of years getting it all in order, and one tough year writing it. Though it dealt with law, there were none of those phone excrescences called footnotes, and I slaved like a slave (like what else do you slave?) to keep it clean of longiloquent legal language. Indeed, I daresay I could have written it in half the time had I used the pompous patois of the profession—but this book was meant for anybody to read. Along came a typical law professor to review it in a typical law review; what he said was complimentary; but the professor clearly felt guilty about praising a book like this. For he added, as though looking over his shoulder, in a sentence I shall forever treasure: "It is to be regretted that the author did not write his work with footnotes and that his style is not in keeping with the depth of study he must have had to pursue to acquire the information necessary to write this book." Well, fellows, there it is in a nice, neat nutshell. All I can add is:—Ah, scholarship; ah, nuts.

Fred Rodell, *Goodbye to Law Reviews—Revisited*, 48 VA. L. REV. 179, 289-90 (1962).

523. *See* MELLO, DEAD WRONG, *supra* note 2.

524. *See id.*

Mostly, I found law school at UVA elitist, disorienting, and boring. I went to law school to become Clarence Darrow, and I came out not having a clue about what I wanted to do with my law degree. I did a summer clerkship with a large urban firm, and I thought: I can do this, and the money is swell. I graduated law school with an offer from the Wall Street superfirm of Cravath, Swaine and Moore. That's what UVA graduates were expected to do.

But first I would clerk for Eleventh Circuit Judge Robert S. Vance in Birmingham, Alabama.[525]

A year before I clerked on the Eleventh Circuit, the court did not yet exist; in 1981, Congress divided the Fifth Circuit, creating a new Fifth Circuit. The old Fifth Circuit was the legendary court that implemented *Brown v. Board of Education* and desegregated the Deep South in the 1960s.[526] I had mixed feelings about living for a year in Birmingham, Alabama, the scene of such violence against the civil rights movement. The memories of those fights were everywhere in the city. I ate lunch near where Bull Connor's police dogs and firehoses had been unleashed against the peaceful desegregation demonstrators.

Judge Vance was an old warrior from the Alabama racial politics of the 1960s; he was George Wallace's principal political nemesis in the Alabama Democratic Party.[527] Personally, Judge Vance hated capital punishment, and, while I interviewed for the clerkship job, the Judge spoke proudly of his opinion that had cleared Alabama's death row. Professionally, however, as an intermediate court of appeals judge, he was bound by the Supreme Court's decisions upholding the constitutionality of death as a punishment.

Partly by chance and partly by design, I served as Judge Vance's "death clerk." On the first day of the clerkship, the judge called me and my two co-clerks into his office. He pointed to three piles of files, and said, "I need one of you to be responsible for the civil rights cases, another for the death cases, and the third for the business cases. Pick a pile." I wasn't quick though to snare the civil rights cases, and I sure didn't want the business cases. So I picked the capital pile, and that was that.

The first half of my clerkship—not covered in my journals—centered around my disagreement with the judge over two capital cases: Ivon Ray

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525. Judge Vance was murdered by a mail bomb a few days before Christmas 1989. I'm not sure I will ever "get over" his assassination, and I'm not sure I ever want to. *See generally* MELLO, UNITED STATES OF AMERICA VERSUS THEODORE JOHN KACZYNSKI: ETHICS, POWER AND THE INVENTION OF THE UNABOMBER (1999) (explaining work with Kaczynski and integrating other life experiences).

526. *See generally* JACK BASS, UNLIKELY HEROS (1981) (highlighting the dramatic story of the Southern judges of the Fifth Circuit who translated the Supreme Court's *Brown* decision into a revolution for equality).

527. *See generally* RAY JENKINS, BLIND VENGEANCE (1995).

Stanley and Joseph Thomas. Actually, we disagreed about virtually all of the death cases.

It soon became clear that my tender sense of fairness was more easily offended than was Judge Vance's; to be more precise, I found at least one (and usually more than one) reason that every death sentence that came before the court was "unfair" and thus, in my naive view, unconstitutional. Sometimes the judge agreed; usually he did not, and we spent long afternoons deconstructing concepts like "fundamental unfairness," as opposed to garden-variety unfairness; error of federal constitutional magnitude, as opposed to garden-variety error that was benignly harmless. The Constitution does not require a perfect trial, the judge told me more than once; it only requires a fundamentally fair one, or at least one not fundamentally *un*fair.

For a long time I jokingly (well, mostly jokingly) referred to my role in these cases as the reason I was going to go to hell. "How much would be the price of your soul?" asks an old gospel song. My answer, during my time as Judge Vance's death clerk, would have been: Not much.

Looking back at it now, I cringe at how much of a pest I must have been to Judge Vance. I didn't understand why the judge didn't push the envelope more in death cases—it certainly wasn't for lack of personal courage—Judge Vance literally put his life on the line when he fought racism during the George Wallace era in Alabama, and death cases always seemed to me to *be* civil rights cases. I knew he loathed capital punishment, and I knew that he agonized over these cases. I knew that the death cases ate at him.

Why, then, didn't he do more?[528] The answer is that he tried to do a lot—and whenever he did, he was resoundingly reversed by the Supreme Court.[529] But he was a law-abiding judge. He chose his battles well. This was not a battle with the Supreme Court he could win.

Judge Vance enjoyed a good argument, and we argued a lot. This reached its zenith when I was assigned the task of drafting an opinion

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528. As my journals indicate, Judge Vance was regularly trashed by some zealots among deathworkers, most notably Stephen Bright, an anti-capital punishment propagandist based in Atlanta. Bright's sanctimonious, self-righteous carping about Judge Vance always has amused me. In terms of personal courage and honor, Bright's PR machine isn't in the same solar system as Judge Vance's (successful) war against the racial politics of George Wallace.

Judge Vance was not always kind to Stephen Bright and other capital defense lawyers who appeared before him in oral arguments. The judge had little patience for disingenuity or for politician's demagoguery, especially when it was coming from lawyers in his court—particularly in capital cases being litigated under death warrant—when the court did not have time to study the law or the record carefully, and so was required to rely on the factual and legal representations of counsel. As the judge put it, he had no time for lawyers who "trifled" with the court. The judge suffered neither fools nor politicians gently. Bright no doubt blames his chilly reception by the Eleventh Circuit on judges like Vance. Rather, it's a self-inflicted wound.

529. *See* Mello, *Rough Justice*, *supra* note 445, at 1201.

affirming the denial of resentencing relief in the case of Ivon Ray Stanley,[530] a retarded African American from rural Georgia who followed along while the mastermind and main mover committed the murder for which both men were sentenced to die in Georgia's electric chair.

In his federal habeas corpus case, Stanley's counsel argued that the defense lawyer at trial had been ineffective in failing to investigate evidence in mitigation. This was an uphill battle, because some mitigating evidence did trickle in before the jury. First, there was evidence that Stanley had at least a learning disability; he was a slow learner, and he had been placed in an educatable mentally retarded class in school. A state sheriff read into the record the results of a psychological evaluation conducted on the man when he was fourteen-years-old. That evaluation had concluded that (1) the man had an IQ of 62 (counsel had previously informed the jury that "imbecile" was defined as a person with an IQ of 0 to 65); (2) the man's test scores "suggest[ed] a history of culture deprivation . . . . [T]he test results and observation indicated [he] was an educatable mentally retarded youngster"; (3) it was "therefore recommended that he be placed in the exceptional child class designed for educatably mentally retarded youngsters as soon as possible to avoid any further" experience that he has undoubtedly incurred throughout his school history.[531] Similarly, a psychologist testified for the state as to Stanley's mentality and psychiatric makeup. The psychologist testified that his examination revealed that Stanley had an IQ of 81, which he defined as not "too significant" in deciding whether "this particular man is mentally retarded." He did concede during cross-examination by Stanley's trial attorney that the IQ placed him in "the upper range of borderline mental retardation."[532]

Finally, Stanley's mother read into evidence, during the penalty phase of the trial, a letter written to her by her son (reading the letter was the totality of the mother's trial testimony):

> THE WITNESS: It says, "Dear Mother, I just sending a letter to let you know I am going to hope," I think it is—I don't know whether it is—it is R-O-O-K, room that is room, July 6, 1976. "Hay Mother, I having" let me see. "Hay Momma, I have seen the lawyer, mother, and he say this carries the chair and, mother, I don't know—don't know, what to go to—what now, I don't know what to do now about it, Momma. I didn't murder no one and rob no one and kidnap no one. To mother, and mother, I not lying to

530. Stanley v. Zant, 697 F.2d 955 (11th Cir. 1983). I realized, while writing this footnote, that I have memorized the full citation to this opinion. I'd prefer not dwell on why this is so.

531. *Id.* at 967.

532. *Id.*

> you. God knows it, but no one believes me, Momma. I don't know what to do. I don't know, I want—want to go to no chair for nothing I didn't do. Tell me what to do, say, hay Momma, are you coming to see me when I go, Momma, hay, Momma, you have told me, told us to be good and you will, we won't have to go to jail. I been good," I think way, he got this W.A.Y., it say, "Momma." It is the best thing he got down there. W.A.Y.
>
> No, it says, "Momma, don't worry. I sorry, Momma. I didn't do it, believe me, and Mary, and Cat, you good to Momma and Senator, too, be a sweet baby for me, Cat, Sheriff, pray for me, I didn't do it because no one believes me, Momma."
>
> I want to come home and, Momma, he told them I robbed him and I—won't make them believe it. I didn't do it. Tell me what to do.
>
> Hay, tell T.C. to come and I go to Court and tell him I say hay and come, too.[533]

So some mitigating evidence came in at trial, but that was only a small fraction of what was available had Stanley's trial attorney bothered to look for it. Postconviction counsel produced the testimony of five members of the Stanley family and a family friend to the effect that if called they would have testified that he had never been in trouble, was obedient, helpful, and cooperative, and was not violent. His mother stated that he had difficulty in school and indicated that he was a slow learner. Stanley himself testified at the habeas hearing on his own behalf. He stated that his lawyer had once asked him about people who could testify about his character, that he had given the lawyer names of some people, but it never came up again. He also introduced into evidence a letter from the pastor of his church that noted his good character, as well as a high school report that indicated that his character was thought to be excellent in every respect.

Judge Richard Arnold, of Little Rock, Arkansas, was sitting on the Eleventh Circuit as a visitor and dissented in *Stanley*. At that time, I believe, Judge Arnold's Eighth Circuit had not yet encountered any capital cases first-hand, which made his *Stanley* dissent all the more impressive. Anyway, the oral argument was held shortly before I started working for Judge Vance, but I listened to the audio tape about two dozen times while I was drafting Judge Vance's *Stanley* opinion. ("Drafting" is exactly what it was; the judge wrote his opinions, and our job as law clerks was to translate his analysis into drafts, which he then virtually rewrote; that's why his opinions have such similar analytical and writing styles down through the years.) The *Stanley* oral

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533. *Id.* at 968 n. 9. My only victory in Ivon Stanley's case was persuading Judge Vance to include this letter in a footnote to the published opinion in *Stanley v. Zant*.

argument tapes were painful to listen to because Stanley's habeas lawyer's palpable condescension toward these beknighted judges from the Bad Old South obscured, in my opinion, Stanley's quite powerful challenges to the legality of his death sentence. Stanley's trial *was* atrociously unfair. By contrast, Stanley's co-perpetrator in the murder, a fellow named Joseph Thomas, was represented on his habeas case by Millard Farmer and Joe Nursey, two of the best capital habeas litigators in the country, then and now. From the trial transcripts it seemed to me that Thomas' culpability was far greater than Stanley's: the record did not indicate that Thomas was retarded, as Stanley was; Thomas was the planner and leader of the murder for which Thomas and Stanley were condemned to die. Thomas' trial lawyer, like Stanley's, put on virtually no mitigating evidence, but Stanley lost in the Eleventh Circuit, and he was executed in 1984, about a year after I drafted his opinion.

I also drafted Judge Vance's opinion in *Thomas*, remanding his case for an evidentiary hearing on his claim of ineffective assistance of trial counsel. During that remand, and during Thomas' subsequent appeal back to the Eleventh Circuit after the district court held the evidentiary hearing and again ruled against Thomas, the U.S. Supreme Court rendered an opinion in *Francis v. Franklin*, another Georgia death case. The Supreme Court held in *Franklin* that the reasonable doubt instruction given routinely in Georgia capital cases had unconstitutionally shifted the burden of proof from the prosecution to the defense. So Robert Franklin gets a whole new trial, say the Supremes, a new guilt/innocence trial as well as a new penalty phase trial. This was good news to Georgia's condemned population—those who were still alive when *Franklin* was decided, that is. In particular, it was good news for Joseph Thomas, whose case was still bouncing around between the Eleventh Circuit and the district court because of the then-still-unresolved ineffective assistance issue. Because Thomas was still alive and litigating at the time the Supreme Court issued its *Franklin* decision, he was able to raise a challenge to his *conviction* based on *Franklin*. And he won, as he should have, because Mr. Thomas' and Mr. Franklin's juries were given virtually identical reasonable doubt instructions.

The problem is that Ivon Ray Stanley's jury *also* got a reasonable doubt instruction functionally identical to the ones given in *Thomas* and *Franklin*. But by the time the U.S. Supreme Court decided *Franklin*, Ivon Stanley had been dead for several years. So, with the benefit of 20-20 hindsight, we can see that the critical time frame in *Thomas* and *Stanley* was 1982-83, when the Eleventh Circuit sent Mr. Thomas' case back down the judicial ladder for an evidentiary hearing on ineffective assistance of trial counsel, and sent Mr. Stanley's case along to the next level of the capital punishment assembly line that ended for Stanley with his execution in 1984.

The question then becomes: Why was Mr. Thomas, the *really* bad actor in the Thomas/Stanley joint venture of capital murder, sent back for an evidentiary hearing in district court, while Stanley, the retarded follower, was not? Part of the answer, I suggested earlier, was simply that Mr. Thomas had a better habeas lawyer. But the *legal* difference between Joseph Thomas' and Stanley's cases in the Eleventh Circuit was a technicality of habeas: Stanley had already received an evidentiary hearing in Georgia *state* court, on his ineffective assistance claim, and Thomas had not. Never mind that the "hearing" in *Stanley* was presided over by a state judge whose boredom with the hearing shone through even in a cold appellate record. The fact was that Stanley had received some sort of hearing in state court, and Thomas hadn't. That lethal procedural technicality, in the end, was what decided that Ivon Ray Stanley would die and Joseph Thomas would live.

But I'm getting ahead of the story. On my first day as Judge Vance's law clerk, he handed me, for my maiden voyage into the waters of opinion drafting, the case files for *Thomas* and *Stanley*. I knew bean dip about capital punishment at that moment—I don't think it ever came up during my education at Mr. Jefferson's University—but it seemed pretty straightforward: Stanley had gotten an evidentiary hearing in state court, and Thomas had not. Judge Vance warned me that his opinion in *Thomas* would likely be unanimously accepted, but that Judge Arnold, a visiting judge from Arkansas, would likely write a dissenting opinion in *Stanley*. Arkansas? Does Arkansas even *have* a death penalty? All I knew from Arkansas was the Little Rock abomination and Governor Faubus.

It ended up taking me three months to draft the opinions in *Thomas* and *Stanley*. I highlighted, in electric yellow, the place in the *Stanley* record where his mother read the letter written by her son. (The first time I read that portion of the letter, I went home and poured myself a stiff shot of Wild Turkey.)

I tried to recast *Stanley* as a civil rights case, since he is—was—an African American. Robert Vance, before Jimmy Carter made him "Judge Vance" in 1977, had been leader of the non-George-Wallace wing of the Alabama Democratic Party, back in the '60's, and the architect of the "Freedom Democrat" challenge at the 1964 Democratic National Convention. Frank Johnson was Vance's hero. Judge Vance and I were arguing over *Stanley* in the Birmingham courthouse; I ate my lunch in Kelly Ingram Park, site of some of the most brutal atrocities of Birmingham Sheriff "Bull" Connor's fire hoses and police dogs.

Judge Vance always worked with Jack Bass's book *Unlikely Heroes* within easy reach: not for reference purposes, because he had lived through so many of those civil rights war as a ferocious combatant, but rather for purposes of memory and perhaps inspiration.

During my year as Judge Vance's clerk, my sanctimoniousness about *Stanley* could not have made his life easier. He always listened patiently to my petulant tirades. He didn't fire me even when I once stormed out of his office in tears over the case.

Eventually, my draft opinions were done. Judge Vance reworked them from the bottom up, and then he circulated them to the other two judges on the *Stanley/Thomas* panel. Word filtered back that Judge Arnold would, after all, circulate a dissent in *Stanley*. I was delighted.

When Judge Arnold's dissent arrived, I was ecstatic. It was magnificent, all the more so because it was (I think) his first opinion in a capital case, ever. His dissent eloquently and efficiently decimated the draft opinion I had written for Judge Vance. There seemed to be more than the usual likelihood that a majority of the complete complement of Eleventh Circuit judges would vote to take *Stanley* en banc, automatically vacating Judge Vance's opinion for the 2-1 panel majority.

The court, then only a year old, rarely took cases en banc. The last time the court *had* given en banc consideration to a capital case raising a claim of ineffective assistance of trial counsel had been in *Washington v. Strickland*, decided by the court shortly before the *Stanley* panel opinions were circulated. *Washington* had resulted in a bitterly divided Eleventh Circuit en banc court, with several concurring and dissenting opinions. Judge Vance had written the opinion for the en banc majority in *Washington*, a carefully principled and practical treatment of how the court ought to go about analyzing ineffective assistance claims.

That made Vance in some sense the court's "expert" on such claims, which did not seem to bode well for Mr. Stanley's chances of persuading the en banc Eleventh Circuit to give plenary consideration to his case. Ineffective assistance of trial counsel is raised, routinely, in virtually *every* capital case, and the Eleventh Circuit judges were frankly sick of the issue. Besides, the future of Judge Vance's handiwork in *Washington* was in doubt (the U.S. Supreme Court ended up granting plenary review and then reversing *Washington*). And, as though that wasn't enough, the en banc request filed by Mr. Stanley's habeas lawyer was nothing to write home about. His chances of getting en banc consideration seemed slim to nil.

We "death clerks," in our respective judge's chambers, spoke among ourselves and commiserated fairly regularly, an informal practice tolerated to a greater or lesser extent by our bosses (Judge Vance, as a product of the rough-and-tumble world of Alabama politics, was especially indulgent, because when I was whining to the other judges' law clerks, I wasn't whining to *him*). Those informal clerk-to-clerk chats left me more fearful than ever that the full en banc court might not agree to take up Ivon Ray Stanley's case.

What I *hadn't* counted on was the power of Judge Arnold's *Stanley* dissent. It moved Eleventh Circuit Judge Frank Johnson to ask for a poll of the full Eleventh Circuit, the first step toward en banc consideration of a case. The written votes trickled into Judge Vance's chambers, one or two a day, over the next few weeks. I kept a tally in my personal journal. And when all the votes were in, it was a tie vote: 6 to 6. The outcome: The panel opinion by Judge Vance would stand, since a majority was required to displace a panel opinion and take a case en banc. Judge Arnold's dissent gathered the votes of six Eleventh Circuit judges, exactly half of the court. Since Judge Arnold was sitting as a visitor in the Eleventh Circuit in *Stanley*, he didn't get a vote.

As I hope this discussion makes clear, I have tremendous and unalloyed respect for Judge Arnold and for his craft, but also for his decency. I've followed his capital opinions over the years, as the Eighth Circuit has, of necessity, become as expert as the Eleventh Circuit was by 1983 in deciding who dies. I've wanted to thank him for a long time. Now, at least, I have tried.

Ivon Ray Stanley lost in the Eleventh Circuit, two votes to one, because, according to binding precedent, his trial lawyer did a good enough job. Judge Vance was absolutely right on the law, but a piece of me died when the *Stanley* opinion was sent to the court's printer for publication under the judge's name. Another piece of me died when Ivon Ray Stanley was executed, about a year later. And, yet again, when Judge Vance himself was assassinated by a mail bomb sent to his home a few days before Christmas 1989, Joseph Thomas was still alive.

I had seen too much. I knew too much to walk away. By knowing and walking away I would become the evil thing itself. By knowing and staying to fight—a fight I knew I could not possibly win—I would become the evil thing itself. "The people should fight for their law as for a wall," Heraclitus wrote.

So I headed for Florida. I went because I couldn't *not* go.

2. The Personal Side of Deathwork

How much would be the price of your soul?
An old Gospel Lyric

There is some personal stuff in the journals presented in this essay but not much (I didn't have time for much of a personal life in Florida)—and what there is is tied in with deathwork. There was the time we smuggled our litigation director, Mark Olive, into Cuba to investigate the family history of

our client, a Mariel boatlift refugee;[526] the time Craig Barnard, my boss, flew from South Florida to Tallahassee to argue for a stay of execution on behalf

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526. When Governor Bob Graham signed Omar Blanco's death warrant, Blanco was no more to me than a name on an unread case file piled upon many other unread case files. The death warrant changed all that. It was signed on January 7, 1986. Execution was scheduled for four weeks hence.

Omar Blanco's lead attorney was Mark Olive, my boss and the most ferociously brilliant capital postconviction litigator with whom I have ever worked. Olive initiated a factual investigation into every aspect of Omar Blanco's personal history and background. Problem was that that history seemed to end, for us, in the waters between South Florida and Cuba in the year 1980.

Omar Blanco had been one of the 125,000 refugees Fidel Castro forcibly evicted from Mariel, Cuba, in 1980. It was the only time between Lyndon B. Johnson and Bill Clinton that my president didn't speak with a regional accent. Jimmy Carter had hurt Castro's feelings in some way or the other. Castro retaliated by opening his prisons and mental hospitals of political and other prisoners and depositing them on the banks of Mariel Island. Castro told the United States: "You want 'em. Come and get 'em."

While Carter dithered, the highly organized Cuban-American community mobilized a flotilla of small pleasure crafts to bring the Mariel refugees over the 90 miles of water separating Cuba from Miami. The Mariel boatlift worked, sort of. When the boats returned into United States waters with the refugees, they were met by the Immigration and Naturalization Service and Coast Guard. Some of the boats were confiscated. The refugees were incarcerated in places like the Krome Detention Center. Eventually, most of them found United States sponsors and were released from custody. Most made a reasonably smooth transition into American life in South Florida. Some became petty criminals. At least two ended up on Florida's death row: Omar Blanco and Pedro Medina. When Medina was executed in Spring 1997, the electric chair malfunctioned. His facemask burst into flames. Eleven years before Medina's botched electrocution, Omar Blanco was scheduled to die in four weeks.

Attorney Olive knew that to win a stay we needed to extend our investigation to Cuba. We needed to get one of our lawyers into Cuba. Our problem, however, was the same problem that made the Mariel Flotilla outlaws: It was illegal under United States law to travel to Cuba. Traveling to Cuba was a crime. Spending money in Cuba violated the Trading With The Enemy Act. Courts and bars take a dim view of lawyers who violate the criminal laws of the United States.

Still, necessity being the mother of invention, Olive found a way—a perfectly legal way. We wouldn't send Olive directly to Cuba; we'd fly him from Miami to the Yucatan, then—by an airline without a name—into Havana. Into Cuba with no money, since spending money in Cuba violated the Trading With The Enemy Act. Into a remote airport in Cuba, far away from the cities and the Cuban security people who patrol them.

Incidentally, Olive knew no Spanish. As he was preparing for his trip to Cuba, Olive's CCR colleagues gave him a list of "key words and phrases" in Spanish: "Where's the bathroom?" "Where's the U.S. Embassy?" "Che wasn't such a bad guy, I think." In tune with the anarchistic ethos of CCR, we didn't all get together and give Olive one list of translations. We all gave him our individual lists. Scharlette gave him a list. Tim Schraeder gave him a list.

Olive flew from Tallahassee to Miami. At the Miami International Airport, Mark got a page. It was Tim Schraeder. "Don't use the list I gave you! It's bullshit. 'Where's the bathroom' is really 'I have a parrot in my pants.' 'Where's the U.S. Embassy' is really 'Everyone in the U.S. really wants to invade you,' and 'Che wasn't such a bad guy' was really 'Che must fuck your sister.'" Thus began Mark Olive's journey to the land of Castro.

Cuba has no embassy in the United States, so we made the arrangements through the Cuban Interests Section in Castro's shadow embassy in D.C. Our intrepid and flat-broke lawyer would be met at the tiny airport. Olive was to have been met by a car that would transport him to the hamlet where Omar Blanco was born and reared.

Of course, no one was there to meet Olive at the Havana airport. So he hitchhiked to Blanco's hometown, where he was welcomed like the Prodigal Son. He received warm food and good wine and affidavits from Omar Blanco's family and village priest.

of our client and his suit clothes landed in Jacksonville, and a friend in Jacksonville put Craig's suit in a cab to Tallahassee, so Craig wouldn't have to appear before the Supreme Court dressed in blue jeans; the times—so frequent they became rituals in my public defender office in Tallahassee—when, the evening after a client of ours was executed, the office would go out to a local steak house, eat red meat and drink red wine; the time Scharlette Holdman snookered me into appearing on *Nightline* ("C'mon. It airs in the middle of the night; that's why they called it *Nightline*; who watches TV in the middle of the night?"); the time a man was executed while his stay papers were still circling the Atlanta-Hartsfield Airport, which was socked in by fog; the time my office's Kaypro computers crashed in the middle of the night, over the Christmas holiday season, and assistants–full of holiday spirits–had to come into the office to retype a brief in a landmark case; the time I got lost in Jacksonville, dashing to file a stay application before the courthouse closed at the end of the day (we didn't make it, but it didn't matter, because the U.S. Supreme Court had already stayed the execution—before driving back to Tallahassee, we stopped by a drive-up liquor store, and drank and sang all the way home); there was the time we thought the Florida Supreme Court might stay an impending execution because a hurricane had just ripped through Tallahassee, where the court was located (as it turned out, our client didn't get the stay-due-to-hurricane: In Florida, death takes no breaks for hurricanes); the logistical nightmares in the days before fax machines (my diaries refer to "zap mail," our term for Federal Express), of getting our stay of execution papers to the right far-flung courts before our client's execution rendered those papers moot (sometimes we didn't make it in time, and the client died while his stay papers circled some airport socked in by weather); there was the time when Governor "Bob" Graham adopted themes in signing pairs of death warrants (one theme was serial killers—Ted Bundy and Gerald Stano, who had warrants signed the same day), and on one day he signed warrants on two men with the last name "Thomas": It was all good fun until Ed Thomas' mother called my office, in tears, because she'd just heard on the radio that a man named Thomas had just been executed in Florida, and she'd thought her son Ed Thomas had a stay (He had: the other Thomas, Dan Thomas, had been executed); the time we learned that the University of Florida Medical School had been dissecting the brains of our electrocuted clients; the time an elderly Mafia hit man (who had gone soft in the head while on death row) was scheduled to be executed, and we couldn't find a lawyer for him, so we called a "Godfather" to see if his associates might help us find an attorney for our guy; the time, after failing to persuade a state trial judge to stay my client's impending execution, my client's mother (who had been present in court during my unsuccessful oral argument) invited me to her home for Thanksgiving dinner; the time a grateful

volunteer lawyer, whom my office had helped, sent us a case of Chivas Regal Scotch—which we cashed in at the local liquor store for a crate of bourbon, vodka, rum, wine, and cheap scotch, giving our office a fully-stocked wet bar for the next six months; there was the time, in 1986, when I was in talking on the phone to my old boss in West Palm Beach, when he mentioned in passing that he was watching from his office window, the Space Shuttle *Challenger* take off . . . and then his incredulous, "Oh my God—I think it exploded . . . . Gotta go, bye;" then there were the times when death warrants kept us in the office all night, for weeks at a time, and we hauled portable cots into the office and slept in shifts and lived on takeout Chinese food and pizza.

a. "The Last Full Measure of Devotion":[527] David Funchess, A Vietnam War Memorial

> *In a war without aim, you tend not to aim. You close your eyes, close your heart. The consequences become hit or miss in the most literal sense . . . . I have done bad things for love, bad things to stay loved. Kate is one case. Vietnam is another.*[528]

The newspapers are now ragged along the edges and yellowing, but still readable—the "fall" of South Vietnam and Cambodia in 1975—the panicked throngs of Vietnamese America abandoned, the last helicopter taking off from the roof of the American Embassy in the city then known as Saigon and now known as Ho Chi Minh City. I still have the dog-eared issues of *Time*, *Newsweek*, and *Life* from the war: the Tet Offensive, the Kent State Shootings, the mass arrests of anti-war protesters in D.C. in 1970 and 1971. Living in Northern Virginia, across the Potomac River from our nation's capital, the war and the domestic unrest it generated were a part of my childhood. The television war, it was called, and not without reason. One spring afternoon heading into D.C. over the Fourteenth Street Bridge, I remember seeing and hearing the huge twin-rotor Chinook helicopters flying low, over the East Potomac Park Golf Course, where my father taught me to play golf. The Chinooks were part of Nixon's response to the anti-war movement. It was 1970 or 1971, I think. I was thirteen or fourteen.

As discussed earlier in this essay, in high school and college I studied the Vietnam War and the anti-war movement. Those studies came full circle when, in 1986, I had an opportunity to use my research on Vietnam in one of my public defender's office's capital cases.[529]

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527. Abraham Lincoln, Gettysburg Address, Gettysburg, Pa. (Nov. 13, 1863).

528. Tim O'Brien, *The Vietnam in Me*, N.Y. TIMES MAGAZINE, Oct. 2, 1994, at 3, 52.

529. This narrative of David Funchess' life and time in Vietnam came from the papers we filed in

David Funchess was the first Vietnam veteran executed in America. Through David's case I first learned about a new illness called Post Traumatic Stress Disorder (PTSD). David had it bad. At the time of David's capital murder trial in the mid-1970s, virtually no one had ever heard of PTSD. By the time David was scheduled to die, in Spring 1986, much more was known about PTSD. We tried to tell that to the courts. The courts refused to listen, telling us we should have raised PTSD at the time of David's trial.

Florida's Governor Bob Graham signed David Funchess' death warrant on March 20, 1986. Funchess had already been through one full round of appellate and post-conviction litigation, state and federal. To stop the execution this time, Funchess' lawyers, led by Mark Olive, and his investigators, led by Scharlette Holdman, would need to come up with some pretty powerful new evidence on why David Funchess did not deserve to die for his crimes.

Shortly before David was executed, his lawyers petitioned Governor Graham for clemency. The legal system is fairly efficient at ferreting out meritorious cases, and leaving the rest. It's not perfect, however, and occasionally only clemency remains for a deserving but unrewarded litigant. This was such a case, because of an unusual twist in legal and sociological dynamics, the lawyers argued.

PTSD was not known at the time of trial, resentencing, or even fully understood at the time of the first clemency request. The social winds had changed by 1986. The legal phenomenon follows the sociological one. No previous court proceeding could have been utilized as a vehicle for airing the PTSD claim. The first post-conviction proceeding included some reference to the Vietnam War, but trial counsel was found not to have been ineffective for failing to raise the issue of the war, inasmuch as counsel (like everyone) had no knowledge that PTSD existed or how it affected his client.

The legal system is necessarily conservative, moving slowly behind societal change to test it, the lawyers argued. The Vietnam Memorial will be aged before the law books reflect its image. The clemency board was, in theory, a different creature, more attuned to public sentiment and more able to extend mercy, unbounded by legal precedent and courtroom procedure.

But not in Governor Graham's Florida. Graham denied clemency at 6:30 p.m. on Monday, March 21, 1986. The execution would take place as scheduled, at 7:00 a.m. tomorrow. Now it was up to the courts.

CCR, Funchess' lawyers' office, was only a few blocks from Florida's then-new Vietnam War Memorial. His fellow Vietnam vets stood an around-

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the *Funchess* case. Those papers were created by a group of people (of which I was one) working under the direction of Mark Olive. I am grateful to Mark Olive for his permission to use our collaborative work product here.

the-clock vigil at the memorial. They stood in relays, and they stood at attention, day or night, rain or shine. Whenever there was a lull in our own little battle to keep David alive, CCR's lawyers and investigators would leave the public defender's office and walk to the war memorial.

Although the memorial is in the heart of downtown Tallahassee, what I remember most about it was the silence of the place. It was as though the quiet dignity of those vets absorbed all of the city noises of Tallahassee, creating a sort of a black hole for sound. Nothing loud could enter the perimeter of their vigil for David Funchess.

About an hour after Governor Graham denied clemency at 6:30 p.m., Mark Olive (MO) called CCR from the federal district court in Jacksonville: no decision on our stay application was expected until 8:30 or 9:00 p.m. At 8:00, I left the CCR office for the vigil, where I stayed for about an hour. In addition to the Vietnam vets, religious leaders were there, too, including Tom Horkin, director of Florida Catholic Conference.

At 10:30 p.m. Olive called again from Jacksonville. The federal district court had denied everything, including permission to appeal. MO read the judge's opinion over the phone, and it was a killer: procedural technicality piled upon procedural technicality. There are bad ways of losing a capital case in court, and there are worse ways. This was the worst way.

I delivered the bad news to the folks standing vigil. When I told them that David was dead, their response was silence and sadness, not surprise.

At midnight MO called to chat and noodle. As soon as I hung up the phone with Mark, it rang again. The U.S. Supreme Court was calling: "Have you heard? Did the Eleventh Circuit [Court of Appeals] tell you what they did?" I said no. "Then I'd better let them tell you. Call 'em now." I tried, but the phone in Atlanta was busy (was the Eleventh Circuit talking with MO?)

At 12:55 a.m. I finally got through to the Eleventh Circuit's clerk's office. The court had granted a stay until noon tomorrow (today); since David was scheduled to die at 7:00 a.m. (*i.e.*, in six hours), it meant that he had, in effect, a three-hour stay. The reason for the stay: an Eleventh Circuit judge had asked for a poll of all the judges on the court, to see if there were enough votes to take David's case "en banc"—to have it heard by the full Eleventh Circuit.

At 1:00 a.m. MO called again from Jacksonville. He's heading back to Tallahassee, but we need to file additional papers in the U.S. Supreme Court. Could I draft something? Of course.

At 1:50 a.m., Angela Bickers, the Eleventh Circuit's "death clerk," called from her home in Atlanta. Angie read me the Eleventh Circuit's opinion, and I began the drafting MO had requested. He called at 2:15 a.m., from a pay phone on I-10. We argued about the tone of the papers I was drafting. I wanted calm; he wanted aggressive. He called me a wimp, and today I see he

was right. That night, I didn't argue. He was my boss. I wrote the papers his way.

At 5:00 a.m., I returned to the vigil, but the morning drizzle had ripened into a downpour. I stayed for only a few minutes (MO *was* right: I was a wimp) and headed back to the office.

The morning was long stretches of waiting interspersed with intervals of frenetic activity: drafting, dictating, editing, doodling, then waiting. And more waiting.

At 10:10 a.m.—one hour and fifty minutes before the U.S. Supreme Court stay was scheduled to expire and David Funchess would be electrocuted—the U.S. Supreme Court called. The stay had been extended five hours until 5:00 p.m. The prison had rescheduled the execution for 5:01 p.m. I went back to the vigil. We waited. Mid-afternoon, I drove home to shower, shave, and change my clothes. I waited. We all waited.

The news from Washington came at 3:25 p.m. The Supreme Court's "death clerk" was calling: the Court had denied a stay, 7-2, with Justices Brennan and Marshall dissenting. Tears. It was over.

At 4:30, I walked to the vigil one last time. At 5:01, while, half a state away, David Funchess was being destroyed, I laid a flower at the base of the Vietnam Vet's War Memorial. A reporter accurately described the scene at the Florida Vietnam Veterans Memorial the evening David Funchess was executed:

> At the late afternoon vigil, people looked at their watches. It was 5:20. "It must be over by now," one woman told another. Others held each other and wept. Still others stared at the color photograph of Funchess in his Marine uniform placed atop a basket of flowers. The group formed a circle in between the two huge granite columns that form the war monument.
>
> Rev. Jim Hardison, coordinator of the death penalty project for Florida IMPACT—an interfaith lobby group for social justice issues—said he was angered not by capital punishment per se but by the way the state administers it.
>
> "Again, we've taken a poor, penniless, minority person who was mentally ill and executed him," Hardison said.
>
> Others present said they felt compelled to speak.
>
> "We're really appalled by your callous indifference toward David Funchess," said Linda Reynolds, Director of the Florida Clearinghouse on Criminal Justice, referring to the governor. "Vietnam veterans will not forget what you've done today."

> "David Funchess was killed twice by society," Reynolds said. "Once in Vietnam and once today."[530]

Later, from Jim Thompson, David's friend and fellow Vietnam veteran, who had witnessed the killing, I learned that, at the end, "David was fine, from the first burst of electricity."

We—David Funchess' lawyers and investigators and paralegals and secretaries and support staff—were not fine. We went out to a dinner of steak and red wine, something of a CCR ritual when our clients were executed. That night at dinner we cried. We all cried: Scharlette and I, included. For the rest of the night, I slept on MO's couch at CCR. For some reason, going home to my clean bed and orderly house would have felt like treason.

After he was killed, David was buried on Florida land owned by Jim Thompson, his fellow Vietnam veteran.

The *Florida Flambeau* newspaper, in an editorial on Governor (now U.S. Senator) "Bob" Graham's denial of clemency for Funchess, wrote:

> Words can come back to haunt you.
>
> Listen to Gov. Bob Graham at the dedication of the Vietnam War Memorial in Nov. 11, 1985. He mourns the Floridians who gave their lives in service to their country during the Vietnam War, and recognizes how the experience "marked" the lives of those who didn't lose their lives there: "Today we take a giant step in the healing process . . . . We say to all who served, welcome home—and we express our heart-felt gratitude for your bravery and spirit of sacrifice . . . . We who live in freedom salute you, as we commemorate those who made the ultimate sacrifice. Your actions speak more eloquently than our words, even a decade or more later... Many have fought to overcome the physical as well as the spiritual effects of that conflict. The contributions of the Vietnam veterans are making today is powerful testimony to their character, and to their talent."
>
> Listen to Graham defending his decision to ignore the last wish of an ex-Marine—one of those Florida veterans he's so proud of. The vet is the first ever to face the electric chair in America, and is compelling evidence of how the war and Post Traumatic Stress Disorder turned him into a broken heroin addict, sending him ever downward, until he kills two people in a Jacksonville bar and winds up on Death Row. Listen to Graham tell the man, as he told us at the dedication ceremony last year, that time has opened the eyes of the American public to the ultimate sacrifice he and all veterans

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530. Moni Basu, *Florida Kills Vietnam Vet in Electric Chair*, FLORIDA FLAMBEAU, April 22, 1986, at 1.

> made for us, and how anxious we are to try and pay them back: Sure, PTSD is a problem—but he had his chance at raising the issue before the court already, and there is no reason to bring it up again.
>
> But, David Livingston Funchess' claims of Post Traumatic Stress Disorder were never head by the jury that convicted him of murder. His friends and family from Jacksonville, who saw him come back from the war a stranger, were never given the opportunity to tell the court what they knew. No one cared then; no one cares now.
>
> Least of all the man who claimed to honor this veteran, but turned a deaf ear to his last request on this earth.[531]

Remembering David Funchess' case always makes me think about walls. In 1995, nine years after David was executed, I visited, for the first time, the powerfully moving Vietnam War Memorial in D.C.—the most visited site in a city full of memorials. I looked for David's name on the wall, even though I knew it wouldn't be there.

I have come to know a fair number of people whom various states were trying to kill—and also the families and loved ones who were victims of my clients' crimes (except for the surprising—to my mind at least—number who were factually innocent of the crimes for which they are condemned to die; i.e., they didn't do it, period). The only generalization I can make about the killers I have known is that no generalizations really work. They're a surprisingly random slice of American culture, with the only clear unifying characteristic being that virtually all of them came from backgrounds of extreme poverty and family dysfunction. And they couldn't afford to hire the lawyers who might well have kept them from death row. So they got the best defense no money can buy. They got what they paid for.

Not that that explains away or justifies their hideous crimes. And, as often as not, they are ashamed of their backgrounds and reluctant to let me raise their histories as legal issues, even when raising such claims would get them off death row. They'd rather die in the electric chair than let their lawyers tell the world about how they were raped by their parents or about how their family lived in a tar-paper shanty and subsisted on dog food.

The fact is that prisoners, on and off death row, are more like us "normal" people than we often want to admit or acknowledge. Sometimes they are too recognizable for our comfort. "Ted" Bundy, for instance, remains our culture's leading metaphor of incomprehensible evil and horror, even half a decade after his execution. If you were to meet Bundy in your

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531. Editorial, *Graham's Gratitude*, FLORIDA FLAMBEAU, April 22, 1986.

local bar, you'd never know he had allegedly confessed to many, many murders. You'd think he was just like you, and for the most part you'd be right. That's the scariest part for many of us: not that he's so different from us, but rather that he's so similar. As we are similar to him.

There is no "us" and "them." We're all part of "us."

b. Jupiter Childbirth, and the U.S. Supreme Court Brief in the "Crazy Joe" Spaziano Case

> *Vietnam was more than terror. For me, at least, Vietnam was partly love. With each step, each light-year of a second, a foot soldier is almost always dead, or so it feels, and in such circumstances you can't help but love. You love your mom and dad, the Vikings, hamburgers on the grill, your pulse, your future–everything that might be lost or never come to be. Intimacy with death carries with it a corresponding new intimacy with life. Jokes are funnier, green is greener. You love the musty morning air. You love the miracle of your own enduring capacity for love.*[532]

Sometimes the juxtaposition between life and death in my journals is arresting. The birth of Larkin Robson Mello, shortly before my first Supreme Court brief was filed, is a good example. Of all the adventures recorded in my Florida journals, what stands out in my memory has little to do directly with the U.S. Supreme Court or death row or capital punishment. Rather, what stands out was the birth of Larkin, in the home Ruthann and I were renting in Jupiter, Florida, best known as home to the Burt Reynolds Dinner Theatre, not far from my office in West Palm Beach.

Capital punishment brought us together and then tore us apart. Ruthann and I met at the first birthday party for the newly-created Eleventh Circuit. We met in October 1982, while I was clerking for Eleventh Circuit Judge Vance in Birmingham, Alabama, and she was clerking for Eleventh Circuit Judge Peter Fay in Miami. The Eleventh Circuit was a brand new court; in 1981 Congress split the old Fifth Circuit into two courts, the new Fifth and the new Eleventh.

Now, in October 1982, the Eleventh Circuit was celebrating its first birthday party. The party was held in the new court's home base in Atlanta. All the judges and their law clerks were invited.

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532. O'Brien, *supra* note 528, at 51 (emphasis added).

Ruthann and I met in the birthday cake line. For some reason we began talking about how we were going to hell for opinions we were then drafting for our respective judges in two different capital cases—Ivon Ray Stanley's case was mine, Stephen Todd Booker's was hers. Both Stanley and Booker were African Americans who got lousy lawyers at trial because, as paupers, they had no choice but to accept who the government chose to give them. Judges Vance and Fay had decided, however—and properly, according to the law at the time—that Stanley's and Booker's capital trials were close enough for government work. Ruthann and I were to draft opinions, for our respective judges, upholding the death sentences of Ivon Ray Stanley and Stephen Todd Booker. We ended up talking about how we felt about writing those opinions. We ended up talking about it all night.

We both came from working class backgrounds, and we both kept asking ourselves, silently at the birthday party and later aloud to each other, what the hell we were *doing* there, as lawyers and law clerks, drafting opinions for affluent white men, opinions upholding death as a punishment for poor African American men. Ruthann was (and is) a poet, and we talked about Audre Lourde and "using the master's tools to dismantle the master's house." We talked about Hannah Arendt and *Eichmann in Jerusalem.*

But what was so striking, at least for me, wasn't just that Ruthann *talked* about these things. Newly-minted lawyers talk about these and similar things all the time, and both in and out of the classroom. What stunned me about Ruthann that first night wasn't that she talked about these things; what struck me was that she really *cared* about them; she really cared about asking the hard personal questions, and she cared about the answers too. It wasn't just talk. *It mattered* to her. And she didn't think I was crazy because it mattered to me too.

She felt as awkward and out of place at the birthday party as I had. More so, maybe. When Ruthann received her invitation to a "party," she had assumed that party meant *party,* she wore a striking (and strikingly beautiful) fire-engine red cocktail dress, with a bright yellow banana-shaped design in the front. She did sort of stand out among the sea of pinstriped gray suits at the court's party.

So in the weeks following the birthday party, Ruthann and I kept in touch the only ways we could, by letters and phone calls. During our correspondence I came to understand that Ruthann took other things as seriously as I do: writing, language, friendship, loyalty. She sent me her poems and short stories. We edited each other's work. In a way, more intimate than sex. The distance between Birmingham, Alabama, and Miami, Florida, didn't seem so far to us and, when Judge Fay was scheduled to sit on an Eleventh Circuit panel in Montgomery, Alabama, Ruthann came along as his law clerk. Montgomery was about a forty-five-minute drive from

Birmingham, and on the night after their arrival I drove to meet her. Because I was nervous, I brought my gray Persian cat, Mithrender, along with me for the drive. That became our drill over the next three days of the court's sitting: I drove Ruthann from Birmingham to Montgomery during the working day and back to Birmingham for the night. A few weeks later I flew to Miami to visit Ruth. Sometime over the following weeks we decided to become a couple. Later, after I'd left Judge Vance and began working in the West Palm Beach public defender's office, we decided to have a child, or, more accurately, we decided not to try *not* to have a child. Before long, Ruthann was pregnant with Larkin.

We were determined to have this child and raise him our way. He would be born at home, attended to by a midwife instead of a doctor. Natural childbirth, no drugs, Ruthann insisted I promise. Promise I did. I distrusted doctors and hospitals almost as much as Ruthann did.

Almost, but not quite as much. It was a complicated and painful pregnancy for Ruthann. She was ill during much of it; all the normal health hassles of pregnancy seemed magnified four-fold in Ruthann's case. At one point, she had a 103-degree fever that showed no signs of abating. I forced her into our car and I drove her to the local hospital. She became delirious in the hospital: once, when she regained consciousness and saw on the TV that the United States had invaded Grenada, she thought she was watching a bad old Ronald Reagan B-movie. She switched channels, but every station seemed to be showing the same weird movie, with newsclips of Reagan interspersed with scenes of United States Marines hitting the beaches in some foreign country called Grenada. She clicked the TV off and went back to sleep.

Ruthann and the baby were fine, but the fever had scared us both. We needed to modify our homebirth plans to account for the possibility that the birth might require rapid access to hospital facilities. Even our midwife was getting nervous. She suggested an obstetrician at the Palm Beach County Hospital. Dr. Vic, we called him. We met with him, and he agreed to our plan.

This was our plan. Once labor began, Ruthann would stay at our home in Jupiter, Florida, for as long as possible; during that time the midwife would be with us. When the midwife decided that birth was imminent and that we needed to get Ruthann to the hospital, we'd go. At the hospital, Dr. Vic would take over from the midwife. The baby, whom we had decided to name Larkin, would actually be born in the hospital.

These decisions were being made in early January 1984; Larkin was due during the first few days of February. In the meantime, in mid-January, the United States Supreme Court decided to decide "Crazy Joe" Spaziano's capital case. I had written the cert. petition in *Spaziano* (the first paper filed

in a court with my name on it, soon after I was admitted to the Bar). My boss Craig Barnard assigned me to write the portion of Joe's brief dealing with one constitutional issue, the legality of Florida's jury override; Craig wrote the other issue. We had forty-five days to finish and finalize the brief. So, while Ruthann was ill and while we both were attending childbirth classes, I was scrambling to write and edit the brief in my first United States Supreme Court case.

According to our master plan, Larkin was due about a week before Joe's brief was due. Problem was, no one told Larkin about the schedule. The due date came and went. For the first few days, Dr. Vic didn't seem too concerned. But by the time Ruthann was a week "post-dates," Vic began bouncing off the walls. He would have to induce labor, Dr. Vic insisted with ever-increasing urgency. Hell no, Ruthann replied with increasingly stubborn determination. I didn't know what to do, which side to take. I eventually sided with Ruthann. She knew her body better than Dr. Vic ever could. Ruthann knew—she *knew* that the baby was fine and that he'd be born, healthy and naturally, in his (and her) own time. She knew the exact moment she became pregnant—during a short visit to Alabama.

Presented with our unified front, Dr. Vic delivered an ultimatum: either Ruthann would allow him to do an electronic "stress test" sonogram to see how Larkin was doing, or he'd quit as our doctor. He explained that in a stress test sonogram the mother receives an injection of Pitocin–enough to induce enough pressure to allow observation of the baby's health, but not nearly enough Pitocin to induce birth.

Ruthann reluctantly agreed and, when she was ten days "post-dates," Dr. Vic performed the procedure. Larkin seemed fine to him. Although he was willing to give Ruthann three more days, he insisted that Ruthann and I sign waivers of liability, just in case the worst happened during the birthing. We signed the waivers absolving Dr. Vic of liability.

Sobered by Dr. Vic's insistence that labor be induced ASAP, Ruthann and I took a long walk on the beach. Ruthann was serene, almost beautiful. I was a mess. Signing the liability waivers had spooked me. Also, I'd promised Craig Barnard my final edits on the Spaziano brief by early evening. So we drove home. I went out for a basket of Kentucky Fried Chicken, but Ruthann only picked at it. I tried to eat chicken and edit the brief at the same time; by the end of dinner the brief was interlarded with streaks of chicken grease and the occasional fleck of flesh or skin.

By early evening I was ready to drive my edits to the office, where Craig would input them into our then-new word processing system. I had put the legal papers in my VW beetle, and I walked into the bedroom to tell Ruthann I was heading to work for a few hours. Ruthann said she was feeling funny. I asked whether she wanted a bit more chicken; she'd hardly eaten all day.

No, she replied. I walked into the kitchen anyway, thinking that seeing and smelling the food might encourage her appetite. It didn't: never try to force-feed a woman who has just gone into labor greasy fried chicken.

Ruthann screamed like only women in labor scream. I forgot the chicken and grabbed my watch. To time the contractions, I mean. After all, in high school I was an EMT. I'd worked on the ground rescue team for the Civil Air Patrol. I'd done volunteer work at the inner-city ER in old town Alexandria, Virginia. I'd assisted on every kind of traumatic injury and illness I could imagine, and more than a few I couldn't. I'd watched people be born. I'd watched them die. Once, when a high-rise building under construction at Bailey's Cross Roads collapsed (near my high school) I'd been one of the first people with any medical training to reach the scene (I'd been on recess or cutting classes, I don't remember which); I'd helped search the rubble for bodies and body parts until a Virginia State Trooper realized how young I was and ordered me back to high school. In college, I'd been a medic for the Yippies at the 1976 Democratic National Convention in New York and Republican National Convention in Kansas City. Sure, by 1984 I was a little rusty. But, hey, it's like riding a bicycle, right?

Well, no, actually–either because I forgot whatever medical training I'd ever had, or I panicked. Either way, over the next two hours I did everything wrong. Beginning with the stopwatch. I did grab the watch; that much I did right.

I grabbed the watch and dashed into the bedroom to time the contractions. Just like we had been taught at the childbirth classes. Problem was, when do you start timing and when do you stop? Is it from the beginning of a contraction until the end of another contraction? Is it the time *in between* the contractions—end to beginning? My mind was a blank, so I asked Ruthann.

This was unwise. She replied, at the volume that could be heard on Key West, by screaming, "How . . . do I know how to time the contractions, you stupid, incompetent . . . . Don't you see the pain I'm in, . . . I've got the *hard* job; I'm the one *having* the . . . contractions, all you have to do is *time* the . . . things . . .!" Or words to that effect. I'm paraphrasing here.

She did have a point. So I decided to time the periods *between* the contractions. She'd tell me when they began and ended. I'd time 'em and write 'em down on the papers nearest to the bed, which happened to be Bob Woodword's book, *The Brethren,* on the United States Supreme Court Justices. To calm Ruthann down a little, the plan had called for me to play soothing tapes; rivers or forests or something, only it didn't matter, because I couldn't get our $19.95 boombox to work.

The plan also called for me to contact the midwife and for her to drive over to our house and to supervise. I got her after-hours service and told it to

tell her to get over here. The prepubescent operator asked me how far apart were the contractions. Um . . . that's kind of a problem, I replied, but I think they're about three minutes apart. Impossible, the operator said; they shouldn't be that close together for hours yet. She'd track down our midwife.

I returned to Ruthann and timing and writing the times in *The Brethren.* Except that now the contractions seemed *less* than two minutes apart, no matter how I measured them.

At that point I blurted out my opinion that the contractions *couldn't* be that close together this soon into labor, that maybe she wasn't reporting them to me quite accurately. This kind of pain, and contractions this close together, wasn't supposed to happen until the second stage of labor. It was as if Ruthann had skipped the first stage of labor and jumped right into the second stage. I also apparently suggested that Ruthann wasn't doing something right. I don't remember saying that. Ruthann does *remember.*

I do remember that at this point Ruthann began screaming that she wanted to kill me. She really wanted to kill me. She *really* wanted to kill me.

The phone rang. It was the midwife, but there was a little logistical problem. She was in Miami at a midwife's convention, and the whole crew of them had been drinking that evening. In fact, she was calling me from a parking lot pay phone booth. In the background, I could hear the chatter of midwives who sounded like they were feeling no pain. They would talk me through this, they said, as though they were air traffic controllers talking down a Piper Cub pilot who was trying to land a 747 at Chicago's O'Hare Airport, which actually isn't a bad analogy. The midwives asked me how far apart the contractions were. Before I could explain all that to them, Ruthann screamed for me to come *right now.* I hung up on the midwives.

I told Ruthann that the midwife wasn't coming, which was not the news she wanted to hear from me. She wanted to throw up, which she did. Then she wanted to take a shower. At last, something I could *help* her do. By then she was about an hour into labor. The contractions were two minutes apart, at most.

While Ruthann was in the shower, the inebriated midwives called back from the Miami parking lot pay phone. They said the contractions *couldn't* be that close this early into labor. While I was trying to explain it to them, Ruthann let out another especially attention-grabbing scream. The midwives told me not to hang up again. I didn't.

Ruthann was sitting on the bathroom floor, pointing to her hip area. "Look there," she said, almost quietly. "I think it's crowning." Couldn't be, I thought (but didn't say). Crowning means that the baby's head was about to emerge into the world. I looked. The head was crowning. It was *definitely* crowning. I could see wisps of Larkin's hair. I could *touch him.*

I got back on the phone with the midwives. They didn't argue. They didn't hesitate. They said what I should have done an hour earlier: *CALL 911.*

I did. The call went out to Jupiter Fire and Rescue Unit #2. They would be there within five minutes. Uh huh, I said, and returned to Ruthann.

Ruthann was by now in a small hallway that connected our bedroom with the bathroom. She was on her hands and knees. She was definitely crowning. Or the baby was crowning. Crowning was taking place.

The cavalry arrived less than five minutes after I placed the 911 call. The *whole* cavalry: two ambulances, a fire truck and assorted police cars, and about a dozen medical personnel. All with red lights flashing and sirens blaring, and all in front of my house (leading a neighborhood to wonder whether one of my clients–or maybe their lawyer–had run amok with an AK-47 automatic rifle); the scene did look a little like a scene from *The Towering Inferno.* Guess it was a slow night at Jupiter Fire and Rescue Number Two.

Within moments of their arrival, our house was filled with men and women in uniforms, barking orders to one another and setting up all sorts of equipment in our living room, bedroom, and hallway. They decided Ruthann was fine where she was, still in the hallway between the bedroom and bathroom.

I thought the scary part was over, but it wasn't. The birth part went fine. Larkin's head was soon followed by the rest of him. I sat on the edge between the hallway and bathroom when Larkin was born. I even helped catch him, I think. I was awestruck by it all—by Larkin and the paramedics and the hallway and the night.

Because I was off somewhere else, inside my head or my heart, at first I didn't notice the new tension in the hallway. I felt it before I understood its source or its reason. The source was the platoon of paramedics crammed into the tiny hallway.

The reason was Larkin wasn't breathing. The paramedics tapped him. He still wasn't breathing. Another tap. Nothing.

Then, one of the paramedics asked another, "Should I get out the stillbirth kit?" I froze. Everything inside me froze. The room froze, the paramedics froze, the flashing lights froze, my blood froze, my brain froze.

It only lasted a moment. It lasted a lifetime. Then, as if on cue, my son coughed and cried and didn't stop crying for the next four years or so.

The rest of the night happened in slow motion. Our ambulance trip to the hospital. The paramedics' careful monitoring of Larkin's breathing and Ruthann's blood pressure. The silently angry face of Dr. Vic when we arrived at the hospital. (To this day Dr. Vic believes we did all this on purpose, so as to have our homebirth). Watching Dr. Vic suture Ruthann's tears. Calling my parents and calling Ruthann's. Watching her hold Larkin for the first time. Holding him myself.

Sometime during the delivery, my boss, Craig Barnard called me about the edits on the Spaziano brief. I told him and he laughed. First thing tomorrow, I promised him. I did bring the edits with me in the ambulance to the hospital. The hospital allowed me to spend the night in Ruthann's room, sleeping on the second bed in the room.

I couldn't sleep. Around dawn I got back into tinkering with the brief. When Ruthann woke up she saw me sitting on the edge of her bed, near her feet, surrounded by piles of legal paper. I think I smiled at her weakly, hoping she might find it amusing, might find it so *me*.

Because it *was* "so me." Perhaps that was why she didn't smile, not even a little hint of a shadow of a smile. Her eyes were cold and lifeless. I had just flunked a test I didn't know I had been taking. I think our relationship ended that instant. That's what I saw in her eyes.

c. "One Percenters": Among the Outlaw Bikers

> *We're the one percenters, man – the one percent that don't fit in and don't care.*
>
> A biker[533]

Capital representation requires us lawyers to bridge unbridgeable gulfs of culture. The best illustration of this was my first meeting with the leadership of the Florida Outlaws motorcycle brotherhood. I knew about the Outlaws, or I thought I did. I had at any rate seen newspaper accounts of the brotherhood. Since the 1970s, South Florida biker "gangs" were feared and loathed by the police and condemned by the local newspaper, the *Orlando Sentinel*. In the mid-seventies the *Sentinel* brought the Florida Outlaws to national attention. In 1995 the *Orlando Sentinel* described the motorcycle brotherhood as:

> Like ogres in a fairy tale, they're part of a legend that reaches across decades to seed the sleep of innocents with nightmares.
>
> These are grim brothers, all right: rugged, hairy men in black leather and chains, roaring across 1970s Florida on motorcycles.
>
> The bikers nailed one woman to a tree. They chained another to a ceiling for an afternoon of rape and torture. They snatched teen-age girls from sidewalks, took them to dark clubhouses and raped them repeatedly.
>
> Tales of motorcycle gangs were so potent in the 1970s that even today, 20 years after Outlaws member Joe Spaziano was

533. HUNTER THOMPSON, HELL'S ANGELS 13 (1966).

> sentenced to death for killing an Orlando woman, many people familiar with the case still are too terrified to talk about it publicly.[534]

The Outlaws were the family of a client of mine, "Crazy Joe" Spaziano. Joe was an Outlaw, but, more than that, the club had been the emotional center of his life during the entire time of his stay on death row. I had to meet them. The bikers and the nerd.

"Sublime" is the word I'm looking for, I think. Pleasurable, but also with a faint but unmistakable edge of danger. Sublime. That's what I felt the first time I visited the clubhouse of the Orlando Outlaws.

The visit wasn't planned ahead of time, which probably was just as well. The Florida Supreme Court had stayed Joe Spaziano's death warrant, so he was safe for the moment. But another of my CCR clients, Butch Sireci, was still under warrant and scheduled to be killed in less than two weeks. Mr. Sireci's capital murder trial had been in Orlando, so that's where CCR filed the application for stay of the impending execution. The judge had decided he wanted to hear oral argument on Mr. Sireci's stay application, so I would have flown from Tallahassee to Orlando to take part in the argument. The arguments lasted much of the day, which was unusual. Even more unusual, in the end the judge issued a stay of execution. After calling Butch Sireci's family to give them the good news, I made plane reservations back to Tallahassee (another client of mine, Nollie Lee Martin, was also under death warrant).

My flight wouldn't leave for a few hours, so, after cabbing to Orlando's airport I did something I had been meaning to do since I began working on Joe Spaziano's case in 1983. I phoned the Outlaws' clubhouse in Orlando and told them I was in town. If they wanted, I could catch a cab from the airport to the clubhouse, and I could finally put faces with the phone voices I had been dealing with for years. (I also needed to talk with the club leadership about money; during my time as Joe's lawyer until that point, money had never been an issue, since my salary was paid by my state-funded public defender's offices; my successor counsel would need to work out the money issues with Joe and the club.) Unfailingly polite and direct, the person with whom I spoke that day—Wildman, I think—invited me for a visit. Since the clubhouse was located in a rural area outside of town, they would pick me up.

When my ride arrived—in an old Chevy, not a Harley, as I had sort of secretly hoped—I couldn't have looked like, or acted like, the kind of

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534. Christopher Quinn, *Legendary Fear of Biker Gangs Still Reigns Today. Many People Close to the 20-Year-Old Murder Case of Outlaws Member Joe Spaziano Are Still Terrified to Talk,* ORLANDO SENTINEL, Sept. 10, 1995, at A1.

attorneys with which the club was used to dealing . My suit, such as it was, was rumpled and drenched with sweat from the Butch Sireci argument and its preparation. I was exhausted from the adrenaline crash that followed the unexpected stay in Sireci's case ("execution interruptus," Mark Olive called it). I was worried about my other client's scheduled execution; I was running on caffeine and stress, which aggravates a facial tick about which I am always self-consciously aware. Add to this my owlish glasses and my quiet, soft-spoken demeanor, I couldn't have looked like much of a lawyer to them.

And, in a way, I wasn't. Florida bikers tend to be fairly savvy consumers of legal services; that comes from the fact that bikers in general, and Orlando Outlaws in particular, are subjected to almost continuous harassment from law enforcement. Of the eighty-four people released from America's death rows in recent years after having proven their total factual innocence of the crimes for which they were sentenced to die, a disproportionate number have been bikers.

When bikers think of lawyers—when most Americans think of lawyers—they're thinking of *trial* lawyers, lightening-quick litigators who are adept at swaying juries and judges with their oratorical skills and withering cross examinations. In fact, Joe's trial lawyer fit that bill quite nicely: he was quick on his feet, he shot from the hip, he used all his Perry Mason tricks in court. Joe's trial lawyer put on quite a show, and he almost pulled it off: the jury was hesitant to convict Joe of murder, and its recommended sentence was life imprisonment rather than death.

I'm not quick on my feet, and I'm sure not any kind of showman, which partly explains why I was an *appellate* public defender rather than a trial lawyer. I have enormous admiration (and some envy, I must admit) for the great trial attorneys: Clarence Darrow, Millard Farmer, Charles Morgan, William Kunstler, Mark Olive, David Bruck, Judy Clarke, Edward Bennett Williams, Dennis Balske, Johnny Cochran, Deanne Seimer. But it ain't me.

When I was a Florida appellate public defender, I was most happy reading and writing briefs and the like, in my office, surrounded by books and piles of paper and notes—far away from any courtroom. On those frequent occasions I did have to go to court, I was making my client's case to panels of judges, not juries. Appellate judges—at least those judges sitting on the courts I was actually in, the Florida Supreme Court and the Eleventh Circuit Federal Court of Appeals—liked their lawyers to be polite, quiet, dignified, deferential, respectable and, above all, reasonable. Appellate judges didn't want showmanship; they wanted a straightforward attorney who had done her homework and who knew the law and the record cold. It was always interesting for me to watch trial lawyers performing in appeals cases; most of them seemed as awkward as I would have been trying to make a closing

argument to a jury. The skills are different, and the requisite temperaments are different as well.

Still, if the Outlaws found me as alien as I felt, they gave me no sign of it. As I said, the brothers were unfailingly polite and otherwise respectful of me and my quirks. When our car arrived at the clubhouse, the brothers greeted me with a handshake and a beer. They sat patiently, in companionable silence, as I searched my briefcase for some paper or another. They allowed me to set the agenda and conversational cadence during our meeting, which took place in the clubhouse living room, with two or three brothers and me pitched on various couches. The tone of the meeting was serious and businesslike—in other words, professional. No verbal pyrotechnics on either side.

All this was especially interesting because I had arrived with so little advance notice, and because the topics I was there to talk with them about were not easy ones: money and information. It clearly was okay for us to disagree, and we did.

At the clubhouse I was impressed with their self control, as I had been in the past when I had met club members during crisis moments in Joe's case, times of tremendous stress. What always struck me was the dissonance—the total and utter disconnect—between the actual flesh and blood Outlaws with whom I was dealing and the hysterically paranoid view of the biker organization portrayed in the *Orlando Sentinel* newspaper. So these were the notorious bikers that Orlando and its newspapers were so terrified of? These were the big, bad devils on bikes who, it was feared, would turn Orlando into a scene of city-wide hysteria and lawlessness? These were the *Outlaws*? Sure, I was on Joe's side, which meant that I was on their side. But I doubt they were on their best behavior during our meeting. These were not the type of men who needed to put on "best behavior" for anyone—and certainly not for an owlish-looking chap in a gray pinstriped suit.

In fact, I think that their transparency and independence were the reasons why we got along so well together. They were what they were, and if you didn't like it you could take a hike. I like to think of myself as being much the same way. Deal with me honestly and directly, and we'll all get along just fine. So we did. The bikers and the nerd.

The Outlaws I met at the Orlando clubhouse in 1986 were nothing if not honest and direct. Unlike most people I encountered during my Florida deathwork days, the Outlaws never lied to me. They never bullshitted me, and I always tried to return the courtesy.

Because, yes, they were courteous, and not in a fake, quintessentially Southern way. Emily Kucer has described Joe Spaziano as "chivalrous," and, in their own singularly quirky way, most of the Outlaws I've come to know

over the years are indeed chivalrous—as I hope I am, in my own singularly quirky way.

The Outlaws' chivalry is impossible for me to define, with words, without coming across as patronizing or condescending. It's a rare quality that I have only found in people who really know who they are, what they're about, and what things are important enough for them to fight for. They've *decided* who they are; they've sorted through the endless stream of cultural and societal messages about who they're *supposed* to be, who they're expected to be; and they haven't rejected all of straight society's norms—what they've done is *choose*, for themselves, a code of values, conduct by which they will live their lives. That's the first point: they've made a conscious *choice* about how they'll live and under what rules. They actually live by that code; that's the second point. And they're ready to accept the consequences of the choices they have made, be they ostracism and fear and loathing by the dominant culture and its adjuncts and enforcers, the police. That's the third point.

What I felt in the Orlando clubhouse that day in 1986, what I've always felt from the Outlaws, is the serenity of ones who have selected a code of values to live by—a code of honor. As I've said, it's a quality I have encountered only rarely in people I've met. Perhaps unsurprisingly, I've found it mostly in people who are society's rejects. Outcasts. Outlaws.

Who are the Outlaws I've met over the years? Some of them are Marine Corps veterans who saw combat in Vietnam—they're men who feel they've *earned* the right to live their lives as free men in America, to wear their hair long and to ride Harleys and, most of all, to be *left alone* by the government they defended with their blood. They're roofers and electricians and mechanics and construction workers. They don't pick fights, either with the locals or with the cops, but when someone has the poor judgment to pick a fight with them, they fight back; and, because so many people seem to feel threatened by, or jealous of, the Outlaws, such fights are not infrequent. They make the best of friends and the most fearsome of enemies. They are, in Rilke's phrase, guardians of one another's solitude.

Perhaps because I had read his 1966 book on the Hell's Angels shortly before my first visit to the Outlaws' clubhouse, Hunter Thompson's observations of biker culture resonated with me before and after my Outlaws visit. Today, more than fourteen years after my visit (and thirty-five years after Thompson's *Hell's Angels* was published, and after reading a fair amount of the literature of motorcycle brotherhoods in America), Thompson's 1966 book remains the best source, in my view. Thompson's book can still be found occasionally in the section of bookstores devoted to sociology, social studies, or (my favorite) criminality.

The other book that resonates with me is Phillip Pauldan's history of the 1863 massacre at Shelton Laural, *Victims: A True Story of the Civil War*.[535] Pauldan's *Victims* focuses upon a moment in American history long before motorcycle brotherhoods, or motorcycles, for that matter, or internal combustion engines: the 1863 massacre of Shelton Laural, North Carolina, a community of mountaineers in southern Appalachia, by forces of the Confederate Army. Pauldan's insights into Shelton Laural can be applied to Mai Lai, or Auschwitz, or to the two decades Joe Spaziano has lived on Florida's death row for crimes he didn't commit. Still, that is not why I mention his book here.

The reason I mention it is that Pauldan's descriptions of the people of Shelton Laural capture, for me at least, the social dynamics of the Outlaws as I have experienced them, explain how the Outlaws are perceived and treated by mainstream America. Indeed, the Shelton Laural mountaineers were called "outlaws" by the Confederate authorities. For instance, Pauldan writes that on April 17, 1862, a detachment of the Confederate regular army moved towards Shelton Laural, a place known as—according to a report quoted by Pauldan—"a general resort and hiding place for *outlaws*," with orders to "put down any illegal organization of men that might be found there."[536] It was a frustrating and probably impossible assignment, and it became guerilla warfare.

What typified these Shelton Laural "outlaws" were the qualities of most mountain men: isolation, individualism, courage, and the attitude of self-assuredness that comes from knowing "exactly who he was and where he fit in the scheme of things, even though he was limited by his physical and intellectual isolation. This limited viewpoint, because it was *his*, was frequently exalted into truth. He did what was right, and it was right because he did it."[537]

Often derided by the outside world as "hillbillies" and "hicks," the mountain people themselves knew better—and didn't much care, anyway. "People whose traditions included the Regulators, the Mecklenburg Declaration of Independence . . . harbored not just self-will but pride in what they were. If what they were might often be called ignorant and primitive by outsiders—well, let the outsiders match the mountaineers' history."[538]

Fearlessness, courage, individualism, and isolation might "foster pride and devotion to heritage," but it "also nurtured a primitive and potentially dangerous emotionalism. Although their emotionalism could provide a

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535. PHILLIP PAULDAN, VICTIMS A TRUE STORY OF THE CIVIL WAR (1982).
536. *Id.*
537. *Id.*
538. *Id.*

release from the pains of life, it could also erupt into a violence linked with self-righteousness."[539]

On the other hand, the Outlaws—like the mountain men described by Pauldan—also possess a remarkable capacity for tenderness, kindness, and generosity of spirit. I have seen this quality again and again in my encounters with the Florida Outlaws over the years. Recall that it was a biker "gang"—the Hell's Angels, not the Outlaws—who literally nursed "Crazy Joe" Spaziano back to life following his nearly-fatal car accident in 1966. To recognize in bikers the capacity to be tender and kind—sometimes arrestingly so—is not sentimentality. It is simply accurate. And honest.

And still, like the religion of Pauldan's mountain men, the combination of perceived self-preservation and self-righteousness, independence and isolation, "often encouraged brutality rather than restraining it. Men who would feel conscience-stricken over something like breaking the Sabbath or swearing could commit murder and feel that their souls somehow remained unblemished."[540] The code of retribution was strict and strictly-followed: the "capacity to judge others and find them wanting seems to have been one that many mountain killers possessed. Some folks deserved killing, and a man had the right, and maybe even the obligation, to determine who those folks might be."[541] Like the mountain men, Outlaws pass sentences of life or death. Justice is *personal*. Whether these sentences are driven by self-righteousness, self-preservation or simple meanness, the results are always the same.

> Again, Pauldan:
> More than simple self-righteousness was involved in the personal views of justice held by the mountaineers. The power of kinship, the isolation . . . and a highly developed individual sense of right and wrongall contributed to private justice and did so in a complex way. At issue was not a simple balancing of personal vendettas against the rule of law represented by the judicial system. The local courts—located sixteen twisted, rugged miles away . . . did not necessarily dispense an impersonal justice.[542]

Residents of Shelton Laural didn't trust Marshall juries to be impartial, and such distrust was grounded in the reality of experience and history. The outlaws of Shelton Laural knew what they could expect from the "law"—as outlaws today know what they can expect from the judges and juries of south-central Florida. Pauldan could have been writing about the outlaws in mid-

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539. *Id.*
540. *Id.*
541. *Id.*
542. *Id.*

1970s Florida: "Juries in county seats [like Marshall] could and did ignore the law and evidence to acquit or convict people they liked or disliked, people whose values or kin they did or did not respect."[543] Thus, Shelton Laural was ruled by one principle:

> Private justice could be more just than the verdicts of a court. This principle existed when community standards could be applied to members of a community, when the rules of a way of life in a particular place were factors in decisions to punish or not. When people shared values and shared lives, justice outside the courts might claim to be at least as just as that which courts dispersed. The order of custom might be preferable to the rule of law.[544]

This doesn't work when cultures collide, however. When strangers encounter each other, "[A] man might not be judged by a jury of his peers — by men who shared values about the ends and means of justice. In fact, he might be judged by people who thought his values and his style of living did not deserve respect."[545]

Just as the Orlando Outlaws weren't demons, their clubhouse seemed to me an unlikely Gomorrah. The clubhouse I visited in 1986 was a pleasant, albeit dilapidated, ranch home alongside a river. Cozy, almost, with fake wood paneling, a threadbare carpet, and overstuffed chairs and a pair of couches. All the talking was done by the Outlaws men. The few women I saw that day passed through like ghosts, trying to remain invisible and never making eye contact with me. I tried not to worry about these women and the others, but they seemed healthy and maybe even somewhat content, in a sullen sort of way, and, besides, my business that day was with Joe's brothers.

My meeting with the Outlaws completed, we sat for a while, sipping our Budweisers and chatting about the local judges and the like. *They* weren't surprised that the Orlando trial judge had stayed Butch Sireci's execution. The Outlaws knew the local judges far better than I, which really isn't that surprising, when you think about it.

I last visited an Outlaw's clubhouse in October 1998.[546] The prosecution had offered Joe Spaziano a "no contest" plea bargain, and I had flown from Vermont to Florida to meet with him about whether he wanted to accept the plea offer. The day after meeting with Joe, I visited the Outlaws clubhouse in Jacksonville. I needed to confirm with Fuzzy Miller, the President of the Florida region of the Outlaws, that the Club would not object to Joe's

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543. *Id.*
544. *Id.*
545. *Id.*
546. *See generally* MELLO, WRONG MAN, *supra* note 58.

decision to take the plea. When Fuzzy invited me to meet him at the Outlaws' Clubhouse, I accepted on the spot.

Once again, the Outlaws were gracious and indulgent hosts. The visit turned immediately into a working session.

With Fuzzy's help, I wrote up a letter to Joe and a draft of a memorandum of plea agreement. Fuzzy invited me to spread my paperwork over the clubhouse bar, which I did in short order. He also allowed me to take over the Clubhouse phone and fax machine. Thus, for most of the afternoon, the Outlaws Clubhouse was converted into my mobile law office.

As always, I wrote in longhand, on yellow legal pads. Throughout the afternoon, I faxed the drafts back and forth to Laura Gillen in Vermont, who word-processed the documents and faxed them back to me at the Clubhouse. By the end of the day, I had a draft plea agreement and a final version of a letter to Joe. (I used my hotel as the address on the letter, lest the prison censors intercept the letter, as they might have done had I used the Outlaws Clubhouse as my return address).

Fuzzy and I remain in touch. In November 1999, I prevailed upon Fuzzy to review a draft book I had written about Joe's case.[547] Fuzzy agreed, and he corrected several factual inaccuracies in the manuscript.

Two days before the last Christmas of the millennium, an overnight mail package arrived at my home in Vermont. It was a book from my friend, Fuzzy, a beautiful book of photographs of the outlaws.[548] The stark black and white photos were powerful, but the reason I'll always cherish this book was Fuzzy's inscription, scrawled across the title page in black magic marker handwriting: "To Crazy Mike (Mello, Hell), the one not afraid to buck the system! Fuzzy 1%er O.F.F.O."

A little while ago, Fuzzy invited me to go on a ride with the Outlaws: "You got us right in your book, but you can't really know us without spending some time with us. Why don't you come on a ride with us?" Perhaps I will–in the interest of research for my book, of course. Of course.

But I digress . . .

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547. *See id.*

548. *See* MICHAEL UPRIGHT, ONE PERCENT (1999).

IV. THE JOURNALS: "IN THE YEARS WHEN MURDER WORE THE MASK OF LAW"

What can I bury?...
I have erected
A barrier, that my soul might be protected
Against the invading ghosts of what I saw
In years when Murder wore the mask of Law.

Seigfried Sassoon (1926)[551]

These journals are at their core verbatim transcripts of the contemporaneous diary I kept in as a law clerk in Alabama and as a public defender in Florida. For this essay, I dictated the journals and they were transcribed by Laura Gillen, Judy Hilts, and Virginia Fifield. I then edited the transcribed diary entries, adding some material from materials made contemporarily with the journals (correspondence, memos, legal filings, and the like) and from my own memory. As noted earlier in this essay, my principal reason for keeping the journal was as a memory-trigger. Thus, the diary entries provided here consist of both the bare journal entries themselves and the bits of additional material. At their core, however, these remain transcripts of the diary entries themselves.

You should understand a couple of additional things about these journals. First, I have edited them for content and taste. The original journals contain material protected by the attorney/client privilege, as well as some personal information about others not germane to my project here. Second, I have to a great extent maintained the shorthand-like form and abbreviations used in the original diaries, although I have included identifying information about people and courts, and I have spelled out what the abbreviations stand for the first time they appear; where additional explanations or editorializing was necessary, I have done so in the footnotes. As to many of the constitutional issues to which my journals refer, several are discussed and explained in the previous section of this essay.

The names of some of the death row prisoners mentioned in these journals you will probably recognize: Ted Bundy, "Crazy Joe" Spaziano.

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551. SEIGFRIED SASSOON, *A Footnote on the War* (1926), *in* SEIGFRIED SASSOON, THE WAR POEMS (1983).

Others are not names you will likely recognize. That does not matter. The legal issues mentioned in these journals are not issues (often referred to here in shorthand) you will likely recognize. That does not matter, either. All you need know is that each name refers to a person living on death row, and that the legal issues were shorthand for constitutional claims I and others raised in attempts, sometimes successful sometimes not, to save their lives.

The journals begin midway through my clerkship with Judge Robert S. Vance as his "death clerk," in Birmingham, Alabama With fear and trembling, I have applied for a job with the capital appeals division in West Palm Beach, Florida, the LDF of capital punishment in Florida. On New Year's Day 1983, I was visiting Ruthann, my significant other (with whom I later would collaborate on writing two Law Review articles and raising a child), at her home in Coral Gables, Florida.

A. 1983: Shiloh; Birmingham, Alabama

> Finding the lawyers to represent the flood of condemned (Florida men in the mid-1980s) was like bailing the Titanic with a teaspoon. The teaspoon had a name: Scharlette Holdman. Scharlette Holdman had a title: Director of the Florida Clearinghouse on Criminal Justice.
>
> David Von Drehle[552]

Saturday, January 1, 1983:
Coral Gables with Ruthann; we didn't have dinner at a fine French restaurant.

Sunday, January 2:
Coral Gables.

Monday, January 3:
Coral Gables.

Tuesday, January 4:
Interview with Craig Barnard and Richard Burr, West Palm Beach, Public Defender's Office.[553] 1:00 p.m.; drove there with Ruthann [my significant other]; interviews were intense, and they seemed to think RSV (Judge Robert S. Vance, for whom I was clerking at the time) is a hanging judge.[554]

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552. VON DREHLE, *supra* note 854.

553. The best account of this office's leadership role in capital litigation in the early 1980s is David von Drehle's book. *See generally id.*

554. I discuss my clerkship in general in MELLO, DEAD WRONG, *supra* note 2.

Wednesday, January 5:
Coral Gables. Wrote bench memos on pending dope cases. Read law review articles for *Holmes v. Continental Can Co.*, Title VII class action.

Thursday, January 6:
Coral Gables. Bench memos, Steven Todd Booker's[555] lawyer is awful: conceded much. *Wainwright v. Sykes*/procedural default stuff.

Friday, January 7:
Coral Gables. *Ford v. Strickland*[556] opinion, from *en banc* Eleventh Circuit Court, comes out in slip opinion form.

Saturday, January 8:
Coral Gables.

Sunday, January 9:
Coral Gables.

Monday, January 10:
Coral Gables. Interview with Attorney Joe Brown: pompous jerk: very impressed with self and used to being in control. Back in Birmingha.m., co-clerk tells me I got a letter from Craig Barnard.

Tuesday, January 11:
Flew from Miami to DC.

Wednesday, January 12:
Interview with DC Public Defender Service – very tough interview; dinner with Miller and Chevellier Law Firm.

Thursday, January 13:
Interview with Miller and Chevellier; flew from DC to Miami.

Friday, January 14:
Coral Gables. Interview with Bill Shepard falls through, because a trial of his was moved up.

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555. The Booker case is discussed in MELLO, DEAD WRONG, *supra* note 2.
556. Ford v. Strickland, 696 F.2d 804 (11th Cir. 1983) (en banc).

Saturday, January 15:
Coral Gables.

Sunday, January 16:
Drove from Miami to Birmingham, Alabama

Monday, January 17:
Back at work in Birmingham. Opinion in Robert Austin Sullivan's case (drafted by Ruthann) comes out. The opinions I drafted in *Stanley* and *Thomas*[557] sent to the printer.

Tuesday, January 18 - Friday, January 21:
Birmingham.

Saturday, January 22:
Drove from Birmingham to Miami to visit Ruthann.

Sunday, January 23:
Coral Gables.

Monday, January 24:
Drove Miami to Birmingham. *Hance v. Zant* opinion comes out in slip opinion form. Wrote follow-up letter to Craig Barnard and letter to Cravath, Swaine and Moore.

Tuesday, January 25:
Birmingham.

Wednesday, January 26:
Co-clerk Dick Evans and I argued about the *Foxworth-Bermudaezs* section of *Mers*.

Thursday, January 27:
Birmingham.

Friday, January 28:
Good letter from David O. Brownwood, hiring partner of Cravath, Swaine and Moore, re their job offer into corporate department.

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557. Stanley v. Zant, 697 F.2d 955 (11th Cir. 1983); Thomas v. Zant, 697 F.2d 977 (11th Cir. 1983).

Saturday, January 29 - Thursday, February 3:
Birmingham.

Friday, February 4:
Birmingham. Ruthann in Jacksonville. I finished draft of opt out issue in class action case, *Holmes v. Continental Can Co.*

Saturday, February 5:
Birmingham. Ruthann at Marge Piercy reading and workshop in Jacksonville.

Sunday, February 6:
Birmingham. Ruthann at Marge Piercy reading in Gainesville. Ruthann not pregnant yet.

Monday, February 7:
Birmingham.

Tuesday, February 8:
Proofed opinion in *Aladdin's Castle*. Ruthann in Young Harris, Georgia with Blanche.

Wednesday, February 9:
Ruthann arrives in Birmingham. *Thomas* and *Stanley* opinions out in slip opinion form, will arrive in office, dated tomorrow.

Thursday, February 10:
Stanley and *Thomas* opinions hit the street. Ann, the judge's secretary, and I proofed *Thomas* opinion. Conference on cases with the judge. He asked me if we can Rule 25 (per curiam affirm) a death penalty case, referring to the *Steven Todd Booker* case: "There's less here (in *Booker*) than I've ever seen in a death case yet. *Wainwright v. Sykes* it."[558]

Friday, February 11:
Proofed *Stanley* opinion with Ann. Research on civil fine issue in *Sanchez*.

Saturday, February 12:
Happy.

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558. I discuss Booker, Stanley and Thomas in DEAD WRONG, *supra* note 2, at 50-55, 78-82.

Sunday, February 13:
Ruthann and I drove to Atlanta for three judge panel hearing oral arguments: Judges Vance, Fay, and Allgood.

Monday, February 14:
St. Valentine's Day. Oral Arguments in Atlanta, Georgia. Joe Brown argues *Brooks*: Ugh. Slip opinion in Willie Jasper Darden's case[559] comes out. Research on *Sanchez* (Mariel Refugee Cuban boat lift case). Dinner with judges and law clerks: Judge Vance blithely tells the table that "tomorrow we have a light day, we just have one execution." Judge Fay says "Don't say that, you'll make Ruthann sick." Judge Vance gets very strange look on his face. Judge Allgood asks to be introduced to "your [i.e., my] girl"; Ruthann replies, "I'm Judge Fay's law clerk." I a.m. speechless.

Tuesday, February 15:
Oral Arguments in Atlanta. Ruthann and I find a Time magazine in the Peachtree Plaza Shop and find letter to the editor from Robert Austin Sullivan: we have a drink, but can't get the taste of it out of our mouths.

Wednesday, February 16:
Oral Arguments in Atlanta. Oral argument in Steven Todd Booker case, his lawyer was okay, he talks much better than he writes.

Thursday, February 17:
Oral Arguments in Atlanta. *Booker* assigned to Judge Fay, which means Ruthann will write the draft: probably will go off on *Wainwright v. Sykes* procedural default grounds. Drove back to Birmingham with Ruthann.

Friday, February 18:
Birmingham. Busy work for morning, then went home to Ruthann.

Saturday, February 19:
Ruthann leaves for Florida. Work on *Holmes v. Continental Can.*

Sunday, February 20:
Finish *Holmes* draft.

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559. Darden's case ended up in the Supreme Court. *See* Darden v. Wainwright, 477 U.S. 168 (1985).

Monday, February 21:
Sent Craig Barnard and Bill Shepard *Stanley* and *Thomas* slip opinions; proofed *Bloodworth*; discussed *Holmes* class action issues with Judge Vance.

Tuesday, February 22:
Called Atlanta for law review articles on hypnotism. One of Ruthann's co-clerks told her that she and I are "the hottest thing in the circuit."

Wednesday, February 23:
Proofed *Lindstrom* opinion with Ann. Ruthann learned that the Florida Supreme Court got to the merits of the *Smith* issue in *Booker*, so the federal courts must, too. *Booker*'s federal *habeas* appellate lawyer completely missed this issue: on to the merits of the *Smith* issue.

Thursday, February 24:
Bench memos in dope cases.

Friday, February 25:
Got law review articles on hypnosis. Ruthann found article on *Sullivan* case in magazine. Redrafted opinion in *Holmes* and wrote memo to Judge Vance on *Holmes*.

Saturday, February 26:
Shepardized *Holmes* and added miscellaneous cases and law review articles; looked over *Neff v. Kehoe* (screener) (an Alabama commercial case).

Sunday, February 27:
Finalized and gave dope cases bench memos to Judge Vance, shepardized *Bloodworth* and read it aloud, got cites from Westlaw on *Holmes* and shepardized.

Monday, February 28:
Bench memos on dope cases.

Tuesday, March 1, 1983:
Met with Judge Vance on *Holmes*, got tickets for Miami and West Palm Beach trip, worked on *Holmes* draft, did bench memo on hypnosis case.

Wednesday, March 2:
Got clippings from Ruthann on *Sullivan*. *Holmes* draft typed and given to Judge Vance; drafted opinion in *Neff*; listened to *Holmes* oral argument tape;

the judge gave me another screener (*Snug Harbor*); co-clerk Dick told me that the judge asked him if I'm wearing a wedding ring now.

Thursday, March 3:
Elizabeth Taylor, classmate from law school, called about her clerkship with U.S. Supreme Court Justice Harry Blackmun; revised *Neff* opinion most of the day, and the case may be put on an oral argument calendar; the judge said *Holmes* "looks right": put footnotes in and left on Ann's desk to be typed. *Stanley en banc* motion came in—testy, and didn't mention *Godfrey v. Georgia*, the most important U.S. Supreme Court case on the constitutional issues raised in the case.

Friday, March 4:
Played with *Neff* draft; told the judge that I'm free, and he gave me *Dollar v. Harrelson County* (a section 1983 civil rights case), and I did an Index of Legal Periodicals search for law review articles on civil rights cases: gave the judge law review articles and cases on hypnosis.

Saturday, March 5:
Xeroxed cases for *Dollar*; read bench memos and briefs; Westlaw search in civil rights case; got list of law review articles on section 1983 civil rights cases and constitutional torts; listened to oral argument tapes.

Sunday, March 6:
Xeroxed a brilliant law review article, Steven Gillers, *Deciding Who Dies*, in the Pennsylvania Law Review; made one copy for me and one copy for Ruthann; xeroxed cases on Section 1983 civil rights actions, for *Dollar*; mapped out *Holmes* and worked on *Neff*.

Monday, March 7:
The judge called Atlanta and told them to send a complete legislative history of the Section 1983 statute; Ruthann called: it looks like we can't get around the proper impeachment issue in *Booker*; in a new death case, *Campbell*, there seems to be a very strong argument on prosecutorial misconduct, that requires the court to choose between *Hance* and *Darden*; did law review literature search on death cases generally; found out that the new death case, *Campbell*, Georgia, was from the February 11 sitting (Judges Tjoflat, Morgan and Vance).

Tuesday, March 8:
The judge gone for the day. Started on bench memo in insurance case.

Wednesday, March 9:
The judge told me to make changes in *Mers* opinion; Ruthann called: *Booker* looks bad: it all comes down to whether it's proper cross examination: she will try to do Westlaw research and is working on the facts now, but looks pretty lousy; received law review articles on Section 1983 civil rights cases, and the judge asked for some to take on the bench; *Thomas* and *Stanley* come out in soft-bound F.2d volumes—I read them in bed; got in the forms to apply to the Florida Bar.

Thursday, March 10:
Worked on *Bivens* case; bench memos: the case looks too hard to do on a Thursday, so I put it aside and did a bank insurance memo instead; the Eleventh Circuit library in Atlanta called: putting together a legislative history of Section 1983—nightmare, but they're plugging away; I went through law reviews to try to pinpoint debates; learned today that D.C. Public Defender's Service wasn't going to offer me a job; Ruthann didn't get into Georgetown; worked on *Campbell* at home: finished it at 11:30 p.m.; the judge was in briefly, but I didn't see him.

Friday, March 11:
Revised *Campbell* bench memo: talked to the judge about *Hance* and *Darden* issues; called clerk's office for the State's *habeas corpus* opinion in *Darden*; the judge told me to proof *Bloodworth* again, because we must be cert.ain all the cites are right; the judge told me that *Snug Harbor* is fine, but *Neff* needs to be restructured: deference argument needs to be tighter; Ruthann did the *Sykes* issue in *Booker* and got around procedural bar, because of merits ruling by state court.

Saturday, March 12:
Proofed *Bloodworth* again: no better the second time around; xeroxed cases for bench memos; did bench memo on subcontractor case; started on *Delta Airlines* bench memo.

Sunday, March 13:
Did *Delta Airlines* bench memo. This will give the court a chance to gut *Bivens*, by holding no standing to raise the Fourth Amendment issue. A good companion case for *Dollar*: got *Bivens* and Section 1983 all in one session.

Monday, March 14:
Robinson v. Delta Airlines bench memo done; that's it for the April 11 oral argument sitting; saw letters from various judges in re *Stanley*: it's going *en banc*, I think! Judge Arnold's dissent is magnificent.

Tuesday, March 15:
Law clerks' grapevine has it that Judge Frank Johnson was "very disturbed" by *Stanley*, and that Judge Kravich just barely beat Johnson to the trigger asking for an *en banc* poll in *Stanley*: Both judges thought that Arnold's dissent was excellent; the *Hance* mandate has issued, so it's okay for me to rely on it in *Campbell*; Judge Vance mentioned to me that *Stanley* will probably be a 6-6 tie vote on *en banc*, with Henderson being the decisive vote; I asked the judge whether he would vote to take his own case *en banc*, and he replied, "Hell no I won't vote for it going *en banc*; I did it right the first time"; went over *Davis v. Page* votes with Judge Vance.

Wednesday, March 16:
Looked up cross examination cases on Westlaw for Ruthann on *Booker*; got *Holmes* back from Ann; listened to oral argument on *Holmes* and *Morrison*; West Publishing called with questions on *Mers: Mers* is in final page proofs, waiting to be printed. I told Judge Vance that Ruthann is ill and that I would like to go early to Miami: his response was, "You take a hell of a lot of time off; what do *you* do if *she's* ill?"

Thursday, March 17:
Flew from Birmingham to Miami, missing the Thursday conference with the judge and the other law clerks on the next sitting in West Palm Beach.

Friday, March 18:
Coral Gables. Randy, my co-clerk, called from New York: Judge Vance asked about Ruthann's health and is concerned about her.

Saturday, March 19:
Ruthann feeling much better; we went to Key Biscayne Beach and watched the sunset; went to the Renaissance Festival and ate a lot of great pork.

Sunday, March 20:
Coral Gables. Chores around the house. Washed Dillon, the sheepdog; made veal Parmesan; called my mother: all is well.

Monday, March 21:
Pabian (indictment dismissal case): reversed, the judge was rough on defense counsel for sleazy misuse of authority. The judge read the last sentence of my bench memo to the other judges, prefacing it with, "I don't countenance lack of respect. . ."; *Wainer*: former Judge Fay clerk argued well: joked about clerkship: judgment affirmed. Judge Vance gave me *Holmes* draft back with

few comments: "Ready to go"; co-clerk Randy commented on it, but not very helpfully; *Mers* out and *Martinez* out; I will draft opinion in *Pabian*.

Tuesday, March 22:
Ambrose; Judge Tuttle very concerned about government misconduct, but the judgment affirmed since the issue wasn't raised and preserved below; Judge Vance says *Mers* controls the entrapment (indictment) issue in *Frade* and *Doss*: Cuban boatlift cases, reporters and 10 priests in District Court, had awful lawyer who focused on weak issues: the lawyer for the government was superb: Judge Vance very frank about what bothers him about the case: judgment reversed, on *mens rea*, at least; will write *Burger King*: long and dull; Judge Henderson writes (Susan Sockwell, his clerk, has death penalty exhaustion of state remedies case); *Waskall*: Judge Vance says not reach hypnotism issue, and reverse on straight up Fourth Amendment grounds.

Wednesday, March 23:
Querra Barona: Judge Tuttle very concerned about mere presence issue; *DeWeese*: Tuttle will dissent from Judge Vance's and Judge Henderson's short judgment affirming the convictions: government attorney didn't seem to believe his own case: Judge Tuttle wants it to go before the *en banc* court: Judge Vance had prepared a two-paragraph per curiam affirmance; *DeArmas* (swimmers): Rule 25, summary affirmance; *Jones* (stop sign): Rule 25, summary affirmance; *Ramirez* (cocaine in roses): Rule 25, summary affirmance; my co-clerk Randy's friend said I seemed like a "real crusader"; Ruthann and I made chicken for dinner; Judge Tuttle clerk's interviewed with Jack Greenberg, NAACP Legal Defense and Educational Fund, Inc.

Thursday, March 24:
My twenty-sixth birthday; *Waskal* (hypnotism): Judge Tuttle writes: probably reverse on Fourth Amendment and not reach hypnotism issue: this is the only case I listened to the oral argument: spent the morning xeroxing materials, law reviews and cases on constitutional torts; talked with Judge Tuttle's clerk about death penalty cases: he has two, with *Lockett* issues: didn't know that *Stanley*, *Proffitt*, *Darden*, and *Sullivan* were all on point; Judge Fay approves *Booker*; *Darden en banc* poll: 6-6, with Judge Tjoflat's vote not in: Judge Vance voted no on *Darden en banc*.

Friday, March 25:
Rewrote draft opinion in *Neff*; Judge Tjoflat's vote in *Darden* still not in; proofed *Mers* draft opinion; Ruthann typed letters to Bill Shepard and Craig Barnard, enclosing my draft opinions in *Mers* and *Lindstrom*; *Booker* goes out

to panel (Judges Vance and Allgood); made notes on cross examination memo, if Judge Vance shows draft opinion to me before concurring.

Saturday, March 26:
Fiddled with *Holmes* draft class action issues; added a case that Ruthann found in the slip opinions; went over *Holmes* with Ruthann.

Sunday, March 27:
Proofed text of *Mers* with Ruthann; read three pages of Sheldon Nahmod article on constitutional torts for *Dollar*.

Monday, March 28:
Judge Tjoflat's vote is in *Darden*: *Darden* is going *en banc*, on whether *Witherspoon* is an issue of fact or a mixed question of law and fact; proofed *Mers* footnotes with Ruthann; wrote draft of memo on *Burger v. Zant*;[560] *Booker* should have arrived in Birmingham today; arrived in the office at 1:20 a.m.: bench memos typed; screener on my desk; left *Neff* in litigation bag and went home to sleep.

Wednesday, March 30:
Aladdin's Castle comes out in slip opinion form; xeroxed bench memos and gave to Judge Vance; Ann typed *Neff* and I gave to Judge Vance; made *Holmes* cart and gave it to Judge Vance; Ann complained and whined about *Mers* corrections which I gave Judge Vance and he approved; Judge Vance gives *Neff* to Randy to proof; the judge: "I'll decide *Campbell*, since Judge Morgan is a liberal"; *Delta Airlines* case: no jurisdiction: untimely appeal: government should be sueable, but this isn't the case; co-clerk Dick to proof *Holmes*; Judge called *Holmes* "very fine": Dick said, "Tell Mike": Judge Vance said, "I'm hesitant to praise him."

Thursday, March 31:
Gave the judge my memo on *Burger v. Zant*, HAC/heinousness aggravating circumstance issue; the judge concurs in *Booker*: *Booker* arrived in Judge Fay's office today, so it probably got out the day I came in here never talked to me about it: at least it makes some good *Wainwright v. Sykes* procedural default law—very good *Sykes* law, in fact; the judge went over *Holmes*; received stuff from Dad on Florida Bar; draft of *Hooks* (screener: severance) at home; Ruthann received flowers; called Elizabeth Taylor re *Booker*; Judge

560. The *Burger* case ended up in the Supreme Court. *See* Burger v. Kemp, 483 U.S. 776 (1987).

Vance dissents in part in *Brooks*: would go further in reversing the convictions, not just death sentences, in the capital case.

Friday, April 1, 1983:
April Fool's Day. Clerks met with RSV: he said *Holmes* is "very good: I like it: it's right"; very worried about case backlog in office: twenty-two cases, more than ever before in his chambers: problem is that we law clerks are treating too many screeners as big cases; I'm writing *Pabian*; Randy is proofing *Holmes*; *Burger* must wait until we're down to seven or eight cases; RSV interviews law clerk applicant from Vanderbilt, asked me to read his writing sample; RSV note in file: "Open" on *Campbell*: must ponder the effect of *Hance v. Zant*.

Saturday, April 2:
Ruthann goes to Key West to interview peace activist Barbara Deming for *Kalliope* magazine; sent draft letters to law firms for Ruthann to type, along with *Campbell* bench memo, Pullen article and *Lindstrom*; read articles on Section 1983 civil rights law suits for *Dollar v. Harrelson County*; Ruthann hears from Susan Griffin: she'll do the interview, so Ruthann is going to Kentucky conference next week; read RSV opinions in bound volumes, including his (Wendell Burt's) 1979 *Williams* case, giving the good faith exception to the exclusionary rule to the Fifth Circuit—issue now before U.S. Supreme Court in *Illinois v. Gates*.[561]

Sunday, April 3:
Read Section 1983 article; looked through *Pabian*; Ruthann interviewing Barbara Deming: it went very well, and she sounds very happy; talked strategy for getting it into *Kalliope* magazine.

Monday, April 4:
RSV says I, like his earlier law clerk Wendell Bird, have a few legal concepts we save up and are just waiting to write into law: with Wendell Bird, it was the good faith exception to the exclusionary rule: with me, it's death penalty stuff, especially wanting to invalidate the HAC/ heinousness aggravating circumstance in Georgia: in *Stanley, Green, Burger* and *Campbell*; *Campbell*: RSV says the only issue before us is *Eberhart*: no other prosecutorial misconduct is preserved, since the Georgia Supreme Court only considered the *Eberhart* issue on its merits, but Georgia waived it by not arguing it before

561. The Supreme Court ducked the issue in Illinois v. Gates, 462 U.S. 213 (1983). The Court recognized the good faith exception a year later, in U.S. v. Leon, 268 U.S. 897 (1984).

this court; gave RSV questions for UVA moot court board: death case problem: good faith exception to the exclusionary rule, diminished capacity. Judge Kravich stays mandate in *Sullivan*: minor language changes; last banquet: Dick and I go; Judge Kravich's dissent in *Antone* comes into Judge Fay's chambers, and Ruthann reads it: 30 pages: she only dissented on the *Barclay* issue: agrees with Ruthann's draft opinion on all other issues; Judge Fay and Ruthann think they should remand *Antone* in light of *Barclay*.

Tuesday, April 5:
Ruthann revising *Antone*,[562] to respond to Judge Kravich's dissent: Judge Fay agrees to remand per *Barclay*: Judge Kravich has no sense of strategy: this is *not* the case to make death penalty law with: her footnote sharply criticizes lack of analysis in majority: she doesn't seem to care about cases—just wants to write a law review article in each death penalty case; talked to Kembra Smith in Eleventh Circuit clerk's office: full record in *Pabian* on the way; gave RSV *Georgetown Law Journal* article critical of *Williams*, his good faith exception to the exclusionary rule case; *Hooks* (screener) typed and given to RSV; Judge Tjoflat's opinion in *Davis v. Page en banc* is in: Randy working on dissent; deep questions for moot court; met with RSV for two hours: no duty at all in *Dollar*: *Parrot v. Taylor* not apply: his approach makes no sense at all to me, but did draft of *Dollar* at home and wrote Ruthann bitter letter about it afterwards.

Wednesday, April 6:
Ruthann drives to Jacksonville, en route to Kentucky writers' conference; gave draft of *Dollar* to Ann to type; talked to RSV briefly: he seems concerned; proofed *Hooks*: goes out; *Neff* goes out to panel: "publish"; co-clerk Dick points out RSV was a city attorney before he was a judge; maybe that explains *Dollar*; argued with Randy on *Davis v. Page*: Tjoflat disagrees with her, so thus she thinks he's stupid; went through full record in *Dollar*.

Thursday, April 7:
Dollar typed and given to RSV; we got motion to add parties to speedy trial issue in *Mers*; we told RSV they may want to get in now, as a prelude to asking for *en banc* consideration of the issue; added professor George Rutherglen's *Virginia Law Review* piece to *Holmes* draft opinion; RSV: *Dollar* looks "right nice—I got the impression you were trying to keep it as narrow as possible": I said I'd give him a memo; spoke with Roger: he liked the approach and said Judge Allgood would also; drafted *Dollar* memo; Roger

562. I discuss *Antone* in MELLO, DEAD WRONG, *supra* note 2, at 175-78.

called to say Judge Allgood likes my draft; conference with RSV: *Campbell* appears dismissed as moot, because he died in prison; *Robinson v. Delta Airlines*: no timely appeal; RSV gives me *Yero* (screener) and says I can do *Burger v. Zant* draft opinion in my spare time; talked to Ruthann from payphone in Kentucky.

Friday, April 8:
Dollar memo typed and given to RSV; Ann typed second draft of *Dollar*, give to RSV; *Darden* and *Morrison* (Ruthann's draft opinions) came out in soft-bound volume of F.2d; *Mers* not out yet; RSV gives me another law clerk applicant writing sample to read: he liked the others; listened to oral argument tape in *Pabian*; Randy scurrying about, proofing *Holmes*, finishes substantive approach; my airline tickets to Miami arrive; RSV: "I'm taking *Dollar* and your memo with me to Atlanta": he asked if I *really* liked the negligence analysis better, and I said I had convinced myself; quote cases and law review articles on *Burger* heinous and aggravating circumstances issues; listened to oral argument tape: it's a straight up HAC/ *Godfrey v. Georgia* issue.

Saturday, April 9:
Did memo on *Holmes*, left it on Ann's desk; my cat Mithrender in the office with me: he is not too happy; Ruthann interviewed Susan Griffin today in Key West; started draft of *Pabian* opinion: finished at 1 a.m.. Wrote *Yero*: it took me less than an hour to affirm the convictions of three people; drafted a letter to Millard Farmer, withdrawing job application because of pendency of *Burger v. Zant* in Judge Vance's chambers: Farmer is *Burger*'s lawyer in the Eleventh Circuit.

Sunday, April 10:
Went over record in *Pabian*; fine tuned the draft; spoke with Ruthann from Jacksonville—she sounded exhausted; did draft of *Godfrey* issue for *Burger*: vast, excited, incoherent in places— must go slow, deliberate, and not overplay my hand: this is the case to strike, once and for all, the HAC/heinousness aggravating circumstance under Georgia's death penalty statute and, given pendency of *Zant v. Stephens*, may even invalidate most death sentences in Florida and Alabama, too.

Monday, April 11:
RSV in Atlanta for oral arguments: *Robinson* (*Bivens* case) argued; I read Randy's *Davis v. Page* dissent, and we argued; sent *Holmes* draft opinion to Ruthann, along with three rows of flag stamps; talked with David Vogel: he gloated about *Darden en banc*, said Judge Fay's miscite of a case swung Judge Tjoflat; Judge Fay hasn't spoken to Judge Frank Johnson in a month:

pissed at getting his hand slapped in *Darden*; *Stanley en banc* status—five votes in: Judge Fay no; Judges Johnson, Clark, Kravich and Hatchet yes; Ann typed *Holmes* final draft; finished draft of HAC/ heinousness aggravating circumstances issue in *Burger*: Vogel and Roger Bates will check bench books to see if Judge Johnson or Allgood commented on the *Godfrey* issue.

Tuesday, April 12:
Judge Vance in Atlanta for oral arguments. No votes in today on *Stanley en banc* application; added final paragraph to *Dollar*, and Fifth Circuit cases to *Burger*. Ann typed *Yero* and *Pabian*; gave *Burger* to her to type; started proofing *Mills*; co-clerk Randy finishes proofing *Holmes*; I intercept it on the way to Ann, look it over, read it aloud; read *Holmes* aloud with myself; Ruthann talks to Marge Percy: *great* talk; only minor changes in *Pabian* and *Yero*.

Wednesday, April 13:
Ann typed second draft of *Yero* and *Pabian*; left for RSV; *Stanley*: Judge Rony votes no; RSV told Ann he had a "no vote" in Atlanta: did not say who, maybe Judge Tjoflat. RSV said that by his own personal count, the score for *Stanley en banc* is tied at 6-6; called Shelda Harris: we're missing the State's brief in *Burger*: she'll send it from Judge Allgood's secretary, who was just looking at those briefs to throw them away: not bad on *Godfrey*, distorts record; *Stanley* flash: so far, RSV says he's picked up Judges Hill and Rony as "no" votes: "it all hangs on Judge Henderson"; called clerk's office for U.S. Attorney's manual on indictments, re *Pabian*; Ann begins typing *Burger*; David Vogel: Judge Frank Johnson *was* concerned about *Godfrey*; did *Sykes* procedural defaults issue; listened to oral arguments tapes in *Burger* and *Pabian*.

Thursday, April 14:
RSV in Atlanta for oral arguments: I asked him: "Do you want to do anything further on *Burger*?" RSV:"Not yet; I'm pondering it still"; (ARRGGHHH!!!!); called Florida Bar Review company: they sent stuff out to me in the mail on Friday; I left RSV a note on *Burger*; Ann and Mary Nell typed *Kemper*; RSV says *Yearo* is ready to proof; Judge Fay, when I called yesterday: "that was Judge Vance's law clerk, but he didn't want to leave his name"; no more votes in on *Stanley* on *en banc*; and types *Holmes* memo; give to RSV; played with *Pabian*, *Holmes*, and *Dollar*, waiting for Ann to type *Burger*; Ruthann thinks she will probably get *Kalliope* magazine jobs: she will hear tomorrow; Ruthann called re Bill Shepard and learned he is phasing out of civil rights work and is advising in lots of death cases; I called his office: he had a death warrant signed today on one of his clients and things are hectic: asked me to

write him a letter about interviewing him for a job; also awkward call with Craig Barnard, West Palm Beach public defenders office: no word on job until May: he did not "like" my opinion in Stanley. Ruthann and I read *Holmes* over the phone.

Friday, April 15:
Discussed *Dollar* with Ruthann: "awful law"—will try to narrow it for da.m.age control; Judge Henderson voted "no" on *Stanley en banc*: Ann gave me his vote and said, with no sarcasm, "this will make you happy"; Judge Anderson voted "yes" on *Stanley*: now it's up to Judge Tjoflat; *John Louis Evans* of *Evans v. Hopper* fame, Judge Vance's attempt to clear Alabama's death row,[563] which was slam dunk reversed by the U.S. Supreme Court now doesn't want to die: is petitioning the governor for a stay; RSV: doesn't expect trouble from Judge Tuttle on *Holmes*; proofread *Yero*: goes to panel, "do not publish"; talked with RSV re cases he heard oral arguments on in Atlanta; RSV: *Pabian* "reads well" and he likes *Dollar*, not mention *Burger*; dictated letter to Ruthann to send to Bill Shepard; assigned "*Boyd* privacy act" screener; I misread my *Stanley en banc* votes: Judge Goldbold's vote isn't in yet; sent *Burger* to Ruthann; and finished typing it. Night: restructured *Burger* draft opinion.

Saturday, April 16:
Looked up all cases citing *Godfrey* for HAC aggravating circumstance issue for *Burger* draft; read draft to Ruthann; Ruthann read an abortion short story to me: she wrote it yesterday; went over *Burger* again and again; Ruthann received *Pabian* draft.

Sunday, April 17:
Burger, Burger, Burger: Do I sound like a McDonald's commercial?; left *Burger* draft on Ann's desk; picked nits off of *Pabian*, *Holmes*, and *Dollar*—anything to avoid thinking about *Burger* and *Stanley*: I'm going to hell for those cases.

Monday, April 18:
Co-clerk Dick gave me newspaper articles on Evans impending execution; went over *Burger* in detail with Ruthann; RSV: I'm proofing *Davis v. Page* dissent: "drop all else," in Alabama "if there is anything wrong with it, they will kick my butt," was RSV's remark; Ruthann and I went over *Pabian*, Ann

563. I discuss *Evans* and the effect I think it had on Judge Vance in MELLO, DEAD WRONG, *supra* note 2, at 46-47.

typed it; made up cart for RSV; Ann gave RSV my *Burger* draft and asked for a "priority": he said hold it; RSV found something wrong in *Mills*, so he gave it back to Randy, hold off proofing; showed RSV my proposed *Dollar* insert, re negligence: he did not buy it, saying my insert "conceded too much": no more than four judges would vote to take it *en banc*; still no word from Judge's Tjoflat - *Stanley* is finished; saw Chief Judge Godbold's *Stanley* letter on RSV's desk: it's over, though he still will give judges until April 25 to change their minds.

Tuesday, April 19:
Mailed job letters to Bill Shepard and Millard Farmer; RSV gave me *Johnny Harris* case, to bench brief for special sitting; sort of a death case, with Anthony Amsterdam, Jack Greenberg, and David Kendall, on the briefs; Ann typed *Dollar*; I made cart and gave to RSV; also typed proof of *Holmes*; got proof copy of *Mills* from Ann; Governor George Wallace denied *John Evans* clemency; RSV's only change to *Dollar* was to change "Ms." to "Mrs."; proofed *Davis v. Page* dissent; left on RSV's desk; RSV: "Judge Randall, like Michael, wants to settle the law in every case"; RSV: "there are now twenty-two cases in my office, not counting *Dollar*, *Pabian*, *Holmes* and *Davis*."

Wednesday, April 20:
Kalliope job falls through for Ruthann, probably; sent *Pabian* draft opinion to Ruthann; Randy and I met with RSV, on *Davis v. Page*: he agreed that *Sosna* should be the law and gave to Randy to rewrite; Dick got *Dollar* to proof; he finishes *Pabian*; talked to RSV re *Burger*: he seems to agree with me, will wait: I read parts of the opinion draft to him; at *Burger* meeting RSV asked who's on the panel: how many aggravating circumstances there were he said he thought putting the victim of the crime in the trunk of the car was "torture" for purposes of the HAC/heinousness aggravating circumstances: I read *Sanstrom* part of the draft to him as well as the part on mental-physical stuff: he said counsel and judges said *Stephens v. Zant* controls, but I argued it controls only one issue in the case, and not the rest.

Thursday, April 21:
Gave RSV *Chagra* (administrative law case); started on *Boyd* Privacy Act case; next case will be *Kemper Insurance Company*; he suggested *FDIC*, but I said I would screw that one up: he said wait on *Burger* until decks are clear—told him this is a final draft, if he buys the analysis; Ruthann: RSV gave me *Nycek* open "screener"; *Evans* scheduled to be executed tonight at 12:01 a.m.; I left proof of *Mills* on Ann's desk to type the final version; I'm proofing RSV's *Zamiri-Salfi* opinion (extradition); Judge Reverly asks for *en*

banc in *Aladens Castle*; as I'm doing final proof on *Davis*, Judge Randall calls RSV and said hold it until we see the Supreme Court's choke hold decision, which he said is definitive on standing issue; Angela Davis had a moment of silence for *Evans*; signed book, U.S. Supreme court denies *Evans* stay; RSV tells me at 5:15 p.m. about it: says the next step for him is Federal District Court in Mobile, Alabama. Came into office at 10:20 p.m.: heard on Ann's radio that *Evans* got a stay from Judge Cox from Mobile at 9:30; the State of Alabama is in Atlanta, trying to dissolve Judge Cox's stay. 10:37: Eleventh Circuit is deciding the issue and will rule tonight. 10:39: a Judge sounding like Judge Lanier Anderson, called RSV at the office and I said he's at home: Judge Anderson said "you know this *Evans'* case is in the Eleventh Circuit?". 11:50, at home: "Eleventh Circuit upheld Judge Cox's stay."[564]

Friday, April 22:

8:00 a.m: Alabama "frantically" petitioning the U.S. Supreme Court to dissolve the *Evans* stay;[565] *Booker's* slip opinion comes out; proofed *Za.m.ari Salfei*; *Evans*: RSV, Roney and Anderson were the emergency Eleventh Circuit panel last night: they see it as the abuse of the *habeas* writ case; *Evans* lawyers raised two issues: *Lockett* and *Profitt* "jury instruction on endangering many people"; Federal District Court Judge Cox's in Mobile Alabama did not understand it: they had conference call last night, with the parties on Judge Cox's phone: it was Anderson that called last night; Judge Cox just doesn't understand the legal issues and needed more time–*that's* why they upheld the stay—not get to the merits of any of *Evans* constitutional claims; RSV thinks *Evans* lawyers waited too late to go into court: "good chance" panel will dissolve it; his opinion on Tuesday was sweeping"; read the entire record. 8:30 a.m.: Birmingham newspaper says *Evans* was executed at 8:30; I called the newspaper: they said it's on TV and Public Radio; Supreme Court denied the stay at 7:30;[566] nothing on commercial radio yet. 8:47; radio interrupts baseball game; on the phone with Ruthann at 8:55: "executed 25 minutes ago"; eyewitnesses report that they had to electrocute him twice before they killed him. 9:30 a.m.: They did it *three* times;[567] Smith press conference: the station alternates between baseball and news of *Evans* execution.

Saturday, April 23:

Florida bar application; Ruthann read her *Evans* poem; I put together *Evans'* news clips.

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564. Mello, *Rough Justice*, *supra* note 445, at 1224.
565. *Id.*
566. *See id.*
567. *See id.* at 1224-25.

Sunday, April 24:
Ruthann's mom's birthday; sent *Evans* news clips to Ruthann; played with *Burger* and Florida bar application; no energy; need mindless work; very sad.

Monday, April 25:
Final proof on *Miles* and *Zarmari Salfei* and *Davis v. Page*: go out to Judge's panel today; Mary Nell now has been typing a paper for RSV's son "over 50 pages," last weekend, today, as *Burger* sits on her desk, untyped, since last Monday; Terry Pierce: "any capital punishment cases?" RSV: "we fried one customer on Friday"; RSV: "lightweight stuff before any heavies," i.e. *Burger*; last day for judges to change their minds on *Stanley en banc*.

Tuesday, April 26:
Left note for RSV re *Burger* at noon; at end of day, RSV left *Burger* on Ann's desk; Ruthann received *Evans* news clips; Ruthann loves me; RSV tells Ann to call West Publishing Company and put a hold on *Aladans Castle* opinion.

Wednesday, April 27:
Ann typed eight pages on *Burger* today; I started *Nychek* screener; *Stanley*: RSV said Judge Roney said he'd vote it *en banc* if the vote was six-six, but he thinks *en banc* court has made a mess of death cases, so no *en banc* consideration for *Stanley*; Tuttle concurs in *Holmes* and *Pabian*, and calls *Holmes* "excellent"; Judge Fay joins *Dollar* opinion; all eight Texas judges ask for *en banc* in *Aladan's Castle*: it's going, says RSV; RSV said last week that Judge Randall spoke with all Texas Supreme Court Justices at judicial conference, and all said we misread Texas law in *Aladan's Castle*; *Stanley* poll arrived: six to six, so panel opinion stands; Randy says RSV is "furious" re *Aladan's*, and will wait ten days to cool down before responding; discussed *Johnny Harris* case with RSV: he's open; not inclined to find ineffective assistance of counsel.

Thursday, April 28:
One death case in June: read Anthony Amsterdam's brief in *Zant v. Stephens* issue; recusal slips in; no briefs yet; RSV circulated to law clerks final orders in *Evans*; petition for re-hearing *en banc* came in for *Mers*; Judge Anderson dissented in *Neth.*; talked and philosophized about death cases, *Evans*, crim. law, etc. with RSV: he thinks *Stanley* may go up to U.S. Supreme Court on presumption of ineffective assistance issue; looked over *Harris* draft; Ann has typed fifteen pages of *Burger* in her spare time; *Stanley en banc* denial sent to clerks office in Atlanta.

Friday, April 29:
Judge Henderson concurred in *Pabian*: that's all three; so it goes to the printer now; spent the morning filing and doing other routine chores, ignoring *Burger*; read law reviews on death penalty, waited for *Burger*; Ann is out for the afternoon; RSV bounced ideas for presentation at judicial conference on federal/state friction, the main one being death penalty cases; co-clerk Randy asked about Judge Tjoflat's letter about *Davis* dissent: we discussed it; *Mers* is out in soft volume; Allgood concurs in *Dollar*, so it goes to the printer; end of day: *Burger* not at machine, on Ann's desk. I'm furious.

Saturday, April 30:
Xeroxed articles on First Amendment and other stuff that interest me, possibly for a law review article on the Pentagon Papers case and prior restraint; I a.m., as they said in the 60's, on strike (at least for this weekend); did *Johnny Harris* bench memo.

Sunday, May 1, 1983:
Xerox First Amendment articles, Section 1983 cases for *Boyd* screener.

Monday, May 2:
RSV not in office today; no sign of *Burger* opinion from Ann; finished Florida Bar application; asked Mary Nell to run *Burger*, but she didn't; Mary Nell typed *Harris* bench memo: on her desk at 9:00 a.m.: she got it done at 3:00 p.m., and it's three pages long; *Freddie Goode* opinion comes out: Judge Anderson granted *habeas corpus* writ: seems to be controlled by *Barclay*: will talk to RSV: Judge Anderson's opinion is extremely vulnerable, seems to me.

Tuesday, May 3:
Bill Shepard gets stay from Florida Supreme Court in his *Alvord*, death warrant case; Ruthann had heard that a stay had been granted, and called Jane and found out that it was in Shepard's case; called Shepard and spoke with Susan White, re job interview: *Evans* and *Barefoot*: they got the *Evans* stuff I sent; drafted *Burger* memo; Ann finished typing and printing *Burger* draft opinion: gave to RSV; left the *Burger* draft on RSV's desk at 3:00 p.m.; at the end of the day, it was still in the "in" box; left *Burger* memo on Ann's desk to type.

Wednesday, May 4:
Thirteenth anniversary of the shooting at Kent State University. Noon: *Burger* still in RSV's "in" box; did not want to discuss *Harris* because he hasn't read the briefs yet; listen to *Burger* oral argument tape; xeroxed Privacy Act cases for *Boyd* screener: talked with RSV about it; received briefs for next sitting:

looked over *Roosevelt Green* (NAACP death penalty case); Ann typed *Burger* memo: left on RSV's desk; *Burger* is out of RSV's "in/out" box, but buried on his desk: progress?

Thursday, May 5:
Flew from Birmingham to Miami; argued with RSV about length of *Harris* draft opinion; and on *Burger*: I knew he (RSV) wasn't in any hurry to get to that: "you're (i.e. me) the one in a hurry"; called Bill Shepard: will meet Monday night; changed to Tuesday, because Ruthann has court date on Monday morning; Shepard says to "drive safely."

Friday, May 6:
Ruthann and I went to day correctional institution (*i.e.* prison) with Lucy Batchelder: Ruthann and I were cross-examined by two jailhouse lawyers: minimum security, but still definitely a prison; we discussed our jobs as law clerks, they said public defenders are "worthless": discussed problems getting prisoner's mail to the outside world, plea bargaining system: Lucy B. is a wealthy liberal, but does good work, and has been since 1938: great time; we brought rocking chair; Chinese food; thirteenth anniversary of the killings of two Black students at Jackson State, Mississippi, University.

Saturday, May 7:
Worked on RSV's stuff on beach; dinner at Joe's Stonecrabs; co-clerk Randy called after midnight: can't get into apartment; Judge's Randall and Anderson joined *Davis v. Page* dissent; RSV spoke with Judge Sam Johnson: Judge Randall's *Aladen's Castles* dissent is right; RSV has said nothing to Judge Randall about *Burger*.

Sunday, May 8:
Monty Trainer's restaurant, briefly.

Monday, May 9:
Called Bill Shepard: spoke with Susan: job interview still on; drove Miami to Jacksonville; Ruthann court date 9:00 a.m. in Hialeah, with Rosemary.

Tuesday, May10:
Meet with Bill Shepard at 6:30 p.m.: job interview went well, I think: met Betsy White: he said I should do 50 % death work, 25 % prisoners civil rights, 25 % BS: he said he was "real serious" about getting funding to match his funding for me to do death penalty work: he's enthusiastic: he knows *Robert Austin Sullivan* and *Anthony Antone*: gave me Judge Krentzman's opinion in *Alvord*, his recent death warrant case: The opinion relied on my *Stanley*

opinion, which was quite depressing: Shepard said the thing that impressed him most is my persistence in bugging him until he hired me to do death work at his law firm: he will let me know by mid June: asked me to keep him posted about Craig Barnard and the possibility of a job in the West Palm Beach Public Defender's Office; flew Miami to Birmingham.

Wednesday, May 11:
Oral argument in *Johnny Harris* case in Savannah, Georgia: Judges Vance, Fay, and Tjoflat on panel; started drafting a letter to Shepard about *Alvord* and *Stanley*. 11:00 p.m.: arrived at RSV office: *Burger* not moved: memo drafted May 5 from RSV, demanding explanation for Xeroxing the previous weekend, and saying to divide up bench memos among my two co-clerks while I'm gone.

Thursday, May 12:
Did not say a word to RSV today; Xerox memo written and left on his desk; looked at bench memos; too fried to work; John, Ruthann's ex-husband, will take her bed at 8:00 p.m. tonight; wrote letters to Bill Shepard; updated resume; Judge Allgood's secretary said she would type up resume for me; co-clerk Dick said Alabama lawyer did not show up for *Harris* oral argument in Savannah: called in sick; he also said that Professor Dan Meador, UVA law school professor, blasted the U.S. Supreme Court for it's treatment of death penalty cases, and Supreme Court Justice Lewis Powell took copious notes while he did so; *Davis v. Page*: looks like we've lost: Judge Vance dissented, and Judge Randall is writing separately.

Friday, May 13:
Friday the Thirteenth, my lucky day; dictated letter to Bill Shepard to Ruthann over the phone so she could type it; left resume on Virginia's desk; *Westbrook v. Zant* comes out: awful opinion for the HAC/*Godfrey*/heinousness aggravating circumstances issue in *Burger*: left it on RSV's desk; it gives him the ammunition to kill *Burger*; wrote note; talked with RSV for two hours about *Burger*: he read it a week ago and says it's "very well written," but does not want me to "reach out" and "play god." He's inclined to wait for the U.S. Supreme Court to decide *Stephens v. Zant* before we do anything on the HAC/heinousness aggravating circumstances issue in *Burger*: he does not have a strong gut feeling about it either way; he will call Judge Hatchett about his *Westbrook* opinion: wants to know why he should stick his neck out for this HAC/heinousness aggravating circumstances issue: thinks its all jury instruction stuff anyway, and those are bullshit anyway ("juries never pay attention to jury instructions—only appellate courts do"): Judge Anderson is the only Judge who automatically vacates every death penalty case: RSV said

"don't think of my views as static; they change (re death cases)": he said: "you're the only person in the circuit who thinks HAC/*Godfrey* and the heinousness aggravating circumstance issue is important: I've spoken with my colleagues several times about this issue, and none of them cares about your issue"; *Harris* affirmed in one paragraph opinion.

Saturday, May 14:
Did bench memo in *Jordan, Ortega* and *Herbone*; did draft of note to RSV "on playing god."

Sunday, May 15:
Bench memo on *Roosevelt Green:* death case from Georgia: *Godfrey*/heinousness aggravating circumstances issue; drafted letter to Judge Hatchett about his opinion in *Westbrook* and its impact on *Burger* and HAC issue generally.

Monday, May 16:
9:45 a.m.: Gave RSV draft letter to Judge Hatchett in *Cohen* "just in case you want to write to him. . . ."; RSV: "ok, I have a call in for him, but he is not in today"; RSV says *Nychek* screener ok: wants me to proof it: I did; RSV talked to Judge Kravich: she does not care about the HAC/*Godfrey*/heinousness aggravating circumstance issue in *Burger* or *Green*: I suggested he talk to Judge Frank Johnson, but he said no; Virginia finished typing my resume: copied, stapled; Randy: RSV said this morning that I must be having "catatonic fits" on *Burger*, because of Judge Hatchet's opinion in *Westbrook*; RSV gets notes from Judge Randall *re Davis v. Page* and *Aladan's Castle*: I think she destroys us on *Aladan's Castle*, exposes our attempt to insulate the opinion from subsequent review by the U.S. Supreme Court.

Tuesday, May 17:
Sent packets of job application materials to Bill Shepard; RSV talked with Judge Hatchet: he "had no idea"he was zapping all HAC/*Godfrey*/heinousness aggravating circumstances cases when he wrote *Westbrook*, and doesn't intend to do that: he's "very disturbed" by the HAC/ *Godfrey*/heinousness aggravating circumstance issue; RSV said he is the only judge in the country who is concerned about HAC/*Godfrey*/heinousness issues, and that Hatchett said *he's* also concerned. Judge Hatchet said he would change *Westbrook*: it wasn't in holding in his opinion in any way—it was only dicta, so it can easily be removed; RSV had me xerox my *Burger* draft and sent it to Judge Hatchet; *Mers*: Judge Goldbold letter points to a guideline section I missed: not do anything on it now: I told RSV "I missed it"; RSV gave me two screeners,

Terry and *Gibson*; *Burger* draft went out without being proofed; RSV: it will be a month before we have anything about *Burger*; I did *Perry* screener.

Wednesday, May 18:
Dollar and *Pabian* come out in slip opinion form; did *Gibson* screener; was in RSV's office when Judge Godbold called, taking a "death case survey": RSV said *Burger* is waiting for two cases in the U.S. Supreme Court and the Eleventh Circuit—"*Zant v. Stephens* in the U.S. Supreme Court in *Westbrook v. Zant* in the Eleventh Circuit," and told Godbold what we did with my draft: so it looks like he's sitting on it; talked with co-clerk Dick about RSV and me on *Burger*: we're suspicious of each other: RSV looked funny when Dick said I was writing bench memo on *Roosevelt Green* case; he said RSV intimated I wouldn't write another death case as his law clerk: he's pissed that I went ahead and wrote a draft in *Burger* on my time, without his authorization: he said he's not afraid to write death cases himself; Mary Nell typed *Gibson* and *Perry* and three bench memos; RSV also told Dick again that he thought my *Holmes* draft opinion was "marvelous."

Thursday, May 19:
Proofed *Terry* and *Gibson* screener; played with *Boyd* screener and we discussed it; RSV said he alerted Judge Frank Johnson about what he had done in *Burger*, and he was pleased that Judge Hatchett was going in, too: four to six weeks minimum before anything is decided, because Judge Clark, on *Westbrook* panel is in Europe. 12:30: Judy, Judge Hatchett's secretary, called, and said the Judge would call RSV this afternoon: she read me a sentence he changed in *Westbrook*. 1:50: RSV said Hatchett not called yet, but the sentence change didn't go far enough. 4:30; RSV gave Mary Nell the typed *Green* bench memo: gave to RSV.

Friday, May 20:
Judge Hatchett called: RSV said he needs to go further in modifying the *Westbrook* opinion; RSV is waiting on *Burger* "a month at least, before anything will move on *Burger*": Judge Hatchett is "in no rush," probably because Judge Vance told him not to be in any rush; wrote *Boyd* draft opinion, but did not leave it to be typed: I will let it sit, keeping *Burger* company: what the hell: left it on Ann's desk; Judge Hill concurs in *Holmes*, so its off to the printer; RSV says nothing, of course: I found out by looking in the file; *Mers* comes out in slip opinion form.

Saturday, May 21:
Cleaned out apartment for Ruthann's visit; Westlaw "times/places/manner" and added recent cases to *Boyd*; left on Ann's desk, again.

Sunday, May 22:
Ruthann flew from Miami to Atlanta: arrived 1:40, Delta airlines; at airport; drive to Atlanta: leave at 9:00 a.m; t-bone steak at Holiday Inn.

Monday, May 23:
Ruthann in Atlanta, where Judge Fay is sitting for oral arguments all week; I drove from Birmingham to Atlanta in the morning, after breakfast; gave RSV two bench memos; wrote memo on *Boyd*; Mary Nell typing *Boyd*; made up cart and gave to RSV on *Boyd*; I'm feeling burned out from the drive; Ruthann heard an oral argument about HAC/*Godfrey*-heinousness aggravating circumstance-*Stanley-Burger-Green* issue in *Willis v. Zant*, a death case out of Georgia; left note for RSV about *Willis v. Zant*: also a case mentioned *Mers*: Ruthann thought that things looked good in *Willis*, after the oral argument, and after the conference: solid prosecutorial misconduct argument in addition to HAC/*Godfrey*-heinousness aggravating circumstances issue; received Judge Anderson's dissent in *Neff*: RSV not say anything to me about it.

Tuesday, May 24:
When I gave RSV note on *Boyd*, he said "another note on *Burger*?" RSV: get rid of all the First Amendment stuff and *Boyd* stuff except one paragraph: "this case feels like trash to me": "all we're doing is writing a textbook here on the First Amendment"; proofed *Dollar* and *Pabian*; saw on RSV's desk a letter to him from Judge Hatchett, saying he agrees with "your law clerk" about HAC/*Burger-Godfrey*-heinousness aggravating circumstances issue and copy of letter he sent to Judge Kravich and Judge Clark about proposed changes in Judge Hatchett's *Westbrook* opinion: spoke with RSV: he will wait a bit, and then talk to Judge Frank Johnson about the HAC/*Godfrey*-heinousness issue; RSV came in and gave me *Benton* (screener) and memo to do on "what is a security?," for purposes of the Securities and Exchange Commission statute.

Wednesday, May 25:
Drove to Atlanta at 5:30 p.m.; drove from Atlanta to Birmingham in morning; sent in bar review forms and check to master charge account; proofed *Boyd*: goes out stamped "published"; looked up cases for Securities and Exchange memo; told co-clerk Randy that RSV was asking for *en banc* in Judge Kravich's Haitian refugee case: when I told her that Randy went nuts: said that killed *Frade* and *Doss*; spoke with RSV at great length re *Burger*: he has strong gut feeling that the U.S. Supreme Court will say something relevant in *Zant v. Stephens*: thinks the way I drafted the *Burger* opinion would be far reaching, and he's also very concerned about other work in the office.

Thursday, May 26:
Picked up Ruthann and drove to Birmingham; wrote *Bretton* screener in Atlanta in library; left on Ann's desk; had lunch with Ruthann, Judges Fay and Anderson: talked about death cases; Fay said we would never rely on waiver/procedural default in death cases: Judge Anderson seemed real pleased with *Goode* (he wrote it himself?): Judge Anderson also asked about Ruthann and I, while Fay, beamed: "not that I pay attention, but I heard a clerk for RSV is dating a clerk for Peter Fay"—busted by Judge Lanier Anderson.

Friday, May 27:
RSV: *Willis* panel isn't writing to the HAC/*Godfrey*/heinousness aggravating circumstance issue: they're granting the writ of *habeas corpus* on another ground; Judge Clark's opinion in *McCorquadale* came in: seems to me to be controlled by *Darden*; proofed *Benton*; RSV: Judge Godbold concerned about *Booker*: was an impeachment?; RSV: *Kemper* is an easy case, even though Tjoflat will dissent, we shouldn't worry about that; read law review articles on security regulation; RSV modified *Davis v. Page* and sent it out, with a note to Judge Randall; he and co-clerk Randy went over it yesterday.

Saturday, May 28:
Ruthann typed letters to Shepard and finished my Florida Bar application; we went to the zoo and to Rube Burrows for dinner.

Sunday, May 29:
Drove Ruthann back to Atlanta; drafted first part of securities regulation memo and most of second part at home; power went out in my apartment.

Monday, May 30:
Finished securities regulation memo; left on Ann's desk; she and Mary Nell not in today; RSV: no word from Judge Kravich about *Westbrook*: should know by *en banc* sitting time; listened to oral argument tape in *Federal Kemper Insurance Company*; read insurance cases; wrote note about *Booker*. left on RSV's desk; discussed *McCorquadale* with him; wrote dope case bench memo, left for Ann to type; while on Westlaw for *Thomas*, found that Ruthann's *Antone* opinion is out in slip opinion form, dated May 26th.

Tuesday, May 31:
Notarized and had fingerprints taken for Florida Bar Application; Ruthann gets *Alvord*'s slip opinion; Judge Roney asks for *en banc* poll in *McCorquadale* and *Jaffrie* (Alabama school prayer case); RSV: "you have three minutes to lobby *Darden* to me," *i.e.*, why he should vote to take *Darden*

en banc: I tentatively got him to agree that (1) no District Court discretion on *Witherspoon* issues and (2) if fact finding is to be given a presumption of correctness in *Witherspoon* cases, then it must be explicit and on the record: state court must say "why" it thinks a juror isn't solid enough to sit on a death case.

Wednesday, June 1, 1983:
Proofed *Benton*; finished draft of *Kemper*, left on Ann's desk to type; RSV: I'll proof *Rogers* and maybe *Frade* to avoid writing *Mers*: also see how the Georgia Supreme Court defines "torture" for HAC/*Godfrey*-heinousness aggravating circumstances purposes, re *Burger*; RSV wants to nail down what's troubling him about my *Godfrey*-heinousness argument: physiological torture is enough under Georgia law, it seems: that may be the end of my HAC/*Burger-Godfrey*-heinousness issue; left RSV a note, along with the cases, not quite conceding defeat on physiological torture being sufficient under Georgia law, but coming very very close.

Wednesday, June 8:
Holmes comes in: RSV: "That one should get a good bit of notice: Judge Rubin of the Fifth Circuit wanted me to send it to him as soon as it came out"; RSV gives *Kemper* to Dick to proof and *Frade* to me to proof; RSV: "My clerks normally leave July 31, but that's not ironclad: you sweating something?" I said it would be premature to go into it now; RSV: "We'll talk about it again in a week"; called Atlanta for record in *Phillips*; wrote draft of *Phillips* at night.

Thursday, June 9:
Did bench memo on *Hooks v. Wainwright*, mammoth civil rights class action brought on behalf of all Florida state prisoners; played with *Phillips*, left on Ann's desk; Ann accused Ruthann and I of being indiscrete; proofed text of *Holmes* with Ann; Ruthann and Judge Fay talked about *Darden* and *Lisenbee*: he joked about her outwitting him, and getting *Lisenbee en banc*: she told me Fay kept bringing it up; Ruthann: Supreme Court dodged *Illinois v. Gates* good faith exception to the exclusionary rule, and went off on *Aguilar/Spinelli* probable cause for an informant's tip grounds, and overruled *Aguilar* and *Spinelli*; sent *Holmes* opinion to Bill Shepard; P.m.: got BRC bar review books, and looked over introduction.

Friday, June 10:
Discussed *Phillips* with RSV: Mary Nell typed it up and gave to RSV: he said it looks right; Ann typed *Hooks* bench memo, gave to RSV; proofed *Holmes* footnotes with Ann; discussed pending U.S. Supreme Court death cases with

RSV: he thinks they're "ready to explode" and that Supreme Court Justice Louis Powell may be able to consolidate the right wing of the court; he'll talk to Judge Frank Johnson, at the *en banc* sitting, about *Burger*: do not know if we'll wait for the U.S. Supreme Court to decide *Zant v. Stephens* before we issue an opinion in *Burger*; he took my draft with him at night to give to Frank Johnson, and he also took copies of my memos to him on HAC/*Burger*; Judge Hill sends biting letter on Judge Clark's *McCorquadale* opinion; called Bill Shepard, but he's in a conference, so I left my number.

Saturday, June 11:
Studied Florida Civil Procedure and Florida State Constitutional Law section for Florida Bar Review course; RSV's notes in file suggests he's concerned about the juror issue in *Green v. Zant*, and thinks one issue needs to wait for *Barclay v. Florida* to be decided by the U.S. Supreme Court; read *en banc* motions for *Dollar*; Ruthann drove from Miami to Jacksonville.

Sunday, June 12:
Ruthann drove from Jacksonville to Atlanta; met with Ruthann at Atlanta airport; she seemed nervous to me.

Monday, June 13:
Ruthann in Atlanta for *en banc* oral arguments: *Lizenbee* argued (Ruthann had drafted the panel opinion in *Lisenbee*): she'll write draft of *en banc* opinion; *Athens Lumber* (First Amendment and federal election committee case; my securities regulation case will be a unanimous decision, but it has not yet been assigned to a judge to write the opinion; finished Florida Con Law part of Bar review Intro; David Vogel: not hear anything on *Burger*.

Tuesday, June 14:
Darden argued in the *en banc* court, and lawyer was pretty awful: he did not know the law or the facts or the record: 6-6 vote, affirming district court; RSV: not talk to Judge Frank Johnson yet, *re Burger*, but he will tomorrow at the judicial conference; Ruthann and I decided to get married.

Wednesday, June 15:
Listened to tape in *Phillips*; read EEOC cases; made cart of cases and left for RSV; *Antone* is in, dated June 13; read *en banc* petition in *Pabien*; noticed that, in the *Antone* decision, missing was the nasty language of Judge Kravich; got law review tapes and listened to Intro.

Thursday, June 16:
Sent money to reserve Orlando hotel room for Florida Bar exam.; RSV: he discussed *Burger* with Judge Frank Johnson, and he's pondering it: RSV voted to reverse *Darden* on *Witherspoon* grounds: *McCorquadale* is going *en banc*, 10-2: Judge Rony has six death cases circulating among various judges on various panels; I worked on proofing *Frade*; RSV: *Phillips* looks okay: proofed it myself; Ann typed final draft; my *Burger* draft is back on RSV's desk.

Friday, June 17:
7:15 a.m.: home test says Ruthann is pregnant; final proof on *Phillips*; it goes out to panel; plodded on with *Frade*; called Bill Shepard, again: he's still not in.

Saturday, June 18:
Ruthann typed letters to public defenders, including Craig Barnard at West Palm Beach; I still can't get Bill Shepard to return my phone calls.

Sunday, June 19:
Drove Ruthann to Atlanta, where she just barely made her plane to Miami; listened to Florida Con Law tapes for Bar review on the drive back from Atlanta to Birmingham; mailed letters to public defenders; I did diagnostic self tests for Bar exam. study; still no one home at Shepard's office.

Monday, June 20:
Studied Florida Civil and Criminal Procedure for Bar exam.: skimmed, too tired from computer cards and self tests to really study; did computer cards for diagnostic tests for Bar review; called Bill Shepard's office three times: he'll let me know for certain in a week: he didn't return my first two phone calls; discussed leaving with RSV: if I feel pressed, I can leave after bench memos and screener I got today, NLRB labor law case; finished substantive check on *Frade*, and left on Ann's desk; RSV discussed the possibility of my leaving July 10, but agreed to stay flexible on the date.

Tuesday, June 21:
Studied Wills and Trusts for Florida Bar: also, Florida Civil and Criminal Procedure took notes from audio tape and did other Bar junk; wrote cover letters, and co-clerk Randy typed, to Litman, Paul & Thompson, and Steele, Hector and Davis law firms.

Wednesday, June 22:
Wills and Trusts, notes from tape for Bar review, Civil and Criminal Procedure; proofed *Frade*; applied for staff attorney's job (section 1983 prisoner civil rights cases, under federal district Judge Melton in Jacksonville).

Thursday, June 23:
Studied Business Entities I and Trusts and Estates for Bar exam.; law clerk's conference with RSV: *Green v. Zant* to be reversed, and *habeas* writ granted: *Hooks* to be reversed: no right to counsel, as a matter of federal constitutional law, beyond the first nondiscretionary appeal as of right—only a right to law libraries; RSV: Judge Tjoflat is trying to avoid saying that intermarriage violates Title VII in *Phillips*; phone calls exchanged: News Flash: RSV told me that the U.S. Supreme Court reversed *Zant v. Stephens*, 7-2: Impact on HAC/*Burger/Godfrey* mixed: If my argument that HAC is unconstitutional wins, then impact much less than if *Stephens* had come out the other way (vacates death sentences only if HAC is the *only* aggravating circumstance found by jury)—on the other hand, since the stakes of my winning the HAC argument are now fare lower (fewer death sentences would be invalidated), maybe I now have a better shot at carrying the day on *HAC*; finished proofing *Frade*; *U.S. v. Jones* comes out in slip opinion; learned that Ruthann not pregnant.

Friday, June 24:
Ruthann bought a great camera; studied Business Entities II from audio tapes on Bar Review; Judge Melton's secretary called and invited me to interview for the staff attorney position: set it up for Tuesday, which means Ruthann and I can spend her birthday together; *Kemper* and *Frade* go out; briefs for August sitting come in. We three law clerks divided them up; I'm proofing *Davis v. Page* dissent.

Saturday, June 25:
Studied Business Entities for Bar exam.

Sunday, June 26:
Drove from Birmingham to Jacksonville: listened to Business Entities tapes on the way.

Monday, June 27:
RSV in Atlanta; Ruthann and I went to St. Augustine and decided to get married; I should hear from Bill Shepard today: called and left him my phone number in Jacksonville.

Tuesday, June 28:
RSV in Atlanta; interview with Judge Melton: strange, but I really didn't have much of anything to say to him: also met Judge Moore, who seemed to me to be a hardline, right-wing sort: he did mention that liberals are okay: we talked about *Hooks v. Wainwright*: the two current prisoners civil rights staff attorneys, Sue and Carl, both said that they loved my *McKinnis v. Mosley* opinion, distinguishing 1983 law suits from *habeas corpus* law suits, and they spent a day trying to figure out what I was talking about in *McKinnis*.

Wednesday, June 29:
RSV in Atlanta; I drove from Jacksonville to Birmingham, arriving around 8 p.m.: letters from Ditmar, and a few public defenders; *Neff* opinion is out; Judge Morgan joined *Kemper*; *Boyd* sent to printer; pulled U.S. Supreme Court's opinion in *Zant v. Stephens* from Westlaw: my HAC/*Burger/Godfrey/* heinousness aggravating circumstances issue may still be breathing in *Burger*; no word yet from Judge Melton, Bill Shepard or Craig Barnard at the West Palm Beach public defender's office.

Thursday, June 30:
RSV in Atlanta; proofed *Davis* and dictated last three bench memos; the Eleventh Circuit is going to reverse *Green* and send it back for a hearing: Judge Vance will write—actually, it seems that I'll write it, according to the judge; I asked him, "Is my role in *Burger* over?," and he answered, "I think so; I want to wait until the dust settles after *Barclay v. Florida, Zant v. Stephens*, and the other death cases decided recently by the U.S. Supreme Court"; studied Evidence for Bar exam..

Friday, July 1, 1983:
Judge Melton called: Carl isn't leaving as staff attorney until January, so no job opening at the time: must keep it open until November: asked me to let him know in a week if I'm still interested; discussed *Green* with RSV: told him there *had* been a State evidentiary hearing; also looked up cases on the merits of the issue of jury dismissal without an inquiry; Dad called: Paul & Thompson law firm wrote saying no job; studied Evidence for Bar exam.

Saturday, July 2:
Studied Evidence Hearsay and Exceptions for Bar exam; dictated letters applying for jobs with Jacksonville pig law firms: fuck public interest and public interest lawyers, especially public interest lawyers; called Bill Shepard three times, but he's always "on another line" or "out of the office"— never called me back.

Sunday, July 3:
Evidence and Hearsay and Exceptions for bar exam.

Monday, July 4:
Studied for Bar exam, studied Criminal Law, Corporations, Partnerships, Wills and Trusts.

Tuesday, July 5:
Studied Contracts for Bar exam; RSV: I can take off any time, but can't take any pending work with me; wrote draft opinion in *Green*, finishing it at about 2:30 a.m.; called Craig Barnard, West Palm Beach Public Defender's Office: budget is still being kicked around in the Florida legislature two weeks minimum before any word on a job possibility: not hopeful, but if they hire at all, I'm at the top of the list: gave him Ruthann's phone number in Miami; called Judge Melton: I'm still interested in the staff attorney position; wrote *NLRB* screener.

Wednesday, July 6:
Cleaned out office; paperwork, etc.; got Title IX screener; tidied up *Green* opinion, and left it on Ann's desk to type; final draft proof on *Davis v. Page*.

Thursday, July 7:
RSV asks me to incorporate the U.S. Supreme Court's opinion in *Zant v. Stephens* into my *Burger* draft, and to make up a cart of all the cases and materials I cited in the draft, although he won't get to it for "a few months": I did it; Mary Nell typed NLRB screener; Ann typed my last bench memos.

Friday, July 8:
Last conference with RSV as his law clerk: *Green* opinion draft sounds fine to him: he'll read *Burger* over the weekend and may call me about it in Miami (??!!!); drove from Birmingham to Miami: on the road, listened to Real Property tapes for Bar review, but almost fell asleep at the wheel anyway; from a phone booth, I called Ruthann, and she told me that she is, in fact, pregnant.

Saturday, July 9:
Arrived in Coral Gables.

Sunday, July 10:
Studied Criminal Law for Bar exam.

Monday, July 11:
Studied Criminal Procedure and Contracts for Bar exam; Ruthann spoke with friends at Rogers, Towers law firm, and they're hiring and would probably be interested in me; her contact there is in trial now, but will call Thursday or Friday; fussed *Boyd v. Secretary of Navy* opinion.

Tuesday, July 12:
Studied Contracts for Bar exam; Smith, Halsey law firm called: job interview set for August 2.

Wednesday, July 13:
Studied Constitutional Law for Bar exam; Craig Barnard, West Palm Beach Public Defender's Office, called: their budget was approved by the governor this morning; come by to meet the boss, Dick Jorandby, on Friday at 2:00; I asked him if we could move it up to Thursday at 2:00, and he said I could: the address was 224 Datura Street—I95 to Belvidere—dead ends onto Olive Street (US1) north – office is at the corner of Olive and Datura.

Thursday, July 14:
Ruthann drove us from Miami to West Palm Beach: interviewed with Craig Barnard, Richard Burr, and Richard Joranby: they need a full-time death penalty person, but still don't know if they can afford it: talked mostly about cases I had worked on, and especially disliked the opinion I'd drafted in *Stanley*: Barnard said *Thomas* was "wonderful": their concern was that I wouldn't be "an advocate" enough after my clerkship (ho ho ho—ask RSV), and that I don't have trial experience, which, of course I don't:; hopefully I will hear from them in a week; on drive back from West Palm Beach to Miami, Ruthann and I agree that, if Joranby calls to offer me the job, I would accept it on the spot; studied Federal Constitutional Law for Bar exam.

Friday, July 15:
Studied Real Property for Bar exam; Ruthann brings home from the clerkship job opinions by U.S. Supreme Court in *Barclay* and *Barefoot*: language seems to zap *Burger*.

Saturday, July 16:
Studied Real Property for Bar exam; Joranby called and offered me the job, and I took it on the spot: Salary is $16,500 a year, increased to $18,000 when (if?) I pass the Bar exam: I'm supposed to start August 8, and the appointment is for three years; when Ruthann returned from walking Dillon, and I told her about Joranby's offer and my acceptance, she went into a rage, stormed to her

writing desk, and, with the sweep of her arm, swept everything on the desk onto the floor.

Sunday, July 17:
Studied Florida Constitutional Law for Bar exam.

Monday, July 18:
Studied Florida Constitutional Law for Bar exam; called for application to take Professional Responsibility exam: the application must be in by August 2nd; called Smith, Halsey and other law firms; called RSV and told him about West Palm Beach job, and he still seems mostly mystified that I would turn down an offer to work at Cravath, Swaine and Moore to work for the capital appeals division of a State public defender office; co-clerk Randy told me that the draft opinion in *Green* is proofed and had been sent off: RSV has been working real hard on *Burger*.

Tuesday, July 19:
Studied Torts for Bar exam; Randy: *Green* was circulated to the panel yesterday.

Wednesday, July 20:
Studied Torts for Bar exam. Drove from Miami to Orlando, arriving around 8:30 p.m., for Bar review capsule cram course.

Thursday, July 21:
Orlando: Bar review capsule course: Torts and Federal Constitutional Law: Barry Josephson did Torts: Patricia Dore did Constitutional Law.

Friday, July 22:
Orlando: Bar review capsule course: Wills and Trusts, Florida Constitutional Law and Real Property: really great lectures.

Saturday, July 23:
Orlando: Bar review capsule course: Contracts and Bar Writing and Evidence and Hearsay and Exceptions.

Sunday, July 24:
Orlando: Bar review capsule Course: Criminal Law and Criminal Procedure and Business Entities and Florida Criminal Law and Criminal Procedure; Ruthann drove from Miami to Orlando, along with Dillon, the sheepdog: Adventure smuggling Dillon into the hotel room, in the back way, up a freight elevator.

Monday, July 25:
Orlando: Panic over Bar exam tomorrow: Ruthann asked questions: went over outlines, but did not really study; Ruthann called Florida Rural Legal Services in West Palm Beach, re job application: they need more materials and information from her.

Tuesday, July 26:
Orlando: Day one of the Bar exam: the Florida portion: four essays: Florida Con Law (municipal bonds), Federal Constitutional Law (First Amendment and defamation) Property (landlord tenant), and Wills and Trusts: also, eighty multiple choice questions on Florida Civil Procedure and Evidence; I was able to stay relatively sane, and not talk to others about the questions, until, while eating out, I overheard some other folks talking about how easy Rule Against Perpetuities question was—except that I didn't think there had been a Rule Against Perpetuities question; on the whole, capsule review lectures were prescient (or had inside info about what the questions would be), especially the Florida Con Law lecturer, who nailed quite precisely the question that would be on the exam; anyway, there is something weirdly fitting to be taking the Bar exam in the shadow of Disney World, but I'm babbling....

Wednesday, July 27:
Orlando: Day two of the Bar exam: the multi state portion: brutal: cert.ain I failed, but everyone else seemed cert.ain they failed too; too exhausted to write, talk, or think.

Thursday, July 28:
Drove from Orlando to Birmingham; Ruthann sends writing samples to Florida Rural Legal Services; sends in my Professional Ethics exam application; called Craig Barnard: housing is steep in West Palm Beach, which wasn't quite what he'd said during my interview.

Friday, July 29:
Birmingham: McGregor's furniture rental people came to remove my furniture at noon; closed out lease; packed my VW bug with all my stuff; left Birmingham at 4:30 p.m., en route to Miami; called Ruthann: West Palm Beach Legal Aid wants to interview her: that's set for next Thursday at 11 a.m..

Saturday, July 30:
Arrived from Birmingham to Coral Gables at 10:30 a.m., driving straight though (19 hours—but, thankfully, this time, listening to Springsteen rather

than Bar review tapes); called Steve Sloan, my law school roommate, and my Dad.

Sunday, July 31:
Coral Gables: House hunted in West Palm Beach—ugh.

Monday, August 1, 1983:
Coral Gables: The phones are out: I still can't call house in West Palm Beach.

Tuesday, August 2:
Coral Gables: House hunting; found house in Jupiter, Florida.

Wednesday, August 3:
Coral Gables: Studied for MPRE Professional Ethics exam..

Thursday, August 4:
Coral Gables: Ruthann interviewed with West Palm Beach Legal Aid; got call back from Squire, Sanders & Dempsey.

Friday, August 5:
Coral Gables: Craig Barnard called: Governor Graham signed a death warrant in *Darden*: odd, since *Darden's* rehearing petition is still pending in the Eleventh Circuit, and the mandate has been stayed; attended MPRE Ethics lecture from 6 p.m. to 9:30; Ann Carleton called from RSV's chambers: how many boxes in *Burger* record? (So are they sending the record to Judge Frank Johnson, for his dissent?)

Saturday, August 6:
Coral Gables: Hung out in Coral Gables with Ruthann; studied for MPRE Ethics exam., sort of.

Sunday, August 7:
Moved some books into new house.

1. Opening Shots

Monday, August 8:
First day on the job at the Capital Appeals Division, Public Defender Office, Fifteenth Judicial Circuit, West Palm Beach, Florida: a day of introductions: met the group; started to index all federal death penalty cases since 1978; got U.S. Supreme Court opinions in *Barclay v. Florida*, *Zant v. Stephens*, *Barefoot v. Estelle*, and *California v. Ra.m.os* to read.

Tuesday, August 9:
Craig Barnard assigned me the *Nollie Lee Martin* case: "When people talk about the death penalty, this is what they mean—this is the Ted Bundy case of Palm Beach County": horrible facts, giant record, but he thinks there is a good confession issue, and other possible issues as well: "Lee Martin just wants to live—he spent his whole life in prison, and he gets along fine there every year, around Christmas, Lee asks me if he's going to make it for another year. So far, I've always been able to tell him yes. You keep it that way."

Wednesday, August 10:
Started reading record in *Martin*: pre-trial publicity issue?

Thursday, August 11:
Went through 500 pages of *Martin* file: no real 3.850 State post conviction motion issues yet; Thursday conference of members of the office's appellate division, capital and non-capital: discussed and let off steam about Florida Supreme Court cases decided the week before; Craig Barnard: clemency for *Martin* is now scheduled for November.

Friday, August 12:
Last day of Ruthann's clerkship with Judge Fay; I took MPRE Ethics exam. at 12:30—no way to tell if I passed or not, since I think I studied a total of two hours for it..

Saturday, August 13:
Moved the big stuff from Coral Gables house to Jupiter house.

Sunday, August 14:
Move.

Monday, August 15:
Discussed *Martin* legal issues with Dick Burr: we may go straight into federal *habeas* court, if no good State post conviction Rule 3.850 motion issues;

Dick's special interest seems to be in mental health and mental illness issues, and he wants us to explore, in investigating for the 3.850 motion, whether *Martin* was denied the effective assistance of psychiatrists—a claim analogous to an ineffective assistance of trial counsel claim: the problem is, it seems to me, Martin was examined by *seven* psychiatrists before the trial: seems to me a little bit silly to argue that he was denied a constitutional right to an eighth psychiatrist, but Dick says we must find out exactly what an eighth shrink would have said; Governor Graham may sign *Martin*'s death warrant the day after clemency; if pre-trial publicity is an issue, will ghostwrite the case and give it to other counsel; Craig Barnard remarked, again, over lunch, that they hired me because I said I worked "fast and on deadline."

Tuesday, August 16:
Finished reading the multi-volume pre-trial mental competence to stand trial hearing in *Martin*; skipped sentencing guidelines meeting to work on *Martin*; Craig not say much in afternoon; later, Craig accuses me of not "bantering" enough with other lawyers in the office; lunch with Ruthann.

Wednesday, August 17:
Finished reading *Martin* record.

Thursday, August 18:
Craig Barnard and Dick Burr on phone, about *J.D. Raulerson*[568] (Governor Graham signed his death warrant): discussed HAC/*Godfrey*/heinousness aggravating circumstances issue with Craig: I wrote up a master issues list for *Martin*, and there are twenty-three possible issues in all: Craig, Dick and I will discuss all twenty-three issues on Monday; discussed my role in *Stanley* and *Thomas* over lunch: Craig was called as soon as the two opinions came out, and he wonders how I'll feel about arguing ways around *Stanley*, which I wrote: I actually thought this was kind of a stupid question for him to ask: I said I thought *Foster* was in trouble with the *en banc* Eleventh Circuit (*Kenny Foster* is one of Dick Burr's capital clients).

Friday, August 19:
Crystal River Public Defender Conference (called Life over Death): survey of the law.

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568. I discuss the *Raulerson* case in MELLO, DEAD WRONG, *supra* note 2, at 173-74.

Saturday, August 20:
Crystal River Life Over Death Conference: imaginative use of experts, by Dr. R. Ratner; statistical challenges, by Glenn Pierce; investigators.

Sunday, August 21:
Crystal River Life Over Death Conference: jury selection, by Bruce Winnik; *Witherspoon* issues and how to raise them, preserve them, and win them.

Monday, August 22:
In all day with Dick and Craig going over *Martin* issues: Dick convinced we need to investigate the eighth psychiatrist angle and contact Forbes, the co-perpetrator who cut a deal with the prosecutors in exchange for his testimony against *Lee Martin* at trial: Dick and I will be working on it, and we seem to be on more or less the sa.m.e frequency when it comes to the case: we may make a big *Witherspoon* challenge, per *Grigsby*; Millard Farmer and Joe Nercy were in town, arguing a death case before the Eleventh Circuit; met them: Farmer drawled, "I know who you are" – which seemed a little ominous to me, but maybe I'm just being paranoid.

Tuesday, August 23:
9 - 11 a.m.: finished going over *Martin* issues with Dick; we assigned issues: I'm doing the confession, prosecution proneness (*Grigsby*), and pre-trial publicity issue (if there is one: must call John May and Jerry Shwarz, *Martin*'s attorneys on direct appeal); read our papers in Florida Supreme Court and U.S. Supreme Court cert. petition in *Martin*; read some cases; still doing background research on confessions; I raised with Dick the issue of whether *Lockett v. Ohio* said a state can't exclude evidence of general deterrence (actually, the absence of general deterrence of the death penalty), and Dick said that the states don't read *Lockett* that broadly, but we should give it a shot: Craig Barnard liked the issue, and said it's now before the Eleventh Circuit in *Shriner*..

Wednesday, August 24:
Martin pre-trial publicity issue: Dick Burr said that to raise it, we probably would have to get outside counsel to argue it, since our office might have been ineffective for not raising it on the direct appeal to the Florida Supreme Court: Margaret Good, an appellate attorney whose office is down the hall from mine, said it sounds like a good issue, and she gave me some useful stuff to read; Governor Graham signed two death warrants today: *Carl Jackson* and *McArthur Breedlove* (not our cases); worked on *Lockett*/general deterrence evidence issue; *Martin*'s trial lawyers flew in Hans Zeisel, national expert on the deterrence (or not) of capital punishment, to testify at *Martin*'s penalty

phase that (1) capital punishment doesn't deter generally, and (2) it can't be expected to deter someone like *Martin* specifically, who is mentally ill; Craig Barnard talked to Jerry Schwartz in Vermont: they did not raise pre-trial publicity issue on *Nollie Martin*'s direct appeal to the Florida Supreme Court because those are so hard to win: since the judge did individual voir dire, any pre-trial publicity error was probably cured anyway.

Thursday, August 25:
Craig suggests I read *Bill White* brief (Outlaws biker case, nicknamed "Snivelhead"), since his clemency is coming up soon, which means a warrant is soon; I read it: mostly based on state misconduct during trial in the guilt-innocence phase; weekly Florida Supreme Court opinions conference; talked with Louis Carres, appellate attorney, about *Virgil Douglas* (jury override case in the Eleventh Circuit); read stuff on "the limits of *Lockett*" issue: did draft of *Lockett*/evidence of general deterrence for *Martin*.

Friday, August 26:
Gave draft of *Martin* issue to Flo Wilson, secretary for the Capital Appeals Division, to type; read Florida cases on *Lockett v. Ohio*: the Florida Supreme Court basically lied about the applicability of *Lockett* to Florida, soon after *Lockett* was decided in 1978; Craig calls this issue *Cooper/Lockett* and it's a fallback, second generation version of the stand jury instruction lost in *Ford* in the Eleventh Circuit *en banc* court: If Florida law was always consistent with *Lockett*, then trial lawyers rendered IAC in not investigating or presenting nonstatutory mitigating evidence.

Saturday, August 27:
Jacksonville; read coerced confessions cases: *Jurek v. Estelle*, a lengthy *en banc* Fifth Circuit Court of Appeals opinion in a capital case, does not look good for us.

Sunday, August 28:
In Jacksonville visiting with Ruthann's parents.

Monday, August 29:
Read more coerced confessions cases for *Martin*: *Martin* presents just about every confession in the book: Fourteenth Amendment voluntariness (*Bram*), *Miranda* right to counsel (*Edwards v. Arizona*) and waiver, *Miranda* right to silence (*Mosley* and "scrupulously honored") and waiver, Sixth Amendment right to counsel (*Brewer v. Williams* and when the constitutional right is triggered—what counts as sufficient initiation of the criminal prosecution), fruit of the poisonous tree and cat out of the bag (two confessions in *Martin*);

you could build an entire law school course around this case: Craig Barnard thinks the issue of whether voluntariness is an issue of fact or an issue of law is merely "atmospheric" and not of substantive importance: ha!; Dick Burr is in Kentucky, working on the clemency in *White*; Richard Green said the clemency interview in *White* was "short."

Tuesday, August 30:
Richard Green asked me to be on an ACLU panel on censorship: called Rob Holly and set it up; read some First Amendment stuff, drafted remarks; read more coerced confessions cases, including Justice Felix Frankfurter's remarkably scholarly opinion in *Columbe v. Connecticut*: brilliant!; *Darden* awaiting Eleventh Circuit *en banc* rehearing; *Raulerson* filed Rule 3.850 motion: no stay yet in either case; Steve Bright and the Southern Prisoners Defense Committee is doing *Raulerson* and Robert Augustus Harper still has *Darden*.

Wednesday, August 31:
Discussed *White* with Craig and Dick and Richard Green: Dick found good ineffective assistance of counsel stuff in Kentucky: lawyer not investigate penalty phase, and will testify that he had no strategy for not doing so; *Jimmy Lee Gray* is scheduled to be executed on Thursday night in Mississippi: Fifth Circuit Federal Court of Appeals has denied a stay, and now they're polling the full Fifth Circuit court; *White* passed a polygraph: could we have an actually innocent client the State of Florida wants to fry?; drafted "standard of review" portion of *Martin*.

Thursday, September 1, 1983:
Eleventh Circuit granted *Darden* a stay, vacated their 6-6 decision, and is hearing the whole case again: Did they think it unseemly to send him to die without an opinion by a majority of the court? I wonder if Judge Fay was right and this will be another *Ford v. Strickland en banc* disaster; drafted first three subparts of the coerced confession/*Miranda*/ Sixth Amendment right to counsel issues in *Martin*; weekly Florida Supreme Court recent cases conference; gave speech on First Amendment with Rob Holly of the ACLU.

Friday, September 2:
Jimmy Lee Gray executed at 12:01 this morning in Mississippi: a former Southern Prisoner Defense Committee case, so Dick Burr is very upset; the defense bar is preparing a report for the Eleventh Circuit on expedited appeals in death cases, after *Barefoot v. Estelle*, where the U.S. Supreme Court upheld the constitutionality of such expedited procedures adopted a couple of years ago by the Fifth Circuit Court of Appeals: our office will probably head it up;

went to death penalty "rally," masterminded by Richard Green and attended by about ten other public defenders: TV and press there (ho ho); finished first confession voluntariness issue in *Martin*.

Saturday, September 3:
Jacksonville.

Sunday, September 4:
Jacksonville; drafted confession issues in *Martin*.

Monday, September 5:
Drove from Jacksonville to Jupiter; wrote confessions issues in *Martin*.

Tuesday, September 6:
Louis Carres in Jacksonville, helping Steve Bright with *Raulerson*, before Federal District Judge Moore waited all day for decision; at 6:00, Judge Moore issued a forty-eight-hour stay, to expire at 7 a.m. Friday morning: Prison re-set execution for noon on Friday: Judge Moore's opinion was very nasty; Kotelis Alexander called: he's still clerking for Judge Hatchett on the Eleventh Circuit, and the Eleventh Circuit is circulating proposed stay standards, per *Barefoot*: Hatchett was on a committee to study such expedited rules, and Kotelis worked on them with him; I drafted second confession issue in *Martin* all afternoon.

Wednesday, September 7:
Anthony Antone granted panel Eleventh Circuit rehearing; Margaret Good came by to chat about *Martin* issues; talked with Louis Carres about *Raulerson*: he testified at evidentiary hearing, since his office (when he ran the Tallahassee Public Defender's Office) represented *Raulerson* on his first direct appeal to the Florida Supreme Court: Judge Moore asked questions of all the witnesses and seemed out to screw *Raulerson* and his lawyers: Louis thinks Judge Moore will make as bad a set of fact findings as possible, and maybe even deny a certificate for probable cause granting permission to appeal his decision to the Eleventh Circuit: Louis said Steve Bright did well, considering the time constraints: Louis thinks the case really needs a lot more factual development; I finished confession issues in *Martin*.

Thursday, September 8:
Met Richard Lubin, *Martin*'s trial lawyer; my day to lead the discussion at the weekly Florida Supreme Court recent decisions conference; talked with Louis about *Raulerson*: Judge Moore issued a fourteen-page order rejecting the claims, at 10 p.m. last night: his stay is still in effect until 7 a.m. Friday; Craig

got a note from Scharlette Holdman, saying *Raulerson*'s case is in the Eleventh Circuit, and Judge Fay is the senior judge (so is RSV and Kravich on it? They're a screening panel together); Scharlette at the Florida Clearinghouse and Criminal Justice called while we were at lunch to say *Raulerson* got an indefinite stay out of the Eleventh Circuit.

Friday, September 9:
10 a.m.: met to discuss Eleventh Circuit stay standards and procedures; Richard Green: the person who says *Bill White's* co-defendant confessed to him passed a polygraph: the co-defendant, named Demoreno, is a real scumbag: rapes, killings, much racially motivated violence: "at first, I thought this was our worst case for clemency—now I think it's our best," was Richard's remark; I fine-tuned *Martin* issues I've done so far one confession.

Saturday, September 10:
Chores around the house, cleaned the pool, etc.

Sunday, September 11:
Drafted *Lockett*/deterrence issues for *Martin* and read to Ruthann out by our pool.

Monday, September 12:
First anniversary of when Ruthann and I met in Atlanta, at the Eleventh Circuit's first birthday party; Craig and I will do *Elledge* cert. petition to U.S. Supreme Court: the main issue on the Rule 3.850 motion was ineffective assistance of counsel; the Eleventh Circuit vacated its stay in *Smith* (Georgia death case); Dr. Smith screwed us on alcoholism issue in *Bill White*; I researched ineffective assistance of counsel caused by the court's refusal to grant a continuance, i.e., court-imposed ineffective assistance of counsel: argued that ineffectiveness claims fall along a continuum, with the prejudice required varying with the degree of state involvement in the ineffectiveness; heard that I'd passed the Ethics portion of the Florida Bar Exam., the MPRE.

Tuesday, September 13:
Dr. Smith will review his *White* report: he seems to agree with our alcohol blackout theory, but for some reason didn't say so in his report; we met with Michael Van Zampft, the lawyer in *Thompson*, where the Eleventh Circuit last week held that though a state can waive exhaustion of state court remedies, the federal district court can refuse to accept that waiver: Van Zampft wanted our input on whether he should ask for Eleventh Circuit *en banc* consideration or take cert. to the U.S. Supreme Court; we said no on both counts: it's great as it is, and he shouldn't tempt the fates by messing with it; Louis Carres

circulated Judge Moore's order in *Raulerson*; Craig Barnard said *Elledge* must be filed next Tuesday (the 20th) and wants a draft tomorrow; I worked on *Elledge* draft much of the night at home.

Wednesday, September 14:
Craig: we'll have to work this weekend on *Elledge*; I finished draft on *Elledge* and gave it to Flo to type; Craig: NAACP, LDF, Inc. not doing any more U.S. Supreme Court cert. petitions in death penalty cases, because the U.S. Supreme Court has become such an unsympathetic audience in these cases; news: Eleventh Circuit decided *Shriner* against us, apparently with no dissent (Tuttle and Kravich on panel); Florida Supreme Court is due to decide many pending cases against us in the next two weeks; Eleventh Circuit will announce its new stay of application / *Barefoot* standards on Monday; learned that I'd passed the multi state portion of the Florida Bar: I heard the secretaries saying that someone else in the office had passed, so I called the Florida Bar, and got the good news.

Thursday, September 15:
Called Kotelis in Judge Hatchett's chambers, re *Shriner*: he not know anything; *Dennis Adams* rehearing denied by Eleventh Circuit; Richard Green and Flo scrambling to get *White* Xeroxed and ready to go; Florida Supreme Court rendered a twenty-three-page opinion in *Delap* (Margaret Good's case): she, Craig and I talked about possible rehearing issues.

Friday, September 16:
Richard Green argues *Bill White* clemency; *Jackson* (Karen Gottlieb's case) going very badly before Judge Davis: trying to zip it through: told them to have a memo on why they needed evidentiary hearing in by 8 a.m., so we stayed up all night: Dick Burr helped: gave them *Thomas* opinion; I finally saw the Eleventh Circuit stay opinion in *Raulerson* (Fay, Vance and Kravich); Flo typed and printed *Elledge*: awful mess, so I made corrections and Craig typed them, starting at 5 p.m.; Richard Green called in: Governor seemed interested in our *Dimorino*/actual innocence argument in *White* clemency; worked all night on *Jackson* and *Elledge*.

Saturday, September 17:
Edited *Elledge*; *Smith*: Eleventh Circuit, full court, granted stay of execution pending *en banc* consideration: apparently a substantial *Giglio* claim is giving them trouble.

Sunday, September 18:
Edited *Elledge*.

Monday, September 19:
10 a.m. to 4 p.m.: went over *Elledge* with Craig and Dick: skipped lunch: I didn't say much for most of it: suggestions good: Flo typed as we wrote: I felt ill at ease during most of this meeting; Craig gave me *Shriner* pleadings, opinions and other materials to look over for rehearing issues. Evening: read the *Shriner* materials over, and two issues seemed similar to *Martin* issues.

Tuesday, September 20:
Elledge cert. to U.S. Supreme Court must be sent; Eleventh Circuit granted the *habeas* writ in *Virgil Douglas* case on ineffective assistance of trial counsel; Flo made corrections we did yesterday on *Elledge*: ran it off: made final corrections and assembled the photocopied appendices; talked to Dick about whether he should recuse a bunch of judges in *White*; called RSV yesterday re cases I'm precluded from working on because they were in the Eleventh Circuit while I was clerking, but he wasn't in the office, I'll try again tomorrow, and Ann said she tried all day yesterday to get me: finally got him: there's no Eleventh Circuit rule on such matters, so I should just use common sense and my own judgment: my draft opinion in *Green* is out; Southern Prisoners Defense Committee called Dick and told him about *Green*.

Wednesday, September 21:
Went by Richard Lubin's office to get psychiatric stuff on *Martin*, also got news reports; went through *Martin* record for material for Dr. Dorothy Lewis, for her psychiatric and neurological examination of *Martin*; got *Alvin Ford* record, and must look for successive *habeas corpus* issue; discussed *White* with Craig and Dick: looking like the victim was killed because she witnessed another Outlaw's murder—problem is if we push too hard, Outlaws may kill us; talked about *Ford*: it became the lead case, before the Eleventh Circuit *en banc* court, on the *Brown* issue and the *Lockett* issue totally by accident: when Fort Lauderdale Federal District Judge Norman Roetteger denied the stay of execution back in 1982, Dick Burr read the record for the first time on appeal, jumped into the case and was sure that they'd win before the Eleventh Circuit.

Thursday, September 22:
Got *Martin's* psychiatric stuff ready to go to Dorothy Lewis and Betty McMahon; discussed *Shriner*: I'll draft an outline of two issues and Dick Burr will draft one: we won't write it up as I'd suggested; I drafted outlines of my two issues; we received *Green* and *King* (the Eleventh Circuit opinion based on my *Stanley* disaster): sent to *Shriner's* lawyer my handwritten draft of the deterrence/*Lockett* issue and confessions issue in *Martin*, for his use in preparing a petition for rehearing in the Eleventh Circuit; after going through *Ford* transcript and previously filed pleadings, I'm to start preparing *Nollie*

Lee Martin's clemency: Dick and I will meet *Lee Martin* in two weeks, before his psychiatric evaluation.

Friday, September 23:
Met with midwife Sarah: all okay with Ruthann's pregnancy; news: Eleventh Circuit sent *Arango* back to Federal District Court with order to wait for exhaustion of state remedies, even though the State waived exhaustion; U.S. District Court, Judge Reed, found against us in *Hitchcock*:[569] have 10 days from Monday to file for rehearing (Richard Burr will work no it early next week); also: *White* Rule 3.850 motion and *James Dupress Henry* are due; I'll read *Ford* trial transcript this weekend; Burr will read *Martin*; next week, Dick Burr, Richard Green and I will go to Florida State Prison to see *Martin* and prepare him for the psychiatric evaluation: they'll also meet with *Bill White* and *Alvin Ford*, but I'll just meet with *Nollie Lee Martin*.

Saturday, September 24:
Read *Ford* trial transcript and pleadings file at home.

Sunday, September 25:
Read *Ford* trial transcript and pleadings file at home.

Monday, September 26:
News: On Friday, Governor Graham signed two death warrants: Joseph Green Brown[570] (of *Brown v. Wainwright*, the *Brown* issue in *Ford v. Strickland* fame) and *Dwight Messer*: both have 3,850 motions pending in state court, so both should be fairly safe: *Brown*'s lawyer is Richard Blumenthal in Connecticut, seems very good, called Dick Burr this morning; Dick and I discussed whether we should ask for rehearing in *Hitchcock*: Richard Green thought so, but Dick Burr thought we wouldn't gain anything: Federal District Judge Reed will just dissolve the stay on the 17th, regardless of what we do, so we should use our time to get a Cert.ificate of Probable Cause (CPC) to appeal application from him, giving us permission to appeal his judgment, or we should ask the Eleventh Circuit to issue the cert.ificate of probable cause: discussed substantive *Hitchcock* issues as well: District Judge Reed's order came in today; discussed *Ford* with Dick: three issues so far: one, HAC/*Godfrey*/ heinousness aggravating circumstance (my old issue from *Stanley*, *Thomas*, *Green* and *Burger*); two, mental competency to be executed; three, sequestered, individual *Witherspoon* voir dire (*McCorquadale* issue);

569. *See* Hitchcock v. Dugger, 481 U.S. 393 (1987).
570. I discuss the *Brown* case in MELLO, DEADWRONG, *supra* note 2, at 142-45.

I went over *Ford* record for state use of preemptory challenges on jurors who had passed muster under *Witherspoon* (Bruce Winnik's *Dobbert* issue); Craig told me I'm doing the cert. petition in *Joseph Robert "Crazy Joe" Spaziano*:[571] this will be the first paper I will write that will actually be filed in a court,[572] and it's due October 11: talked with Craig about it: the best issue is the jury override, although chances of convincing the U.S. Supreme Court to grant cert. on that issue are very slim, since Louis Carres and dozens of others had asked the U.S. Supreme Court to grant cert. on that review in many cases over the years; the evidence of guilt against Spaziano is extremely weak.

Tuesday, September 27:
Spoke with Dan O'Connell (*Carl Shriner*'s lawyer): he was most thankful for the stuff we sent him: *en banc* petition will go out today; spent morning discussing whether we should ask for a rehearing in *Hitchcock*; I a.m. to prepare a memo on successor *habeas corpus* issues/law/standards for *Ford* and our other upcoming successor cases; finally decided not to ask for Federal District Court rehearing in *Hitchcock*; Craig on phone most of the day answering questions from lawyers with death cases: Craig commented to me, "We're like LDF now that they're getting out of Florida"; I did some initial work on *Spaziano* cert. petition.

Wednesday, September 28:
Spoke with Louis Carres about *Spaziano*: he'll work with me on jury override issue, since he's raised it in several cases recently; we'll make a facial challenge to the constitutionality of the override, and also an "as applied" challenge: he thinks we should make the "no lesser included offenses" issue as an independent ground for cert. grant; Richard Green thinks my *Green v. Zant* opinion requires us to seek rehearing in *Hitchcock*: Craig not agree; I read Louis's materials on jury override and the existing case file on *Spaziano*, which is huge: not sure how to frame the facial challenge to the constitutionality of the override; full U.S. Supreme Court granted a stay in *Baldwin v. Maggio*, a Fifth Circuit ineffective assistance of counsel case: does this mean we will get indefinite stays in every single ineffective assistance of counsel case, now? Dick Burr at Florida State Prison to meet with *James Adams*.[573]

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571. *See* Spaziano v. Florida, 468 U.S. 477 (1984). I discuss the *Spaziano* case in MELLO, DEAD WRONG, *supra* note 2; Mello, *Death and His Lawyers*, *supra* note 42; Mello, *Outlaw Judiciary*, *supra* note 46; Michael Mello, *Outlaw Executive*, 23 J. CONTEMP. L. 1 (1996); MELLO, THE WRONG MAN, *supra* note 58.

572. *See Spaziano*, 468 U.S. at 447.

573. The Adams case is discussed in RADEL ET AL, *supra* note 80.

Thursday, September 29:
Drafted the "as applied" constitutional challenge to the jury override in *Spaziano* cert. petition; Craig slaving away at *Ja.m.es Dupree Henry*:[574] punchy from drafting all day; read Sandy D'Alamberte's and James Nabrit's *Barclay* brief in the Florida Supreme Court (following their loss in the U.S. Supreme Court earlier this year in *Barclay v. Florida*); wrote facial challenge in *Spaziano* at night; Dick Burr at FSP to meet with *Nollie Lee Martin*.

Friday, September 30:
Dick Burr spent nine hours with *Nollie Lee Martin*; strong doubts about guilt in North Carolina crime that was predicate for imposing the death sentence in Florida, so maybe ineffective assistance of counsel claim against trial lawyer Richard Luben, for not sufficiently investigating the validity of the North Carolina conviction prior to the capital trial in Florida; also got good psychiatric and family background information from *Martin*: Dick very up on doing the clemency in *Martin*; I did outline of *Spaziano* cert. issues for Louis Carres: he liked it, especially the "as applied" issue and will work with me on the facial challenge: we will exchange drafts on Monday; discussed *Ford* with Dick Burr: Monday is the first Monday in October, the opening of the U.S. Supreme Court's 1984 term, so the Court may announce dispositions of many cert. petitions filed, and held, over the summer: no need for us to panic yet, just to be aware that the execution flood gates may be about to be opened; Dick: we may have a lawyer for *Ford*: a Miami guy tight with the governor.

Saturday, October 1, 1983:
Came into office to get *Spaziano* materials; Craig there, and gave me *White* and *Henry* drafts to look over the weekend.

Sunday, October 2:
Worked on *Spaziano* cert. draft at home.

Monday, October 3:
The first Monday of October. Morning: went over Dick's *White* draft. 10 a.m.: Dick called the U.S. Supreme Court: cert. denied in *Ford v. Strickland* (from Eleventh Circuit *en banc* court), 7-2: Dick calling for counsel to represent *Ford* on the successive *habeas* petition: I'm to start researching our issues immediately: one, are electrocutions cruel and unusual punishment for purposes of the Eighth Amendment;[575] two, does the constitution preclude

574. The Henry case is discussed in Michael Mello & Michael Randelet, *Executing Those Who Kill Blacks*, 37 MERCER L. REV. 911 (1986).

575. The U.S. Supreme Court granted cert. in this issue on October 26, 1999.

execution of the presently insane, and, if so, what standard of competency is appropriate to deciding whether someone is sufficiently crazy to preclude execution; three, proportionality, and whether there is a constitutional right to a proportionality analysis; four, the HAC/heinousness aggravating circumstance (*Godfrey/Stanley/Green/Burger*); five, collective *voir dire* (*McCorquadale* issue); Tom Marshall called Dick to say he can't be *Ford*'s lawyer on a successor, but that he will "make some calls" to try to find *Ford* a lawyer; Eleventh Circuit remanded *Spencer v. Zant* for evidentiary hearing on Professor David Baldus's study of the racial dimensions of capital sentencing patterns in Georgia; U.S. Supreme Court denied cert. in *Autry* (5th Circuit): due to be executed in Texas Tuesday night; spent most of the day with Dick Burr and Richard Green on *Ford* issues: divided up the issues: my first priority is to write a legal memo on execution competency[576] and its constitutional dimensions and possible constitutional challenges.

Tuesday, October 4:
Autrey was denied, 5-4, by the U.S. Supreme Court, so they must have granted cert. and zapped him on the merits; package from Patsy Morris, Georgia ACLU, on *Spencer* (great on *Thomas*); *Fair v. Zant* (my bench memo for RSV, my last sitting) three page opinion, reversing he death sentence: RSV wrote *Fair*; spent morning with Craig and Dick discussing HAC/heinousness aggravating circumstances/*Godfrey/Stanley/Burger* issue: I'm to look up all 311 Florida Supreme Court cases to show how arbitrarily applied Florida's heinousness aggravating circumstance is; *James Autry* gets Eleventh hour stay by Justice White; Dick Burr lost *Velma Barfield*'s case in the Fourth Circuit; she could be the first woman executed in this new age of executions; *Davis v. Page* came out of the Eleventh Circuit: RSV lost; read fifty HAC/heinousness aggravating circumstance cases here. Night: 100 more HAC cases, and also went over *Spaziano* cert. draft.

Wednesday, October 5:
Read HAC/heinousness aggravating circumstances cases: finished the 311 Florida cases in the evening; discussed jury override with Louis Carres: he thinks I'm too conservative, in considering that the U.S. Supreme Court has already decided the issue at all in *Proffitt*: on reflection, I think he's right: it's still an open issue; discussed HAC heinousness issue with Dick: we're really making a facial attack, although it looks, walks, feels and smells a whole lot like an "as applied" attack; Flo not yet made *Spaziano* corrections, so we can't discuss it; Federal District Judge Reed granted us cert.ificate of probable

576. *See* Ford v. Wainwright, 477 U.S. 399 (1986).

cause to appeal in *Hitchcock Night*: U.S. Supreme Court Justice Byron White stayed *Autry*'s execution 15 minutes before he was to die by legal injection in Texas—stay pending *Pulley v. Harris*, the California proportionality review case now pending in the U.S. Supreme Court.

Thursday, October 6:
Last night, drafted *Spaziano* statement of the facts for cert. petition, but Flo isn't doing it for this draft; discussed heinousness aggravating circumstances issue with Dick: once we prove HAC is bad, so what? Under *Zant v. Stephens*, since there are other valid aggravating circumstances, the error is harmless and we lose; Dick gave me his *Velma Barfield* materials to look over, to help in putting together a rehearing petition in the Fourth Circuit next week; Flo typed *Spaziano* corrections: I made a copy for Craig; *Birt v. Montgomery* goes *en banc* in the Eleventh Circuit: my *Thomas* standard for when an evidentiary hearing is appropriate in the state death penalty case raising a claim of ineffective assistance of trial counsel may be the central issue, and, if so, my *Thomas* victory will have an extremely limited shelf life; Craig thinks my *Spaziano* cert. draft is too long. Night: worked on *Spaziano* cert., editing down.

Friday, October 7:
Dick Burr drafted HAC/*Godfrey*/heinousness aggravating circumstance issue for *White*: very similar to what we'll use in *Ford*; discussed *Spaziano* with Richard Green: he not like to admit that retribution is a legitimate goal of the death penalty, but it seems to me (per Professor Steven Gillers' *Deciding Who Dies* article) that that is by far the best way of framing the jury override issue to make it attractive for a U.S. Supreme Court cert. grant; Dick: "We will almost certainly get a warrant on *Ford* next week"; Flo typed some changes on *Spaziano*— Craig will do the rest on Saturday (?!); Dick Burr working on *White*; *Barfield* rehearing must be filed next week; Thursday, Friday: *Martin*'s clemency interview with parole and probation; discussed whether to apply to Eleventh Circuit for a stay in *Hitchcock*; read and catalogued HAC/heinousness aggravating circumstance cases.

Saturday, October 8:
Went over *Spaziano* cert. draft: gave to Craig; read HAC/heinousness aggravating circumstances cases all afternoon. Night: until 3 a.m.: HAC/drafted heinousness aggravating circumstance issue for *Ford* and *White*.

Sunday, October 9:
Did "Question Presented" and other formulaic details for the *Spaziano* cert. petition.

Monday, October 10:
Craig Barnard agonizing over *Spaziano*: reorganizing the arguments, to make the *Beck/Evans v. Hopper* issue the big argument, and the jury override argument secondary; I'm working on HAC/ heinousness aggravating circumstances draft: done with organizing the HAC/heinousness cases and putting them in some coherent order— now I'm working on legal argument: why these cases mean the heinousness aggravating circumstance is unconstitutional (essentially recycling the argument that I made, unsuccessfully, to Judge Vance in *Stanley, Thomas, Green* and *Burger*); worked until 2:30 a.m. on *Ford* HAC/heinousness aggravating circumstance issue.

Tuesday, October 11:
Spaziano cert. petition must be filed: Craig still reorganizing it; played with *Ford* issues: added cites, footnotes, etc.; Richard Green heard that the governor will be gone until Sunday, so we're safe from death warrants until then; I found two fantastic law review articles on mental competency to be executed, one note from the *Stanford Law Review* and another note from the *Yale Law Journal*; Dick Burr gave me Larry Wollin's draft of an argument that people change over time, and that executions take so long to occur, that you can't execute anyone, since they're a "different" person; sounds like bullshit to me;[577] spoke with Dick on my next two issues: competency to be executed and Florida Supreme Court's proportionality review (must read all Florida Supreme Court cases, in every death penalty case, again, to do this right); did table of authorities for *Spaziano*; Craig: "You *are* going to stay late, *aren't* you."

Wednesday, October 12:
Worked on mental competency to be executed issue for *Ford* :cases, law review articles, etc.;[578] should get some stuff from Bill Shepard (he raised this issue in *Alvord*); called Jack Boger, at LDF, who has worked on competency issues and other cases: he referred me to the Southern Poverty Law Center and Dennis Balske; Balske said they'd send some materials to me; discussed competency to be executed issue with Craig: he thinks it's just a depravation of a right to life, not a "life interest by state law" thing: I'm not sure I understand the constitutional nuances here; Dick Burr was up all night, and looked awful, from working on *Barfield*, so he can go home briefly before

577. This just shows how cra.m.ped my imagination can be. The issue of whether lengthy stays on death row can render death sentences unconstitutional has gotten the interest of at least some Supreme Court Justices. *See, e.g.*, Lackey v. Texas, 514 U.S. 1045 (1995).

578. I discuss the *Ford* case in MELLO, DEAD WRONG, *supra* note 2.

heading out tonight to Florida State Prison to prepare *Nollie Lee Martin* for his preclemency interview with Parole and Probation folks; *Davis v. Page* is out, in soft-bound volume: RSV not even close to getting a majority. Night: played with HAC/heinousness aggravating circumstance argument.

Thursday, October 13:
Weekly conference on recent Florida Supreme Court cases: Florida Supreme Court, in *Messer*, said that even though they don't say they do proportionality review, they really do it, and that we should just take their word for it—attempting to derail a potential *Pulley v. Harris* claim? You betcha; discussed competency to be executed issue with Craig, and worked on it all day, on and off; news flash: Judge Stafford scheduled a hearing on the merits on *Messer* for tomorrow: his lawyer is in Texas; Scharlette Holdman's Clearinghouse[579] is the only thing he's got now, so we must do research on continuance law for *habeas corpus*; talked to someone from the Clearinghouse (first year law student) doing the pleadings tonight—in reality, this guy has no lawyer.

Friday, October 14:
Dick Burr called from Florida State Prison: he needed info on *Martin* transcript; I've found a possible problem with *Ford* competency to be executed/due process claim: the Florida procedure for determining execution competency is really pretty good, as compared to the absence of procedures in most other states: the *Yale Law Journal* Note, that I liked so much, actually uses Florida as an exam.ple of the right way to do it (shit shit shit); *Messer* is going well: Steve Malone, from Bill Shepard's office, is there; read cases and law reviews on competency to be executed and abuse of the writ/successive *habeas corpus* petitions.

Saturday, October 15:
Wrote competency to be executed issue for *Ford habeas*.

Sunday, October 16:
Wrote competency to be executed issue for *Ford*.

Monday, October 17:
Messer got a stay on Friday: Bill Shepard's associate came in, and pulled it off; Miami Attorney General has a lawsuit pending in the Florida Supreme Court arguing that State Public Defenders (i.e., us) can't do federal *habeas*

579. The best description of Holdman and the Clearinghouse is VON DREHLE, *supra* note 54.

corpus cases: if he's right, then we can't represent *Alvin Ford*, or *Nollie Lee Martin*, or almost any of our other death penalty cases in federal court; an emergency hearing is scheduled on the case for Thursday; met with Dick Burr and Richard Green, re *Ford*: divided up remaining issues: I'm to finish us execution competency: Dick will work on geographic disparity/discrimination issue: Richard will research a possible confession (of co-defendant) issue, and a shackling issue: we'll all due proportionality and abuse of the writ/successive *habeas* petition issue; *Brown* got a stay today from Federal District Judge Terrell Hodges; *Booker* and *Sullivan* had cert. denied today in the U.S. Supreme Court; *Newsweek* magazine did a cover story on *Autry*; read Tony Amsterdam's brief in *Pulley v. Harris* in the U.S. Supreme Court: brilliant; read about 200 Florida cases, looking for proportionality arguments; Craig called Art Weidinger (Governor Graham's death/clemency aide) on *Ford* mental competency to be executed claim: Weidinger was very evasive on status of cases and on the statute on execution of the insane: "The statute says . . . "; Dick and Craig decided to advise the Governor that we're invoking the procedural provisions of the execution competency statute in *Ford*; Dick then called the Governor's office and formally invoked the statute.

Tuesday, October 18:
Richard Green: it seems the trial judge in *Ford* found a mitigating circumstance, so the death sentence was improper under the Florida Supreme Court *Elledge* rule: other new issues (confession of co-defendant and shackling) not working out; read last 100 proportionality cases: looks like Florida does it, but not good enough; Ruthann learned inadvertently from Rose Marie (Judge Fay's secretary) that Millard Farmer will win *Davis v. Zant*; *Burger v. Zant* comes out of the Eleventh Circuit: Judge Vance, who wrote the opinion, rejected my HAC/*Godfrey*/heinousness aggravating circumstances argument: RSV wrote to no other issues in the case, including ineffective assistance, on which Judge Frank Johnson dissented; Dick Burr all excited about new issue Richard Green found in *Ford*: seems like a loser to me—one issue is that the trial court did – may have done – really found a statutory mitigating circumstance: sounds like nothing more than an error of state law, at best, to me, and not of federal constitutional magnitude, but, then, I'm probably sounding like Judge Vance.

Wednesday, October 19:
Dick Burr: Psychologist Betty McMahon thinks *Martin* may really be crazy—maybe even didn't do the murder for which he's on death row: needs more time, so we're asking the Governor to postpone clemency; Dick and I discussed *Ford* proportionality issue: he'll try to get other issues typed; Dick thinks there's a conflict between *Adams* and an Eighth Circuit Court of

Appeals case, on the issue of presumption of trial strategy (the issue I lost in *Stanley* when clerking for Judge Vance); called Patsy Morris, Georgia ACLU, to see if cert. had been filed in *Stanley*: it had, but not been decided yet: she also said that we'd lost *Dobbert*, with Judge Wisdom dissenting; Scharlette Holdman: the proportionality issue wasn't really raised in *Messer*. Night: wrote draft of proportionality issue for *Ford*.

Thursday, October 20:
Scharlette Holdman:[580] Steve Winter of LDF will send *Booker* transcript so that I (and Ruthann) can go over it this weekend, to look for ineffective assistance of counsel issues; Dick Burr in Tallahassee, meeting with Art Weidinger; I worked on proportionality issue for *Ford*: reworked draft; read *Dobbert* Eleventh Circuit opinion: pathetic piece of trash. Night: wrote more on proportionality issue: fine tuned it.

Friday, October 21:
Craig: Dick's meeting with Art Weidinger on *Ford* (executing the insane) went badly: they were very formal, but mainly Art asked procedural questions, so they maybe *will* use the statutory procedure for determining execution competency; I drafted a letter to the Governor on the procedures we need to determine execution competency; met on *Ford* strategy: should we file my execution competency memo now, to try to convince the Governor's office that we're right and serious—and hold off a warrant? Or would that tip our hand and only get them more entrenched? Just have to get it typed and then see: Scharlette Holdman: no lawyer yet for *Booker*:[581] she thinks Governor Graham will sign his death warrant on Monday; *Booker* has published a book of poetry; got State's reply in *Elledge* cert. petition, re heinousness aggravating circumstances; got *Booker* materials from LDF; worked on *Ford* files.

Saturday, October 22:
Read *Booker* transcript; drafted letter to Scharlette on potential constitutional issues: there are several possibilities, including ineffectiveness (guilt phase as well as penalty phase, as well as *Cooper/Lockett*), prosecutorial misconduct, proportionality, and our other, standard, "system wide" issues we're developing in *Ford*: proportionality and the HAC/heinousness aggravating circumstance issue.

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580. The best description of Scharlette Holdman is in VON DREHLE, *supra* note 54.
581. I discuss the *Booker* case in MELLO, DEAD WRONG, *supra* note 2.

Sunday, October 23:
Ruthann running high fever (104°): she finally allowed me to take her to the hospital, where she was immediately admitted.

Monday, October 24:
Fifth Circuit granted stay in *Williams*, who was to be executed tonight; spoke with Scharlette Holdman at length re *Booker*: went over issues and compared notes: she has a lawyer for Eleventh Circuit papers, but none yet as lead counsel, though two firms seem interested; I passed Florida Bar: Dick Jorandby will swear me in; wrote case summaries for newsletter, including *Green, Burger*; Flo typed letter to Scharlette; went out in evening.

Tuesday, October 25:
Flo did letter to University of Wisconsin student doing law review note on *Spaziano* jury override issue; I drafted reply brief in *Elledge*; Joranby congratulated me on the Bar, said I'm doing superb work, and gave me a raise to $20,000; *Ford*: Craig thinks Administrative Procedures Act challenge to statutory insanity determination procedure would bear fruit, or, at least, ball things up and delay execution; drafted a letter to Art Weidinger on why the statute is inadequate; discussed at length strategy on raising competency issue: go to Governor, then try judicial review: de novo judicial review? What can we do under the Administrative Procedures Act? No resolution: will pick it up tomorrow.

Wednesday, October 26:
Late getting in to work: took Ruthann home from hospital; Craig and Dick talked about incompetency to be executed issue this morning, but seemed pissed that I wasn't there for the conversation; Craig thinks my *Elledge* draft is too long and unfocused, and wants me to redraft; Dick drafted a letter to Art Weidinger: I had problems with it: Craig kept saying that they discussed that "this morning"; but Dick is going to incorporate my suggestions into the letter; my concern is that by saying we have no due process right from the Governor, when we get into court, as we inevitably and surely will, the court will find that the governor already decided the issue, with all the process we asked for—which was virtually none; Craig: nothing will get extension on *Martin*.

2. The Hornet's Nest

Thursday, October 27:
Discussed *Martin* and *Ford* issues with Dick Burr: I'll do some work on abuse of the writ/successor *habeas* issue and presumption of correctness issue, then onto venue/pre-trial publicity issue in *Martin*; went over Dick's revised letter to Art Weidinger: I liked it, but Craig had problems; Governor Graham signed *Booker*'s death warrant today: November 17 is the execution date; no lawyer yet: the successor will be in Judge Stafford's court: Scharlette sent me a copy of *Booker*'s book of poetry; lunch: Craig said we should withhold issues we've developed in *Ford* from *Booker*'s counsel, since *Booker* has good issues on his own: I said I'd remind him of that on the 16th: Dick said I played hardball; Scharlette: Steve Winter will write papers for *Booker*: still no lawyer here; I just noticed that Booker's judge sentencing proceeding occurred *after* the U.S. Supreme Court issued its decision in *Lockett v. Ohio*, thus screwing up *Cooper/Lockett* issue.

Friday, October 28:
Scharlette: met with Arthur Kinoy yesterday, re *Booker*: he won't take it now, but gave her endless hassle about not having a lawyer yet: he sees it as a race discrimination case; took my memo with him, and said "we'll stay in touch": the *Lockett*/ineffective assistance of counsel argument in *Booker* is falling apart: Steve Bernstein, the trial lawyer, submitted a memo before the trial judge just before sentencing, arguing *Lockett*; Craig thinks it's a boilerplate *Lockett* motion that Bernstein picked up at a death penalty Crystal River Life Over Death conference, and that the trial lawyer just filed it without really understanding it; Scharlette trying to get Bill Shepard as expert witness on IAC in *Booker*; Scharlette: we won *Hooks v. Wainwright* in the Eleventh Circuit (??!!!!); did background research on abuse of the writ/successive *habeas* petitions; Scharlette: *Hooks* was dismissed on a procedural ground; Shepard will testify as an expert witness in *Booker*; conference call with Steve Winter at LDF: went over *Booker*'s issues: not decided on whether to raise any or all of *Ford*'s issues in *Booker*: Craig and Dick think no; Steve Winter has my letter to Scharlette Holdman.

Saturday, October 29:
Night: Wrote felony murder issue in *James Adams*; spoke with Jeff Robinson about finding someone to take *Booker*; played with competency to be executed issue for *Ford* (and maybe *Booker*).

Sunday, October 30:
Dropped *James Adams* off at the office to be typed.

Monday, October 31:
Flo typed my *Adams* draft: I went over it with Dick and Craig; Steve Winter said that he needs our proportionality argument, but it's not yet typed; I tried to negotiate it so that Jeff Robinson can take *Booker*: Jeff called back and said he'd take it, if he can find a partner at his law firm (Wilmer, Cutler & Pickering) to sign on; Dick and Craig scrambling to get *Adams* out, and I'm scrambling to get things set up on *Booker* with Jeff and Steve Winter. Night: talked to Jeff about constitutional issues in *Booker*; drafted letter to him.

Tuesday, November 1, 1983:
Talked with Craig and Dick about the time I can put in on *Booker*: *Martin* clemency petition must take priority, but I can put in some time working with Jeff on *Booker*: Craig made it clear that *Booker* is not "our" case; xeroxed for Jeff my drafts of HAC/*Godfrey*/heinousness aggravating circumstances (130 pages), proportionality, and mental competency to be executed; Jeff got stuff from LDF: we'll go through it today; called with questions and asked for some general reading on ineffective assistance of counsel in death penalty cases; met Marian Lindbergh, another associate at the Wilmer, Cutler & Pickering firm, on the phone: she's very quick and is into the transcript and legal issues: extremely quick study: they both seem to be very much on top of the case: sent out, Federal Express, my *Booker* stuff to them.

Wednesday, November 2:
Morning: met with Craig and Dick: decided to withdraw *Adams* stay application extension: talked *Booker* strategy and timetable with Craig and Dick: discussed *Elledge* cert. and "limits of *Lockett*" issue; *Booker*: Jeff Robinson called: they have a partner, James Coleman, and set up a conference call on strategy for the afternoon; conference call: went over *Booker* issues and discussed psychiatric stuff with Dick Burr: they seem a bit overwhelmed by it all, but still very much on top of the case and the job that needs to be done; sent *Booker* team a package on electrocution as Cruel and Unusual Punishment and Sam Gross statistical study on racism and capital sentencing patterns to them Federal Express (ALSO SENT Gross study to *Sullivan* lawyers).

Thursday, November 3:
Booker Warrant: Jeff: Dr. Ratner will do it: he or Marian will go to New York to track down witnesses on *Booker's* background and early life: Jeff thinks that guilt phase ineffectiveness is an issue and that penalty phase ineffective

assistance of counsel is a very powerful issue, and, other than *Cooper/Lockett*, is the way to go in terms of emphasis and atmospherics in crafting the stay application; Florida Supreme Court ruled against us in *Terry Sims*: we're right on some issues, but waived or defaulted others; Jeff: there really is a prosecutorial misconduct issue in *Booker*: maybe a preemptory challenges issue as well (Bruce Winick, *Swain v. Alabama*—prosecutors exercising their pre-emptory challenges of perspective jurors solely based on race of the jurors); proportionality, too; news flash: Eleventh Circuit panel withdrew it's opinion vacating the death sentence in *Kenny Foster*, because counsel (our office: Dick Burr) didn't raise this issue on appeal . . . ; we lost *Sireci* in rule 3.850 in the State trial court. Night: went over *Booker* issues with Jeff; edited HAC/*Godfrey*/heinousness aggravating circumstances pleading.

Friday, November 4:
Got technical info for Jeff on *Booker*; did HAC/heinousness aggravating circumstances pleading: will dictate this afternoon; Dick: *Alvin Ford* did great on the psychiatric evaluations and tests: he'd flunk *any* test of execution competency, regardless of how high the courts put the bar; got proportionality argument typed and back, along with a copy of my draft, from Jeff: went over it with him; Jeff talked with Steve Seleger, a Florida lawyer: he will help Jeff, Marian, and Jim on *Booker*, but won't argue the case in court: Jeff trying to find an expert on guilt phase insanity defense; dictated HAC/*Godfrey*/heinousness aggravating circumstances pleading to Jeff's machine in DC. Night: talked about HAC/*Godfrey*/heinousness aggravating circumstance incompetency to be executed issues with Jeff.

Saturday, November 5:
Talked with Jeff about HAC/*Godfrey*/heinousness aggravating circumstances issue: he's concerned that my argument isn't case-specific enough, too broad gauged and scatter shot; Dick offered to be *Booker*'s expert on insanity, in addition to Vincent Fuller of the DC law firm Williams & Connolly (who represented John Hinckley in 1982); Craig said that would be a bad idea, since Dick is in what we in the office ironically refer to as "the conspiracy":[582] Craig agreed they needed a Florida lawyer, but couldn't suggest one: Dick got

582. "The conspiracy" was an ironic reference to the views of some prosecutors, politicians and judges that there was a vast, tight-knit network of anti-capital punishment lawyers around the nation, directed by LDF in New York, who were implementing our coordinated, clever master plan of using the courts to abolish capital punishment by making it unworkable. If fact, this vast "conspiracy" consisted of about a dozen lawyers around the country—far too independent, stubborn and idiosyncratic to ever be part of any "conspiracy"—most of whom were always treading water to keep their death row clients alive.

Sa.m. Gross to agree to let *Booker* and *Sullivan* use his unpublished statistical study in their stay application.

Sunday, November 6:
Judge Fay's law clerks' picnic: Judge Fay, Mary Ann and Rosemary all said he was granting the *habeas* writ in two Georgia cases: Judge Fay said he didn't think he had the votes to hang onto *Darden* before the *en banc* court; *Booker* Warrant: Jeff: talked about HAC/*Godfrey*/heinousness aggravating circumstances issue and mental competency to be executed issue: Dr. Ratner thinks *Booker* may not be competent to be killed: they got Booker's school records from Brooklyn, the Walter Reed Hospital stuff, too: pleadings done, memo still to go: Jeff got into the office at 5 a.m.; Marian Lindberg worked all night, and Jim Coleman worked until midnight: they will file the State 3.850 motion in the State trial court at noon on Monday, and also will trigger the statutory procedure for determining whether *Booker* is mentally incompetent to be executed.

Monday, November 7:
Scharlette Holdman called for update on *Booker*: she very pleased with Jeff's, Marian's, and Jim's job on *Booker*; Jeff up all night: done, but filing tomorrow; Scharlette: U.S. Supreme Court lifted stay in *Williams v. Magio*, a case that reached the U.S. Supreme Court from the Fifth Circuit Court of Appeals, which had been held for *Pulley v. Harris*, the proportionality case pending in the U.S. Supreme Court; *Booker*: worked on Marian's jail records issue, went over Dick Burr's competency memo draft and discussed it with him; *Booker* paper sent by courier to Tallahassee: Susan Cary, a Gainesville attorney, picked them up and will file them Tuesday morning, i.e., tomorrow morning.

Tuesday, November 8:
Wrote letter in *Freddy Lee Hall* case; *Booker* Warrant: spoke with Craig and Dick about state subpoena of all of the trial records of *Steven Todd Booker's* trial attorney, Steve Bernstein, and law on continuances in post-conviction cases under death warrant: Jeff: talked about proportionality review and *Pulley v. Harris* issue—the constitutional need for doing it on the face of the Florida Supreme Court opinions; *Booker* papers filed in Gainesville State Court, 3.850 motion and stay application; Dick Burr in Tallahassee doing *Martin* clemency; looked over *Hall* Eleventh Circuit brief for Jerry Lockett and Ed Stafman: I'll do a letter: their *Thomas v. Zant* evidentiary hearing argument can be stronger: they can't just ignore *Stanley* – they need to discuss the presumption of correctness, presumption of trial tactics, and all the other horrible stuff in my *Stanley* opinion – they need to *engage Stanley*, distinguish

it, and try to bury it – they can't just ignore it; Governor Graham signed *Bob Sullivan*'s death warrant: scheduled for the 29th of November; spoke with Jeff on *Booker* proportionality issue, which they'll raise as an original *habeas corpus* proceeding filed directly in the Florida Supreme Court, as a way, hopefully, of getting around procedural bar; Art Weidinger, Governor Graham's clemency aide, told Craig they would appoint a psychiatric commission, per Florida's statutory procedure for determining mental competence for execution, for *Ford*. 4 p.m.: Judge Crews in Gainesville gave *Booker* a hearing, and scheduled it for Thursday, i.e., in two days: discussed whether Jeff and company should try to present evidence at that hearing; Anthony Amsterdam argued *Pulley v. Harris*, the proportionality case, in the U.S. Supreme Court yesterday; the justices were fairly quiet during the argument, probably not a good sign.

Wednesday, November 9:
Morning: Jeff in Gainesville, reviewing *Booker's* trial lawyer's files to see what he should let the State receive in discovery: we went over subpoena law and continuance law; Dick Burr: *Sullivan* has "very thin" issues—has papers for us to review, but the only issue is new evidence of ineffective assistance of counsel, which is a loser: He not raise any of our system issues in Rule 3.850 motion, which was denied yesterday; maybe on rehearing; *Booker* motions for continuance and to quash State subpoena for trial attorney's files is scheduled to be heard in Gainesville court today; Jeff: they're noticing depositions of Dr. Ratner and Vincent Fuller in DC, moving to recuse Judge Crews: Jeff Weiner, will try to get to Gainesville by late afternoon to help in the hearing; talked with Jeff on recusal: read a Florida Supreme Court case; talked strategy with Jeff in afternoon; Jim Coleman is coming to Gainesville; Craig: Art Weidinger said the Governor is thinking of repealing the execution competency statute, since all defendants can invoke it at any time as a way to indefinitely delay their executions; got my "big" HAC/*Godfrey*/ heinousness aggravating circumstance memo from Jeff; did corrections.

Thursday, November 10:
Marian Lindberg: *Booker* hearing set for noon: State Trial Judge Crews ordered *Booker* to be produced and present for it, which probably means he's not going to give us the continuance: Dr. Ratner is going down tomorrow: sent depositions of Vincent Fuller and Dr. Ratner; Dick: Sullivan may have a new ineffective assistance issue (conflict of interest by trial lawyer), also has new alibi witness and new evidence on confession issue: I'll read pleadings before Dick calls Steve Gey, an associate at the New York law firm of Paul, Weiss, Rifkind, Worten and Garrison; we lost *Tommy Randolph* in Florida Supreme Court, with three dissents: Craig says it will be assigned to me to write a

rehearing petition: I have two weeks to do a rehearing: looked over our briefs in *Randolph*: will focus on penalty issues; Marian Lindberg and Jim Coleman called Craig at 4:30, in a panic: Judge Crews took the continuance motion under advisement and will hold hearing on Monday: Judge Crews said from the bench: "ineffective counsel is the only issue you couldn't have raised before," hence, it's the only issue you can raise now; sent proportionality issue draft to Jeff in Gainesville and Steve Winter at LDF in New York.

Friday, November 11:
We got *Randolph* opinion in: the Florida Supreme Court only upheld one aggravating circumstance; Craig said Scharlette is very "up" on *Booker* and Jeff Robinson and company: "My" lawyers took over the courtroom and got all they wanted: money for Vincent Fuller and Dr. Ratner and they got time; Governor's psychiatric exam. of *Booker* is now set for Tuesday; Governor says that if a death row prisoner is crazy he'll *commute* the sentence, and not just stop the execution—not treat them, cure them to make them sane enough to be killed, and then kill them: that may not help *Booker*, but it's great news for *Alvin Ford*; Dick talked with Steve Gey in New York about *Sullivan* and sent him my materials this morning; *Sullivan* is in real trouble, I think; Jeff and Jim Coleman called: discussed competency to be executed issue and strategy: tried to convince them that the Florida courts really *were* going to screw them at this evidentiary hearing: they're going to argue that competency to be executed isn't ripe until the effective assistance of counsel claim is resolved: they're not ready for Monday and will ask for a continuance, but probably won't get it: I predicted that Judge Crews would make them go ahead on Monday, put on any evidence they had to put on, deny everything, 3.850 motion and stay of execution, then they'd be in the Florida Supreme Court Monday night and decided Monday night or Tuesday morning — then in Federal District Court in *habeas* by Tuesday morning or Wednesday.

Saturday, November 12:
Booker Warrant: Talked with a Wilmer, Cutler and Pickering associate about the possibility of filing a lawsuit and suing to enjoin the governor from triggering the statutory procedure for determining execution competency: told them about Bill Shepard and *Gary Alvord* case; talked at length with Jeff on strategy for hearing: he writing the federal *habeas* papers this weekend: we discussed HAC/*Godfrey*/heinousness aggravating circumstance, proportionality and procedural default; Jim Coleman in Gainesville, preparing Bill Shepard, Steve Bernstein (the trial lawyer) and others to testify at the hearing.

Sunday, November 13:
Booker Warrant: Learned that the hysterical person from Gainesville I had spoken with a couple days earlier wasn't Marian Lindberg at all, but rather was Susan Cary: *Booker*: Jeff: federal papers almost done: hearing starts at 9 a.m. tomorrow: Jeff will leave DC early tomorrow: no one will review his pleadings before they're filed, and that sounds fine with me: Jeff and I talked about the stakes and the "Alice in Wonderland" sense that pervades the atmosphere of litigating death cases under active death warrant; *Bob Sullivan* is in a very dangerous situation, and he will be zapped on abuse of the writ/successive *habeas* corpus petition doctrine.

Monday, November 14:
Booker Warrant: Florida Supreme Court tentatively scheduled oral argument in *Booker* for today, not a great sign since the evidentiary hearing in the trial court in Gainesville was scheduled to occur today: *Booker*: evidentiary hearing starts at 9 a.m.; Craig came in to discuss *Randolph*, but I wasn't excited enough, so he said "Bye" and walked out; *St. Petersburg Times* and *New York Times* newspapers both did big stories on Florida death penalty. Noon: no word on *Booker* yet; U.S. Supreme Court denied cert. in *Bill Elledge*; discussed *Keney Foster* at length with Craig and Dick, re rehearing in the Eleventh Circuit: Eleventh Circuit panel misread the record on ineffective assistance of counsel: trial counsel allegedly (according to Dick) lied about the extent of his investigation into mitigating circumstances, and the panel misunderstood what was before the sentencing jury: can we get a remand for an evidentiary hearing, I wonder: Craig: "bluff and bluster, bluff and bluster"— I disagreed, arguing that what we needed to do was a precise analysis of the record. 5:30 p.m.: Craig heard from Gail Rowland, who works with Scharlette at the Clearinghouse, who heard from Scharlette, that at 3:00 *Booker*'s trial counsel Bernstein was on the stand all morning at the evidentiary hearing in Gainesville— hearing may run into tomorrow. 9:00 p.m.: Jeff called: Judge Crews denied their 3.850 motion and denied stay from the bench as soon as the evidentiary hearing was closed— he did not even go into cha.m.bers for a moment to deliberate: evidentiary hearing ended at 6:00 p.m.: Judge Crews refused to admit into evidence the psychiatric evidence, so they had an extensive proffer for the record after the judge had left the bench, with just the court reporter and the prosecutor present: things seemed to be going well in the morning, but backed off on cross examination – the trial lawyer did: *Booker* Florida Supreme Court papers and appeal to be filed tonight.

Tuesday, November 15:
West Palm Beach Post newspaper quotes Attorney General Jim Smith as saying *Sullivan* is the "next to go," *i.e.*, the next Florida prisoner most likely to be executed; discussed *Randolph* Florida Supreme Court rehearing issues with Craig: big issues are the felony murder aggravating circumstance and the Fourth Amendment issue (exigent circumstances for a search or seizure) — must get U.S. Supreme Court cert. now, or gone, per *Stone v. Powell*. 3:00 p.m.: Craig heard from Scharlette: Florida Supreme Court gave a one-day stay in *Booker*: oral argument at 8:30 a.m. tomorrow, Thursday, one-and-a-half hours after the execution was originally scheduled to occur: *Booker* death warrant not expire until noon on Friday, so they could still kill him: so they'll lodge stay papers in Federal District Court today, but not exhaust state proceedings until Thursday: they'll lodge their papers in the clerk's office in the federal district court, but not file until after they lose in the Florida Supreme Court—so the federal district court and the Eleventh Circuit will have one half of Thursday and Friday until noon to decide whether *Booker* dies; the Governor dissolved *his* stay in *Booker*, which had been based on the competence to be executed issue. 5:00 p.m.: Scharlette called Craig: xeroxing *Booker* papers for the Florida Supreme Court, which is getting impatient to receive them: at competency exam., Art Weidinger's psychiatric experts showed up, but Jim Coleman said no way because no due process; Jeff called at 10:30 p.m.: stay papers filed in the Florida Supreme Court just after 5 p.m.: in fact, the Florida Supreme Court stay is only for five hours, until noon on Thursday: Scharlette brought up, tactfully over dinner, the procedure if they lose and *Booker* is executed, *i.e.*, who will witness it, disposition of his body and personal effects, etc.; Clearinghouse is planning last-ditch organizing effort for *Sullivan*: I offered to go up to Tallahassee if we lost—talked and fretted and shared fear and anger for an hour over the phone— to call this shit "due process of law" is a really bad joke.

Wednesday, November 16:
Booker Warrant: Called Jeff about getting an hour-by-hour contact with the clerk's office in the Eleventh Circuit and the U.S. Supreme Court: Federal District Court, Judge Maurice Paul, has scheduled a hearing on *Booker* for 1:00: "may be" an evidentiary hearing. 5:10 p.m.: Craig called Scharlette: hearing lasted for one half hour: Judge Paul took stay motion and application under advisement: State argued exhaustion of state remedies and jurisdiction—Judge Paul can't even consider a stay application until all of the claims have been exhausted in the state court system; Judge Paul said he not need to do anything until the Florida Supreme Court stay ends anyway; Eleventh Circuit *Booker* papers lodged in clerk's office, just in case—U.S. Supreme Court papers being Xeroxed; the prison won't say if the *Booker*

execution has been rescheduled until Friday at 7 a.m. or not; waiting, waiting, waiting; Craig told me that Ed Stafman was very pleased with my letter: "I (he) missed an issue."

Thursday, November 17:
Booker Warrant: *Booker* was originally scheduled to be executed at 7 a.m. this morning: at the moment, the execution is stayed until noon on Friday by the Florida Supreme Court; oral argument on the *Booker* stay application in the Florida Supreme Court set for 8:30 a.m.: Jeff Weiner, will do it; *Palm Beach Post* newspaper reports that last night, the governor's office "rescheduled the *Booker* execution for 7 a.m. on Friday"; 10:30 a.m.: Craig called Scharlette at the Clearinghouse: the oral argument went overtime: they're waiting for a decision; submitted memo on exhaustion of state remedies to Federal District Judge Paul, who said he won't rule until the Florida Supreme Court rules; waiting, waiting, waiting; drafted *Spaziano* reply to the State's opposition to my cert. petition; Dick Burr: we can raise issue in Eleventh Circuit remand of *Ford*—technical, but it may get us time to scrape together some other issues; received State's response to our cert. petition in *Spaziano*: nasty, little brief that missed the issues, missed the point, and misrepresented the record. 12:40 p.m.: called Jeff: still no word from the Florida Supreme Court—their stay expires at noon. 3:00 p.m.: Florida Supreme Court denied *Booker*'s stay, unanimously, 6-0. 5:08 p.m.: they got a stay from Federal District Judge Paul, Jeff called to tell me. 9:00 p.m.: Jeff called: talked for an hour on fear and loathing in Tallahassee: Jim Coleman is highly pissed at the Florida courts: *Booker*'s lawyers will kick ass now, as only a big firm that's completely behind the case can kick ass; Jeff and Jim love Scharlette and the Clearinghouse.

Friday, November 18:
Scharlette called Craig about *Sullivan*, who's in real trouble: she thinks he'll get a stay; I went back to my real work: worked on *Randolph* rehearing, read cases and law review articles on felony murder; finished draft of *Spaziano* reply and Flo typed it.

Saturday, November 19:
Drafted rehearing in *Randolph*, focusing on proportionality issue, which I hate: *Tommy Randolph* was convicted of killing his wife, and my argument, in essence, is that he shouldn't receive the death penalty because it is "only" a domestic violence case—the fact is, that is an argument that has a real shot with the Florida Supreme Court, because the court seems to recognize a "single spouse" rule, *i.e.*, the first spouse you kill, you won't be sentenced to death: This argument is sexist and incredibly offensive to me personally, and

I'm afraid to even mention it to Ruthann: also, the Florida Supreme Court opinion in *Randolph* contained virtually no legal or factual analysis of the most important legal issues: drafting a memo, which probably won't be included in the rehearing petition that we actually file, relying on Weschler's *Harvard Law Review* article on neutral principles, that asks a central question: "What is a court?"

Sunday, November 20:
Drafted the rest of the rehearing *Randolph* issues. For this I went to law school—to make a legal argument playing to the worst instincts of an all-male Southern court?

Monday, November 21:
Sullivan oral argument tentatively scheduled in the Florida Supreme Court; Craig tried to impress upon Scharlette that's it's a *real* problem that *Sullivan* raised the stuff he's raising now in his previous round of post-conviction litigation; Jeff Robinson called: he very worried that Paul, Weiss' law firm is not firing with all cylinders on *Sullivan*: he saw their Florida Supreme Court papers on Friday, and they concede that their new evidence on ineffective assistance of trial counsel "may not have made a difference" in the outcome of Sullivan's original trial, *i.e.*, no prejudice, *i.e.*, they lose, without even being entitled to an evidentiary hearing on the new evidence, since it wouldn't have made any difference to the trial outcome anyway: *Sullivan*'s lawyers also raised proportionality, but they only raise it very narrowly; LDF had written off *Booker* as hopeless; is that why they did so little to help and were so eager to "dump" the case, in the words of Steve Winter, on Jeff Robinson and the Wilmer, Cutler and Pickering law firm; I told all of this to Craig and Dick, and Dick told Joe Engel to get people together politically to organize around the *Sullivan* execution, which looks more and more likely each hour. 2:00 p.m.: Susan Cary visiting the office; Scharlette called at 2:10: Sullivan's lawyers will file in Federal District Court tomorrow: as she was talking with Craig on the phone, she got word that the Florida Supreme Court had issued an opinion; Scharlette called Dick: the opinion said ineffective assistance of counsel was raised before (no shit), discussed proportionality, but only very superficially.

Tuesday, November 22:
Morning: met with Florida Atlantic University social scientist to discuss starting up a full-blown study of the Florida death penalty, perhaps even on a scale with the David Baldus study of capital sentencing patterns in Forsyth County Georgia; agreed on need to bring "the big guns together," and set up mid January as a target for a meeting: we'll set up specific agenda; met with Craig and Dick on felony murder issue in *Randolph*—they disliked my draft

rehearing very much (e.g., "Did you really write this? It reads like a strea.m. of consciousness"); I said the reason was that the issue was poor, so they tried to convince me otherwise: Dick Burr will rewrite it; Scharlette called to rave about how great Jeff Robinson and Jim Coleman and Marian Lindbergh are fine people, in addition to being great lawyers. 10:15 p.m.: Scharlette called: *Sullivan*'s federal district judge is Judge Gonzales, again: he demanded they hand-type and deliver the papers to him in Fort Lauderdale: they filed after 5:00 p.m.; Judge Gonzales scheduled a hearing for 9:30 tomorrow morning and seems real pissed at the lawyers: the lawyers are panicked, which is understandable: she not sure they really know abuse-of-the-writ/successive *habeas* petition law: no word from Roy Black yet, who was *habeas* counsel for *Sullivan* the last time around: Roy Black not returning their calls: Scharlette wants Dick or me tomorrow to fly in to help; I called Dick: he's going tomorrow: the lawyers seemed to him to be okay on abuse-of-the-writ law: I'm to stand by to back Dick up, if needed.

Wednesday, November 23:
Craig: *Sullivan* not looking good: 11 a.m. hearing delayed, since no one told the prosecutors about it: they contacted Roy Black last night, and he will be a friendly witness for *Sullivan* this time around; Carolyn Snurkowski ("the Snurk"), the head of the Attorney General's capital post-conviction squad, is en route to Fort Lauderdale. 2:00 p.m.: Dick called Craig: Federal Judge Gonzales ruled from the bench: one-half hour hearing, and one-half hour recess: he did not leave the bench, just went over his notes: Roy Black not called to testify: Judge Gonzales held that all issues except proportionality had been raised in the previous *habeas* petition and therefore couldn't be raised now, and their proportionality review was "a frivolous issue here." The lawyers will file the Eleventh Circuit papers on Friday; I argued with Craig all day about *Randolph* ("Did you argue with Vance like this?"): no real resolution, but no bad feelings either, I don't think. 4:30 p.m.: Dick called: *Sullivan* went "awful": it seems to me that his only shot is a procedural one: remand for evidentiary hearing on abuse-of-the-writ/successive *habeas* issues: it will all depend on which judges we draw for the Eleventh Circuit panel.

Thursday, November 24:
In Jacksonville with Ruthann: the *Jacksonville Journal* newspaper reported that there was "new evidence" of *Sullivan's* innocence: a confession to a priest that the confessor was with *Sullivan* on the night of the killing; can't tell from the newspaper story whether this really is new, since it sounds a lot like what we've known all along and what the Paul,Weiss lawyers argued on Sullivan's behalf in Federal District Court yesterday: the article was on the front page of

the newspaper and said that the witness can't identify himself as being with *Sullivan*, since his family doesn't know he's gay.

Friday, November 25:
Jacksonville: Dog races with Ruthann's dad; nothing on *Sullivan*.

Saturday, November 26:
Went to Gainesville with Ruthann (drove by Florida State Prison, my first glimpse of it); picked up newspapers from yesterday and today: several news articles on *Sullivan*: *St. Petersburg Times* says the Eleventh Circuit panel is Rony, Tjoflat and Anderson, and that there will be a hearing on Monday (sounds like an oral argument; nonevidentiary): bad panel, except that Anderson is very good and knows abuse-of-the-writ law: he wrote the big case on it, *Potts v. Zant*; Ruthann and I spent the day in Jacksonville with her parents.

Sunday, November 27:
Drove from Jacksonville to Jupiter: called Craig: *Sullivan* hearing is at 9:30; Dick in touch with *Sullivan*'s lawyers over the weekend, stressing he importance of abuse-of-the-writ and getting an evidentiary hearing on abuse-of-the-writ issues as a strategy for bootstrapping into a stay—need stay to do hearing on abuse; Craig and I exchanged sharp words about my *Randolph* rehearing draft (e.g.: Craig: "You remember *Randolph*"? Me: "Yes; I wrote a long rehearing on it once"): Craig said he's been working on *Randolph* all weekend.

Monday, November 28:
Randolph rehearing due; read it over: it's okay; Flo typing my *Spaziano* reply to the State's op cert. in the U.S. Supreme Court; big news stories on *Sullivan* in *Fort Lauderdale Sun Sentinel* and *Miami Herald*; *Sullivan* hearing began at 9:30 a.m.; I looked at the briefs in *Sullivan*; the Eleventh Circuit's new stay of execution guidelines are out: they're horrible; Jeff Robinson called: How is *Sullivan* going? 11:15 a.m.: Dick called Southern Prisoners Defense Committee in Atlanta: Eleventh Circuit oral argument in *Sullivan* went pretty well, all things considered: Judge Anderson was explaining abuse-of-the-writ doctrine to Judge Rony—Anderson, at least, seemed solid and in control: Judge Tjoflat foaming at the mouth during the oral argument (Craig said that Governor Graham's aide said he's thinking of suspending the death warrant in *Sullivan* for 60 days to dispose of the questions about innocence): the oral argument is still going on: Eric Freedman, one of the Paul, Weiss lawyers representing *Sullivan*, got an hour and a half of initial oral argument time, which is a lot. 2:15 p.m.: Joe Nursey of Team Defense in Atlanta called Dick

on whether they should file for rehearing in *Sullivan* if they lose unanimously, 3-0; Joe said the oral argument went badly; Steve Gey and Eric Freedman en route to DC; discussed *Freddy Lee Hall* issues with Craig: Eleventh Circuit panel is Hill, Hatchett and Allgood: discussed which issues to stress at oral argument. 2:46 p.m.: the Eleventh Circuit decided *Sullivan*, 2-1 against him, but sounds like some *en banc* issues, especially geography and race, have a shot at getting a stay from the full *en banc* Eleventh Circuit Court; found abuse-of-the-writ; Dick went over rehearing petition with *Sullivan*'s lawyers. 5:00 p.m.: *Sullivan* panel rehearing denied: not yet disposed of petition for *en banc* review. 6:00 p.m.: I went home. 6:50 p.m.: Governor Graham turns down appeal from the Pope on *Sullivan*'s behalf, Jeff Robinson calls to tell me. 9:50 p.m.: Dick Burr calls: stay denied: "No members of this court. . ." asked for an *en banc* poll; not clear whether it's ruling on *en banc*, only on stay application, etc.: will file in U.S. Supreme Court: discussed what it means and where to go from here. 10:30 p.m.: Dick and I, over the phone, discussed whether we should raise "hopeless" issue: electrocution as "Cruel and unusual punishment" issue, and innocence issues: ethical problems: should we just let *Bob Sullivan* accept his fate and prepare to die, or should we fight on to the bitter end—we decided the choice is *Sullivan*'s, not ours – only *he* can decide, but we will make the issue available if he and his lawyers want to raise it. 11:15 p.m.: Chief Judge Godbold of the Eleventh Circuit issues stay, based, apparently, on Sa.m. Gross race discrimination study: it seems that only now has Judge Anderson requested a poll of the *en banc* court: stay seems solid, at least for tonight, until *en banc* poll can be taken—and Eleventh Circuit told U.S. Supreme Court and *Sullivan*'s lawyers that they can't get a poll distributed and decided until Wednesday.

3. Fallen Timbers

Tuesday, November 29 and Wednesday, November 30:

Sullivan Warrant: Decided to still do last-ditch issues in *Sullivan*, arguing that electrocution is "Cruel and Unusual Punishment" just in case: I did supplement to electrocution as Cruel and Unusual Punishment pleading, relying on *Ohio Law Review* article—argument has three parts: (1) Constitution guarantees the least torturous and undignified (i.e., least destructive of bodily integrity, in terms of organs frying, eyes popping, and other sorts of gross disfigurement caused by electrocution), and (2) now there is a more "humane" form of killing an otherwise healthy adult human being, less destructive of body and dignity: lethal injection, so (3) Constitution requires states to use lethal injection: problem is in *In re Kemler* U.S. Supreme Court upheld constitutionality of electrocution, but distinguishable: (1) last century, before the more "humane" form of lethal injection was available:

compared to hangings and shootings, electrocution *did* seem relatively humane (2) *Kemler* was incorporation case, not 8th Amendment case, and court held 8th Amendment not apply to states: First electrocution (of Mr. Kemler, in New York) was botched, and the case got caught up in dogfight between Thomas Edison and George Westinghouse, AC verses DC current: found great *Tallahassee Democrat* story describing an electrocution; Joe Nursey told Margaret Good that Eleventh Circuit will poll re *en banc* by noon and stay probably will not hold; U.S. Supreme Court summarily reversed Eleventh Circuit opinion in *Freddy Hall*'s case; denied cert. in *Charlie Proffitt*'s case; I dictated *Sullivan* electrocution issue to Scharlette Holdman: went over other issues with Gail Rowland: Gail said that the rumor is that the Eleventh Circuit judges have left for the day; sent out my *Spaziano* reply brief to U.S. Supreme Court. 6:00 p.m.: went home. 6:30 p.m.: Craig called: Eleventh Circuit said they'd release a decision in *Sullivan* within an hour—we agree it's a bad sign. 6:40 p.m.: Craig called: Eleventh Circuit vacated Judge Godbold's stay in *Sullivan*: Craig will call back after checking in with Scharlette at the Clearinghouse. 7:00 p.m.: Dick coming in to the office; me, too, after grabbing a pizza. 8:15 p.m.: I arrived at the office: the Eleventh Circuit order was the standard summary *en banc* denial; not sure when the execution is now scheduled for: Florida Supreme Court says 10:00 a.m., but the prison says 7:00 a.m.. 8:30 p.m.: Dick, Craig and I meet; Dick calls Eric Freedman in DC: U.S. Supreme Court Justice Louis Powell referred the stay application to the full court; Craig suggests raising electrocution as Cruel and Unusual Punishment as a Section 1983 prisoner civil rights claim: Dick's skeptical, but I jump on it: under my *McKinnis v. Mosley* case (that I drafted for Judge Vance) it *is* a Section 1983 issue rather than a *habeas* issue, and it lets us avoid all of the *habeas corpus* procedural default problems (*e.g.*, successive petitions, exhaustion, procedural default, etc.): we'll write it and get someone in Jacksonville or Gainesville to sign it and file it; I draft Section 1983 law, while Dick sets up complaint and plugs in the few facts we'll need: very excited. 10:30 p.m.: Steve Malone, of Bill Shepard's office, won't sign on to the 1983 complaint. 10:45 p.m.: full U.S. Supreme Court denies *Sullivan*'s application for stay of execution—opinion will be released at 11:30; Doug McGee called re electrocution issue in Florida Supreme Court; Richard Green and Ellen Morris came in to type the Section 1983 complaint and to xerox it; Dick likes my draft, and it's being typed. Midnight: Dick tells me that he and I will drive the papers to Jacksonville, and that Bob Link, a Jacksonville attorney Dick knows, will be the lawyer who will sign them and file them; Doug McGee called re electrocution. 12:30 a.m.: Margo Schulter from San Francisco called, suggesting new issue—not helpful; spoke to Doug McGee at length at 1:30 a.m.. 2:30 a.m.: proofing, collating, xeroxing. 3 a.m.: leave for Jacksonville: drive at 80 mph, with music blasting on the car stereo. 8:30

a.m.: arrive at Bob Link's office 8:45 a.m.: file in Federal District Court; panic at 9:17 a.m.: papers not arrived in Atlanta yet—plane late; Dick fighting with Southern Prisoners Defense Committee, who says we shouldn't file in the Eleventh Circuit at all; Dick gives oral motion to clerk, from phone in hall. 9:35 a.m.: our judge is Judge Moore, about the worst judge we could get in Jacksonville, and he'll convene court now. 9:46 a.m.: Judge Moore denies our application for a temporary restraining order from the bench, in a short order, he reached the merits of the electrocution claim and seems to agree it is properly a Section 1983 claim, rather than *habeas*; Dick Burr runs to pay phone, and Link and I to clerk's office (Don Cinnamond). 9:51 a.m.: in clerk's office, frantic conference call with 3 three Eleventh circuit judges in three different states. 9:52 a.m.: District Court clerk Don Cinnamond says the case is in "ghost status," since no stay, *i.e.*, the execution will proceed as planned, unless we can convince a court to intercede otherwise; confusion at Eleventh Circuit: Don Cinnamond ticks off the minutes from 9:57 a.m. to 10 a.m.; Judge Frank Johnson is one of our Eleventh Circuit judges; Link orally describes our motion, over speaker phone, to Judge Johnson—since our stay papers still not there at Eleventh Circuit in Atlanta (still in the air circling around Atlanta airport), Link's argument is very chaotic: we can't get an open phone line into the death chamber, so not know if execution went down as scheduled. 10:05 a.m.: Don Cinnamond says prison says *Sullivan* has probably been executed. 10:07 a.m.: Eleventh Circuit denies us stay application: Judges Frank Johnson, Hill and Henderson: Don Cinnamond called Chris Vasil at U.S. Supreme Court for procedure for cert. and emergency stay application; we discuss it and decide it's over – for all we know, *Sullivan* has already been executed; Dick, Link and I went to Link's office, where we heard *Bob* was executed at 10:01 a.m.; I called Ruthann in West Palm Beach to tell her what had happened; drove back to West Palm Beach with Dick, much more slowly this time; got home about 8 p.m..

Thursday, December 1, 1983:
Went to Orlando with Joranby, Dick Burr and Richard Green to meet with Dr. Elizabeth Kubler-Ross, author of *On Death and Dying*; Susan Cary was there with *Bob Sullivan* before she witnessed, execution, and she said that *Bob Sullivan* was really ready to die—at peace and "without malice." I wish I could say the same about myself. This experience had left me with a hell of a lot of malice–trying not to think about how this will feel when it's one of *my* clients, someone I've come to know and fought for years.

Friday, December 2:
Craig and I flew to Florida State Prison to do clemency interview with *Bill Harvard*: my first time inside Florida State Prison: *Bill* is a real nice person,

who never should have been on death row to begin with: it will be a joy to fight for him.

Saturday, December 3:
Decompressed at home.

Sunday, December 4:
Put my notes on meeting with *Harvard* in order.

Monday, December 5:
Met with Craig on *Harvard*: discussed the purpose of clemency, the difference between clemency and litigation, and what the focus of the clemency ought to be in *Harvard*, as well as the issues to develop factually; Jeff called: *Booker* evidentiary hearing set for Thursday—in Federal District Judge Paul's court, but trying to get it put off: he'd like the idea of arguing electrocution as a Section 1983 claim, rather than a *habeas corpus* claim: sent him stuff from *Sullivan* and law reviews on procedural default; Judge Eaton denied all our issues except one in *Levis Aldrich* case: reserved ruling the racial disparity/ Sa.m. Gross statistical study issue: will hold status conference next week, to see where to go from here on that issue; Judge Vance's opinion in *Burger v. Zant* out in soft-bound volume; *Booker*: it's not an evidentiary hearing on Thursday; it's just a nonevidentiary oral argument on procedural default, abuse-of-the-writ, and other procedural issues; Scharlette read me a poem on the penalty; drafted a letter to Dave Grady, at DC's law firm Hogan and Hartson, on why they should take a death case pro bono. Night: Jeff called: re *Booker* discovery in *habeas corpus* cases.

Tuesday, December 6:
Drafted letters to law firms on why they should take death cases pro bono: Cravath, Swaine and Moore, Arnold and Porter, Bedel Ditmar, etc., etc.; met with Craig, Dick and Richard Green: case review: must get counsel for *James Adams now*: start doing Eleventh Circuit brief for *Hitchcock*: generally, the capital punishment landscape looks very grim: also discussed the Eleventh Circuit stay/expedited consideration rules: we'll send a letter to the Eleventh Circuit, and so will Scharlette, on how devastating the new rules would be on our attempts to represent our clients effectively in post-conviction proceedings: Dick will draft something for us to play with; I'll go over U.S. Supreme Court's opinion in the *Freddy Goode* case and talk with David Bruck on whether they should file for rehearing; at Dick's request; Jeff called: he'll look for a lawyer for Goode: discussed 1983 strategy; I called Judge Vance: he told me that now death cases go to the standing screening panels, who see them through—oral arguments, briefs, remands, successors, they always go

to that sa.m.e panel: he also said several times that things look very bleak for death cases in Eleventh Circuit these days: told him my role in *Sullivan*.

Wednesday, December 7:
Drove from West Palm Beach to Starke, home of Florida State Prison, with Craig: met with *Bill Harvard* for six hours: went over his life story again, trying to draw him out on the hard areas (his father's drinking, his sister's abuse of their mother while Bill was in prison). Night: made outline of questions to ask *Bill Harvard* tomorrow.

Thursday, December 8:
Arrived at Florida State Prison with Craig at 8:30 a.m.: talked with *Bill Harvard*: he told of FSP death row guards' reaction to *Sullivan* execution—some guards were subdued, some were happy: *Bill* said that when death warrants come, they are brought to the prison by small plane, which the inmates have learned to recognize, when it lands at the Florida State Prison landing strip: *Bill* talked for four and a half hours, with no interruptions from us, to the Parole and Probation person; home: Jeff called: State in *Booker* is arguing abuse-of-the-writ on the ineffective assistance of counsel claim in *Booker*: they're arguing that Booker could have fired Bernstein before or during the first death warrant and had another lawyer raise the issue that Bernstein rendered ineffective assistance of counsel at Booker's original trial: Jeff and I discussed responses: the hearing today went well—Jim Coleman and Marian Lindberg were there.

Friday, December 9:
Louisiana Clemency Board turns down *Williams*, 3-2: he's due to die on Wednesday; *John Eldon Smith* and *Alpha Otis Stephens* (of Zantu Stephens fa.m.e) due to die in Georgia on Wednesday and Thursday, respectively; discussed *Booker* issues and strategy with Craig and Jeff: Jeff: "Depositions are punishment," quoting from a criminal law professor that he had at Yale; discussed *Dobbert* and *Douglas* with Louis Carres; he's consulting on them, and wants me to consult, too; wants me to help, since both are jury override cases now up for cert.; Scharlette called: she has photos from an electrocution from Al Clayton: sending them to Jeff; Margo Schulter from San Francisco called: she thanked me for hearing her out on the *Sullivan* issue ideas that she had: she's into our Section 1983 civil rights challenge to electrocution as Cruel and Unusual Punishment and wants to help Jeff craft it; Jeff called: he's going to Gainesville on Sunday: Bernstein, *Booker's* trial lawyer, to be deposed on Monday: *Booker* hearing moved up to Wednesday: Scharlette may be a witness, on how trial lawyer Bernstein was the only ga.m.e in town for *Steve Booker* during his first death warrant: had Bernstein not jumped into the

case (waived *Booker's* ability to challenge the effectiveness of Bernstein's representation of *Booker* at the trial), *Steven Todd Booker* would have been executed on that first warrant, without a lawyer to raise any issues whatsoever: it's simply silly to suggest that *Booker* was to blame for going with Bernstein the first time around.

Saturday, December 10:
Christmas shopping in Coral Gables and Coconut Grove.

Sunday, December 11:
Chores around the house.

Monday, December 12:
Richard Green: Eleventh Circuit denied *Stephens* on Friday (Judges Vance, Fay and Kravich): *en banc* pending: *Smith* and *Williams* have nothing pending except clemencies; I'm back working on *Martin*: jail records issue; saw Eleventh Circuit opinion in *Stephens*: summary dismissal (3-0), relying on *Stanley v. Zant* – oh my God: Stephens is going to be killed based on the opinion I wrote in *Stanley*: Craig spoke with Steve Winter at LDF: something is filed in *Williams*, a second successor *habeas* petition: he laughed when Craig suggested our Section 1983 idea challenging electrocution as Cruel and Unusual Punishment; Jeff: the deposition of *Booker's* trial lawyer Bernstein went very well: "We're golden": they should win on the abuse-of-the-writ/successive *habeas* petition issue, too. Night: drafted *Martin* jail records issue; Dick Burr at Florida State Prison, at psychiatric exam. of *Nollie Lee Martin*.

Tuesday, December 13:
Morning: newspapers say no word yet on clemencies in *Smith* and *Williams*: U.S. Supreme Court denied cert., 7-2 (Brennan and Marshall filing their standard dissent) in *Williams* case yesterday; Dick: psychiatric exam. of *Nollie Martin* yesterday went very well: Dr. Dorothy Lewis is finding much evidence of organic brain damage and dysfunction in *Martin*; did summaries for life over death newsletter; my next project is Ja.m.es Adam's reply to the State's opposition to our cert. petition; Today's disasters: we lost *James Dupree Henry* in the Eleventh Circuit—Craig has "guarded nonpessimism" that it might be *en bancable*: *Spencer*, Georgia case raising Baldus race discrimination study, went *en banc*: *Williams* and *Smith* were denied clemency: *Stephens* was denied a stay in the Eleventh Circuit by a 6-6 vote: LDF is challenging the clemency procedures in *Smith*, a last ditch effort, sure to fail; talked with Marian Lindberg re *Booker*: they may write a letter about

the Eleventh Circuit's new rules of expedited consideration of death penalty cases: we have Dick's draft of our letter on them. Night: drafted *Adams* reply.

Wednesday, December 14:
Robert Wayne Williams executed in Louisiana; U.S. Supreme Court granted (5-4) stay for *Stephens*, pending Eleventh Circuit *en banc* resolution of racism claim in *Spencer*—this is all on the David Baldus study of racial disparities on capital sentencing patterns in Georgia; I rewrote Dick Burr's draft letter to the Eleventh Circuit on their new expedited rule; played with *Adams* reply brief; made up list of issues for *Martin*; Scharlette called: organizers in Louisiana and Atlanta called her last night: "What should we do?": we discussed our letter to the Eleventh Circuit on their new expedited consideration rules, and compared notes: she heard that after *Sullivan* was killed, Governor Graham and his aides met and discussed the "optimal" number of executions between now and June, *i.e.*, enough executions to get political mileage out of them, but not too many to turn people off—it depends on the other states (Governor Graham doesn't want Florida to break ahead of the pack when it comes to executing people: it's all a numbers game), but two or three executions between now and June would be nice, the Governor and his aides think; *Williams* lost 5-4 in the Fifth Circuit, after losing 3-2 before the clemency board – doesn't it offend anyone else's sensibilities that people die based on such razor-thin margins?; read the good guys' U.S. Supreme Court brief in *Washington v. Strickland*,[583] the big ineffective assistance of counsel case in the U.S. Supreme Court: the briefs were superb!

Thursday, December 15:
6 a.m.: radio reports that death penalty protestors will be out in front of the West Palm Beach Courthouse again today. 7:00 a.m.: U.S. Supreme Court cleared the way for the execution of *John Eldon Smith* in Georgia, which is scheduled to occur at 8:00. 8:50 a.m.: met Richard Green in parking lot; he said it's over—they're going to kill him; called U.S. Supreme Court: *Stanley* cert. petition still pending (I needed to know this for my reply brief in *James Adams*); I'm to work on *Cooper/Lockett* issue in *Hitchcock*'s case and race discrimination issue in *Aldrich*'s case; talked with Steve Stitt about the race discrimination issue: he has hearing before a Federal District Court today on it in one of his cases: gave him our cases and mapped out our argument for him; we have a status conference before Judge Eaton in Miami: he gave us a "hearing" on the racial discrimination issue (the Sam Gross statistical study), in January despite the State's strong objection: State said it would appeal, but

583. I discuss David Washington's case in Mello, *Rough Justice*, *supra* note 445.

Judge Eaton said "I've been holding hearings for seventeen years": Twenty-eight witnesses, unless State wants to try to rebut our reports then, they can pay for the witnesses.

Friday, December 16:
Called Jeff: the hearing in *Booker* went well, but the State thinks it went well for them, too: Judge "not know his ass from his elbow": it seems to me that *Booker* should win; met with Craig, Dick Burr and Richard Green on our Eleventh Circuit letter: they liked my version: we went over minor things—will fly it out today; called Steve Bolotin: good chat about *Spaziano* and jury override issues; talked with Louis Carres re jury override issue: I will get list of issues and reasons why cert. should be granted, and then research the criteria for granting cert. this weekend, I have to read the transcript in *James Adams'* 1962 conviction in Tennessee; told Dick I was working with Louis on jury override issue, and he said not to get too involved with that, since I was going to get a big piece of the Eleventh Circuit *Hitchcock* brief to write: the *Cooper/Lockett* issue.

Saturday, December 17:
Slept for 16 hours.

Sunday, December 18:
Read transcript and federal *habeas corpus* papers on *James Adams'* 1962 rape conviction in Tennessee: framed nine issues and did basic research on them: It was a racist trial, but I don't know if we can prove it.

Monday, December 19:
Discussed issues in *Hitchcock* with Craig; Dick Burr at Florida State Prison for *Alvin Ford's* competency to be executed exam.; Steve Stitt called: talked for an hour about *Thomas* and *Stanley* issues and race discrimination statistics; drafted letter to Steve Stitt: also list of issues to raise in jury override cert. petitions; signed Christmas cards to each of our death row clients – 15 of them in all; Jeff called: they met on the due process/Section 1983 challenge, and he will be managing it for the firm: brought him up to date on the various possible hearings on the other race of the victim statistical studies and data; Flo typed my letter to Steve Stitt; Craig too busy to meet on *Hitchcock* again today.

Tuesday, December 20:
Read Dan O'Connell's cert. petition in *Shriner*: very similar to my *Martin* arguments, which I had sent to him; met with Craig, Dick and Richard Green on *Hitchcock*: (Craig divided issues): Dick is doing the big guilt/innocence

phase issue, Craig *Cooper/Lockett* and I'm doing the "fluff" issues (as Craig put it), and Richard Green the "crap" (as Craig put it) (statement of the case, procedural history, statement of the facts, etc.); Southern Prisoners Defense Committee lost *Carzel Moore* in Eleventh Circuit: Dick had the case while he was there at SPDC, and is depressed; discussed *Cooper/Lockett* with Craig and told him that I thought the Florida Supreme Court brief was superficial. Night: discussed with Ruthann whether I should really push it on *Cooper/Lockett* or just let Craig do what he wants: this issue really could be so much more powerful than it is at the moment—can't really wait and comment on what Craig writes, since he'll probably wait until the last minute to write it: if I'm going to be able to change the direction of the argument, I'm going to have to do it *now*, preemptorily, *before* Craig has an opportunity to get something down on paper.

Wednesday, December 21:
Worked on life plea issue in *Hitchcock*: cases, our prior pleadings, etc.; Dick: *Carzel Moore* opinion is "an atrocity"; Eleventh Circuit clerk sent very strange letter in *Foster*, seeming to issue mandate on the first opinion (where *Foster* won) and not mentioning the modified opinion (where *Foster* lost); Craig agreed that the life issue in *Hitchcock* is weak but wants to put it in for atmosphere – but I shouldn't spend much time on it. Night: summarize cases for Florida Supreme Court recent decisions conference; Ruthann and I opened solstice presents.

Thursday, December 22:
My day to do recent Florida Supreme Court decisions conference; Dick discussed *Adams* with me: should we try to knock the prior Tennessee rape conviction out here, in Florida, as part of the post-conviction litigation attacking the legality of the Florida murder conviction and death sentence, or should we attack the Tennessee conviction in Tennessee? He liked the work I did on *Adams* last weekend; long talk with Craig: I'm now doing *Cooper/Lockett* issue in *Hitchcock*: we talked about how to disagree with one another, our different approaches to deciding which issues to raise, and which ones to emphasize, atmospheric issues and issues raised to support and effect we're trying to produce: this conversation really cleared the air between us; Dick Burr: all of *Nollie Martin's* family is crazy: many are clinically mentally ill and most are at least weird; Xeroxed stuff on *Cooper/Lockett* issue for *Hitchcock*; *Songer*, also raising *Cooper/Lockett* will be argued in the Eleventh Circuit around same time as *Hitchcock's* case is argued; *Carl Songer* is represented by Deval Patrick, at LDF.

Friday, December 23:
Met with Rich Lubin, *Martin's* trial lawyer: he'll go along with ineffectiveness claim, but thinks we have a better chance with equal protection challenge to the quality of the expert psychiatric assistance Martin received at trial: Luben says he didn't really get quality psychiatric stuff because *Martin* is an indigent, and look what good stuff would have been generated and shown, had Luben had the resources that we post-conviction attorneys are now bringing to bear on the issue.

Saturday, December 24:
Drove West Palm Beach to Jacksonville with Ruthann.

Sunday, December 25:
Jacksonville to visit with Ruthann's parents

Monday, December 26:
Ruthann' mother turned on me, screamed that I'd better not ever forget that Ruthann and I aren't married, that I was not welcome in their house and that I was trying to get Ruthann under my control and, of course, don't love her, etc., etc.; drove Jacksonville to West Palm Beach with Ruthann; wrote draft of *Cooper/Lockett* issue for *Hitchcock*—up all night working on it.

Tuesday, December 27:
Worked on *Cooper/Lockett* issue for *Hitchcock*: discussed it with Craig and Dick; chatted with Jeff on my *Holmes v. Continental Can* class action opinion drafted for Judge Vance, and on *Booker* strategy; Craig worked on *Harvard*: we discussed clemency strategy; Dick Burr: *James Adams* cert. will probably be denied on January 9: getting successor counsel is our highest priority now: went over possible names: I called Kotelis Alexander, who said he'd let me know tomorrow.

Wednesday, December 28:
The deadline for my handwritten *Hitchcock* draft of the *Cooper/Lockett* issue was moved from today to Friday; Jeff: what is the Florida statute of limitations for section 1983 civil rights actions?; Dick Burr: Bob Morin of SPDC called for suggestions on rehearing on *Carzel Moore's* case: Dick asked me to look over the Eleventh Circuit's opinion in *Moore* we went over each issue in some detail and discussed Eleventh Circuit strategy (e.g., framing issues as legal problems rather than factual disagreements for *en banc* consideration and vice versa for panel rehearing consideration); Kotelis Alexander called: they can't take *James Adams*: he wrote Hatchett's dissent in *John Eldon Smith's* case: he also drafted the Eleventh Circuit rules on time

limits for capital deadlines—the time limits were his: the battle within the court was over whether judges should have to decide capital cases within specified time limits—he was surprised that the rules came out at all, since there was such dissent within the court about whether to articulate such rules in the first place: they were on hold when he left the court; called Elizabeth Taylor: she was working in Justice Blackmun's chambers when *Sullivan* was killed: had the U.S. Supreme Court gotten to the merits of the statistical issue on race discrimination, they would have slaughtered the issue in *Sullivan*'s case.

Thursday, December 29:
Did statute of limitations research for Jeff; wrote letters to law school professors: can you take a death case pro bono?; spent all afternoon discussing *Cooper/Lockett* issue in *Hitchcock* with Dick, Craig and Richard Green: little agreement as to approach or style or tone or anything else: someone else will probably do another draft, after mine: no time problem now, since the State has stipulated to a 20-day extension to filing our initial Eleventh Circuit brief in *Hitchcock*; after the meeting, Craig said, "I guess we can't agree on anything, can we?" I guess not.

Friday, December 30:
Deadline for typed draft of *Hitchcock* Eleventh Circuit brief moved since we got 20-day extension of time from the court; *James Adams* reply brief goes out today: Dick not use any of the arguments in my draft; called Steve Stitt's office and left a message that Jeff Robinson is also litigating the race discrimination issue before Federal District Judge Paul; Dick Burr sent my execution competency memo to lawyers in a North Carolina case, a person set to die in early January: the case is *Hutchens*, and they're working on a successor federal *habeas* petition; Eleventh Circuit *en banc* court held against *McCorquadale*, 8-4: Judge Anderson voted with the majority; called Jeff Stone re getting Allan Dershowitz to do a case: he's very busy with the *Von Bulow* appeal: wait until we have a case with a sexy legal issue and then approach him through a big gun like Anthony A.m.sterda.m. or Jack Greenberg: thanks, but no thanks; Allan: he's a publicity hound; Jeff would contact him if it would do any good, but it wouldn't. Prick.

Saturday, December 31:
Stayed at home.

B. 1984: Sharpsburg (Antieta.m.); West Palm Beach, Florida

> For every Southern boy fourteen years old, not once but whenever he wants it, there is the instant when it's still not yet two o'clock on that July afternoon in 1863, the brigades are in position behind the rail fence, the guns are laid and ready in the woods and the furled flags are already loosened to break out and Pickett himself with his long oiled ringlets and his hat in one hand probably and his sword in the other looking up the hill waiting for Longstreet to give the word and it's all in the balance, it hasn't happened yet, it hasn't even begun yet, it not only hasn't begun yet but there is still time for it not to begin against that position and those circumstances which made more men than Garnett and Kempner and Armstead and Wilcox look grave yet it's going to begin, we all know that, we have come too far with too much at stake and that moment doesn't need even a fourteen-year-old boy to think *This time. Maybe this time* with all this much to lose and all this much to gain: Pennsylvania, Maryland, the world, the golden dome of Washington itself to crown with desperate and unbelievable victory the desperate ga.m.ble, the cast made two years ago ...
>
> William Faulkner[584]

Sunday, January 1, 1984:
Jupiter, Florida.

Monday, January 2:
Wrote memo on *Cooper/Lockett* issue in *Hitchcock*: Craig suggested I was wasting my time; Craig working on *Ja.m.es Dupree Henry en banc* petition: he thinks *Enmond* felony murder issue is very strong—I think it's very weak, but what else is new?

Tuesday, January 3:
Added names and numbers into Rolodex that Ruthann gave me for Christmas; asked Dick Burr for my handwritten draft of *Adams* reply brief (which he

584. WILLIA.M. FAULKNER, INTRUDER IN THE DUST 194-95 (1948).

didn't use but which he had thrown away); Craig wants to know why I did a memo on *Cooper/Lockett*; called Jim Cooney, law school classmate, in North Carolina re taking a capital case *pro bono*: he "very interested" in *Adams* and will "lobby for his law firm to take it": asked me to send him a letter outlining the procedural posture and constitutional issues in *Adams*; Craig wants me to read *Harvard* record for Rule 3.850 issues; I asked our schedule on *Hitchcock* briefing and told that it was "flexible"; Jeff called: DC Lawyers Committee on Civil Rights circulated memo encouraging law firms to do these death cases: he's trying to find someone for *Adams*: others in his law firm and other firms are interested; finished letter to Jim Cooney on *Adams*, but Flo did not type it; as I was on my way out the door, we discussed getting my letters done and sent out to Jim Cooney.

Wednesday, January 4:
Called Dave Grady at Hogan and Hartson in DC: he got my letter, asking his law firm to take a death case pro bono, and it's in the law firm pipeline: Middlebrooks, a former Judge Kravitch clerk, is pushing them toward taking a case from Team Defense in Georgia, at least at first: I should hear from Joe Haskell, Community Services Division of the law firm director, soon; Governor Graham signed death warrants on *Anthony Antone* and *Elwood Barclay*, set for January 24: Antone has no lawyer: *Barclay* has Sandy D'Alembert, Steel, Hector and Davis law firm, and James Nabritt of LDF; called Jim Cooney: he'll "go to the mats" with his law firm partner—not hopeful that they'd take a Florida death case, though; my letter to Cooney went out; Jeff called: DC Lawyers Committee needs to know precisely what we need in *Adams*: I may draft a letter; Barbara Giuffre on the *Virginia Law Review* called: she's doing a Note on the race of the victim discrimination issue: talked about an hour about *Spencer*; will send stuff. Night: read *Antone's* Eleventh Circuit briefs: he not raise *Cooper/Lockett* issue in any form.

1. The Cornfield

Thursday, January 5:
Jim Pfander returned my call from DC: he wants to do a death case: send him stuff; Jim Cooney called: they can't take a Florida case, but will do North Carolina work: told him about Dick Burr's *Velma Barfield* case; Jeff called: we talked about DC Lawyer's Committee recruitment efforts; I drafted a letter; Dick asked me to read over his Eleventh Circuit papers in *Foster* with a "former law clerk's eye"; I'm to read *Antone's* trial transcript tomorrow: Tom McCoun, *Antone's* lawyer, is sending it by bus: no successor counsel yet, so McCoun is doing it himself; called Scharlette: she's been calling Mafia

lawyers and people about *Antone*—talked to Trafficante, sort of a Fla Mafia "Godfather":[585] Scharlette does not think we can save *Antone's* life; sent letter to Jim Pfander, along with materials to Barbara at UVA Law Review; Ruthann feels that the baby has dropped: Braxton-Hicks contractions: false alarm.

Friday, January 6:
Picked up *Antone* trial transcripts and pleadings file at West Palm Beach bus station: started reading it; Jeff called: we talked about the letter I had written; Margaret Fienstein called: she has someone who may take a death case: her friend, Tom, a lawyer at Patton, Boggs and Blow, in DC; Craig and Dick in Miami, consulting with Sandy D'Alamberte on *Barclay*; Scharlette called to discuss *Antone's* sentencing phase: they're investigating, and trying to piece together, his family history and other mitigating circumstances: Rick Marsico, a Harvard law school student is working with them: talked to Rick about mitigating evidence; Craig called: things going well in Miami: the State may not oppose a stay; Margaret Fienstein called: has two people who may take pro bono death cases; David Brownwood of Cravath, Swain and Moore wrote me: they're in touch with LDF: do all pro bono that they do with and through LDF; Dick called: we discussed issues in *Antone—Cooper/Lockett* conditions on Deathwatch. Night: Tom McCoun called at home: we discussed his strategy on the first round of federal *habeas* in *Antone*: he just didn't think of *Cooper/Lockett*, given the crush of time pressures: trial counsel not called as a witness in post-conviction because he refused to say anything against *Antone*, and said he'd go to prison for contempt of court first—he'd be a good witness for us now: he was very inexperienced at the time he represented *Antone* at the original trial; Dick called: he'll start reading my draft on *Cooper/Lockett*: we should do a draft and send it to Tony Amsterdam[586] for input; I read the rest of the *Antone* transcripts at night.

Saturday, January 7:
Worked on deliberate bypass aspect of *Cooper/Lockett* issue in *Antone*, abuse-of-the-writ, ends of justice, etc.; called Dick: we may raise another *Brady* issue: need to talk with trial counsel about *Cooper/Lockett*.

Sunday, January 8:
Read abuse-of-the-writ cases.

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585. I discuss *Antone's* case in MELLO, DEAD WRONG, *supra* note 2, at 175-78.
586. *See generally* MELTSNER, *supra* note 83.

Monday, January 9:
Dick Burr thinks there's a big issue as to the confidential informant in *Antone*; I called Chris Vasil, death clerk in the U.S. Supreme Court, a few minutes after 10:00 p.m. to ask what the Court had done on pending cert. petitions: The Court GRANTED cert. in *Spaziano* —general cert. grant, as to all of the issues we raised: Court also denied cert. in *Adams* , and denied rehearing in *Antone*; LDF: Supreme Court says *Stanley* is being held indefinitely, probably pending the U.S. Supreme Court's decision in *Washington v. Strickland*, the big ineffective assistance of counsel case; called Jeff: talked strategy in *Antone* and *Spaziano*: he'll help on both; Jim Robinson, a reporter for Orlando newspapers, called; NBC crew at Clearinghouse; discussed *Harvard* clemency with Craig: *Bill Harvard* is just a "nice guy" is all that the clemency really says so far (yeah, except for the murder part); Dick very down about *Ja.m.es Ada.m.s*: "I just have nothing else": maybe now he'll argue *Stanley*; Jeff called: told Lawyers Committee about *Antone* and *Ada.m.s*: they're calling people around DC trying to find pro bono counsel for them. Night: did draft of deliberate bypass issue—worked most of the night: Scharlette called: we exchanged and compared note on *Antone* strategy.

Tuesday, January 10:
Long meeting with Dick and Craig: Dick despondent about *Ada.m.s*: Dick thinks *Antone* should raise traditional ineffective assistance, rather than *Cooper/Lockett*—I think that would be the kiss of death: it was raised before, though poorly, and this time the courts would say that that was close enough for government work: everyone, including Dick Joranby, calling around to find counsel for *James Adams*; Craig: "I'll do U.S. Supreme Court oral argument *Spaziano* because I'm the boss and have paid the dues"–but I can write the override portion of the brief; Margo Schulter called from San Francisco: she and Lewis Carres will probably do an *a.m.icus* brief in *Spaziano*, expanding on three issues beyond the scope of our main brief: 1). History 2). Professional opinions 3). National practice: they are pleased I a.m. writing the brief and look forward to working together; fine-tuned draft of deliberate bypass issue for *Ada.m.s* and *Antone*; oral arguments in the U.S. Supreme Court in *Washington v. Strickland* today.

Wednesday, January 11:
Tim Ford, the West Coast LDF, called Craig: U.S. Supreme Court also granted cert. in *Arizona v. Rumsey*, a double jeopardy capital case: he thinks *Spaziano* may be a very big case: judge vs. jury sentencing (a bunch of states out west have judges only sentencing): wants to orchestrate many *amicus* briefs; Dick Burr: we're spending too much time on *Antone*—just send Tom McCoun our handwritten drafts; Dick's contact person in Tennessee says

Blacks were systematically excluded from juries at the time of *James Adams'* 1962 rape trial: I drafted *Cooper/Lockett*; I talked *Spaziano* strategy with Craig: must keep focus on *Joe*, while also addressing, completely and thoroughly, all of the big ticket legal issues, as well; Jeff Robinson called: Jim Pfander called him, re *Ada.m.s*, to ask: "what's it going to cost?"; Andrea Rowland, reporter with the *Jacksonville Times* newspaper, called for interview.

Thursday, January 12:
Richard Green: *Hutchins* in North Carolina set to die tomorrow: U.S. Supreme Court denied cert., but can't tell if they did so on his first cert. petition or his successive cert. petition; this is the case Dick sent the lawyers my competency to be executed draft last December. 10:30 a.m.: they have state trial court hearing on execution competition issue; long talk about *Antone*: trial lawyer isn't really solid, either on *Cooper/Lockett* or on straight up ineffective assistance of counsel—they were just bumbling along, and not know penalty phase law or practice: will give them my *Cooper/Lockett* drafts: I convinced Craig and Dick not to sandbag them: also raise competency to be executed "physical and mental anguish: it's just offensive to kill the feeble minded as it is to kill the feeble generally": also may challenge *Ross v. Moffitt,* which held no right to counsel in *habeas* (sic) and argue it not apply to death cases: biggest issue is abuse-of-the-writ (which I've drafted) and getting a lawyer (Tom McCoun will file and then move to withdraw as counsel, since he's the main witness on the abuse-of-the-writ issue); *Spaziano* briefing schedule came: our main brief due February 16; called Margo Schulter: bounced ideas around, re override: she gave me some sources on juries in general, etc.

Friday, January 13:
Friday the 13th; I suggested we do an *amicus* in *Antone*, but Craig said no: time and politics (we must keep a low profile for the benefit of the legislature that funds our office): we may write ghost papers and work with pro bono lawyers like Tom, informally and off the record, but that's all—Craig feels awful about this, but it's the reality of being a state public defender; Jim Cooney called re *Hutchins*: State said *Hutchins* is competent to die, but yesterday a Federal District Court in the Fourth Circuit, in another case, found for the defendant on the prosecution proneness issue (*Grigsby Witherspoon*): Judge Dixon Phillips, on theFourth Circuit, granted a stay at midnight last night in *Hutchins*: State took cert. to the U.S. Supreme Court: death warrant expires at noon, in thirty minutes; talked with Lewis Carres about *a.m.icus* brief in *Spaziano*; Ra.msey Clark, former U.S. Attorney General, is interested in *Adams*—Craig not cert.ain, but can be convinced, I think; Jim Pfander called to say his firm can't take *Adams*: cost of travel to Florida, etc. etc.; called Neil

Skene, *St. Petersburg Times* newspaper: Tammy Robinson asked for his series on the Florida death penalty: she's clerking for someone in the U.S. Supreme Court right now: asked me to send him our cert. papers in *Spaziano*; *Ford*: one shrink says he's competent to be executed one isn't sure and one hasn't decided yet.

Saturday, January 14:
Richard Green: In *Hutchins* in North Carolina, at 5:10 p.m. yesterday, the U.S. Supreme Court dissolved Judge Dixon Phillips' Fourth Circuit stay, with four dissenting justices writing, bitterly: at 5:20 p.m. last night (i.e., ten minutes after U.S. Supreme Court dissolved the Fourth circuit stay), North Carolina Supreme Court granted a stay, saying that the state statute required setting a new date and time for the execution, since he missed the scheduled time "that had passed due to 'the stay of execution;'" met for 5 hours re *Antone*: Dick may go to St. Petersburg to help Tom McCoun draft post-conviction papers: he will drop the right-to-*habeas*-counsel issue, based on a Law Review article I had in my file; news on *James Adams*: in 1979, an inmate alleged the prison paid him to kill *Adams*: much publicity then: Dick Burr wants to file a Section1983 civil rights lawsuit now, based on that incident: we could then argue that the State ought not be able to kill it's main opposing witness (*i.e.*, *James Adams*) in that lawsuit; Craig talked to Rich Shapiro, who argued *Washington v. Strickland* in U.S. Supreme Court: he expects to loose, 5-4 or 6-3 in the U.S. Supreme Court; Sandy D'Alembert, Barclay's lawyer, briefed today by former Justices England and Sunberg of the Florida Supreme Court.

Sunday, January 15:
Drafted life plea issue in *Hitchcock's* case; Dick flew to Tampa to help with *Antone*; Ruthann typed my abuse-of-the-writ draft for *Antone*; Palm Beach Post newspaper had article on *Antone*: in an interview with the *Tampa Tribune*, Antone said he's innocent and talked about spiritualism, astral projection, etc: *Antone* is the oldest person on Florida's death row, and his mind seems to be going. . . .but is he too crazy to be executed? Probably not–it could kill the execution competency issue (*Aluin Ford*, our client, who really is nuts), to run the issue in a case like Antone's where the facts of insanity are weak.

Monday, January 16:
Proofed my deliberate bypass draft for *Antone*; received the letter the Eleventh Circuit sent LDF in *Spencer*, the Baldus race discrimination study case: the court set out ten questions they want counsel to address, analyze and answer; *Barclay* oral argument in Florida Supreme Court: *habeas* writ granted—probably only means a new direct appeal, rather than retrial or re-

sentencing, since the issue that prevailed was ineffective assistance of counsel on *Barclay's* direct appeal, not ineffective assistance of counsel at trial; Lewis Carres: Ramsey Clark wants to do it *i.e.* file an *amicus* brief in *Spaziano*: will find a good group to sign on as *amicus*; Dick Burr called from Tampa: not look good for *Antone*: *Antone* probably is sufficiently mentally competent to be executed: *Brady* claim isn't working out factually: not want to raise *Cooper/Lockett* broad gauge facial challenge to Florida's death penalty statute, since that may undermine the ineffective assistance of counsel at trial claim, which Dick thinks is our best shot, even though Tom McCoun raised it, and lost it, in the first round of post-conviction appeals; Dick called back and talked with Craig: *Antone* probably *will* raise *Cooper/Lockett*, and not raise mental competency to be executed, unless more effectual information comes in demonstrating that *Antone* is crazy, in precisely the right legal way, to justify raising an execution competency issue. 6:00 p.m.: Dick called to discuss deliberate bypass/abuse of the *habeas* writ. Night: read, for *Spaziano* brief, 150 Florida cases picking out all of the jury override cases.

Tuesday, January 17:

Xeroxed jury override cases and briefs in other jury override cases for *Spaziano*:[587] read another 150 Florida Supreme Court cases; Dick Burr is back in West Palm: *Antone's* lawyers using all of my abuse-of-the-writ draft and my facial *Cooper/Lockett* draft: plan to file on Thursday; Flo still working on typing my *Cooper/Lockett* issue; Dick: the affidavit of the court clerk in Tennessee, re racist selection of juries at the time of *James Adams'* 1962 rape trial, is very strong: women and Blacks were excluded from juries at the time of Adams' 1962 rape trial: this is a basis of attacking the aggravating circumstance of the 1962 rape conviction, as it was used to aggravate Adams' murder sentence in the Florida capital case; Dick: Dr. Blau (the shrink Rich Luban tried to get for *Nollie Lee Martin* at the time of trial, but couldn't because the court wouldn't give him money to hire another psychiatrist, says *Martin* is sicker than anyone can imagine: degenerative brain disease, and severe organic brain damage; Craig thinks the State 3.850 judge in *Martin* (Judge Mounts) will be deeply troubled by this ineffective assistance of psychiatry issue; may get clemency, even; called Steve Winter at LDF: he'll send their 1981 brief in *Smith v. Balkcom,* (which raised issue of jury as conscience of the community, similar to the Steve Gillers, *Deciding who Dies* law review article argument I raised in the *Spaziano* cert. petition, and want to emphasize in the merits brief on the jury override issue. Night: went over jury override cases for *Spaziano* brief.

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587. This issue is discussed in Mello & Robson, *Judge Over Jury*, *supra* note 121.

Wednesday, January 18:
Home ill—fever: not able to keep food down; thinking about restructuring the *Spaziano* jury override issue as a straight up Eighth Amendment violation: the objective indicia prong of the Eighth Amendment analysis involves the history and national practice of the procedure being challenged (per Professor Gillers): the independent judicial analysis prong, the second prong of the Eighth Amendment analysis, would discuss the functional analyses of juries in death cases (again, Gillers).

Thursday, January 19:
Tom McCoun filed *Antone's*[588] Rule 3.850 motion and lodged a federal *habeas* petition in Federal District Court; went over *Cooper/Lockett* issue for *Hitchcock*; Margo Schulter called: talked for 3½ hours about her outline of *amicus* brief: little overlap with ours; sounds good generally, especially on history of the use of juries in capital as opposed to non-capital sentencing: the rest of her argument sounds flaky to me; Jeff called: discussed Section 1983 case he is preparing for *Booker*—he's drafting it now; Governor Graham signed death warrant in *Buford White*: execution date is February 7: *White* is represented by a Miami public defender. 3:00 p.m.: *Antone* 3.850 Motion denied in state trial court: oral argument scheduled in Florida Supreme Court for 2:00 tomorrow; I read the *Antone* papers filed: Tom McCoun asking federal court to hear him on Saturday; called Jim Cooney: talked about *Hutchins*, who is scheduled to die on March 16: they really want to do a North Carolina death case in his firm, not a Florida case; Craig is in Tallahassee arguing the *Bill Harvard* clemency before Governor Graham and the Executive Cabinet.

Friday, January 20:
Looked up Law Review cites for *Spaziano* brief in county library and Index to Legal Periodicals; Craig: at *Harvard* clemency argument, Governor Graham seemed interested in innocence issue yesterday; in *Antone*, Federal District Judge Carr won't schedule anything until the Florida Supreme Court acts on the Rule 3.850 appeal; later in the day, Judge Carr set hearing for 1:30 p.m. on Monday (so as not to disturb his Superbowl weekend, which is in Tampa, where Carr sits, this year?); *Antone*: fuck it: we're just going to do the Eleventh Circuit and U.S. Supreme Court papers tonight and tomorrow: Tom McCoun's *Antone* federal *habeas* papers should get here tonight; Buford

588. I discuss *Antone in* MELLO, DEAD WRONG, *supra* note 2, at 175-78.

White, whose death warrant was signed yesterday, was a jury override case, like Spaziano: sent Karen Gottleib, White's lawyer, our *Spaziano* papers; Steve Bright, SPDC, told Dick Burr that during Stephens Eleventh Circuit argument, "Vance was the demon on abuse-of-the-writ": RSV said to lawyer: "Do you know what 'F.2d' is? I'm going to have some bad things to say about you in F.2d". 5:10 p.m.: Tom McCoun called Dick: *Antone* oral argument in Florida Supreme Court not hostile: they asked questions on the merits, and didn't seem angry about delay in filing at all (is it possible that justices actually understand that the counsel crisis is real?); Margo Schulter called: likes my Eighth Amendment analysis of jury override issue in *Spaziano*; talked about her *amicus* brief strategy; met to discuss *Hitchcock* progress: all issues farmed out and being written or written already; met with Craig re *Spaziano* Supreme Court brief: must get going on it; conference call with Tony Amsterdam next week re strategy in U.S. Supreme Court for *Spaziano* brief. Night: read materials on jury override.

Saturday, January 21:
Read materials on jury override for *Spaziano*; *Palm Beach Post* newspaper reports the Florida Supreme Court denied *Antone*'s stay 2½ hours after the oral argument yesterday.

Sunday, January 22:
Read stuff on override.

Monday, January 23:
Antone Warrant: No one knows if Florida Supreme Court has ruled yet: newspapers say yes, but no one has told *Antone's* lawyer, Tom, yet: our papers were lodged in the Eleventh Circuit and the U.S. Supreme Court clerk's office. 10:00 a.m.: Dick called Tom McCoun: Florida Supreme Court did rule, but he does not have their opinion yet: sounds like abuse-of-the-writ/successive *habeas*; Steve Bolotin called: excited about *Spaziano* cert. grant and possibility of getting the U.S. Supreme Court to throw out Florida's jury override: told me that the assistant attorney general on *Booker* has a photo of *Booker* on the wall of his office: I called Jeff Robinson to tell him, and Jeff commented: "What a prick– that's sick"; read Florida Supreme Court jury override cases; called Margo Schulter: she's doing a Sixth Amendment jury override challenge, though it won't overlap with mine. 4:00 p.m.: Miguel Cortez, the Eleventh Circuit clerk, won't file the *Antone* papers unless Tom McCoun files a filing fee—bullshit, but we will pay it: Steve Bright thinks we should wait to file—too much time, if we file now, the courts will have too much time—that's just *crazy* to me, unless the issues we're raising are bullshit, which they aren't: if you've got real issues, the more time you give

the court to consider them, the better it is tactically for you—if we have good issues, we should give the court as much time as we can to consider them and resolve them, especially with complex legal arguments about abuse-of-the-writ. 4:10 p.m.: Federal District Court denied everything in *Antone*; Tom's secretary called Dick Burr: Eleventh Circuit is *Antone's* only hope: one hour oral argument. 5:20 p.m.: Tom McCoun called Dick Burr: 3 hours of argument in Federal District Court, but it was a charade: Tom sat down, Federal District Judge Carr read his order: hard to tell if you made fact findings, since the order is so poorly written; Brenda Houk, Eleventh Circuit clerk told Dick she was going home to change into jeans, since "it's going to be a long night"; we tried to guess which three judges would be on the *Antone* panel, but it was just reading tea leaves by scared people who don't have any. real information to go on. 5:40 p.m.: we lost *Pulley v. Harris*, the proportionality case in the U.S. Supreme Court, 7-2. 1:30 a.m.: Dick Burr called: we lost *Antone* in the Eleventh Circuit, unanimously, 3-0 (the panel was Judge Godbold, Judge Tjoflatt, and Judge Roney); the panel did give *Antone* a 24 hour stay to permit time to file a cert. petition and to ask for a stay from the U.S. Supreme Court.

Tuesday, January 24:

Antone Warrant: originally scheduled to be executed at 7:00 a.m. this morning, but Eleventh Circuit gave him a 24 hour stay, pending the filing and disposition of a cert. petition and a stay application in the U.S. Supreme Court. Morning: we discuss whether Tom McCoun should file for rehearing *en banc* in *Antone* in the Eleventh Circuit—Dick and Craig decided last night not to, but that's wrong it seems to me: can't infer too much from Godbold's not dissenting from the panel, since Godbold *is* Chief Judge and can't be dissenting on this bitterly-felt issue without undermining his leadership role as administrative head of the Eleventh Circuit: Dick got nasty and said he's sick of decision making "by committee" *i.e.*, Richard Greene and I giving our views to the death penalty *real* experts: Dick Burr and Craig Barnard: fine. Noon: Eleventh Circuit and U.S. Supreme Court screaming for our papers to be filed: were writing and dictating to Steve Bright in Atlanta over the phone and Dave Kendall in DC; utter zoo: Miguel Cortez (Eleventh Circuit clerk): Atlanta airport is fogged in, so maybe the court won't be able to distribute our *Antone* stay application to the judges who will decide it; Lewis Carres touched base on *Spaziano amicus*; I xeroxed cases on juries criminal cases; Craig and Dick clearly are leaving me out of the decision making process in *Antone*: fuck 'em. Night: read stuff on jury override for *Spaziano* merits brief.

Wednesday, January 25:
Antone Warrant: 9:00 a.m.: No word yet on *Antone*: cert. petition lodged in U.S. Supreme Court and *en banc* rehearing pending an Eleventh Circuit. 10:50 a.m.: not one Eleventh Circuit judge asked for a poll in *Antone*; rehearing *en banc* denied unanimously: the case is now in the U.S. Supreme Court; noon: *Antone* cert. papers not arrived at U.S. Supreme Court, yet; now the DC airport is fogged in, so *Antone* cert.: stay papers can't land. 1:00 p.m.: Dick: Scharlette's contact in Governor Graham's office says *Antone's* execution will be rescheduled for 7:00 a.m. tomorrow a.m. 2:10 p.m.: the prison officially rescheduled the *Antone* execution for 7:00 tomorrow morning; Margo called: read parts of *Pulley v. Harris* opinions—sounds like my "state created right/Due Process" argument in *Randolph* rehearing in the Florida Supreme Court is still alive and well, even after *Pulley*: Supreme Court in *Pulley* didn't seem to really do a Due Process/state created right analysis at all, although Tony Amsterdam squarely and superbly raised it in the briefs; read cases and Law Reviews on juries for *Spaziano* brief; mostly waited for the axe to fall in *Antone*; evening: Ruthann and I went to dinner, bought bookshelves; no radio news on *Antone*. 9:30 p.m.: Craig called: we lost *Antone* in U.S. Supreme Court, 7-2, Brennan and Marshall issuing their standard dissent: opinion focused on "ends of justice" rather than abuse-of-the-writ; the Supremes found all issues had been raised before Justice Stevens concurred, saying "we don't need to write anything about this case: just deny it summarily, since it's a successor."

Thursday, January 26:
Anthony Antone executed in Florida at 7:02 a.m.: things in the office very somber; Dick extremely depressed; read stuff on juries and override for *Spaziano* brief; called Margo to compare notes; she's written intro to *amicus* brief in *Spaziano*; Jeff Robinson read me New York Times editorial on how "death is different" because now the courts don't care about death cases. Night: read jury override materials.

Friday, January 27:
Xeroxed and read cases on juries for *Spaziano*; Jeff called: he's having lunch with a former Justice Stevens clerk, the one who wrote the U.S. Supreme Court opinion in *Zant v. Stevens*; she may take a death case—she's really sad she couldn't convince Justice Stevens not to write separately in *Barclay v. Florida* excited about the *Spaziano* cert. grant and thinks it's a great issue (the override). Night: drafted introduction of jury override issue for *Spaziano* merits brief in U.S. Supreme Court: started on "objective indicia" argument for *Spaziano* 8th Amendment analysis.

Saturday, January 28:
Drafted *very* rough draft of Eighth Amendment issue for *Spaziano*: it bothers me that I'm really arguing for jury sentencing, and that to win the Court need not go that far but the argument really seems to work—Steve Gillers law Review article *makes* it work: I'll probably do an Eighth Amendment/Double Jeopardy section also, but it will be secondary: drafted introduction to Eighth Amendment and Due process arguments: drafted "nature of the death decision" issue—retribution, etc.: drafted "myth of judicial expertise in capital sentencing decision making" argument.

Sunday, January 29:
Played with *Spaziano* draft; did chores; drafted *Spaziano* federalism argument, drawing from Abe Fortas's brief in *Gideon v. Wainwright*—the inherent arbitrariness of the *Tedder* standard exacerbates federal/state tensions: it drafted out well and easily, but really conflicts with my second jury override argument (the "as applied" argument)—in federalism section, I argue why *Tedder* can't work, but in the "as applied" section, I argue that *Tedder* is constitutionally required: will talk to Craig tomorrow about this tension.

Monday, January 30:
Dick went to judicial conference meeting over the weekend: the Eleventh Circuit's proposed rules to expedite death penalty cases are dead in the water: everyone was attuned to the problems of finding counsel for death row prisoners in Florida: they unanimously (Judge Roney included) voted to suggest the Florida Bar set up a mechanism for appointment and compensation of counsel in capital post-conviction proceedings, Rule 3.850 proceedings in state court and federal *habeas* proceedings in federal court; Richard Greene: Dick Burr heard that the last psychiatrist in *Ford* concluded he's psychotic, but competent to die; called Jeff and went over *Spaziano* override draft: he likes it and made very good comments; discussed override issue with Craig. Day and night: drafted and redrafted and re-redrafted jury override issue for *Spaziano* merits brief; *Buford White* gets a stay, and wins re-sentencing from State 3.850 trial judge on *Enmond*/felony murder grounds (no intent to kill): State appealing to the Florida Supreme Court. Morning: Ruthann has a non-stress pregnancy test: all OK.

Tuesday, January 31:
Craig gave me motion for extension of time in *Delap* to do: "you must take the shit work along with the fun work"; drafted "lingering doubt about guilt"

issue[589] for *Spaziano* brief: did analysis of legislative history of jury override in Florida: really fascinating stuff: smoothed out and fined tuned the "nature of death decision" argument, which is my key point in the jury override arguments. Night: drafted Sixth Amendment right to jury trial issue and Double Jeopardy–they're subsidiary issues, but nice atmospherically to buttress the main arguments.

Wednesday, February 1, 1984:
Craig: Professor Bruce Rogow at Nova Law School wants to moot court *Spaziano*, along with 2 Law Review students who want to clerk for our office: U.S. Supreme Court is *maniacal* about page limits on briefs, and we can't go one line over the page: read Eighth Amendment sections to Jeff over the phone: he thinks they work; talked with Margo for 2 hours: went over my draft, issue by issue, and she likes it and thinks it will compliment her work on the *amicus* brief nicely. Night: smoothed out issues, added discussion about how the Supreme Court's prior death penalty cases (especially *Proffitt* and *Dobbert Daubert*) may have seemed as though the Court were putting its constitutional seal of approval on the constitutionality of the override, but really the issue wasn't presented to them, and therefore they didn't decide it, at least not for all time, in those cases: got cert. petition in *Dobbert* from LDF: it was based on what we had written in *Spaziano*: Steve Winter wrote it, probably with Tony Amsterdam's help, since it is extremely well-written and powerfully argued.

Thursday, February 2:
Spaziano brief: Craig is cert.ain we will win the *Beck v. Alabama* "no lesser included offenses" issue in *Spaziano* in the U.S. Supreme Court—sees it as an easy issue; Craig: we'll do a conference call with Tony Amsterdam today or tomorrow to bounce ideas around; Tony will sketch out the way he thinks the brief should run and we'll take notes; we'll meet at 11:30 on Monday; I'm going to send Tony a letter outlining my draft; Craig thinks he sees it as a double jeopardy issue; Scharlette called: wants to send my big Hac/Godfrey/heinousness aggravating circumstances memo to *Qunice's* lawyers: he and Steve Bollitin called Gerald Hubbart, Bolander's lawyer, and chatted about the jury override issue; I wrote letter to Amsterdam; left on Flo's desk to type. Night: fine tuned jury override draft for *Spaziano* merits brief.

589. This issue is discussed in Mello & Robson, *Judge Over Jury*, *supra* note 121.

Friday, February 3:
Craig wants to start working on the *Beck v. Alabama* issue in the *Spaziano* brief today; I added footnotes to my jury overwrite draft in *Spaziano*—the draft is way too long to work from–easier for me to edit down, then add later; sent my letter-outline to Tony Amsterdam and Steve Winter; received a copy of Jeff's Section 1983 complaint on *Booker* in the mail; Craig went over record to decide which parts to designate as the appendix for the U.S. Supreme Court; criminologists Mike Radelet and Margaret Vandenberg were in the office visiting Dick: will send me statistics on the jury override: they said the Florida Supreme Court decided two override cases yesterday, one affirming a death sentence and one reversing sentencing; Craig: *Quince's* lawyers are incompetent: he's looking for someone to take the case over.

Saturday, February 4:
Rested; did chores.

Sunday, February 5:
Rested.

Monday, February 6:
Morning: Craig and I discussed *Spaziano* issues: *Beck* issue mostly, but some on override issue; conference call with Tony Amsterdam, Craig and Steve Winter for 1 ½ hours: Tony loved the cert. petition: he went over my outline, point by point, made many very good structural suggestions, *i.e.*, not making a separate Sixth Amendment argument and incorporating Double Jeopardy argument into the pre-existing Eighth Amendment discussion: Craig wanted to discuss the *Beck*-no lesser included offensives in structure issues, but Tony said to just to follow the cert. petition: Tony not like my federalism-*Gideon v. Wainwright* brief argument; called Margo: argued to keep the federalism in: her brief is done and sent to the court. 1:00 p.m.-5:00 p.m.: restructured *Spaziano* jury override argument as Tony suggested—looks real good and is ready to be typed; will send Tony and Steve Winter a draft. 5:00 p.m.-11:00 p.m.: at hospital; non-stress test for Ruthann: her heart rate got doctor worried, and he started preparing us for the idea of a cesarian section: we convinced him to consider a less drastic action, so he did a stress test, with Pitocin to stimulate contractions; Ruthann passed it ok.

Tuesday, February 7:
Buford White scheduled to be executed today; got Jeff's latest draft of section 1983 complaint in *Booker*; Russ Canaan is down helping *Quince's* lawyer: *Quince's* lawyer he not seem to know there is such a thing as federal *habeas*

corpus—thought it was all over when you lost in the Florida Supreme Court on direct appeal; discussed my outline and Tony Amsterdam's comments with Lewis Carres, who received Margo's brief through Federal Express today, but he didn't give me a copy. Night: Margo called to discuss her draft: she's still decompressing after writing it sounds very wound up.

Wednesday, February 8:
In morning, Ruthann had non-stress test; all was fine, but Doctor Vic gave Friday as an absolute deadline: refused to do blood test that would show disintegration, after telling me on Monday that their was no such test because the results would not be back until Monday, after his Friday deadline; so we went to Sarah, our old midwife, who agreed that Dr. Vic was being paranoid: agreed to try it at home, if Ruthann goes into hard labor before Monday; right now, Ruthann is two centimeters dilated, 80% if faced and bloody show. 9:30 a.m.: Margo called to discuss *Spaziano*; Craig in the office editing and correcting the issues in *Hitchcock* brief.

Thursday, February 9:
Craig: *Spaziano* draft isn't typed yet, won't be typed today, and probably won't be typed tomorrow–too busy with *Hitchcock* brief; finally got a copy of Margo's amicus brief from Lewis Carres: he afraid we'd "send it all over the country" and the Court would hear about it before its filed–but he shouldn't have flattered himself, because the brief is neither original nor terribly well done: Margo's amicus brief deals with history, and that portion is superb; the rest also is o.k., so far as it goes; Dick: *Bolander* got stay last week: *Quince* has evidentiary hearing today on ineffective assistance of counsel. 2:00 p.m.: *Quince* gets a stay; Dick worried that *James Adams* will get a warrant now; Craig editing *Hitchcock* brief; Ruthann told Dr. Vic that she wasn't being "induced" tomorrow: he said he'd continue as our doctor, but wanted us to sign a release that we were going against his advice and not allowing him to induce the pregnancy tomorrow.

Friday, February 10:
Morning and afternoon: met with Dr. Vic and signed release of Dr. Vic's liability; walked along the beach and talked; Craig: will get my jury override issue in *Spaziano* typed today—I'll come in this evening to make corrections on when it's done, which he expected to happen around 10:00 p.m.. 9:10 p.m.: Ruthann's contractions begin very intense and violent never less than three minutes apart no rest for her in between contractions. 9:20 p.m.: contraction begins, fifty seconds. 9:25 p.m.: contraction begins, thirty-five seconds. 9:28 p.m.: contraction begins, twenty seconds. 9:31 p.m.: contraction begins, 50 seconds. 9:38 p.m.: contraction begins, one minute -

vomited—9:41 p.m.: contraction begins, called mid wife Sarah. 9:43 p.m.: contraction begins, thirty seconds. 9:46 p.m. (on phone with Sarah): contraction begins, ten seconds; Sarah the mid wife; is in Miami, at a mid wives convention afraid Dr. Vic will make trouble for her if she comes out here now, under the circumstances; contractions continued two minutes apart; from bathroom from bedroom; vomiting fairly often. 9:52 p.m.: contraction begins, twenty seconds. 9:57 p.m.: contraction begins, one minute - vomiting. 10:00 p.m.: contraction begins. 10:03 p.m.: contraction begins, thirty seconds. 10:02 p.m.: contraction begins, thirty seconds. 10:03 p.m.: contraction begins. 10:04 p.m.: contraction begins, fifty seconds - vomiting. 10:07 p.m.: contraction begins, twenty-seconds. 10:10 p.m.: contraction begins, forty seconds. 10:13 p.m.: contraction begins; fifty-five seconds - vomiting; two contractions in bathroom - feels very weak-like passing out. 10:22 p.m.: contraction begins, 40 seconds. 10:24p.m: contraction begins, 40 seconds. 10:27 p.m.: contraction begins, thirty seconds. 10:29 p.m.: contraction begins, thrity-five minutes. 10:31 p.m.: contraction begins, thirty seconds. 10:34 p.m.: contraction begins, forty seconds. 10:36 p.m.: contraction begins, twenty-five seconds. 10:38 p.m: contraction begins, forty-five seconds. 10:40 p.m.: contraction begins, forty seconds. 10:42 p.m.: contraction begins, forty seconds. 10:45 p.m. contraction begins, twenty-five seconds. 10:47 p.m.: contraction begins; forty seconds. 10:49 p.m.: contraction begins, forty seconds; 10:51 p.m.: contraction begins, one minute. 10:53 p.m.: contraction begins, fifty seconds. 10:55 p.m.: contraction begins, one minute. 10:59 p.m.: contraction begins. 11:00 p.m.: water broke—Ruthann in bathroom water is clear (good sign); called Sarah on beeper. 11:03 p.m.: contraction begins, seconds. 11:10 p.m.: Sarah called back—in Miami and can't get back in time: said that since Ruthann was vomiting, should go to hospital. While on phone, Ruthann yelled, from the bathroom, to look—she crowning, top of baby's head: I call rescue squad, which arrives within three minutes–two trucks and a car–simply no time to drive Ruthann to the hospital before giving birth; 11:27 p.m.: Larkin Robson Mello born on floor outside the bathroom, at Jupiter home; seemed to take forever for his breathing to start, but it did; rode squad vehicle to hospital with Ruthann; Dr. Vic sutured Ruthann's tears; called our parents; we held Larkin; I slept in bed next to Ruthann's, since I had no way to get home; at foot of her bed: Worked on *Spaziano* brief, Ruthann woke up and looked at me hard.

Saturday, February 11:

Spent day with Ruthann and Larkin at hospital—he was out most of the day, and we got to know each other; picked up *Spaziano* override draft at the office—corrected it at hospital, in between holding Larkin, etc.; took the draft back to the office at night; met Dr. Joan our pediatrician: she examined

Larkin, all fine: told me good way to hold him, under arm, like a football ("babies are not eggs"); meanwhile, back in the office, yesterday and today, Dick Burr had his conference of social scientists interested in studying racism in Florida's death penalty.

Sunday, February 12:
Slept all day with Ruthann and Larkin; Ruthann tried breast feeding, and it's slow but he's getting the hang of it; he and I got to know one another; he loves to be walked, as I did when I was a baby, I'm told; hospital served steak "stork" dinner; the nurse told us "this is the last romantic evening you will have for awhile," that's why they had the dinner; Tom Philips, the Jupiter rescue squad EMT who delivered Larkin, came by the hospital to see how he is doing; tomorrow, we all go home.

Monday, February 13:
10:30 a.m.: Family arrives home from the hospital. 11:30 a.m.: I change my first diaper; Larkin up almost all night; slept, at most, 3 hours; Ruthann and I am dead tired, but happy.

Tuesday, February 14:
Home with Ruthann and Larkin; got birth announcements, etc.; called Craig: *Spaziano* override draft still not sent out maybe today: he'll call Tony Amsterdam to see if this gives Tony enough time to do a hard read of my override issue: he not see any way we will make the deadline, and he'll call the Court to try to get more time ("the guy writing the brief just had a baby–can I put that in a motion for extension of time?": Craig's only concerned about when I will be back, and only as an after thought did he ask about Ruthann and Larkin; Margo called: spoke for three hours about her amicus brief. Evening: Craig called: my *Spaziano* override draft sent to New York today—Steve Winter and Tony Amsterdam will read it tomorrow morning, meet in afternoon: we'll have to have the edits done by Saturday: we discussed *Beck* issue in *Spaziano* in detail: Damned if he didn't get some time from the Supreme Court, by telling them "my co- counsel had a kid ...."

Wednesday, February 15:
Last night, Larkin slept fine when held, but cried continuously when put in his crib: I walked him until 4:00 a.m., when Ruthann took over; called work: no word yet from LDF; Dick asked what was going on with the attempts to get Rory Little at Miller, Cassidy, LaRocca and Lewin in DC to take *Adams* so I called Jeff Robinson, who is been shepparding it through the process at the MCLL law firm: he'll check around Wilmer Cutler law firm and call MCLL: said that Scharlette Holdman and Susan Carey were positive about the *Booker*

section 1983 lawsuit: Jeff is going to contact LDF and Tony Amsterdam next about trying to find a lawyer for *James Adams*; evening: wrote out birth announcements with Ruthann. Night: Margo called: she has an edited version of her brief ("I still haven't seen it, but Lewis may have left it on my desk"): she lobbied for me to use stuff she cut out of her draft: her amicus brief is now all history and nothing else.

Thursday, February 16:
Our merits brief in *Spaziano* was due today in the U.S. Supreme Court, but since we can allow one extra week for printing time, we will print it ourselves, so it's not due till February 23. Morning: called Craig: Steve Winter was very enthusiastic about my "facial" challenge issued to the override—can't cut it more than 1/3 because its already so tight: thinks the "as applied" issue needs work, and I think he's right; I took the family to the office; Craig gave me update on statutes for the appendix to the *Spaziano* brief; got draft of my override issue; Richard Green gave me an Eleventh Circuit case discusses retribution as a goal of the death penalty. Evening: corrected statutory appendix for *Spaziano* brief and took back to office and left on Craig's desk; Dick: the racism conference on Friday and Saturday went very well: they will do a big study for Florida.

Friday, February 17:
Morning: spoke with Craig for two hours: discussed housekeeping matters for brief: he sent Tony his draft of the *Beck* issue yesterday and sent Margo my override issue: Tony said he thought my draft was good—said very nice things; Craig said he hired me to be the "resident scholar" to think things through since he and Dick were "in the pit" and never had time to reflect; Craig will send my draft of the override issue to Jeff Robinson, Ramsey Clark, Margaret Vandiver and Tim Ford; should get the edit back from New York this weekend; Steve Winter called: discussed the edits—thinks my draft is very good and "is editing the shit out of it"; called Craig: Steve Winter hopes to get his edit off to us tonight or tomorrow morning; Jeff called: MCLL can't do *James Adam*: Jeff will keep trying to find a Wilmer Cutler and Pickering Associate for it; called Dick Burr: *Adams* Section 1983 complaint is almost ready: main witness seems solid: news coverage set up the issue nicely; Steve Winter called: questions on my draft; called again with more questions on draft; Margo called: two hours cratering my draft, but few of her comments were helpful: she wants more on Double Jeopardy and Sixth amendment (what else is new)—she and I have had this conversation a dozen times already; Craig: we must send the final version of the *Spaziano* merits brief to the printer by Tuesday.

Saturday, February 18:
Back at work: Steve Winter's edits on *Spaziano* came in, and they look very good and extremely helpful; Craig putting the changes into the computer; told Craig that Margo and Lewis Carres are giving me the hard sell to include in our brief stuff that they omitted from their brief due to page limits—Craig agreed that they had their amicus brief pages to use as they saw fit, so we're not going to let them put their garbage in our brief; went over Craig's draft of the *Beck*/no lessor included offensives issues: looks good; Patsy Morris; Georgia ACLU, sent us slip opinions: Eleventh Circuit opinions in *Alvord* (Bill Shepards' case that he won in district court and was crowing so loudly about when I interviewed him for a job, was just reversed by the Eleventh Circuit): *Bert v. Montgomery* (district court remand opinion in my *Green* case for Judge Vance): for *Spaziano* brief, wrote front part (faxed comment opinions below, jurisdiction, procedural history, etc.); Steve Winter called: conference call on his edits so far and what he wants to do with Craig's *Beck* issue; very good talk.

Sunday, February 19:
Went over statutory appendixes for *Spaziano* brief with Craig; went over Steve Winter's edits, now typed by Craig: looks excellent; Lewis came in, greeted me like we were long lost friends, and thinks "his brief" is great: as counsel on his brief, he got Ramsey Clark, a Catholic lawyer, and maybe Chesterfield Smith, former president of the ABA and a big lawyer for Florida's Holland and Knight law firm: I still haven't read Lewis's amicus brief; I'll do the table of authorities for the *Spaziano* merits brief at home; Craig sent out typed version of my jury override issue to Steve Winter by plane.

Monday, February 20:
Quince had been scheduled to be executed today, but stayed; Steve Winter sent his edits of my issue three ("as applied" challenge to the override) to us last night by plane, but he's not satisfied with it and wants to speak with Tony and us about it today: I'm not impressed with it: it has no focus, rambles on and on; discussed statutory appendix of *Spaziano* brief with Craig: called Margaret Vandiver: ok to use her and Radelet's research as an appendix; Jeff Robinson called: went over draft in details: likes retribution argument; Craig called Mark Menser (assistant attorney general who's our opponent in *Spaziano*): he won't consent to the filing of an amicus brief: Lewis Carres seemed bummed by this; conference call with Steve Winter and Craig: went over my draft in detail: he not like his issue three, either: will confer with Tony Amsterdam tonight and with us again tomorrow; night: wrote summary

with argument section for *Spaziano* brief: proofed statutory appendix and table of authorities; Ruthann's mother arrived for visit.

Tuesday, February 21:
Margaret Vandiver sent Catholic Bishops resolution against the jury override; edited my "facial" issue in *Spaziano* brief; went over statutory appendix with Scharlette: very helpful, since I had missed some stuff; Steve Winter called: we'll all talk later: went over his rework of issue three: I discussed edits I'd done on both issues; Craig redoing his *Beck* issue; Richard Green and I are cite checking; Governor Gráham signed warrants in *Griffin* and *Magill*; *Magill* has post-conviction lawyer: *Griffin* had a volunteer pro bono lawyer, and he called Scharlette and said, "I quit because this is tax season"; HAC/*Godfrey*/heinousness aggravating circumstance is issue in *McGill*; edited Craig's draft of the *Beck* issue; Margo called for status check on our brief and to chat about amicus: she's still lobbying about downplaying the retribution argument; sent Scharlette stuff on killing young offenders (*Magill* is only 17 years old); edited, argued, proofed *Spaziano* brief until 1:30 a.m..

Wednesday, February 22:
Morning: proofed issue two of *Spaziano* brief; 11 a.m. to 1 p.m.: conference call with Steve Winter: went over Tony's comments on issue three. 1:15 p.m.: Ruthann called: Dr. Moffett wants to admit Larkin to hospital for tests, including a spinal tap for meningitis, because he hasn't been eating or peeing: I'll meet her there at the hospital; spent night at hospital; discussed *Spaziano* brief with Craig on phone.

Thursday, February 23:
Spent all day and night at hospital; called Craig: our brief filed in the Eleventh Circuit in *Hitchcock*: Eleventh Circuit issued an *en banc* opinion in *Darden* today, and the good guys won—Frank Johnson wrote the opinion (Judge Vance joining), granting the *habeas* writ on *Witherspoon* grounds; Tjoflat and Judge Fay wrote dissenting opinions: *Spaziano* brief manuscript arrived safely at Supreme Court (they'll do the printing).

Friday, February 24:
Came home from hospital; told Craig I wanted my own cases and to do oral arguments: he gave me *Henry Perry Sereci's* case, now in the Florida Supreme Court on a Rule 3.850 motion appeal: I will write the briefs and do the oral argument; proofed *Spaziano* appendices with Craig; discussed *Sereci* with Richard Green, who did the work in the 3.850 trial court; main issue is *Cooper/Lockett*: had evidentiary hearing below—good record for presenting the issue to the Florida Supreme Court, but they probably won't want to hear

it; decided to try to publish my big memo on *Godfrey*/heinousness aggravating circumstance as a law review article: played with it and put it in Law Review format: Ruthann read it and agreed it might get in; wrote letters to Tony and Steve thanking them for helping in *Spaziano*.

Saturday, February 25:
Gave HAC/heinousness law review manuscript to Fay to type in manuscript form: wrote cover letters. Night: Margo called to discuss my opinions for Vance: wondered why I didn't resign in protest rather than write *Stanley* draft opinion for Judge Vance—not a nice or pleasant chat, because it was a good question.

Sunday, February 26:
Took Larkin for his first trip in a stroller, to J. Byron's Department Store at Jupiter Mall.

Monday, February 27:
Discussed *Sereci* with Craig; he thinks system-wide racism issue is worth really raising in a big way; started going over the record in *Sereci*; discussed it with Craig: issues and strategy; read LDF's racism briefs in *Spencer* and *McCleskey*: superb; focus on Equal Protection; Craig gave me a copy of the amicus brief in *Spaziano*: I don't see what their interest in the case is: it seems to me very general: the brief just seems silly to me, but harmless to us and harmless to Spaziano's case; discussed *Griffiin* death warrant with Craig: no counsel, yet—State trial court set a hearing for March 6 and ordered his old counsel (the one who quit the day the warrant was signed) to show up, but that lawyer not want to do it: Craig thinks *Griffin* might be the case to test whether there is a right to counsel in capital *habeas* proceedings: we may file an amicus brief on that issue. Night: Margo called: apologized for the "good German" trip she laid on me on Saturday: said she wants to work on *Stanley* and *Burger* make ineffective assistance her next "project," "to do for it what I did for the override" — oh boy, it's good that death row has something to look forward to.

Tuesday, February 28:
Discussed Sireci racism issue with Craig; Scharlette found a lawyer for *Griffin*: lawyers in *Magill* have first draft of Rule 3.850 motion, stay application and federal *habeas* petition done—will use my HAC/*Godfrey*/heinousness aggravating circumstance memo in federal *habeas*; Eleventh Circuit, in *Ritter* (John Evans co-defendant) held the Alabama capital statute unconstitutional—so the statute under which *John Louis Evans* was killed is gone, but, of course, so is he; *Autry* in Texas is in deep trouble,

scheduled to be executed in March: *Autry* is arguing it's cruel to kill him now, when before, on his last scheduled execution date, the State had him hooked up to the IV lethal injection tubes with the death drugs ready to go, when the U.S. Supreme Court intervened and stayed the execution; U.S. Supreme Court denied cert. in *Shriner*, *Hutchens* (North Carolina); execution dates likely to be set soon for *Shriner* and *Hutchens*.

Wednesday, February 29:
Johnny Taylor executed in Louisiana; called Scharlette to give cites for *Magill* issue on killing kids, and she told me about *Taylor*: no one knew what was coming, outside of Louisiana—first time in federal *habeas corpus*, no successor, five days in federal court, total: cert. denied, despite ineffective assistance of counsel claim raised; this means the U.S. Supreme Court has decided amongst themselves that we've lost *Washington v. Strickland.* Scharlette thinks that our next warrant will now be a real one: In the nomenclature a the time, a "real" death warrant meant one likely to be carried out. A warrant signed on a death row prisoner whose case had already completed one round of post-conviction litigation (state post-conviction and federal *habeas corpus*) was a "real" warrant, because the execution was likely to occur. By contrast, Florida Governors signed warrants on condemned provokers whose cases had not yet been litigated in the post-conviction process. The governor knew (and so did we) that these cases would almost cert.ainly receive stays of execution. The ostensible reason for signing such warrants was to force the prisoners to initiate post-conviction litigation. *Ford, Goode,* or *Adams*: Jeff Robinson called, very enthusiastic about *Spaziano* brief: right tone, right arguments; Dick Joranby called to congratulate me on Larkin's birth and *Spaziano's* brief; Dick Burr, Richard Green and I met with Jim Green, Florida ACLU, to discuss right to counsel in *habeas corpus* death cases; Craig may hire Steve Malone, the guy Shepard hired, rather than me: he's unhappy there because he wants to do more capital work than Shepard is letting him; read stuff on racism for *Sineci.*

Thursday, March 1, 1984:
Scharlette got a big New York law firm to represent *Griffin*; all day: proofed *Spaziano* brief; must be back at printer by Monday morning; worked till 9 p.m.; Faye done with *Godfrey*/heinousness aggravating circumstance law review manuscript; will do corrections and cover letters tomorrow; Ruthann and Larkin leave for a visit with her parents in Jacksonville; Dick Burr sent *Ford* competency to be executed letter to Governor Graham, arguing (based on Ford's letters to Gail Wolen and others) that the Section 922.07 statutory psychiatric commission is wrong in saying he's sane enough to be executed.

Friday, March 2:
Discussed *Aldridge* strategy with Craig and Dick: how to deal with the State's response on the racism issue; finished proofing *Spaziano* page proofs with Craig; Faye typed corrections on law review manuscript; had it copied and sent out to journals; thinking about doing an article in the Florida Bar Journal on Florida's jury override; Craig likes the idea of an article on the override; I may do it this weekend; Jeff and Donna have a girl, Michelle Lynn, after a 7-hour labor; all well; Dick in Cocoa Beach interviewing Bill Harvard's trial lawyer; went very well: good ineffective assistance of counsel at trial claim (!!!???), *Cooper/Lockett* claim, etc. Night: did law journal article on jury override, based upon my section of the *Spaziano* brief.

Saturday, March 3:
Read cases and law reviews on racism in the death penalty; don't know whether to make a legal argument (*i.e.*, race of the victim statistics are sufficient, in and of themselves, to show an Equal Protection clause violation of the Fourteenth Amendment) or just argue our statistics are good enough in this case and, for the moment, this case alone; fine-tuned jury override law review manuscript.

Sunday, March 4:
Read stuff on racism and fine-tuned jury override manuscript.

Monday, March 5:
While looking for *Harris v. Pulley* proportionality case in the U.S. Supreme Court Reporter, I happened to see that *Keating v. Superior Court* (the subject, when it was still before the California Supreme Court, of my Note for the *Virginia Law Review* had gone to the U.S. Supreme Court), but that they didn't decide the class action arbitration question: not clear to me how their holding effects the issue; *Sereci*: we need to tell the Florida Supreme Court (1) that race of the victim matters and should bother the justices, *i.e.*, that they should *want* to look at the statistical information we've provided them; (2) that statistics are enough, in and of themselves, and that our statistics specifically are enough to make out a prima facie case of a constitutional violation under both the federal constitution and the state constitution; *Hitchcock*: oral argument scheduled in the Eleventh Circuit for March 26—hardly time to do a reply brief; xeroxed and read stuff on racism and equal protection; gave jury override law journal manuscript to Faye to type; Craig called: Mike Selnick (on the Florida Bar Journal): page limit is 12 pages, so the manuscript is too long: I'll just send it to Law Reviews instead. Night: read general Equal Protection law: seems our statistics aren't good enough; need "qualitative" information, such as a history of racism generally in that county or that court,

but can still use the statistical information as context within which we can ask the court to view the geographically-targeted patterns of racial discrimination in the county.

Tuesday, March 6:
Doesn't look like Dick Burr raised the Equal Protection argument below in *Sereci*, so we may be procedurally defaulted from raising it in the Florida Supreme Court, which would leave a weak Eighth Amendment argument; Dick: spoke with the premiere race historian in Florida (a professor at University of Central Florida), re *Aldredge* hearing: this professor is sending information on racism in Florida, qualitative stuff I can use in *Sereci*; called Jeff Robinson: can't prove Equal Protection violation by statistics alone—must show discriminatory intent, and it's hard to prove intent with statistics alone; so maybe Dick Burr was right to focus on the Eighth Amendment, rather than the equal protection clause of the Fourteenth Amendment, since the Eighth Amendment test isn't so clear yet, and *Furman v. Georgia* suggests that discriminatory *impact* alone may be enough to win on an Eighth Amendment ground; news: Governor Graham signed death warrant in *Stewart* (first time post-conviction—should be safe: has lawyer) and *Freddie Goode* (could be a real death warrant, since he's already been through state post-conviction in federal *habeas corpus*—execution sanity is an issue in *Goode*, but not sure he has a lawyer to raise it; Scharlette at *Griffin* hearing today, so not sure what's going on with *Goode*:) executions are scheduled for April 6, four-week warrants; Craig: *Spaziano* brief is being printed tomorrow morning; read Dick's Section 1983 complaint in *James Adams*, to go out tomorrow—his constitutional argument is strong *if* the facts he alleges are true—idiotic if they're not. Day and night: read and stuff on racism: the Florida and Georgia studies conducted, respectively, by Sam Gross and David Baldus—I'm not even sure I understand them well enough to write legal pleadings based on them.

Wednesday, March 7:
Read stuff on racism; U.S. Supreme Court granted leave to file the amicus brief in *Spaziano*; news: Richard Green heard from Amnesty International that *Autry* is scheduled to die on March 13, in Texas and that *O'Brien* is scheduled to die March 3, in Texas: cert. denied in both: *Autry* has been through federal *habeas* twice already; Richard heard there are other people in Texas with execution dates scheduled. Home: started writing introduction to racism issue.

Thursday, March 8:
Started drafting racism race of the victim issue; Dick has hearing tomorrow on racism issue in *Aldredge*: wants to present evidence on Florida's past history of racism, so we start looking for it today; Craig, Dick and I all stay late; I may attend the hearing tomorrow (it's here in West Palm Beach). Night: wrote very rough first draft of racism issue.

Friday, March 9:
Helped Dick Burr prepare for racism evidentiary hearing in *Aldredge*: went over our background, anecdotal evidence on the history of racism in Florida; Dick and I at *Aldredge* hearing: met with Judge Eaton in chambers first to hash out and focus the issues and arguments—he said he'd take judicial notice of Florida's history of racism, but not that it persisted today: Joy Shearer, assistant attorney general for the State, objected. Night: fine-tuned racism draft.

Saturday, March 10:
Wrote draft of *Cooper/Lockett* issue for *Sireci*; Ruthann and Larkin came home from Jacksonville tonight.

Sunday, March 11:
Played with Larkin.

Monday, March 12:
Jeff Robinson called: Tony Amsterdam sent a five-page, single-spaced letter on their draft Section 1983 complaint in *Booker*, with brilliant legal analysis, etc.: Tony is concerned with timing and that filing it now might mess up Booker's individual *habeas corpus* case; I gave racism and *Cooper/Lockett* drafts to Craig to be typed; got State's response in *Hitchcock* in Eleventh Circuit: they rely on my *Stanley v. Zant* opinion for Judge Vance; Scharlette: Louis Carres was there during *J.D. Raulerson's* death warrant, and her job was to keep him from the real lawyers in the case (Steve Bright) who wanted to execute *Lewis*; Doug Magill has argument in Florida Supreme Court tomorrow: got good evidentiary hearing; cert. denied in *Autry* in U.S. Supreme Court: argued it was double jeopardy to kill him now, when last time they had him on the legal injection table with the deadly IV ready to go, when he got a stay from Justice White, and it's cruel to do it again when he came so close before–a lot like the *Willie Francis* case from 30's, when the portable electric chair malfunctioned.

Tuesday, March 13:
Autrey scheduled to die in Texas at one minute after midnight tonight: has a final successor federal *habeas* petition pending, arguing a 1st Amendment right to TV coverage of his execution; *Magill* got stay in Florida Supreme Court; printed *Spaziano* briefs came in from U.S. Supreme Court printer; Faye finished typing jury override Law Review article: sent to Michael Selneck of *Florida Bar Journal*; Dick working on cert. petition in *Foster*: main issue is ineffective assistance of trial counsel—that will be the main successor *habeas* issue, too; Craig working on *James Dupre Henry* cert. to U.S. Supreme Court; water main in office broke, so building closed at 2:00, and I went home to work.

Wednesday, March 14:
James Autrey executed in Texas; drafted continuance/ineffective assistance of counsel issues in *Sireci*; Bob LaBoue called (New York law firm representing *Griffin*): discussed racism issue and compared notes on how we are raising it: they had an evidentiary hearing on ineffective assistance of trial counsel and got killed in it; Griffin's "trial lawyer was the best witness for the State": has oral argument tomorrow in Florida Supreme Court: will let me know how it goes; other issues "bullshit" in my view, I told him; *Goode*: Dick says that Miami firm is sending a shrink (Dr. Barnard) to examine him—if he may be insane, they'll take the case and raise competency to be executed—so if he has an issue, then he has a lawyer to raise it; called Steve Gey at Paul Weiss law firm in New York: Gross/Marro study wasn't part of *Sullivan* papers in Florida Supreme Court, although they did raise it later, in Federal Court.

Thursday, March 15:
Wrote "Comment on Silence" and other short issues for *Sireci* Florida Supreme Court brief; all issues now on Flo's desk to be typed; Craig: "We are in a crisis getting *Henry* and *Foster* cert.s filed today"; it's very frantic; *Griffin* oral argument in Florida Supreme Court at 2:00; *Hutchens* in North Carolina: Governor Hunt denies clemency at 1 p.m.; nothing pending in the courts—at *Hutchens'* request; nothing between him and death, now.

Friday, March 16:
James Hutchens executed in North Carolina; worked on appendices for *Sireci* Florida Supreme Court brief; *Griffin*: lost in Florida Supreme Court: hearing on Monday before Federal District Judge Melton in Jacksonville on the legal questions and the stay of execution; disaster: Richard Green and Dick Burr never gave the crucial Gross/Marro racism study to the trial court in *Sireci*, so it's not on the record, so I can't use it in my Florida Supreme Court brief or

oral argument—Craig thinks we can "bluff" it in now, but that strikes me as sleazy—Judge Vance would eat us alive if this happened in his court; fear: if racism *is* their main issue, and ineffective assistance of trial counsel really went as bad as everyone said, *Griffin* may really die on Tuesday.

Saturday, March 17:
Joyce typed *Cooper/Lockett* issue in *Sireci*: ran off it and racism issue, corrected it at home.

Sunday, March 18:
Modified racism issue to deal with the fact that the Gross/Marro statistical study isn't in the *Sireci* record on appeal—wrote that and other junk parts of the brief; called Scharlette at the Clearinghouse: Gail Rowland read me the Florida Supreme Court's opinion in *Griffin*: seems not to hurt my racism claim in *Sireci*: she'll send me the *Griffin* Florida Supreme Court and trial court opinions.

Monday, March 19:
Stetson Law Review wants to publish my HAC/*Godfrey*/heinousness aggravating circumstances article,[590] which is not a bad early birthday present—I called right back and accepted with Tom DeCulio, editor-in-chief; received State's response in *Spaziano*: very bombastic, hysterical and cheap; spoke with Rich McAlpin, who will be editing my article at *Stetson*: he'll have it out to me this week; sounds like a very light edit: "It's really in final form already," he said; *Griffin*: Federal District Judge Melton granted a stay until Friday—warrant expires at noon on Friday and Judge Melton will decide tomorrow whether to have an evidentiary hearing: if he does, then he'll extend the stay, beyond Friday, and the death warrant, and hold a hearing then: if he decides tomorrow not to have a hearing, then he won't extend the stay, and we will go to the Eleventh Circuit for a stay; *Goode*: Dr. Barnard is to examine him this week, to see if there's an issue of mental competency to be executed that can be raised credibly; *Hitchcock* panel: Judges Roney, Frank Johnson and Louis Morgan: could be better, could be much, much worse: at least Judge Johnson will understand the *Cooper/Lockett* argument we are raising, even if Roney won't—so Judge Morgan will be deciding the case, he'll be the decisive vote.

590. *See* Mello, *Heinous, Atrocious or Cruel Aggravating Circumstances*, *supra* note 116.

Tuesday, March 20:
Griffin scheduled to die today: stayed by Judge Melton until Friday; *Carzel Moo*re rehearing *en banc* granted by Eleventh Circuit; received *Griffin* opinions from Gail Rowland at the Clearinghouse: very careful, reasoned rejection of the ineffective assistance of trial counsel issue—virtually nothing written by the courts on racism issue, which is good for *Sireci*, and probably good for *Griffin* as well in federal court; worked on *Sereci*, mostly on trying to get it typed; also put the appendix in order and corrected typing done so far; Jeff Robinson called: U.S. Supreme Court granted cert. in *Ake*, an Oklahoma case dealing with the State's duty to provide poor defendants with psychiatrists to prepare for their penalty phase in capital cases: this is the issue that Dick Burr is so interested in raising in *Nollie Lee Martin's* case, *i.e.*, the right to an eighth psychiatrist.

Wednesday, March 21:
Morning: discussed *Hitchcock* rehearing with Craig: went over *Cooper/Lockett* issue in detail: "That's the issue our marbles are on," was Craig's comment–"dealing with *Stan*
ley precedent will be fun"; *Griffin*: Federal District Judge Melton ruled against him at 4:30 a.m.: 45-page opinion: now it's up to the Eleventh Circuit; I wrote reply brief in *Hitchcock*; Goode had a press conference; he wants to molest more little boys and wants to die with a naked orphan child on his lap—because of his flamboyant and unrepentant pediphelia, Freddie Good was perhaps the most hated man on Florida's death row: Dr. Barnard to examine him tomorrow *re* mental competence to be executed. Night: went over Law Reviews and books I may want to add to the HAC/*Godfrey*/heinousness aggravating circumstance article.

Thursday, March 22:
Miami Herald: Griffin got stay last night from Eleventh Circuit panel; *Sireci*: Craig wants to ask the Florida Supreme Court for two extra days to file the brief, since it isn't getting typed: he called and got the two extra days, so we now have until Wednesday or Thursday to file the brief; Dick: Griffin got a real stay, beyond the death warrant's expiration on Friday, from an Eleventh Circuit panel consisting of Judges Fay, Vance and Kravich; wrote motion to exceed page limit for *Sireci*; proofed *Hitchcock* rehearing; received *Stetson Law Review's* edit of my HAC article: called and discussed it with Rich McAlpin; Jeff Robinson called: went over the letter from Tony Amsterdam on their Section 1983 law suit in *Booker* in detail—he's mostly worried that such a case would just piss off the courts, which is true and which we knew from the start; Stewart: got stay of execution from state trial court (Rule 3.850 motion) in Miami.

Friday, March 23:
Corrected the issues typed so far in *Sireci*; *Spaziano* will be argued in the Eleventh Circuit on April 17; *Burger*—my Burger, the Burger I fought with RSV for a year about—is due to die in Georgia's electric chair on Tuesday; Craig mentioned it in passing as we were leaving the office; Craig: Tony Amsterdam thinks the State's brief in *Spaziano* is the worst he's ever seen: we won't even bother filing a reply brief.

Saturday, March 24:
My 27th birthday; went to Phoebe Snow concert. at zoo, with Ruthann and Larkin; dinner at The Good Earth restaurant.

Sunday, March 25:
Afternoon: Ruthann read *Sireci* draft: we went over it in detail: Richard Green called with his comments on the draft, and we went over them. Night: edited HAC aggravating circumstance section of *Sireci* brief: wrote introduction and "neutral principles" section added recent cases.
Monday, March 26:
Oral argument in *Hitchcock* in Eleventh Circuit, in Atlanta: Craig did the argument; original due date for *Sireci* Florida Supreme Court brief now not due until Wednesday; received Jeff Robinson's letter from Tony Amsterdam on the Section 1983 law suit idea in *Booker*, along with the most recent draft of the complaint—discussed it with him; called *Stetson Law Review*: told Tom DeCarlo that my edits were on the way; *Goode*: Dick said if the Miami law firm doesn't take the case by today, then he will do it himself and raise the competency to be executed issue; Craig called Dick: *Hitchcock* oral argument went very well: Judges Rony and Johnson seem to think we need an evidentiary hearing—all questions were on my *Cooper/Lockett* and life plea issues; news: called Patsy Morris, Georgia ACLU: Burger got stay from U.S. Supreme Court pending cert.: rehearing denied in Eleventh Circuit on February 14: Eleventh Circuit has *en banced Brooks* and *Tucker*, two Georgia cases involving prosecutorial misconduct in closing argument; Judge Fay wrote an opinion, granting *habeas* relief in *Curfew Davis*: Judge Fay was on the *Tucker* panel, also.

Tuesday, March 27:
Discussed *Hitchcock* Eleventh Circuit oral argument with Craig: sounds like we will get a remand for an evidentiary hearing on *Cooper/Lockett* issue; I did table of authorities for *Sireci* brief; sent First Amendment manuscript to *Stetson Law Review* (First Amendment/prior restraint/Pentagon Papers); long meeting with Craig: went over status of our cases that need stuff done—I'm to do cert. petition in *Sims*, then clemency and Rule 3.850 motion—then I'll

read *James Adams'* record for successor *habeas* issues; in *Sims*, it seems that the big cert. issue (maybe the only one) is *Grigsby* and prosecution proneness resulting from the death qualification process; *Sireci* brief: edits being typed in; Craig and I will stay tonight to get all my changes in and a copy printed for final corrections; did front part of brief; stayed at office until 11:00 p.m.; proofed at home until 3:00 a.m..

Wednesday, March 28:
Gave corrections on *Sireci* brief to Flo and Lee Currie; *Goode*: Dr. Barnard was lukewarm on competency to be executed: Dick thinks he could be "worked" but not that the Miami people will put in the effort: Dick can't do it because he must file a cert. petition in *Velma Barfield* (his North Carolina woman on death row case), and it must be filed this week; we all met to discuss *Goode*: theories of execution competency discussed my long memo on the Eighth Amendment and Due Process clause of the Fourteenth Amendment arguments against executing the presently insane. All day: getting *Sireci* into shape. At 5:00 p.m., after final draft had been run, Richard Green decided we needed to discuss geographical disparity and race discrimination: we all discussed it and decided not to add it to the brief; plodded on with corrections, proofing, etc. 8:00 p.m.: Scharlette called Craig: Miami law firm *will* take *Goode*; I left the office at 10:00 p.m.; at home, did cases for tomorrow's weekly meeting on recent Florida Supreme Court cases.

Thursday, March 29:
My week to lead meeting on recent Florida Supreme Court cases; *Sireci* brief goes out to Florida Supreme Court; met and discussed *Goode*: I played devil's advocate on possible problems with competency to be executed claims—discussed whether they'll have abuse-of-the-writ problems, whether it matters that Goode was found competent to stand trial (*i.e.*, unlike *Alvin Ford*, it's not a matter of intervening insanity, *i.e.*, insanity that came into being for the first time after the original trial): Goode's been crazy all along–not just since he was living on death row, as was the case with *Alvin Ford*: one reason *Ford* is so good as a test case on this issue was that his craziness clearly didn't begin until after he was on death row, *i.e.*, it was intervening insanity—*Goode* is an especially bad test case since Dr. Barnard, who now says Goode is too nuts to die, was the same shrink, at the original 1977 trial, who said he was too nuts to stand trial—Dr. Barnard's views then, in 1977, just didn't carry the day, and it's doubtful they will now: bottom line is that *Ford* (who is our client) is a good test case vehicle for taking the execution competency issue to the Eleventh Circuit and U.S. Supreme Court, because Alvin is really very crazy (talking to spaceships crazy) and because his insanity was intervening, in that it began during (and was caused by) his

time on death row: Goode (who isn't our client) is a terrible test case vehicle, since he's allegedly been crazy all along, and because his craziness is so offensive (his pedophelia press conference)–raising and losing the issue in *Goode*, in Eleventh Circuit and Supreme Court, could make it much harder for *Ford* to win on it later: But, still, we have to run the issue on *Goode*–we can't play god.

Friday, March 30:
Ronald O'Brien, scheduled to be executed in Texas one minute after midnight tonight: *U.S.A. Today* newspaper has interview with him says Texas federal district court denied him, he's in the Fifth Circuit, and the execution is set for tonight—looks very grim; I started researching for *Sims*, the *Grigsby* (prosecution proneness) issue; *Spaziano*: Louis Carres thinks strongly that we should file a reply brief—I said I didn't think so and Craig sat looking very uncomfortable: Louis waited until after I'd left, and then lobbied Craig some more; *Goode*: State papers filed today no oral arguments yet; confusion over dates: not cert.ain if he's scheduled to be executed on the 5th or the 6th: Richard Green says Amnesty International says he's scheduled to die on the 5th: Dick in touch with Miami lawyers: they sound on top of things: their briefs "sound like" my execution competency memo for *Ford*, according to Dick.

Saturday, March 31:
Ronald O'Brien executed in Texas: 300 death penalty supporters were there, throwing candy at the 30 opponents—a local nightclub had a "Halloween party" to celebrate the execution.

Sunday, April 1, 1984:
Hung out with Larkin at home.

Monday, April 2:
Called Rich Rosen, professor at University of North Carolina Law School: he's doing a law review article on the HAC /aggravating circumstance: will send him my *Stetson Law Review* manuscript: talked about the issue: sent him my first draft; *Goode*: I read pleadings, and they're really excellent: discussed strategy with Dick: suggested they go to U.S. Supreme Court immediately following denial by Florida Supreme Court, before filing a *habeas* petition in federal district court—that way they can challenge the continuing viability of *Solesbee v. Balkcom* (the bad old Felix Frankfurter opinion for the U.S. Supreme Court rejecting a Fourteenth Amendment/Due Process of law argument against executing the presently insane) without getting hung up with a federal court finding of abuse-of-the-writ/successor bar: Craig suggested filing a Section 1983 law suit as a way to avoid abuse-of-the-writ; discussing

it all day; *Spaziano*: Craig and I agreed no reply brief need be filed; *Dobbert*: U.S. Supreme Court is to hold it pending *Spaziano*—thus, they must be interested in the jury override issue? *Shriner* (Dan O'Connell's case, raising issues similar to *Martin*: we discussed it): cert. denied this morning. 4:50 p.m.: Florida Supreme Court denied *Goode*, without oral argument; Jeff is doing U.S. cert. petition in *Goode*.

Tuesday, April 3:
Barclay (Sandy D'Ala.mberte and James Nabert's case) won in the Florida Supreme Court: ineffective appellate counsel on first direct appeal, according to today's *Miami Herald* newspaper; no: the *Herald* was wrong: they only had oral argument yesterday in the Florida Supreme Court; *Goode*: met with Dick and Craig on strategy: federal *habeas* should be ready to be filed this afternoon; we will file that and see if the district court reaches the merits, or goes off on procedural default/abuse-of-the-writ, successive *habeas* petition: if the district court does reach the merits, then we may go to the Eleventh Circuit before filing for cert. in the U.S. Supreme Court; went over Florida Supreme Court *Goode* opinion: got to the merits, not procedural bar, so good posture for federal review, at federal district court level or cert. to the U.S. Supreme Court directly from the Florida Supreme Court; Jeff Robinson called: he's doing *Goode* cert., but it's all confused–*Freddie*; *Goode* now doesn't want to appeal, so must go "next friend" petition route (per Gary Gilmore). 2:00 p.m.: federal *habeas corpus* filed, as "next friend"; waiting on cert. petition in U.S.; *Sims*: I research *Grigsby* issue: it's purely one of law, since no *Witherspoon* jurors were actually excluded improperly in this particular case, so where's the prejudice? 6:00 p.m.: Federal District Judge Terrell Hodges said that by 9:00 a.m. tomorrow morning they'd have a hearing or an order denying their *habeas* petition in *Goode*—Judge Hodges seemed hostile, and the lawyers are not hopeful.

Wednesday, April 4:
9:00 a.m.: Federal District Judge Hodges found abuse-of-the-writ in *Goode* and frivolity on the merit of the execution competency issue: short, harsh order denying all claims without even hearing oral argument, much less evidentiary hearing: on to the Eleventh Circuit and U.S. Supreme Court; I read cases and Law Reviews for *Sims*, but mostly waited for the axe to fall in *Goode*; on and off phone with Jeff Robinson, on mechanics of filing cert. petition (e.g., size of paper, margins, etc.); discussed *Sims* cert. with Craig: he agrees the Supreme Court only would take cert. to screw us on the *Grigsby* issue, but he not think they'll take it, and, anyway, we file for cert. only to buy some time, not in the hopes that they'll actually grant the petition and hear the case in full. Later: Craig says I convinced him that we shouldn't raise *Grigsby*

and risk losing it in the U.S. Supreme Court now in *Sims*—so I'll do a cert. petition on a bullshit (but safe) issue; received LDF's (Tim Ford's) amicus brief in *Rumsey* (the double jeopardy case with *Spaziano* in the U.S. Supreme Court). 5:30 p.m.: Jeff called: cert. in *Goode* filed with U.S. Supreme Court Justice Louis Powell: no word on Eleventh Circuit appeal yet. 8 p.m.: Craig called me at home: Eleventh Circuit panel denied *Goode*, 3-0 (Judges Godbold, Roney and Tjoflat) went off on abuse-of-the-writ and *Solesbee* (1950) Supreme Court case as being controlling of the merits of the execution competency issue; asking for Eleventh Circuit *en banc* review. 9:40 p.m.: U.S. Supreme Court denied cert. on appeal from Florida Supreme Court—that's the end.

Thursday, April 5:
Freddy Goode executed in Florida; Elmo Sonnier executed in Louisiana; read cases on cross examination issue for *Sims*; Larkin with me in the office all afternoon and evening; Craig, Dick, Larkin and I met to go over possible question areas for *Spaziano* oral argument: moot courted it among ourselves: also did postmortem on *Goode* litigation: how it will affect *Ford*, what the Florida Supreme Court decided and what they left open in *Goode*, and how to proceed from here. The way things played out in *Goode* could have damaged our ability to raise the issue in *Ford* much worse than we did. The issue is still clean in the U.S. Supreme Court, since no merits ruling, and I never thought we'd win the claim in the Eleventh Circuit–unlikely the circuit court will "overrule" *Solesbee* (they'll leave that to the U.S. Supreme Court), and our ways of distinguishing *Solesbee* are also why *Ford* is distinguishable from *Goode*, since *Goode* was based on Solesbee. *Solesbee was* (1) a Due Process clause case, not an Eighth Amendment case, (2) Solesbee was decided in 1950, before the Courts modern Eighth Amendment jurisdiction–a jurisprudence grounded in an attempt to identify (by objective indicia and exercise of the Court's independent evaluation of the goals of punishment) the revolutionary standards of decency that mark the progress of a maturing society."

Friday, April 6:
I had originally thought that Goode and Stewart were scheduled to die in Florida today, but this was wrong: due to die yesterday—mix up in execution dates; Aric Press of *Newsweek* called re *Spaziano*; worked on cross examination issue for *Sims* cert.

Saturday, April 7:
Wrote *Sims* cert. petition.

Sunday, April 8:
Fine tuned *Sims* U.S. Supreme Court cert. petition.

Monday, April 9:
Larkin with me all day in office; discussed *Sims* cert. with Craig; interviewed Steve Gey from Paul Weiss: he's interested in job, but has friend who is an artist and likes New York—we chatted about West Palm Beach being a desert for artists (ask Ruthann) and how the salary here isn't enough to support two people (ask Ruthann again), while Craig looked nauseous; Linda Prout from *Newsweek* called: did interview at home re *Spaziano*.

Tuesday, April 10:
Discussed possible oral argument questions in *Spaziano* with Craig and Louis Carries for morning and most of afternoon; over and over it.

Wednesday, April 11:
Craig and I flew from West Palm Beach to New York for him to moot *Spaziano* with Tony Amsterdam and LDF: moot courted it at LDF with Steve Winter, Tony Amsterdam, Joel Berger, Jack Boger and two law school professors—they ate us alive, asking questions we had never thought of and didn't know how to answer; Tony then gave us some answers and all the LDF people gave careful analyses: I didn't say a word during any of this and Craig didn't say much—it was very helpful, but draining and more than a little depressing. I felt pretty outclassed and outgunned, and I really felt sorry for Craig, and for once was glad that he, not I, was doing the oral argument (I had suggested to him once, mostly jokingly, that it would be kind of nifty for me to do my very first oral argument in *Spaziano* in the U.S. Supreme Court—he thought it was nifty, but not nifty enough to let me do it).

Thursday, April 12:
All morning: went over questions and problems re *Spaziano* with Craig, Dick and Richard Green; Governor Graham signed death warrant on James Adams (who is black),[591] our client: death warrant dated March 9, but I just heard about it today; discussed strategy for *Adams*—Dick going through trial transcripts and appellate records; Tennessee rape conviction study is almost ready to go, and we must do the successor ourselves, since no one else has been found to do it; governor also signed warrant on Freddy Lee Hall: Scharlette says he has pro bono counsel; made major typing error correction in *Sims* cert.; on and off the phone with Jeff Robinson: should we lean on one

591. The *Adams* case is discussed in RADELET ET. AL, *supra* note 80.

of the volunteer lawyers he's found to take *Adams*, or wait until a "better" case (*i.e.*, better issues and slower pace) comes along—we really do need other counsel to represent Adams this time around: other counsel needs to be able to go after us on why we didn't raise stuff the first time through the post-conviction courts; discussed this with Craig and Dick and they agreed.

Friday, April 13:
Friday, the Thirteenth; morning: discussed *Spaziano* with Craig: spent most of the time arguing why Louis Carres' arguments are stupid; corrected *Sims* and gave back to Lee Currie to type; met all afternoon with Craig, Dick and Richard Green on *Adams*: mapped out strategy and went over the issues Dick had identified for the Section 1983 law suit and the successor *habeas corpus*—all sound pretty hopeless to me.

Saturday, April 14:
Went over oral argument questions re *Spaziano* with Craig; xeroxed cases we may need during the argument.

Sunday, April 15:
Craig, Dick Joranby and I flew from West Palm Beach to DC; checked into hotel; went over questions and answers focusing on double jeopardy; still pretty general; I summarized cases we may need to get to fast during the oral argument; dinner at mom's: dad, Lee Benjamin and fiancé Alex, Aunt Mamie and my cousin Jennifer were there; a welcome break from the intensity of preparing Craig for the *Spaziano* oral argument.

Monday, April 16:
Craig wrote outline of oral argument while I wrote out the most likely questions the justices might ask and our crispest answers—went over them, fine tuning; Dick Burr called to wish us luck and update us on *Adams*—chance is not good the issues are falling apart, but it still isn't over.

Tuesday, April 17:
Spaziano oral argument in U.S. Supreme Court in Washington DC: the Court was very active and alert and into the argument, but Craig was very nervous; the Justices seemed frustrated that Craig wasn't arguing the jury override issue forcefully—Justice Stevens said, "It doesn't seem you're very enthusiastic about your (jury override) argument," which was ironic since Justice Stevens *did* seem interested: argument on *Beck* issue went okay, but Court seemed most excited about the override—every question we had anticipated and worked out an answer, and every answer was in the brief so the questions were easy, and the Court seemed to be hoping that easy questions would make

Craig relax: Craig did properly concede that a holding for us on the override issue would affect the five judge-only death penalty states; Prosecutor Menser was a complete ass (he remarked that Spaziano was lucky that he wasn't tried in "one of the klan counties up in northern Florida," and Louis Powell, looked like he'd seen a ghost, or at least a white sheet): the whole experience was a hoot, from meeting Chris Vasil in the clerk's office, to signing in and getting my pass (with little chart showing which Justice sat where), to sitting at on-deck table with Dick and Craig, and arguing with Dick over who would get to keep the Southern quill pens), to sitting down at counsel table and listening to Craig argue the override argument I'd help sculpt (it's amazing how *close* we were to the Justices, sitting at counsel table–could almost reach out and touch them), to wanting the earth to open up and swallow me when Stevens told Craig that Craig didn't seem to believe (my) jury override argument–although I can't say I'd have done any better, only 2 years out of law school, 9 months as a lawyer, never having done an oral argument myself: still, I loved it; my parents and Jennifer were there for the argument, and got to see me carrying the briefcase that my parents gave me as a graduation present from law school, walking up to counsel table and sitting next to Craig during an oral argument in a case I was listed as co-counsel on in the U.S. Supreme Court; after the argument, Jennifer commented to me that she thought I could have done a much better job doing the argument than Craig did, but I told her she was wrong.

Wednesday, April 18:
Postmortem: Jeff Robinson and Jim Coleman think we have four votes (Stevens, Blackmun, Brennan and Marshall) despite Craig's argument—everyone was disappointed with the argument, but thinks it will go off on the briefs anyway, with the argument being fairly irrelevant; my family, of course, thinks I would have done a much better job; Ruthann: "You can't continue taking Larkin to work with you"; flew from DC to West Palm Beach.

2. The Dunker Church

Thursday, April 19:
Met to discuss *Adams* Warrant strategy all day with Craig, Richard Green and Dick Burr: went over issues, one by one, focusing on weak points and dividing up work—I'll do abuse-of-the-writ/successive *habeas* petition issues, the jury challenge issue and the negligence aspect of the Section 1983 claim; long meeting with investigators looking into physical evidence of innocence in *Adams*: hair found in the hands of the victim did *not* match James Adams's hair.

Friday, April 20:
Adams Warrant: updated successive *habeas* abuse-of-the-writ research I had done for *Antone* for *Adams*—I want to give the U.S. Supreme Court a solid cert. petition raising the issue: is *Sanders v. United States* (the big 1963 case on abuse-of-the-writ and successive *habeas* petitions) still the law governing abuse-of-the-writ and successive petitions? It seems not, but the court must *say so*: lower courts need guidance: it's a classic cert. issue: Also, abuse-of-the-writ requires fact findings on deliberate bypass (if *Sanders* is still the law) or cause-and-prejudice (if *Sanders* has been superceded by *Sykes*), etc.–and that means an evidentiary learning, which should require a stay.

Saturday, April 21:
Adams Warrant: Abuse-of-the-writ research and drafting for *Adams*.

Sunday, April 22:
Adams Warrant: Wrote jury issue and negligence in Section 1983 law suit issue for *Adams*.

Monday, April 23:
Adams Warrant: Researched whether *Adams* has a right to stay alive to litigate his Section 1983 negligence case (legal theory of access to the courts or something); Jeff called: lost *Booker* as to all issues: abuse-of-the-writ on ineffective assistance of trial counsel issue and procedural default as to others (proportionality, HAC, etc.); *Myers*: a state case Tom Ball won in DCA, State took cert., and Craig wrote opposition to State cert. petition: U.S. Supreme Court summarily reversed (did not want briefs or oral arguments).

Tuesday, April 24:
Adams Warrant: Dick and I will go to Fort Pearce, Florida at 1 p.m. to argue *Adams* Rule 3.850 motion and stay application (filed today); wrote letter to Steve Winter, *re Adams* cert. issues; Scharlette called for information on implied findings of fact (my *Green v. Zant* case for Judge Vance) for *Hall*—scheduled to die the same day as *Adams*: *Hall* had evidentiary hearing Friday and lost today. Night: did outline of *Adams* argument: moot courted it with Ruthann, and it's still very weak, but hopefully it will be enough to get at least a temporary stay in Adams.

Wednesday, April 25:
Adams Warrant: Argued Rule 3.850 motion and application for stay in *Adams* in Fort Pearce: Dick Burr, Leon Wright (investigator) and I went—judge never asked one question of any of us: State had Russ Bohn, and another lawyer there, and their papers and arguments were very good: the judge started

with the State's motion to strike my racism issue—I argued it, and lost — the judge struck the issue: then the judge heard legal argument on the jury issue, which the judge denied summarily: then had evidentiary hearing on *Brady* issue (innocence: hair in the hand of the victim analysis) and court was a slow-motion-train-wreck nightmare–our factual case just fell apart, and then *James Adams'* trial lawyer killed us by saying it was all strategy not to use the evidence at the time of trial; judge zapped us–lost on everything and no stay; stayed after the hearing while the transcript was typed; met with *James Adams* for an hour and went over the chances—he's in reasonably good spirits and has faith.

Thursday, April 26:
Adams Warrant: Discussed *Adams* Florida Supreme Court brief, which must be filed tonight: Craig did a draft yesterday: we dropped the *Brady*/hair/innocence issue: went over the briefs: Dick asked me to draft an original *habeas corpus*, to be filed directly in the Eleventh Circuit, challenging the contradiction between my *Stanley* opinion and the Eleventh Circuit's decision in *King v. Strickland*: I don't think I'll sign that pleading, though I watched Larkin in afternoon, in my office. Night: wrote the original *habeas*: this petition is frivolous: *Stanley* and *King* are consistent with one another—the *Stanley* presumption of trial tactics only applies when there's no real evidence of strategy, and in *King* (and *Adams*) there *was* evidence of strategy (*i.e.*, the post-conviction testimony of trial counsel that the decisions being challenged now were in fact strategic at the time of trial) and so the presumption not apply: the only difference between *King* and *Adams* isn't the presumption — it's the merits of the record on strategy.

Friday, April 27:
Adams Warrant: Met with Dick and Craig: Dick thinks the Section 1983 injunction action is a loser, but will file it anyway: discussed my problems with *habeas* idea in the Eleventh Circuit (I got a cool reception from Craig and Dick); *Adams* Florida Supreme Court brief done—we get State's brief today, and must reply; I'll go back to abuse-of-the-writ, for Eleventh Circuit and cert.; Joy Shearer, our opponent, brought their brief by at 10 p.m.: I went over it with Craig; went over abuse-of-the-writ cases for Eleventh Circuit briefs. Night: drafted abuse-of-the-writ argument for the Eleventh Circuit brief; will start on U.S. cert. petition tomorrow.

Saturday, April 28:
Adams Warrant: Gave Eleventh Circuit draft (abuse-of-the-writ arguments) to Dick Burr; did research on *Adams* U.S. Supreme Court cert. petition; decided

I wouldn't go to Florida Supreme Court argument; not much to do here; Dick pulling together federal *habeas* papers and clemency memo.

Sunday, April 29:
Adams Warrant: Ruthann and I had to cancel a picnic that had been planned for our house today; Craig flew from West Palm Beach to Tallahassee for Oral Argument in Florida Supreme Court; I wrote *Adams* U.S. Supreme Court cert. petition on abuse-of-the-writ: is *Sanders v. U.S.* still good law?

Monday, April 30:
Adams Warrant: Oral argument in Florida Supreme Court in *Adams* begin at 9:30 a.m.; I fine-tuned abuse-of-the-writ arguments, Flo typing away on them. 11 a.m.: Craig called Dick Burr: oral argument went very well: justices seem convinced about Tennessee rape conviction and racism generally; stay application in *Hall* argued right after *Adams* in Florida Supreme Court; Richard Green is handling the "political end" of *Adams*: calling *60 Minutes*, Tom Wicker, etc. 2:15 p.m.: Florida Supreme Court stays *Hall*—nothing yet on *Adams*, which means they're writing, which also means we're probably going to lose; Governor Graham signed death warrants on Alvin Ford and John O'Callahan: Ford set for May 31—Dick's reaction was "I can't think about that; they're not going to kill him until then"; called Steve Winter at LDF: the *Adams* cert. sounds good: they used the same *Sanders v. U.S.* strategy in *John Eldon Smith* case in Georgia and it didn't work, but the judgment call was that it was worth a shot; Craig: no Florida Supreme Court opinion will be issued until Wednesday, probably—the justices felt bad about the racism in Tennessee rape case issue, but State gave them many procedural ways to avoid deciding it—possibly a dissent on that issue; I'm to get *Ford* ready to go in my "spare" time, between *Adams* projects; proofed my abuse-of-the-writ issues for the *Adams* cert.; left office at 10 p.m.—with two full hours of "spare time" left today to work on *Ford*.

Tuesday, May 1, 1984:
Adams Warrant: Outlined issues for possible reply brief in *Sireci*; went over *Ford* issues identified last October: competency to die is the only real one—got all our stuff on that issue together went over *Goode* papers on execution competency; *Adams*: clemency memo goes out; federal *habeas* hopefully will go out tomorrow; *Witt*: U.S. Supreme Court cert. grant on the standards of federal review of *Witherspoon* challenges to perspective jurors; Steve Winter called: *Adams* cert. on abuse-of-the-writ sounds good—they tried it in *Williams*, but it didn't work: LDF favors short cert. petitions, but I still don't think that will work here—I discussed it with Tony Amsterdam last night, but I still like to really show them *why* it's a hard issue and why the

signals they've sent out in their previous cases have been confusing and conflicting; we have a hearing set for Thursday in *Adams* on the application for a temporary restraining order (TRO) for the Section 1983 lawsuit; Craig told me I will argue abuse-of-the-writ in federal district court in Adams Night: did form motions, etc.: went back and forth on adding new grounds and new constitutional arguments.

Wednesday, May 2:
Adams Warrant: Edited argument on abuse-of-the-writ we worked through last night. 10:40 a.m.: Janice Bentley of the Florida Supreme Court called me: they denied us, 7-0; Gail Rowland at the Clearinghouse going to the clerk's office to get the opinion for us. 10:45 a.m.: Gail read opinion to us over the phone—the court hit us on both procedural and substantive grounds: I did fast research on procedural default, since the Florida Supreme Court found that, as to our jury issue—too late for us to add it to the federal *habeas* papers today, so we'll supplement it in later; wrote "cause and prejudice," *Wainwright v. Sykes*/procedural default issue for use in federal courts; Federal District Judge Gonzales: okay for us to file federal *habeas* tomorrow will set schedule then. Night: wrote procedural default issue: cause and prejudice (*Sykes*) in not raising the jury issue on direct appeal.

Thursday, May 3:
Adams Warrant: Hearing on TRO in Section 1983 suit before Judge Stafford in Tallahassee; Craig served our *habeas* petition on Russ Bohn at 3:30 a.m.—Russ said he's been agonizing over whether to raise abuse-of-the-writ, and had decided not to—Craig told him, tough: *we're* raising it; I added arguments to procedural default, writing under the gun (Lee Currie typed pages as I wrote them); I dictated other U.S. Supreme Court cert. issues: procedural default issue and jury issue. 4:30 p.m.: got Russ's answer—will incorporate our reply to it in our reply memo on abuse-of-the-writ. 4:40 p.m.: Dick called: Judge Stafford will rule tomorrow, Dick thinks we'll lose, but Mary Scharlette McCall isn't so sure. 5 p.m.: we have 30 minutes of oral argument on each side tomorrow, starting at 8:30 a.m.; worked until 1 a.m.; must be back by 6 a.m.

Friday, May 4:
Adams Warrant: Argument before Federal District Judge Gonzales: 30 minutes each side, starting at 8:30 a.m.; arrived in office at 6:30 a.m.; went over my argument with Dick; xeroxed some cases; hearing started at 9:30: Dick argued very well, and Judge Gonzales seemed bothered by the Tennessee racism issue—seemed somewhat hopeful: got interrupted when court reporter had mixup; Judge Gonzales did sentencing, in other federal criminal cases,

while we waited for a ruling; Russ Bohn was pretty sleazy—argued abuse-of-the-writ, procedural default and the merits. 11:15 a.m.: broke for recess; ate lunch and visited with *James Adams* in the cage. 2:30 p.m.: court called to order, and then recessed while the judge thought about the case. 2:40 p.m.: lost TRO before Judge Stafford in Tallahassee, in Section 1983 case. 3 p.m.: Judge Gonzales reads his order from the bench, finding against us on every possible ground: abuse-of-the-writ, procedural default, and merits; did final paper work at clerk's office. Night: until midnight, wrote Eleventh Circuit papers (must be back in the office at 8:30 a.m. tomorrow); on way home, went by Russ Bohn's office to get transcript of today's hearing: the transcript had been hacked up and butchered by the court reporter, so Russ and I spent two hours going over it, making corrections in his office.

Saturday, May 5:
Adams Warrant: 8:30 a.m.: started working on the Eleventh Circuit *en banc*; went over cert. draft (typed). 1:30 p.m.: Ruthann called: she is ill, and I must go home at once. 4:00 p.m.: Ruthann has urinary tract infection: I'll work at home; picked up drafts of cert. issues to use in *en banc* Eleventh Circuit draft. Night: wrote *en banc* petition argument.

Sunday, May 6:
Adams Warrant: Wrote *en banc* petitions fun stuff (statement of the case, facts, procedural history, etc.), fine-tuned legal arguments; Dick and Craig were here at office all night getting the Eleventh Circuit papers out—got them on a 7 a.m. flight to Atlanta this morning; went over *en banc* issues my petition being typed; tonight, we should hear whether we get oral argument in the Eleventh Circuit; got in State's Eleventh Circuit papers: no big surprises; Dick called Miguel Cortez (Eleventh Circuit clerk): We won't hear from the court today. 11:30 p.m.: proofed Eleventh Circuit rehearing; went over cert.: did table of authorities for cert. and rehearing petition; left office at 4 a.m. Last Friday, three days ago, was the fourteenth anniversary of the shootings at Kent State–for the first year since 1974, I forgot the anniversary.

Monday, May 7:
Adams Warrant: Watched Larkin while Ruthann went to doctor in office; final proof on *en banc* petition; pulling cert. together; Congressional Black Caucus people met with Governor Graham for 20 minutes; revival being held, in church. 2:30 p.m.: *en banc* petition on plane to Mobile, Alabama (Eleventh Circuit is having judicial conference this week, so all the judges are in Mobile). Lunch: discussed which of us would witness the execution, if it comes to that; planned logistics for tomorrow: get cert. petition out on 9 a.m. flight: Richard Green will go to Starke in the morning: the rest of us in

afternoon—now, we wait and wait. 7:00 p.m.: Cortez suggests no Eleventh Circuit action tonight: I suggested asking for *en banc* consideration now, at the outset, before the panel even rules, since time is running out—Dick Burr will call Tony Amsterdam to discuss it. 8:00 p.m.: Eleventh Circuit clerk called: oral argument tomorrow at 11:00 a.m. in Mobile, Alabama—Dick will argue it and he asked me if I want to go, but he didn't ask until after he'd made his flight plans; I dash home and to airport, but missed the plane; next one is at 3:00 a.m.: fuck it, I'll stay in West Palm Beach.

Tuesday, May 8:

Adams Warrant: Radio: Governor will hold press conference at 9 a.m. on *Adams*—this sounds to me like a false rumor; cert. petition went out to U.S. Supreme Court on 3:00 a.m. plane this morning; 10 black groups came out for clemency (have I mentioned that James Adams is black?); Black caucus is caucusing; big article in *Tampa Tribune* newspaper about Adams; Neil Skeene, *St. Petersburg Times* editor, is interviewing Adams tonight (Richard Green gives us periodical "political updates"); Flo and Lee Currey are typing my *Martin* stuff from last September (I mean, I wrote it last September). 2:30 p.m.: Dick called Craig: Eleventh Circuit oral argument went very well—our panel is Judge Henderson, Judge Anderson, and Judge Clark: Dick argued for an hour and a half on the Sam Gross race of the victim statistical study issue, and nothing else—opinion should be out soon. 3:22 p.m.: panel grants stay of execution—opinion out in an hour, 3:30 p.m.: it was a 2-1 decision by the panel, Henderson dissenting; State asking U.S. Supreme Court to dissolve Eleventh Circuit stay; Russ Cannon, in DC, just filed our cert. petition—U.S. Supreme Court clerk says all papers (including our cert. petitions) are being circulated among the Justices now, and that the Justices will meet at 4:00 p.m. to decide on the stay application; Dick read the Eleventh Circuit opinions to us over the speaker phone: discussed whether to ask for *en banc* Eleventh Circuit consideration on the issues we lost on—Dick decided no just risk cert. rather than risk losing the stay in the *en banc* court—very good chance the banc court (including Judge Vance, I think) would reverse a stay issue, 2-1, by Judges Anderson and Clark, with Henderson dissenting; we will file short paper in opposition of cert.—will send telegram asking the Court to consider the issues rejected by the Eleventh Circuit (*i.e.*, the Tennessee jury race discrimination issue)—this is why I don't want to raise the Sam Gross statistical study of race discrimination issue at all: fear the Eleventh Circuit might seize on it, grope around the real issues, grant relief in a vulnerable opinion, and then get reversed by the U.S. Supreme Court. 7:00 p.m.: Richard Green and Dick Joranby leave for Florida State Prison in Starke. 8:00 p.m.: only one person at U.S. Supreme Court clerk's office: does that mean we're safe for the night? Went home at 9:00 p.m..

Wednesday, May 9 and Thursday, May 10:
Adams Warrant: 9:30 a.m.: still no word on *Adams*; looked over *Ford* execution competency issue; I watched Larkin in the morning. Noon: got State's latest U.S. Supreme Court cert. papers in *Adams*, trying to dissolve the Eleventh Circuit panel stay; Dick Burr dictated reply over the phone. 12:30 a.m.: U.S. Supreme Court justices will conference after lunch. 1:30 p.m.: I dictated our response in the U.S. Supreme Court to the Wilmer, Cutler & Pickering message center, which will type it up and file it. 1:50 p.m. : Craig called to say our reply papers are on the way—the Supreme Court Justices are conferencing now and our reply will be given to the conference as soon as it arrives at the court by Wilmer, Cutler & Pickering courier; Craig and I met and discussed whether to activate the cert. petition (our cert. petition) or the Eleventh Circuit *en banc* petition—decided it's too risky and too early to move for *en banc* consideration: as fragile as the Eleventh Circuit panel stay is, at the moment, it *is* a stay. 2:10 p.m.: lodged *en banc* papers in Eleventh Circuit: Eleventh Circuit court said they'd be circulated informally to all Eleventh Circuit judges. 3:30 p.m.: U.S. Supreme Court called: still pending and could be until past 5:00 p.m. and "as late as 8:00 or 9:00 p.m."; got after-hours numbers for U.S. Supreme Court clerk personnel; Dick Burr said Eleventh Circuit clerk said he doubted the U.S. Supreme Court would dissolve the Eleventh Circuit panel stay: inside information, maybe? Wishful thinking? Educated guess? Not so educated guess? Anyway, it's a small ray of hope. Scharlette called from Tallahassee: Tallahassee press corps rumor is the stay was lifted. 6:00 p.m.: Dick Burr called local counsel in Mobile, Alabama: the *en banc* papers are distributed. 6:00 p.m. to 8:30 p.m.: Craig, Dick, Leon Wright and I just sit and wait in Craig's office. 8:37 p.m.: U.S. Supreme Court dissolved the Eleventh Circuit panel stay, 5-4: Alexander Stevas, U.S. Supreme Court clerk, called Craig and read him the Court's orders—the five Justice majority said nothing, and Justice Marshall, bless his heart, wrote a blistering dissent—Craig took the call at Flo's desk, gave the thumbs down sign when he heard the result, and took notes on the dissent—Justice White was the vote we lost; Scharlette called for news, and I told her. 8:55 p.m.: Eleventh Circuit clerk tells Dick that the panel is working very hard with Chief Judge Godbold—will call back soon. 9:00 p.m.: I called Florida State Prison to tell James Adams that the stay had been dissolved: also talked to Richard Green, who was with him then. 11:02 p.m.: Eleventh Circuit called: "No judge in active service ..." had asked for an *en banc* poll; I made plans to go to Florida State Prison; decided not to file cert. petition, since they had it all before them already. 11:50 p.m.: I left for Florida State Prison in Craig's car; arrived in Starke at 6:00 a.m., and went to demonstrator's area in the cow pasture across from the prison—Craig locked keys in car; in the cow pasture, we formed a circle and gave testimonials—Dick Burr spoke, and so did Joe

Engle; much, much press, which I tried to ignore. 7:10 a.m.: Associated Press and United Press International white flags go down from window Q-wing, signaling that execution occurred: it's over—very emotional; people weeping, hugging, etc.; witnesses to the execution came out: Dick Joranby and Richard Green witnessed it—they told us that James was calm and at peace, gentle as ever at the end: mostly, he was concerned about how *we* would take it, and about keeping up the fight; we spent the rest of the day in Gainesville, and attended a memorial service at night; Richard Green, Dick Joranby, and Leon Wright spoke; flew back to West Palm Beach.

Saturday, May 12:
Rested with Ruthann, Larkin, Mom, Dillon (the sheepdog) and Mithrender (the Persian cat). Dick Burr called about meeting today about *Ford*, but I said no—we'll do it Monday morning; Jeff Robinson called: he has a friend clerking for Justice Marshall, and his friend wrote the beautiful dissent in *Adams*—Marshall's chambers was "devastated" by what happened, and the clerk was especially crushed—Jeff very comforting about the work we did, but, for the moment, I've no fight left in me.

Sunday, May 13:
Hung out with family.

Monday, May 14:
Took notes for reply brief in *Sireci*; met all day on *Ford* issues; I had Larkin with me at the office for most of the day: he was very cranky and getting into my case files. News: Scharlette called at noon: we lost *Washington v. Strickland* in U.S. Supreme Court: they reversed Judge Vance's handiwork by 7-2 vote—this will seriously affect our practice, since we raise an effective assistance of trial counsel claim in virtually every death case—must re-evaluate the basics of our strategy now. More news: Steve Winter called in afternoon: cert. denied in *Henry* and *Foster*; Richard Green's big news: *60 Minutes* TV show wants to do a story on *Adams*; told Leon Wright he needed clearance to send *Adams* clemency memo to a Philadelphia reporter Leon knows.

Tuesday, May 15:
Jeff Robinson called from DC: *Washington v. Strickland* opinion isn't a total disaster: they took a middle-ground, between the "liberal" Judge Vance position, and the reactionary Florida Supreme Court position; I wrote reply brief in *Sireci*; called Supreme Court: *Stanley v. Zant* is still pending on cert.; Jeff called: he and Lawyers' Committee for Civil Rights under law are trying to find a lawyer for *O'Callahan*, who was scheduled to die in Florida on the

31st—if they can't find anyone, Steve Winter and LDF will take the case; Jeff: I could get a job at Wilmer, Cutler & Pickering—Jim Coleman very impressed with my work.

Wednesday, May 16:
Ford Warrant: Played with *Sireci* reply brief; Dick Burr doing *Ford* execution competency papers; Craig doing *Ford* Florida Supreme Court brief; Jeff: read *O'Callahan* papers (not received yet; they've been sent to LDF): some good issues, but no lawyer to raise them yet; spent most of day correcting *Sireci* reply brief, doing table of authorities, table of contents, etc.; Dick: "I just wanted you to know that your competency memo is the best thing I've ever seen on the subject and we're going to file it verbatim" in *Ford.*

Thursday, May 17:
Ford Warrant: *Sireci* reply brief goes out to Florida Supreme Court; met all morning on status of *Ford* issues: Florida Supreme Court and state trial court papers almost ready and will be filed tomorrow; Richard Green will do federal procedural default and abuse-of-the-writ papers (!!!) and I'll do cert. petition, focusing on mental competency to be executed; Craig told me that my next project after *Ford* would be *Simpson*: a former death case, now in the DCA, intermediate state court of appeals, after a new trial.

Friday, May 18:
Ford Warrant: Worked on cert. petition in *Ford*; *Raulerson* lost in Eleventh Circuit; Richard Green working on another political offensive, this time for *Ford*; argued with Dick Burr about competency issue: he does not want to challenge Florida's procedure, but wants to only argue why we should win under that procedure. Dick: Governor Graham signed death warrants today in *Carl Shriner* and *Carl Jackson—Shriner* does not have a lawyer; Dick said *O'Callahan* got a lawyer today (I called Scharlette: no: no lawyer yet for *O'Callahan*; she told me, "I just lied to Dick about that so he wouldn't worry")—Dick: *Alvin Ford* plans three press interviews for next week—he asked me whether we can block them; Ford "refuses to see anyone, sign any legal papers, and he's banging his head against the wall of his prison cell all day."

Saturday, May 19:
Rested at home.

Sunday, May 20:
Ford Warrant: Wrote cert. petition in *Ford* on competency to be executed: Dick backed down and re-included my argument on why the Florida statutory

procedure for determining execution competency is itself unconstitutional: he just thinks it's irrelevant and that the court will simply ignore it. Ho Ho.

Monday, May 21:
Ford Warrant: Played with cert. petition; Craig and Dick seemed pissed that I didn't come into the office this weekend to work; discussed competency issue briefly with them; Jeff Robinson called: Kay, Scholer law firm in New York may take *O'Callahan*, but then what about *Shriner*—ethical problems in trading off the two cases, one against the other, given that the law firm will only take one, and not both: Steve Winter may be able to get the Paul, Weiss law firm in New York to do *O'Callahan*, if Kay, Scholer can do *Shriner*: discussed strategy in competency cert. petition in *Ford*; received State's answer to my cert. petition in *Sims*; will file *Ford* today: competency issue in trial court (problem: Judge Lee is on vacation and may do it all by phone) and *habeas* in Florida Supreme Court (other issues); Dick Burr decided that he will witness the execution of *Ford* and advocate for clemency until the very end. 4:00 p.m.: Judge Lee denied our motion—no opinion (another judge signed it for him)—he had the case a total of four hours; I started going through the record in *Simpson*, looking for issues; long meeting on *Ford* competency to be executed issue; Dick Burr left in a huff; cert. denied today in *Barfield* (Dick's North Carolina case).

Tuesday, May 22:
Went through *Simpson* record looking for issues; called clerk's office in U.S. Supreme Court: *Stanley* is "still at the conference"—no action yet on cert. petition; Dick Burr's *Barfield* case is big news: first woman to be executed in the U.S. since 1962—okay, since Dick likes publicity; *Simpson*: the only appellate issue seems to be the use of Clark's prior testimony (Clark testified at the first trial and died before the second trial, so they just read his prior testimony to the jury at the second trial), and some interesting Fourth Amendment search and seizure issues—problem is, because of *Stone v. Powell*, I don't know a damn thing about search and seizure law, since after *Stone* you can't raise search and seizure issues in state post conviction or federal *habeas corpus* proceedings: Dug out my old law school notes on search and seizure law.

Wednesday, May 23:
Ford Warrant: Worked on cert. petition in *Ford*; read cases on prior testimony issue in *Simpson*; received clemency investigation materials (from Governor's office) in *Sims*: clemency set for October. Status: Dick Burr is with Alvin Ford at Florida State Prison—Dr. Kaufman did examine Ford and says he's still crazy as ever; filed *Ford* in Florida Supreme Court; Debbie Fins, from

LDF in New York, was down in Florida doing the *Charlie Proffitt* re-sentencing—he was again sentenced to death.

Thursday, May 24:
Ford Warrant: Received State's response in *Ford*: the statutory procedures for determining execution competency are exclusive, and court should defer to it—my argument all along–this is the strongest against us, and we must engage it and bury it, not pretend like its not there—Dick and Craig still think it's a silly argument; in *Ford*, we'll be back before Federal District Judge Norman("Storman, Norman") Roettger (pronounced "Rut-ger"), who was very nasty last time just through in *Ford*: Judge Roettger's law clerk told Dick, "he gave you a hearing on Saturday last time, and I doubt he will do that again—I think he will feel he's done all he's going to do for Alvin Ford"; Congressional Black caucus will issue a statement condemning the death penalty in Florida; *Billy Taylor* in Georgia: due to die today, argument in Eleventh Circuit at 3:00 p.m.; (panel is Judge Vance, Judge Vay, and Judge Kravitch); Craig flies from West Palm Beach to Tallahassee for *Ford* oral argument in Florida Supreme Court; Dick Burr here all night, getting federal papers ready in *Ford*; Steve Winter and Scharlette visit the office at 11:00 p.m.; Steve Winter is doing *O'Callahan*.

Friday, May 25:
Ford Warrant: *Ford* oral argument in Florida Supreme Court at 9:00 a.m.—Craig is doing it; I watched Larkin all morning; I had a long telephone chat with Judge Vance: he said three-quarters of the death cases that come before the Eleventh Circuit would go six to six in the *en banc* court—the hot issue is the racism issue—8 death cases presently before the court now—he was on the panel in *Moore* yesterday: they granted a stay and the judge said that Jack Boger who argued Moore was "very good"—the judge and I discussed *Washington* and *Spaziano* and *Sireci*—he thinks the new constitutional standards for gaging ineffective assistance of trial counsel, set out by the U.S. Supreme Court in *Washington v. Strickland*, seem unclear, "but the message to us is to stop finding ineffective assistance in death cases"; Steve Winter: Judge Vance was an asshole at the *Spencer* oral argument on the Baldus study of racism in capital sentencing patterns in Georgia. 11:50 a.m.: Dick Burr said Craig said the *Ford* oral argument went "real shitty"—only 5 justices were there, and they were all hostile; noon: we lost, 5-0, in the Florida Supreme Court in *Ford*. 12:15 p.m.: Craig read Florida's Supreme Court opinion: they did what I expected, said the governor's statutory procedure for determining execution competency is exclusive, and not subject to subsequent judicial review; chat with Steve Winter mostly about Nancy. 6:30 p.m.: Craig gets back: very depressed about the performance of

"his" court in Tallahassee. 7:30 p.m: Richard Green gets back into town; mapped out weekend plans; dinners, Scharlette says *Hall* won in the Eleventh Circuit on the basis of Judge Vance's opinion and *Thomas v. Zant*—Steve Winter said *Thomas* was "the best thing the Eleventh Circuit did last year"; left the office at midnight, thinking about *Ivan Ray Stanley, Joseph Thomas*, Judge Robert S. Vance . . . and me.

Saturday, May 26:
Ford Warrant: Modified cert. petition in *Ford* to deal with Florida Supreme Courts opinion; wrote a rehearing *en banc* in Eleventh Circuit in *Ford*, if need be; Richard Green: Federal District Court Judge Roettger's clerk suggested he won't decide our stay application in *Ford* until Tuesday, so we will file before then in the Eleventh Circuit under the All Writs Act, Section 1654. 1:30 p.m.: Steve Winter lost most of today's work in the computer. 3:00 p.m.: went home.

Sunday, May 27:
Ford Warrant: Dick Burr: "I know it's crazy, but I think we may be able to stop this," referring to *Ford's* execution—maybe; Scharlette said beautiful things about evolution, Colin Turnbull, anthropology and affirmations of life; made corrections on cert. rehearing and *en banc*; Steve Winter asked to write Eleventh Circuit brief in *O'Callahan*—looked over his other papers and wrote brief mostly from existing papers he had previously written in the case; left office at 5:30 a.m.

Monday, May 28:
Ford Warrant: Sent papers to Eleventh Circuit; ran draft of rehearing; left office at 4:30 p.m.. 9:00 p.m.: Dick Burr called: hearing set for tomorrow at 1:30 p.m. in Judge Roettger's court: Dick wants me to argue the Eighth Amendment aspects of the competency to be executed issue—this will be the first time I will be arguing any issue, in any case, capital or non-capital, criminal or civil, in federal court and he wants me to argue one of the longest shots, legally and factually complex, constitutional questions, in a successive *habeas corpus* petition filed on behalf of a Fort Lauderdale cop killer–I think I will be learning how to swim by being thrown into the deep end of the pool. What the hell, as Yassorian would say.

Tuesday, May 29:
Ford Warrant: Oral argument in *O'Callahan* in Florida Supreme Court in Tallahassee: Steve Winter will do. Noon: Steve Winter got *O'Callahan* stay from the Florida Supreme Court. 2:00 p.m.: oral argument on *Ford* application stay execution before Judge Norman Roettger, Federal District

Court in Fort Lauderdale: I argued the merits of competency issue: Roettger found abuse-of-the-writ as to all issues; Dick and I were back in the office by 5:00 p.m. 5:30 p.m.: oral argument scheduled in Eleventh Circuit, in Atlanta, tomorrow morning: Dick will go to Atlanta: our panel is Judge Anderson, Judge Henderson and Judge Clark–same panel as *James Adams*—A couple of weeks ago, the panel that granted us the 2-1 stay, with Henderson dissenting, that the U.S. Supreme court dissolved 5-4; news from D.C.: *Arizona v. Rumsey* is out: U.S. Supreme Court affirmed the double jeopardy principles of *Bullington v. Missouri*, but screwed *Rumsey*: very good for *Spaziano—Rumsey* was 7-2 opinion. 8:00 p.m.: Dick left for Atlanta; I rewrote cert. to follow the argument I made today in Judge Roettger's court room; left the office at midnight; Craig made edits in computer after I left; I came back into the office at 2:00 a.m. to correct the cert. petition, Xerox, punch holes, etc.; finished at 6:00 a.m. and put Henry, our investigator, on a plane to D.C. to file the thing if need be; no point in going home so late, so I'll just stay in the office.

Wednesday, May 30:
Ford Warrant: Morning: I watched Larkin; discussed contingency pleadings in U.S. Supreme Court with Craig and Richard Green. News: U.S. Supreme Court denied cert. in my *Stanley v. Zant* opinion from Vance: Brennan and Marshall filed their usual dissent. 1:00 p.m.: Dick called Craig: hard to gauge how the Eleventh Circuit *Ford* oral argument went—the judges asked about abuse-of-the-writ: seemed surprised at the State's argument on the merits, and asked about a 24 hour stay to give the Eleventh Circuit judges time to consider the legal issues we had raised. 4:20 p.m.: Eleventh Circuit stay on both grounds in *Ford*: competency to be executed and systematic race discrimination in Florida's system of capital punishment—their judgment not public until they issue an opinion, "about an hour"; the prosecutors activated papers previously lodged in the U.S. Supreme Court, to dissolve the stay; U.S. Supreme Court says no action on the State's motion to dissolve the stay tonight; we will file a brief in opposition of the State's motion to dissolve tonight. 7:30 p.m.: called Craig—no word yet, still a news black-out by the U.S. Supreme Court. 9:00 p.m.: Craig has the opinion from the Eleventh Circuit: 2-1, Henderson dissenting ("surprise, surprise–the ghost of James Adams")—but the majority opinion looks solid and fairly bulletproof–much more cert. proof than their stay in *Adams*; Jeff Robinson called: U.S. Supreme Court reversed and remanded Judge Vance's opinion in *Burger* ("my *Burger*"), telling/conflict of interest issue the Eleventh Circuit to write to, and address in a written opinion, the ineffective assistance of counsel issue.

Thursday, May 31:
Ford Warrant: *Ford* and *O'Callahan* were originally scheduled to die today: *O'Callahan* has a solid stay out of the Florida Supreme Court, and *Ford* has a shaky stay of out the Eleventh Circuit; Craig got our opposition to dissolution of the stay on a 6:30 a.m. plane to D.C. to file in the Supreme Court; read Eleventh Circuit *Ford* opinions: Henderson wrote a careful dissent, but I still think the stay will hold; Ruthann had her first jury trial ("retaliatorial conviction and a landlord tenant case") (jury verdict not in until tomorrow); I sat in on the trial all day, which was good therapy for waiting to hear about *Ford*; I checked into my office periodically—no word as of 5:00 p.m. 5:12 p.m.: Scharlette called: press rumor is that the U.S. Supreme Court dissolved the stay in *Ford*. 5:30 p.m.: went home to eat. 7:00 p.m: called Craig from home: no word yet. 8:10 p.m.: Craig called at home: Supreme Court *upheld* the stay, 6-3—so competency to be executed is a real, live issue, and *Alvin Ford* will live long enough to litigate it—unlike *Freddie Goode*.

Friday, June 1, 1984:
Ruthann won her jury trial: the eviction was retaliatory, and the slum conditions diminished the value of the property to ½ the value of the rent; I left the office at 1:00 a.m.; Tatjana Ostapoff asked me to argue her *Smith* case ("District Court of Appeal") on Friday, if she goes into labor before then and can't do it herself—told her I'll do it, if she can't.

Saturday, June 2:
Nothing.

Sunday, June 3:
Nothing.

Monday, June 4:
Jeff Robinson called and read me the U.S. Supreme opinions in *Adams*: the racism issue (Sam Gross/Study) is clearly dead: we discussed at length the procedural default issue in *Booker*; I sent in application for membership in the Eleventh Circuit Bar.

Tuesday, June 5:
Read cases for possible oral argument in *Smith*; Jeff Robinson's law clerk (Vandengraf) called to talk about the procedural default issue in *Booker*; Craig thinks the racism issue lives, even after the U.S. Supreme Court's opinions in *Adams*: the Supreme Court only trashed the issue in dicta, not in the holding that constitutes binding precedent—I think Craig and I are in separate realities, as Carlos Castenada puts it.

Wednesday, June 6:
Scharlette called to discuss *Shriner*: standby counsel issue may get him a *Booker* stay, since the same lawyer represented him throughout all proceedings so far (trial, direct appeal, first round of state postconviction and first round of federal *habeas corpus*): no lawyer in sight to represent him now, and Scharlette is giving up on it and focusing on developing issues and mitigation on her own, without a lawyer; Tania will argue *Smith* in the DCA on Friday: she gave me another case to (definitely) argue in the Fourth DCA on the 29th (*Blucher*); Craig very bummed about *Henry*: nothing to say in Eleventh Circuit rehearing petition, so he'll do a "jump in their shit" in his rehearing; Randy, my Vance co-clerk, called re *Mariel* boat lift case in the Eleventh Circuit: may bring ineffective assistance of counsel claim if she loses in the Eleventh Circuit.

Thursday, June 7:
Talked to Tania about possible holes in *Blucher*; looked up, read and Xeroxed cases on preemptory challenges: this really is two cases, *Smith* and *Blucher*.

Friday, June 8:
Morning: sat in on oral arguments at 4th DCA with Tania; found a series of federal cases saying that the jury selection process used in *Blucher* is OK—Tania and Ruthann don't think I need to give these cases to the court, but that seems dicey to me, ethically; Jeff Robinson called: discussed *Shriner*, and agreed that things look very grim.

Saturday, June 9:
Nothing.

Sunday, June 10:
Nothing.

Monday, June 11:
Jeff Robinson called: discussed *Shriner* ineffectiveness issue; Jeff will write the memo for stay application; *Simpson* cert. denied in the U.S. Supreme Court; started reading *Simpson* transcript; U.S. Supreme Court decides 2nd generation *Brewer v. Williams* case: "inevitable discovery" rule exception to exclusionary rule.

Tuesday, June 12:
Read *Simpson* transcript 300 pages or so; discussed *Cooper/Lockett* issue in *Shriner* with Jeff: big abuse-of-the-writ issue, sent him papers and memos on it; Craig gave me an Eleventh Circuit case (*Ross*) to orally argue; U.S.

Supreme Court just issued a "public safety" exception to the *Miranda* rule, which may cause us a problem in the *Nollie Lee Martin* case, which has two dynamite *Miranda* issues; read briefs in *Ross*.

Wednesday, June 13:
Read cases for *Ross*, my first Eleventh Circuit (non-capital) oral argument; called Richard Barkman (the Assistant Attorney General in *Ross*) and gave him supplementary authority; met with Craig and Dick to discuss *Sireci*: the psychiatric evaluation of *Sireci* that Dick obtained says Sireci is really, *really* nuts, but there's no way really to get the new report in the record, this late in the appeal–we need to invent an issue of ineffective psychiatric assistance—may ask Florida Supreme Court to remand so that we can add the issue in the Rule 3.850 trial court; *Velma Barfield*, Dick Burr's North Carolina case, was scheduled today to be executed on August 31; *Jackson* (Karen Gottlieb's case) lost in the Florida Supreme Court.

Thursday, June 14:
Spent all day going over cases and statutes: I'll do *Terry Sims* clemency, *Sireci*, and work on *Ford* brief in Eleventh Circuit (I suggested to Dick that we divide the *Ford* oral argument, but he didn't like the idea much); *Shriner*: argument in Rule 3.850 trial court today; argument in Florida Supreme Court tomorrow: discussed *Cooper/Lockett* issue in *Shriner* with Jeff at length.

Friday, June 15:
Jeff Robinson called: *Shriner* denied last night—no hearing: talked about memo; I read cases for *Ross*; Governor Graham signed death warrants in *David Washington* and *Jimmy Lee Smith*: no lawyer for *Smith*: I'll work on *Smith*; Dick will work with Rich Shapiro on *Washington*; Scharlette has *Smith* a lawyer, a Tallahassee solo practitioner named Sarah Bleakley; I talked to Jon May about *Ross*: he did, once, talk to the trial lawyer about strategy; talked to Steve Winter about *Ford*: will send our papers up to him at LDF; received Paul Vandengraf's memo on procedural default in *Booker*–it is absolutely superb, brilliant: I wish *we* could hire this guy.

Saturday, June 16:
Shriner Warrant: Scharlette called several times: I explained *Cooper/Lockett* issue to some guy named James Bob who did not understand the issue at all, especially how it intersects with abuse-of-the-writ doctrine.

Sunday, June 17:
Nothing.

Monday, June 18:
Shriner Warrant: *Shriner* files *habeas* in Federal District Court—hearing before Judge Stafford at 11:00 a.m.; *Jackson*: stayed by Federal District Court, at least in part based on pendency of *Ford* in the Eleventh Circuit; 2:30 p.m.: Judge Stafford found abuse-of-the-writ as to all issues in *Shriner*, so it's on to the Eleventh Circuit—no Supreme Court papers being prepared by anyone, so I asked Jeff to draft something quickly, and he will; 5:00 p.m.: 24-hour stay in *Shriner*; *Shriner's* lawyer has oral argument at 8:00 a.m. tomorrow in the Eleventh Circuit; 6:00 p.m.: called Scharlette: she says *Shriner's* lawyer *Harper* is "out of control"–he will do what he wants, won't talk to or listen to anyone: he didn't argue *Cooper/Lockett* today in Federal District Court; he thinks *Witherspoon* is his best shot (this is just plain stupid)–Scharlette doesnot think *Cooper/Lockett* is even presented or preserved for federal review; Jeff Robinson called me at home: *Cooper/Locket was* raised in *Shriner*, but only in a footnote—*Witherspoon* (which is totally waived, procedurally, abused, and frivolous to begin with) is the focus of *Shriner's* brief.

Tuesday, June 19:
Shriner Warrant: Shriner and Jackson were originally scheduled to die today: *Jackson* has a Federal District Court stay which seems to be solid, *Shriner* has oral arguments in the Eleventh Circuit this morning; *Shriner's* panel is Judge Godbold, Judge Johnson and Judge Henderson; argument went well, I heard; I discussed issues with Dick; talked to Scharlette and Jeff: U.S. Supreme Court papers in *Shriner* are almost ready; now we wait. Dick Burr: Steve Bright at SPDC in Atlanta saw the oral argument in *Shriner* and said *Shriner's* lawyer was just awful—did not answer questions, bumbling totally; Sharlotte: *Shriner's* lawyer thinks the argument went real well; the Eleventh Circuit panel decided *Billy Moore's* case today: issue is what rules govern abuse-of-the-writ and successive *habeas* petitions, and it sounds like it is on the way to *en banc* consideration by the Eleventh Circuit; learned today that my panel in *Ross* will be: Judge Tuttle, Judge Hill, and a visiting judge (this information comes from Ruthann, from Maryann, in Judge Fay's office); Scharlette: *Shriner's* lawyer based his case on *Witherspoon* because he thought *McCorqadale* was a successor, but it wasn't: I looked it up, and *McCorqadale* was a first time *habeas*: Scharlette said: Judge Frank M. Johnson was hot during the oral argument on *Cooper/Lockett* (Johnson is on our panel in *Hitchcock*, so he should understand the issue); 5:00 p.m. or a.m.?: Scharlette called: *Shriner* lost in the Eleventh Circuit, does not know the vote yet, since *Shriner's* lawyer did not ask the Eleventh Circuit clerk who called him to tell him about the decision; we all discussed whether they should seek U.S. Supreme Court cert. or *en banc* Eleventh Circuit, and agreed that it depends

on whether Johnson dissented from the panel opinion. 5:19 p.m.: it was 3-0, Frank Johnson didn't dissent—the Eleventh Circuit ruled unanimously against *Shriner*; *Shriner's* lawyer told Craig the papers are filed with Supreme Court Justice Powell, "that's all we can do"—Craig told him they still had to activate them. 6:00 p.m.: Patsy Morris, Georgia ACLU, read the Eleventh Circuit opinion to us, with Scharlette (in *Shriner's* lawyer's law office) typing it, all on a conference call: it's a savage, vicious opinion; in the middle, Scharlette got a phone call saying the U.S. Supreme Court had denied everything; I called Jeff: this may do in *Booker* as well—we will be spending the rest of Steve Booker's life trying to distinguish what happened today in *Shriner*. 6:45 p.m.: *Shriner's* lawyer calls about rehearing *en banc* in the Eleventh Circuit—what the hell: nothing to lose, but it's really over. 10:00 p.m.: Dick called at home: their hearing *en banc* is filed, but so what? Went to bed.

Wednesday, June 20:
Carl Shriner executed in Florida at 7:00 a.m.: the Shriner execution hit very hard: but for Shriner's idiot lawyer (as opposed to Jeff and Jim and Marion), he'd be alive, for the same reason *Booker* is alive—the legal issues were the same, the constitutional issues were the same, the procedural postures were the same, the identities of the federal judges involved were not materially different—what was outcome determinative, was the quality (or absence thereof) of the man's lawyer: if any two cases underscore the mortal life or death importance of having effective, and well resourced attorneys in the capital post conviction system, it's *Booker* and *Shriner*. I played with my oral argument outlines in *Ross* and *Smith*.

Thursday, June 21:
Billy Moore went *en banc*: the issue is what standard should govern abuse-of-the-writ/successor *habeas* petition analysis; *Ross*: the third judge on my Eleventh Circuit panel is Anderson; I prepared for the argument; I asked Craig for a moot court in *Ross*, he said sure, we'll do it next week; I read record in *Smith* and *Blucher*; discussed *Ross* with Gary Caldwell: he'll moot it with me next week.

Friday, June 22:
I watched Larkin in the morning; proofed confessions, deterrence, jail records issue in *Martin*.

Saturday, June 23:
Ruthann and Larkin left for the Indiana writers conference: I wrote another draft of the outline for my oral argument in *Ross*.

Sunday, June 24:
Played with argument in *Ross*.

Monday, June 25:
Discussed *Ross* with Jeff Robinson at length: theories of ineffective assistance of counsel in a post-*Washington v. Strickland*, post-*U.S. v. Cronic* world: how to structure the arguments; met with Dick to discuss *Aldridge*: Federal District Judge Eaton denied everything—Craig will do Eleventh Circuit stuff; U.S. Supreme Court denied cert. in *Delap*—rehearing denied in *Henry*, *Foster* and *Washington*; moot courted *Ross* with Gary Caldwell and Anthony Calvello in my office: fun; Scharlette called: will Federal Express papers in *Jimmy Lee Smith*, for me to look over: Scharlette and I discussed strategy on when to file in Federal District Court; Craig asked me what I thought the *Ford* Eleventh Circuit brief needed: I told him, but he did not really seem interested—apparently he'll write the brief himself, based on the earlier stuff I'd written on the execution competency issue in *Ford*.

Tuesday, June 26:
Went over transcript and appellate records in *Ross*; received *Smith* papers from Scharlette: discussed constitutional issues and procedural issues with her at length; Craig showed me letter he got from Tony Amsterdam on *Ford*: Tony thinks Craig's (read "my analysis of execution competency is good" and "leaves no room for original thinking" - confusing please clarify); dictated ineffective assistance of counsel issue for *Smith*; discussed *Ford* at length with Craig (Dick out of town, in North Carolina, on *Velma Barfield* case); talked with Sarah Bleakley for two hours about *Smith*: went over it issue by issue, substantive law and procedure, Rule 3.850 and federal *habeas*: she's very quick and will do a good job, I think.

Wednesday, June 27:
Ruthann's birthday; spent all morning and most of afternoon discussing *Ford* issues with Dick and Craig; drove from West Palm Beach to Miami, for *Ross* in Eleventh Circuit, and stayed with Sandy Tart and Les. Night: went over argument about 10 times—read record and reread cases; got about three hours of sleep.

Thursday, June 28:
My day for recent Florida Supreme Court cases discussion: Craig will do it; I argued *Ross* in the Eleventh Circuit in Miami: the argument went okay, I guess: I gave solid answers to most questions and left with my argument fairly intact: all three judges were very active, sometimes asking strings of questions before I could answer any one of them: Judge Tuttle was wonderful: "I

understand you to be arguing that . . . . . ," power bought by a clear and clean articulation by the judge of what I *should* have been arguing: Judge Hill was on point as to the problems in the case-law, especially the lack of facts alleged in the Federal District Court; my guess is it will be 2-1, remanding to the Federal District Court for an evidentiary hearing; spent all afternoon discussing *Ford* with Craig and Dick; read final papers in *Shriner*; went over *Smith* with Scharlette. Night: prepared for *Blucher* oral argument tomorrow.

Friday, June 29:
I argued *Blucher* and *Smith* in the Fourth District Court of Appeals of Florida: disaster: I didn't know how the actual procedure at trial worked, inadvertently mislead the court, and was slaughtered by the prosecutor in their main argument—a total fuckup on my part for my client; discussed *Ford* with Craig: he is still reorganizing the brief along the lines we agreed on, with a law clerk researching the literature, statutes and cases law at the law library at Nova Law School in Fort Lauderdale.

Saturday, June 30:
Cleaned house.

Sunday, July 1, 1984:
Ruthann and Larkin arrive home from Indiana trip.

Monday, July 9:
Jimmy Lee Smith: Sarah Bleakley, now assisted by Gregg Thomas in the Holland and Knight law firm, to file the Rule 3.850 motion and stay application in the state trial court; Craig: *Washington* oral argument at 9:30 a.m.—bad sign, he thinks. 10:40 a.m.: oral argument went "great," Dick thinks—court concerned about jurisdiction to appeal. 11:30 a.m.: Florida Supreme Court ordered the state trial judge in *Washington* to rule on the merits by 9:00 a.m. tomorrow—which is bullshit: panic. Noon: state trial Judge Klein wants proposed order by 2:30 p.m.: Dick will dictate it to Karen Gotlieb in Miami PD's office. 4:00 p.m.: Dick called Craig: *Smith* lost stay application in state trial court; oral argument in *Smith* scheduled tomorrow morning in Florida Supreme Court in Tallahassee. 5:30 p.m.: Sarah Bleakley called Craig about abuse-of-the-writ/procedural default doctrine in federal court. 9:00 p.m.: Sarah called me: argument in Florida Supreme Court tomorrow morning, for sure we discussed constitutional claims, procedural issues and strategy: she told me that Judge Klein *granted* the Rule 3.850 motion (ordering re-sentencing) and granting the stay application on the merits in *Washington*; Sarah and Gregg Thomas were up all night on Sunday working on *Jimmy Lee Smith* state and federal papers.

Tuesday, July 10:
Washington Warrant: Florida Supreme Court to hear oral argument today on the State's appeal of Judge Klein's order granting the Rule 3.850 motion and ordering re-sentencing the stay in *Washington*; Jimmy Lohman, at the Clearinghouse, asked me to call Baya Harrison, re *Amos King* case (Eleventh Circuit ordered re-sentencing and granted *habeas* writ—U.S. Supreme Court reversed and remanded to the Eleventh Circuit for reconsideration in light of their *Washington v. Strickland* opinion): talked about claims of ineffective assistance of trial counsel after *Washington*. 11:00 a.m.: Florida Supreme Court wants oral argument in *Washington* at 4:45 p.m. today: Dick will go; Scharlette called with update: the director of the Florida Bar Foundation, Jane Robinson, called to make sure Scharlette really wanted the Bar Foundation to help find pro bono lawyers for people on death row: Scharlette (and I) are concerned that the Bar can't really want *zealous* representation for death row inmates: Scharlette is convinced that the Florida Bar Foundation really will come through with the money. 2:00 p.m.: went home to watch Larkin, while Ruthann at dentist. 3:30 p.m.: *Jacksonville Times Union* reporter called about *Spaziano* (Frank Lamonte was the reporter): he got my name from the Clearinghouse. 4:30 p.m.: Sarah called: she lost *Smith* in the Florida Supreme Court—we discussed procedural default stuff. 8:30 p.m.: Craig called: *Washington* lost 6-0 in the Florida Supreme Court–no re-sentencing, nor Rule 3.850 grant, no stay of execution: I need to come in to draft procedural default stuff for federal court. 10:00-11:00 p.m.: Sarah called: discussed procedural default—her oral argument is at 9:30 a.m. tomorrow. Midnight to 1:30 a.m.: discussed *Washington* issues with Dick and Craig—I will write the issue on why Florida has no procedural default rule deserving of any federal court deference (the issue that Paul Vandergraft developed for *Steven Todd Booker*); I also wrote argument on why ineffectiveness constitutes "cause" under *Wainwright v. Sykes* procedural default law; left office at 5:00 a.m.

Wednesday, July 11:
Morning: I watched Larkin at home, until 1:00 p.m.; at office: received HAC Law Review manuscript and messages from Sarah Bleakley; Craig mentioned in passing that "your *Stanley* case," from Judge Vance days, is set to die soon—Georgia people are scrambling to get him a stay of execution. 1:20 p.m.: called Clearinghouse: oral argument still going on in *Smith*, and it appears to be going well: the Federal Judge is asking good questions. 2:50 p.m.: Richard Green: *Smith* lost in Federal District Court; Craig on the phone with Clearinghouse; Craig heard the news from Mike McQueen, at Associated Press; I called Gail Rowland at the Clearinghouse: they have not heard a word; I called McQueen: yes, they lost *Smith*; I called Gail: they lost and denied everything—*habeas* and stay of execution, including application for probable

cause to appeal, which means Sarah and Gregg now must go to the Eleventh Circuit to ask permission to appeal; Sarah called, exhausted and hysterical: Federal District Judge Vincent denied everything in a vicious order; she was very upset, but said that she "can last another 24 hours": I talked Eleventh Circuit and U.S. Supreme Court strategy with her and Gregg; Dick filed in *Washington*: case assigned to Federal District Judge Spellman; I dictated a cert. petition and application for stay from the U.S. Supreme Court to Sarah; I went home at 3:00 p.m.. 7:50 p.m.: Scharlette called: argument in *Smith* is at 9:30 a.m. in Atlanta, tomorrow, and until then. the Eleventh Circuit stayed the execution: Sarah and Gregg are en route to Atlanta: Scharlette gave me names and phone numbers of people in DC who can throw some pleadings together and file them in the U.S. Supreme Court; lost *Stanley*, 3-0, on successor in Eleventh Circuit: due to die tonight. 8:00 p.m.: Scharlette: *Smith* panel is Judge Anderson, Judge Clark and Judge Roney: I assured her that's *good.* 9:00 p.m.: called Craig: *Washington* oral argument ended at 7:00 p.m., and the judge and law clerks are scrambling to write an opinion; Dick says it looks very bad. 9:10 p.m.: lost *Washington*: abuse-of-the-writ and procedural default, but temporary stay of execution until Friday morning. 10:50 p.m.: *Smith:* Sarah called me from Atlanta, and we discussed the need for evidentiary hearing, and oral argument strategy for tomorrow morning; Joe Nursey just got there, to help her out, but she may call me later.

3. Bloody Lane

Thursday, July 12:

Ivon Ray Stanley was electrocuted in Georgia at 12:01 a.m.: I got the news at work this morning from Anthony Calvello, in the elevator: "Stanley was executed last night"; Craig: *Smith*'s panel is Judge Tjoflat, Judge Kravich and Judge Anderson: our panel in *Washington* is Judge Roney, Judge Hill, Judge Clark—arguments in both cases were going on as we spoke (as of 9:30 a.m.). 10:30 a.m.: called Scharlette (at home) "Georgia prison wouldn't tell Stanley when it was going to happen—he had only 15 minutes notice before he was killed—"in a way, it's much sadder if you're slightly retarded, because the questions you ask are so basic," Scharlette said. 2:36 p.m.: *Smith* got stay from Eleventh Circuit: Gail Rowland called Craig; Joranby thinks we should all go to Starke for *Washington* execution. 2:45 p.m.: Sarah called: the State is going to U.S. Supreme Court, to try to dissolve the Eleventh Circuit's stay in *Smith*; she read me the Eleventh Circuit stay order—it grants probable cause to appeal on the basis of *Thomas v. Zant*—the irony of winning a stay in *Smith* based on my opinion in *Thomas*, on the same bloody issue that his co-perpetrator in the crime *Ivan Ray Stanley*, who was executed today, was annihilating. 3:15 p.m.: I dictated a petition in opposition to the State's

petition to dissolve the Eleventh Circuit stay in *Smith* to Jerry Fisher in DC, who will get it typed up and filed in the U.S. Supreme Court. 4:15 p.m.: Craig: we lost *Washington* in the Eleventh Circuit, 3-0: Craig and I discussed whether to file for a panel rehearing and/or rehearing *en banc*. 6:00 p.m.: Dick filed for a panel rehearing and *en banc*; I decided not to go to Starke for the execution; I left office at 7:00 p.m.: Ruthann told me when I got home that Sarah had called and that the U.S. Supreme Court had upheld the Eleventh Circuit stay in *Smith*. 9:00 p.m.: Scharlette called: Joe Nursey said Sarah's oral argument in *Smith* was the worst he's ever heard, but fuck him — for my money, she did great—she's on her way to dinner to celebrate *Smith* and mourn Washington.

Friday, July 13:

David Washington executed in Florida at 7:00 a.m.: I heard on the morning news: no one from the office called me last night about cert. being denied in the U.S. Supreme Court; I had left a phone message for Judge Vance on Monday, and he returned my call today: he'd be glad to recommend me for a Florida Bar job; spent most of the day discussing *Ford* with Craig: we went over some old ground—I want a complete new look at the execution competency issue, since my memo (which I wrote last October in such little time, and which is the basis of everything we've filed so far in state and federal courts in *Ford*) has never really been rethought — by anyone, including and especially me: but Craig said there's no time for this, so Craig will just write the *Ford* brief the way he thinks it should be written; Jimmy Lohman called: discussed Congressional Black Caucus statement, re *Stanley* execution; Frank Lamonte, *Florida Times Union* reporter, called about *Spaziano*—just before they put the black hood over him, the only people he saw, on the other side of the plexiglass partition, all he saw were unfriendly faces: Dick Burr and Dick Joranby did not witness the *Washington* execution, but now they regret it: only cops were there to see him die, cops and reporters, so henceforth, one of us, one of the lawyers, will go to witness the execution of all of our clients; we had some discussion about which one of us it ought to be—one of the front line litigators, who know the guys the best, but who are also closest to them, and who would be the most emotionally annihilated by the experience of witnessing the execution, or Dick Joranby, the administrative head of the office, even though he, too, would be emotionally annihilated by the experience—in a Machiavellian and real politic sort of way he is more "expendable" than we are, given the crush of cases and death warrants—I don't know: a.m. I just rationalizing why someone else, other than myself, should go to witness the killing of my/our clients?; Jeff Robinson called to console me and tell me their procedural default argument in *Booker* is going very well.

Saturday, July 14:
Sarah Bleakley called: final update on *Smith* investigation: Scharlette told her about the fact that the Bar might be creating a job, and that I might be applying for it, and the two of them had strategy meetings on how to get me into that job: so she's now a full-fledged conspirator!: also discussed her being local counsel on the Section 1983 suit in *Booker*; Scharlette called: *Craig* wants the bar job: she thinks she can talk him out of it (not enough money, mainly): she seemed stunned by it.

Sunday, July 15:
Sleep; is it my imagination, or are there a hell of a lot of Friday the Thirteenth's in this year?

Monday, July 16:
Cleaned desk; wrote letters to *Blucher* and *Smith* about their oral arguments; Craig very excited about writing *Ford* brief—talked to me about it until Dick arrived; I spent all afternoon discussing *Ford* with Craig and Dick; I don't feel good at all about the brief.

Tuesday, July 17:
Home with Larkin: Dick called: he's not going to the big annual death penalty conference in Arlie this year, so can I do his panel presentation on abuse-of-the-writ and procedural default—it's a panel discussion with Joe Nursey and George Kendall; I called Patsy Morris to see if they'd have problems with me being on that panel because of my role in *Stanley* when I clerked for Judge Vance—Patsy said no; I touched base with Joe Nursey and George Kendall: we'll meet Thursday before we go on the panel to compare notes.

Wednesday, July 18:
Arlie Death Penalty Conference in Warrenton, Virginia; fly out of West Palm Beach at 12:50 p.m. Morning: talked with Craig about *Ford*: he, Dick and Tom Ball brain stormed it yesterday, and now Craig feels very good about writing the execution competency issue; met Jeff Robinson at Washington National Airport; drove to Arlie in time for dinner and drinks afterward; spent night with Jeff and his family in DC; prepared for panel presentation on abuse-of-the-writ.

Thursday, July 19:
Arlie Conference, Warranton, Virginia: saw Tim Ford, David Bruck, etc.; seminars were interesting, though the really great thing about the conference is the sense of community and group effort; amazing how many states have their first capital cases just now moving into state post conviction, much less

federal *habeas corpus*—It's hard not to be jealous of the folks in California: Michael Milleman and company are wonderful, but they have such a wonderful state supreme court, so many resources, I wish we had a fraction of those in Florida.

Friday, July 20:
Arlie Conference: broke up at noon, after seminar on executive clemency; Scharlette will hear about funding for bar job: called Clearinghouse—Jenny Greenberg said no word and none expected; home to northern Virginia; postscript to Arlie Conference: David Bruck gave a touching closing to the conference: "Few moral choices, few things in our lives are so clearly right as this fight."

Saturday, July 21:
Alexandria, Virginia, at mom's: Ruthann called (from Georgia, where she's teaching a writing workshop at Young Harris College with her friend Blanche); called Scharlette at home all day.

Sunday, July 22-July 25:
Alexandria

Thursday, July 26:
Flew from DC to West Palm Beach; *Ford* brief is going slow, but well, says Craig; Dick, Craig and Tom Ball rushing around *Ford*: they borrowed several of my constitutional law books; I worked on *Simpson* transcript.

Friday, July 27:
Sarah Bleakley called: no briefing or oral argument scheduled yet in *Smith*—we talked about coming back to earth after getting a stay of execution; I worked on *Simpson* transcript; Dick and Craig writing *Ford* brief; Dick: a TV reporter and he have come up with a new theory of why *James Adams* was innocent.

Saturday, July 28:
Cleaned house.

Sunday, July 29:
Ruthann and Larkin returned home from Georgia; negotiated lease with landlord.

Monday, July 30:
Plodded along on *Simpson* transcript; called Scharlette for update: the bar funding process has three steps: Florida Rural Legal Services, then the Florida Bar Foundation, finally the Board of Governors: we're past step one: the Foundation is worried that the job be autonomous from the Bar, lest the Bar, subtlety or not so subtlety, blunt the zealousness of the effectiveness that representation of death row requires: trying to structure a procedure job description: (1) case tracking, (2) workshops, (3) advising volunteer pro bono lawyers generally, (4) crisis management of cases under death warrant: Craig won't say anything else about his wanting the job, but concerned about the whole concept, *i.e.*, the co-option and the domestication of death row legal representation: Craig will go Wednesday to meet with Sandy D. Alamberte, Scharlette, Steve Bright, and Steve Goldstein (professor at FSU law school) about the job: Scharlette may float my name at that meeting.

Tuesday, July 31:
Ford brief finished and filed—looks okay; I worked on *Simpson* record; lost *Green v. Zant* (my *Green* from Judge Vance days) in the Eleventh Circuit: Patsy Morris called Craig: Judge Vance wrote the opinion for the court; *Ford*: it's a good first draft, but flabby reasoning—focuses on the old common law commentator, no real discussion of comity or federalism, beyond what I wrote in the cert. petition, and in my earlier memo—they didn't really answer the key question: when and why do federal courts defer to state courts finding of fact: Dick's state created right/due process section is not clear to me, even though the guts of his analysis come from my earlier memo.

Wednesday, August 1, 1984:
Read *Simpson* record; Craig in Tallahassee.

Thursday, August 2:
Craig's meeting with Sandy D'Alamberte, etc., went well: Sandy D'Alamberte pushing hard for Steve Bright to take the Florida job; I read *Simpson* transcript; Scharlette at the beach—finally.

Friday, August 3:
Finished *Simpson* transcript; Eleventh Circuit: our *Ford* brief is too fat, at 93 pages, and we must cut it down to 60 pages.

Saturday, August 4:
Finished *Simpson* record (at home).

Sunday, August 5:
Hung out; Ruthann and I discussed at length what to do (apply for jobs at law firms, just wait to see what happens with bar project, wait and do nothing, etc.): decided to just sweat it out.

Monday, August 6:
Simpson: two main issues: (1) co-defendant Clark's prior testimony (which is unreliable due to *Brady* violation at first trial); (2) sufficiency of evidence/prosecution proneness/grigsby: evidence was weak, so prosecution-proneness a reality in this case, not just a hypothetical, academic possibility, as in most cases I raise the issue in; Scharlette called: she floated my name last Wednesday at the meeting: Craig said I was a brilliant lawyer and I am doing great work; he is in on it and is pushing, as director, a friend of his from North Carolina, Mark Olive (professor of clinical law at UNC law school) to be the director; Sandy D'Alamberte was impressed with my resume, and wants me to come up to meet Olive and him.

Tuesday, August 7:
Spent all morning with Craig: for me to leave West Palm would leave a giant hole in the office, he said (but not nearly as big a hole as if *he* were to leave): he and Dick are burning out, and I'm "just at the point to be taking on big responsibility for cases": he "would be very disappointed if I left, but can't help it if Ruthann and Larkin require the move to Tallahassee"; Scharlette: Craig called: said to her, "how could you stab me in the back like this," *i.e.*, by trying to persuade me to take the bar job in Tallahassee—Scharlette said Craig is livid at her, but only "disappointed" at me—she said she's never seen him this upset; Scharlette called at night: we spoke for two hours: she drafted a letter and appealed to Craig to let me go: now we should just wait, she said: to Tallahassee, soon.

Wednesday, August 8:
Governor Graham signed death warrants in Nollie Lee Martin and Ernest Dobbert (*Dobbert* is represented by Pat Doherty, a kickass criminal defense lawyer in Clearwater, who has already filed a Rule 3.850 motion in *Dobbert*: the Rule 3.850 motion was pending at the time the Governor signed Dobbert's death warrant); Craig told me I would be lead counsel on *Martin* death warrant, a first for me: Craig, Dick and I met all day on *Martin* issues: psychiatric issue (the *Ake*/eighth shrink issue), is the big issue that has not yet been exhausted in the state courts, and must be before we go into federal court; while Dick worked on the eighth shrink issue, I updated and played with my old confessions issues from last year: the confessions issues look stronger than ever; news: the Eleventh Circuit stood firm in *Douglas*; even though the

U.S. Supreme Court reversed their prior decision–Eleventh Circuit granting the *habeas* writ, and remanding the case for reconsideration in light of *Washington v. Strickland*, Eleventh Circuit court reiterated that the writ should issue on ineffective assistance of counsel.

Thursday, August 9:
Martin Warrant: Craig told me I am to draft the federal papers in *Martin*; Dick told me I will do all the federal issues in *Martin* (including any oral arguments on stay of execution), except maybe for the eighth psychiatrist stuff, which he wanted to write, which actually was more than fine with me; I went over all the issues; started researching federal issues not yet written: this case is bursting at the seams with great legal issues.

Friday, August 10:
Martin Warrant: Larkin's six month birthday; drafted confrontation clause (re-deposition) issue and prosecution proneness (*Grigsby* issue) in *Simpson*, trying to clear my decks for the *Martin* death warrant; Flo corrected confessions issue in *Martin*; Scharlette: Bar project may not be funded at all, Bar president James Rineman thinks; Larkin crawled for the first time; I decided to rewrite from scratch the deterrence/*Lockett* issue in *Martin*: the Hertz and Weisberg *California Law Review* article in *Lockett* lays out the issue, with an especially nice analysis of *Green v. Georgia* and the notion of how *Lockett v. Ohio* created a federal constitutional standard for relevance and admissibility of evidence at the penalty phase of capital cases, with those two legal determinations being grounded in the nature of the death decision and the expansive principles of *Lockett*.

Saturday, August 11:
Martin Warrant: In office: rewrote deterrence/*Lockett* issue; discussed eighth psychiatrist issue with Dick at length; still looking for a theory on the eighth psychiatrist issue, a legal hook to get the psychiatric facts that Dick has developed (which actually are fairly persuasive, I have to admit) into court and before the judges; I'm worried that we don't have an issue that really *demands* an evidentiary hearing and factual development (and thus a stay of execution to allow the hearing to proceed in a reasonably nonchaotic manner). Usually, ineffective assistance of counsel is that issue—after *Thomas v. Zant*, there's almost always a right to an evidentiary hearing on penalty phase and effective assistance of counsel claim (notwithstanding *Stanley*, who had already had an evidentiary hearing on penalty phase and effective assistance in Georgia State Court), and I really don't want to raise ineffective assistance of counsel in *Martin*: Rich Luben really did a fantastic job at the trial, and I'm afraid that raising such a gossamer claim of ineffective assistance of counsel will dilute

the power of our other, generally stronger issues—both legally and factually: on the other hand . . . . without a stay on some extra-record claim requiring an evidentiary hearing (like counsel) and thus a stay, I won't get any meaningful Eleventh Circuit review of my great confessions issues: without a stay, Eleventh Circuit will blow past these complex (legally and factually) confessions issues, they'll fall between the cracks, if the Eleventh Circuit has to consider and decide them under the pressure of a death warrant: Eleventh Circuit just won't have the time it needs to understand how powerful these confession claims are–especially if they're focused on a bullshit claim of ineffective assistance of counsel: I just don't know–I sure don't want the first ever Florida execution on a first warrant to happen on my watch, especially my first warrant case as lead counsel . . . still, I *know* the Eleventh Circuit better than Craig and Dick–they'd rather spend their limited time looking at a strong *Miranda* issue than a week ineffective assistance issue: I know that it will be a fight to persuade Dick not to raise ineffective assistance of trial counsel in a death case under a death warrant, but I really do think that the other issues are strong enough to carry the day and get a stay—and to win, at least re-sentencing (deterrence issue/*Lockett* issue), if not an outright retrial (the confession issues: voluntariness, *Miranda*, Sixth Amendment right to counsel).

Sunday, August 12:
Martin Warrant: In office: drafted *habeas* petition in *Martin*; fine tuned *Lockett*/deterrence issue; went over State's Florida Supreme Court brief on confessions issues: it's very good and damaging: we may not win these confessions issues after all.

Monday, August 13:
Martin Warrant: *Martin* federal *habeas* papers and other stuff being typed; I went over *Martin's* massive trial and penalty phase transcripts; Dick met with Rich Luben, *Martin's* trial lawyer, yesterday: Dick thinks he can get Dr. Wilson (the developmental psychologist) to change his mind about *Martin's* mental state; Craig developing legal theory of eighth psychiatrist issue, based on the pendency of *Ake v. Oklahoma* in the U.S. Supreme Court; Jeff Robinson called: he thinks deterrence issue is very solid on *Lockett* grounds: great suggestions on how I can tighten the argument and the analysis, and to make the issue smaller, rather than larger: the last thing we want to do is to have the federal courts think that by granting *Martin* relief on this the federal courts would be opening the floodgates to a whole new generation of constitutional challenges to state imposed death sentences, based on our *Lockett*/deterrence/constitutional relevancy argument.

Tuesday, August 14:
Martin Warrant: Dick: Dr. Wilson was mixed: he thinks *Nollie Lee* is nuts, but also won't admit he messed up with his 1977 diagnosis—he's saying now that the tests he administered then were, and are, "subject to interpretation"; Flo typed corrections to confessions issues in *Martin*: I went over the argument; Lee Currey typing deterrence issue; worked on loose ends of *Lockett*/deterrence/ constitutional relevancy issue; Margaret Good (who was one of *Ted Bundy's* trial attorneys, back when she was solely an appellate attorney, and who did the closing argument at the penalty phase of *Bundy's* Miami trial on the Chai Omega killings) read confessions issue, and we had a very long and helpful discussion.

Wednesday, August 15:
Martin Warrant: I lost *Smith* and *Blucher* in the Fourth District Court of Appeal: summarily affirmed the convictions, in a PCA (per curiam affirmed) summary order; Steve Winter called to say good-bye: he's on his way to teach federal jurisdiction at Rutgers Law School; we discussed my deterrence issue and he reacted: "That's a great *Lockett* issue": I will send the draft to him and Tony and Deval Patrick: LDF has not hired anyone to take Steve's place yet; I fine tuned *Martin* confessions issues; today, I also lost *Ross* in the Eleventh Circuit. Night: edited *habeas* petition.

Thursday, August 16:
Martin Warrant: *People* magazine interviewing Dick Burr about *Martin*; reworked deterrence issue: record not really clear on whether the judge allowed the jury to consider it—very slippery jury instruction—like trying to nail a jellyfish to the wall, in the immortal words of Steve Bright; sent draft of deterrence issue to Tony Amsterdam, Steve Winter, Deval Patrick and Jeff Robinson—as soon as I did, I started to rework it; U.S. Supreme Court dissolved its stay in *Barfield* (Dick's North Carolina case), which is strange, since the court is not in session now: maybe they got the merits briefs in *Witt* and saw that *Witt* won't really affect *Barfield*, regardless of how the Court goes in *Witt* (or it could mean that there is a clear majority, even this early, in the U.S. Supreme Court to reverse *Witt* and gut *Witherspoon*).

Friday, August 17:
Martin Warrant: Played with *Martin* drafts; Tony Amsterdam called: extremely helpful *Martin* comments; Steve Winter called: helpful suggestions on deterrence issue; Dick gave me Rule 3.850 motion draft to read: looks okay, except for no violation of the constitution—will have to add that part on the eighth shrink issue; the facts he dug up really are sweet, if they are

true—there's enough to get a stay here, even without raising a claim of ineffective assistance of trial counsel.

Saturday, August 18:
Martin Warrant: In office: incorporated Tony Amsterdam's suggestions into *Martin* draft; Tom Ball wrote legal memos for eighth psychiatrist issue, but Craig did not like his arguments, and is rewriting them; printed *habeas* petition; made changes to deterrence issue.

Sunday, August 19:
Rested.

Monday, August 20:
Martin Warrant: Deval Patrick called from LDF: he loved the *Lockett*/deterrence/constitutional relevancy draft; *Martin* Rule 3.850 motion on eighth psychiatrist issue and stay application filed in state trial court in West Palm Beach at 9:00 a.m.; worked on deterrence draft; Craig writing legal memo for eighth psychiatrist issue; gave me draft to look over.

Tuesday, August 21:
Martin Warrant: Governor Graham signed death warrant on James Dupre Henry: so I'm *really* doing *Martin* Warrant solo; Jerry Grant told Craig that Judge Marvin Mounts, who was trial judge at Martin's trial, said we will have a status conference tomorrow afternoon on how to proceed with Martin's stay application; Craig's memo of law is very good; I edited federal *habeas* petition in *Martin*; Jeff Robinson called with his and Marian Lindberg's comments on deterrence on deterrence/ *Lockett*/ constitutional relevancy issue: very helpful; got State's reply to *Martin* Rule 3.850 motion: "You raised this on direct appeal (we did), and it's *quorum nobis*, not Rule 3.850 stuff, anyway (in a rational world, that would be true, but not in the through-the-looking-glass world of litigating death penalty cases under death warrants in Florida in 1984)"; Dick is drafting response; Adams (Aubry Dennis Adams, obviously not our James Adams) also got a death warrant signed today; he has no lawyer yet; but we can't worry about trying to find Dennis Adams a lawyer: with only three full-time capital appeals lawyers in the office, and death warrants now on *two* of our cases, we are already bursting the rivets.

Thursday, August 23:
Martin Warrant: Rumor: one of our trial lawyer PD's heard that Judge Mounts was dictating an order in *Martin* this morning; Margaret Goode still working on my confessions issues draft. 2:30 p.m.: Judge Mount's secretary called Jerry: "Come pick up the order"; the judge's secretary read it to her over the

phone: we lost: Rule 3.850 motion denied; stay of execution denied; I had to babysit Larkin at 2:45 p.m., so Dick Burr went over to the courthouse to get the judge's order in *Martin*. Afternoon: proofed rehearing petition in Eleventh Circuit in *Ross*; we decided not to do a *quorum nobis* in *Martin*: we'll just appeal that Rule 3.850 and state denial to the Florida Supreme Court tomorrow; called George Kendall, Georgia ACLU: he thinks *Ross* is a very big deal in Georgia's unified appeal system for dealing with claims of ineffective assistance of trial counsel; George will call SPDC and team defense for input on Eleventh Circuit panel rehearing and rehearing *en banc* in *Ross*. Night: finished draft of *Ross*.

Friday, August 24:
Today should have been *Terry Sims*' clemency interview at the prison, but it was postponed due to our two death warrants; I worked on *Ross* rehearing; Craig working on Florida Supreme Court brief in *Martin*, due today at 5:00 p.m. (must be served on opposing counsel, as well as filed in the Florida Supreme Court in Tallahassee, by then); I did form motions, boiler plate stuff for *Martin*; went over *Martin* federal *habeas* petition, now that all of the legal and factual arguments are contained within one document; Lee Currey printed minor issues for *Martin* federal district court memo of law; news: lost *Keeton v. Garrison*, the big North Carolina *Grigsby*/prosecution proneness case in Fourth Circuit Court of Appeals in Virginia.

Saturday, August 25:
Martin Warrant: Drafted deterrence/*Lockett* and confessions issues for federal memo of law in *Martin*; both constellations of issues are in fairly final form; Tom Ball writing federal memo of law on eighth psychiatrist issue; Joyce typed *Ross* rehearing. Night: I edited *Ross* rehearing.

Sunday, August 26:
Martin Warrant: Craig printed other *habeas* issues in *Martin*; the *Martin habeas corpus* petition is in fairly final form, but the memos of law still need a lot of work; Dick read and we discussed my *Ross* rehearing petition; went over *habeas* issues; proofed; final draft of *Martin habeas* petition should be ready today, tonight; Tom Ball did hand-written draft of its psychiatrist issue for federal memo of law: looks okay; he asked to read my confessions issues draft, and gave me his reactions; helpful; I proofread all fucking day; Craig mentioned that he just got in the *Ford* answer brief in the Eleventh Circuit; I read it, and it's pretty powerful: it wounds our arguments.

Monday, August 27:
Martin Warrant: Got in galleys for *Stetson Law Review* article on HAC aggravating circumstance; got letter and materials from George Kendall: he thinks I should only ask for rehearing in *Ross*, and not rehearing *en banc*; discussed this with Dick, and he thinks we should ask for rehearing *en banc* anyway: "Your loyalty is to *Ross*, and it doesn't really hurt Georgia anyway"; I talked with George Kendall: they are very worried about *Ross*; printed final version of *Martin habeas* petition: many drafts of memo of law issues floating around the office; proofed, proofed, proofed, proofed, proofed; called John May, who represented *Ross* previously when he was a public defender here in the office: May said that Ross is a pretty sophisticated guy, but not a lawyer; May and I discussed strategy, and he offered to do an affidavit re his conversations. Night: went over Stetson Law Review galleys at home.

Tuesday, August 28:
Martin Warrant: Oral argument in Florida Supreme Court in *Martin* and *Dobbert*. 10:30 a.m.: Craig called: argument went well; the justices seemed into the merits, rather than procedural default; I discussed with Craig whether he or I should witness James Dupre Henry's execution; I corrected *Ross* rehearing, and Lee Currey retyped it; Tom Ball proofed *Martin* issues; *Martin* federal *habeas* ready to run on all issues, except the eighth psychiatrist issue; Dick called: psychiatric interview with Henry is going well at the prison: he will be back in West Palm Beach tonight. 4:40 p.m.: lost *Martin*, 7-0, in the Florida Supreme Court; Craig called Lee Martin to tell him; I called Gail Rowland at the Clearinghouse, who read me the opinion: on the eighth psychiatrist issue, the justices said essentially "you *had* seven shrinks at the trial . . . "; Scharlette crying over *Dobbert*, who also lost in the Florida Supreme Court, 5-2, with two dissents: Scharlette told me, "they're going to kill him"; Craig got back from Tallahassee at 5:00 p.m; printed Tom Ball's draft on eighth psychiatrist issue for *Martin* federal *habeas*; I went over it; prepared files for argument; went over transcript notes and read State's brief on direct appeal; photocopied the portions of the record re the deterrence/*Lockett* issue, jail records issue and confessions issues; Craig on the computer word processing all night; Dick rewrote Tom Ball's eighth psychiatrist issue; I was in the office until 5:30 a.m.; outlined confessions arguments for oral argument in Federal District Court.

Wednesday, August 29:
I called Joyce Larkin at Eleventh Circuit clerk's office: we're filing the federal *habeas* petition and stay application in federal district court today; final changes on *Ross* rehearing; everyone trying to get *Martin* legal memo out; discussed *Henry* issues with Dick: there aren't any, really; office is very hectic

getting *Martin* memo out. 3:00 p.m.: filed *Martin* in federal court in West Palm Beach: Jerry Justine took the papers over, and filed them, and our judge is Judge Lawrence King in Miami; I called Judge King's office, and he did not want the papers until tomorrow morning; met with Craig and Dick re *Henry*: Dick wants to focus on that; researching issues; *Ross* rehearing goes out to the Eleventh Circuit.

Thursday, August 30:
Martin Warrant: Shit: *Ross* rehearing went out yesterday without a table of contents or table of authorities; I redid (Ray Currey offered to do them, but it was my screw up . . .); called Jean Phillips at Eleventh Circuit clerk's office and explained what had happened with *Ross*; I took *Ross* cover to be printed, and realized, back in the office, that the cover was wrong, was the wrong color so went back and redid it; trying to find information and intelligence on Judge King: Paul Morris says he's the worst judge on death cases, after storming Norman Rutger in Fort Lauderdale. 12:12 p.m.: clerk called: Judge King wants us to file "*habeas* checklist" by 5:00 p.m. tomorrow; no one in the office knows what that is; we guessed that it probably means Judge King will deny a stay sometime this week, so must go to Eleventh Circuit under All Writs Act, stay to preserve jurisdiction—if Martin is executed, then the federal courts would no longer have jurisdiction over his *habeas* petition; I dictated Eleventh Circuit stay memo, anticipating an adverse ruling by Federal District Judge King; Dick Joranby called to congratulate me on my work on *Martin*. 5:00 p.m.: Judge King's office called: Tuesday at 10:00 a.m. will be argument on the law; we all met and Dick is very worried that Judge King will deny everything on Tuesday: King just became chief judge of the Southern District of Florida and may use us as an example on how to grease these cases through the federal courts under warrant; we also discussed *Ford* reply brief in the Eleventh Circuit; *Ross* Eleventh Circuit rehearing went out, again, to the Eleventh Circuit.

Friday, August 31:
Martin Warrant: Velma Barfield was set to die in North Carolina today, but execution stayed by U.S. Supreme Court; rumors: Ruthann says Judge King really wants to be on the Eleventh Circuit; that he is very political and close to Judge Fay; Joan Fowler Lawson, assistant attorney general in *Martin*, told Louis Carres that George Gieff, the head of the death squad in the attorney general's office, has targeted *Martin* as the first time execution on a first death warrant and on a first Rule 3.850 motion and federal *habeas* petition; God, I love pressure; called the Eleventh Circuit to tell about hearing schedule in Judge King's court for Tuesday morning. 11:40 a.m.: got State's response to Rule 3.850 motion and stay application in *Martin*: very shoddy: confessions

issue taken, word for word, from their Florida Supreme Court direct appeal brief, which was very good given the time it was filed, and its intended audience of Florida Supreme Court justices, but which doesn't at all engage the issues that we have raised in the *habeas* petition and the stay memo; Dick, on *Martin*: "Let's go in with both barrels; demand the *habeas* writ issue, not just a stay"; sounds good to me; went over *Stetson Law Review* HAC article corrections with Roger at the law review; Craig, Dick and I had a long and painful debate on whether to try to raise ineffective assistance of trial counsel in *Martin*: soul searching, since we need an evidentiary hearing issue in order to get a stay; ultimately decided not to raise IAC: Luben did too good a job at the original trial, the aggravating circumstances are too strong, and the North Carolina prior conviction stuff just wasn't that great as a legal or factual issue; we all also discussed *Henry* at length, trying to devise a theory why a State's not considering newly discovered evidence violates the Eighth Amendment to the federal constitution; I sent my *Ross* rehearing papers to SPDC and ACLU in Atlanta.

Saturday, September 1, 1984:
Martin Warrant: We all discussed *Henry* at length: Dick thinks he can resurrect the racism/statistical studies issue by showing that the press coverage of Henry's trial demonstrated that *his* trial, in particular, was racist: not a system-wide, scatter-shot argument that capital punishment as a legal *system* in Florida is racist, but rather that Henry's particular trial was racist —and the way to contextualize, and explain, what happened at Henry's trial, was to use the statistics about system-wide discrimination; Joyce typing my Eleventh Circuit papers for *Martin*; I drafted Eleventh Circuit *en banc* rehearing papers, just in case the Eleventh Circuit panel denies the stay; I corrected my Eleventh Circuit stay memo; evening: went to Blowing Rocks with Ruthann and Larkin.

Sunday, September 2:
Martin Warrant: In office: finished *en banc* rehearing petition in *Martin*; discussed whether to use it; crazy to file it before panel issues opinion, or even before federal district court rules on stay application, but Eleventh Circuit rules say it must be filed more than twenty-four hours before a scheduled execution time; will probably give it to Patsy Morris, Georgia ACLU, to hold it unless needed, and see how it goes before Judge King in the federal trial court; Xeroxed most of the day: *en banc* copies of *habeas* petition and memo in support of stay of execution in district court; Craig made corrections to Eleventh Circuit stay memo in *Martin*; Sarah Bleakley called: *Dobbert* lost in federal district court yesterday; Scharlette very upset; Dobbert's federal district judge was Susan Black, who was "very vicious"; the Bar should vote to decide on whether to create and fund the bar job on Friday; Craig very

pissed at Scharlette about encouraging me to apply for a bar job, and not talking to her at the moment; corrected Eleventh Circuit memo; Dick added his eighth psychiatrist issue; left office at 8:30 p.m.

Monday, September 3:
Martin Warrant: Corrected *Martin en banc* petitions and motions; Flo and Joyce typing and Xeroxing them; arranged for Steve Bright to pick up *Martin* Eleventh Circuit papers and deliver to Eleventh Circuit clerk's office; we decided to give the full Eleventh Circuit *en banc* court rehearing to the clerk's office at the outset: do not want to risk procedural bar, and their refusing even to consider it, because we missed the twenty-four hours in advance of execution filing deadline; I prepared oral argument in *Martin*; discussed with Craig the difference between the Sixth Amendment right to counsel, and the Fifth Amendment/*Miranda* right to counsel, re *Martin* confession issues; went over confessions issues again and again; Craig will argue *Ford* in Eleventh Circuit; Xeroxing, punching holes, etc., all day; spent about a half hour preparing for the oral argument. 11:00 a.m.: Steve Bright called: just lost *Dobbert* before Federal District Judge Black in Jacksonville: abuse-of-the-writ, and other procedural nastiness. 12:30 p.m.: finished getting papers in order to go to Eleventh Circuit in *Martin*; finally can start really preparing for my oral argument on the *habeas* petition and the stay application in *Martin*.

Tuesday, September 4:
Martin Warrant: 10:00 a.m. oral argument "on the law" in Miami before Federal District Judge King; Ruthann, Larkin and I hit the road from West Palm Beach to Miami at 6:30 a.m., and, before the argument, visited Judge Fay: Judge Fay knew about *Martin* and asked about the Bar job project; at the oral argument before Judge King, Dick went first: thirty-five minutes into Dick's argument, King said, "You only have an hour"; so I got up and said, "There are three issues I do not want to talk about"; Judge King did not hear the "not," and asked a string of questions about the tangential issues I most wanted to ignore at the argument: *Grigsby*, racism, the *Brown* issue; at the end of my fifteen minutes, Judge King thanked me, and I said, "But those are the issues I *didn't* want to discuss," and he let me briefly discuss deterrence/*Lockett*/constitutional relevance and confessions issues; the prosecutor only spoke for about ten minutes, so I got a long rebuttal argument, where I really got excited about the deterrence issue and the confessions issues; Judge King very complimentary (read: charitable) on my performance ("You're really helping me understand these issues"); Judge King also asked our legal education and background, after the argument was over with; King himself wasn't prepared at all for the argument: clearly hadn't read our papers; Rosemary, Judge Fay's secretary, told Ruthann that Judge Fay had

lunch with Judge King after the argument; Dick very upset about that, and wants to recuse Judge Fay if we get him on the panel in the Eleventh Circuit; no goddamn way: if you want to raise that kind of smarmy crap, this close to an execution date, then you can raise it in papers without my name on them; back at West Palm Beach: worried and fretted about what it all means. 4:30 p.m.: I called Judge King's chambers: no opinion or decision will be issued today in *Martin*; Eleventh Circuit refused to file or lodge our *en banc* papers, since there is not presently any appeal or other proceeding pending in the Eleventh Circuit: all that xeroxing wasted, but at least now we won't have to worry about *our* missing their twenty-four hours in advance of execution filing deadline for rehearing *en banc*: it's a stupid rule anyway; went home at 5:30 p.m.. 8:00 p.m.: Sarah Bleakley called: the Eleventh Circuit granted a stay in *Dobbert* until 10:00 a.m. Friday; Federal District Judge Black granted a certificate of probable cause to appeal in *Dobbert*, which should give him a real shot at an Eleventh Circuit stay, depending on who the three judges are on the panel.

Wednesday, September 5:
Martin Warrant: 9:00 a.m.: called Judge King's cha.m.bers: nothing yet in *Martin*. 10:30 a.m.: called Joyce Larkin in Eleventh Circuit clerk's office: will file Section 1651/All Writs Act motion to compel Judge King to rule on *habeas* petition and stay application; Section 1651 will be filed at noon; that's enough time for the Eleventh Circuit. 11:20 a.m.: *Dobbert* lawyer called Dick Burr: his Eleventh Circuit panel is Judge Vance, Judge Henderson and Clark; oral argument scheduled today in *Dobbert*; I discussed Judge Vance and strategy with Steve Malone, who is helping Pat Doherty represent Dobbert. 11:40 a.m.: decided to file Section 1651 in Eleventh Circuit at noon; Dick is 98% certain we're going to lose *Martin*; noon: dictated cover letter to SPDC, re 1651; SPDC will file our 1651 in *Martin*. 1:55 p.m.: called Joyce Larkin at Eleventh Circuit clerk's office: papers are filed in Eleventh Circuit, re 1651. 3:06 p.m.: Federal District Judge King's office called: denied *habeas*; denied stay; granted certificate of probable cause to appeal; granted twenty-four hour stay, until 7:00 a.m. on Friday morning; I called Joyce Larkin at Eleventh Circuit to tell her what Judge King had done; sent Jerry Justine, investigator, to file notice of appeal in Judge King's court and pick up opinion; Judge King's opinion: he briefly discusses the eighth psychiatrist issue and summarily denies all other issues; I made plans to fly to Atlanta to do Eleventh Circuit oral argument. 4:30 p.m.: prosecutors have lodged papers in U.S. Supreme Court to dissolve any Eleventh Circuit stay we might get in *Martin*; Chris Vasil, U.S. Supreme Court clerk's office, told Craig that if the Eleventh Circuit grants a stay, "our court will dissolve it"; Vasel seemed pissed that the State was doing this in a first time *habeas* case on a first death

warrant, but it sounds as though the justices will let them get away with it. 5:00 p.m.: drafted U.S. Supreme Court papers in *Martin*. 6:00 p.m.: drafted supplement to Eleventh Circuit papers previously filed in *Martin*; left office at midnight.

Thursday, September 6:
Martin Warrant: 7:00 a.m.: zap mailed[592] Eleventh Circuit supplement to Steve Bright to file in Eleventh Circuit. 10:00 a.m.: Craig heard that *Dobbert* panel only wanted to hear oral argument on the stay, not the merits: seems to be a good sign; argument scheduled to begin at 1:00 p.m. Morning: wrote letters, xeroxed, proofed my *Stetson Law Review* HAC article, discussed errors with editor Roger at *Stetson Law Review*. 1:20 p.m.: Craig, Dick and I ate at Dan's Diner; Peter (the owner of Dan's Diner: go figure) called Craig to the phone: Joyce Larkin was on the phone, and would only talk to me, since I guess I was listed as Martin's counsel of record; I ran back to the office: stay granted in *Martin* by a panel of Godbold, Kravich and Hatchett: Joyce the clerk seemed almost as happy as me; I took the call at Lee Currey's desk. Afternoon: decompressed, realized how exhausted I'd become; vicious headache; left office at 8:30 p.m.. 9:00 p.m.: called Palm Beach Post newspaper: *Dobbert* lost in Eleventh Circuit; not know if there was a dissent; called Craig and Dick: he will be killed at 10:00 a.m. tomorrow morning.

Friday, September 7:
Ernest Dobbert executed in Florida at 10:00 a.m.; learned from Scharlette that Judge Clark dissented in the Eleventh Circuit, and Justice Stevens dissented in the U.S. Supreme Court; funny story Scharlette told me: at the Eleventh Circuit oral argument, Pat Doherty had divided up the issues with his co-counsel, Sonny Goldenfarb; moments before Pat rose to the podium to begin to argue his issues, Sonny leaned over to him and said, "No, I want to argue *your* issues"; then, as Pat picked up the water pitcher on counsel table to fill a cup with it, rather than pouring the water into the cup, he poured the water (ice water, probably) on the crotch of his pants: so, when he walked up to the podium, he probably looked to the judges as though he had, well . . .; I worked on Florida Supreme Court brief in Henry: trying to find a procedural vehicle for raising the issues that *Henry* had raised before, in the previous round of state postconviction and federal *habeas*, and saying "Had this case come up now, for the first time, you'd never affirm this death sentence"; talk about being executed on a legal technicality: but for the fortuity of timing, Henry would not be executed in a few days; trying to decide how to get the

592. That is, "Federal Expressed."

psychiatric stuff Dick found for *Sireci* into the *Sireci* case, since Dick found the information after the appeal was already in the Florida Supreme Court: asked for remand from Florida Supreme Court to allow us to add the new evidence at the trial level?; read over the reports prepared by Dr. Dorothy Lewis, etc., on *Sireci*; Eleventh Circuit called Dick: they won't reschedule the *Ford* argument, so Craig will have to do it; Dick: Susan Cary spoke with Scharlette: Judge Vance was "out of control yesterday" on the *Dobbert* issue; Judge Vance ate Steve Malone alive; fought hard; Judge Clark ended it by telling Steve, "Sit down, son, your time is up". 8:30 p.m.: left for home to work on *Henry* there.

Saturday, September 8:
Henry Warrant: Finished writing *Henry* draft; started writing *Sireci* draft; called Scharlette: she told me, re *Dobbert* Eleventh Circuit oral argument: the tenor, the atmosphere of the argument was so abusive it was painful to watch; your Judge Vance began by saying, "I've read your papers and don't understand it at all; your argument makes no sense"; the argument culminated with Judge Vance leaning forward and telling Steve Malone that Steve is "offensive" to him; "offensive to the court, unethical, a disservice to the legal profession, . . . and I'm going to write you up in the Big Book" *i.e.*, the Federal Report, not the Book of Revelations; Scharlette said that Steve fought back, but that he was almost in tears; Pat Doherty was so shaken he spilled his water all over his papers and himself when he got up to speak to the court; Judge Henderson just seemed "senile or deaf"; the Florida Bar project will hear about their funding on Monday; Scharlette talked about how it would be tactful to use Greg Thomas as an intermediary between Craig and I, re Bar job; talked about Dobbert's final hours; he was reconciled with his son and daughter: they forgave one another; left office at 9:00 p.m.

Sunday, September 9:
Drafted motion to Florida Supreme Court for *Sireci*; Ruthann: the Bar project was the talk of Tampa; no one seems to trust Sandy D'Alamberte.

Monday, September 10:
Henry Warrant: Typed my original *habeas* for Florida Supreme Court in *Henry* yesterday; Dick wants to get it in final form today; I edited it; filed the Rule 3.850 in *Sireci*, got Judge Cyzmanic: reputed to be against the death penalty; Timothy Baldwin executed in Louisiana at one minute past midnight last night: I read about it in the afternoon newspaper, didn't know it was coming; Tom Ball: "Craig tells me you may be leaving . . ."; drafted original *habeas* on *Brown* issue for Florida Supreme Court; Scharlette: the Bar funded the project at $90,000, which is about $60,000 less than what Sandy

Dahlenberg had said was the minimum; very disappointed; do not know if they can hire two people: may get more money in three months, but can't count on it; Scharlette will have Greg Thomas call to officially invite me to apply for the Bar job; Ruthann and I are very skeptical about the whole thing, now.

Tuesday, September 11:
Henry Warrant: Scharlette: $90,000 *is enough*; Gregg Thomas took Jim Rineman aside on Saturday and said, "The person for the job is Mello"; will call later today; we all met to discuss strategy in Florida Supreme Court on *Henry*. 2:30 p.m.: prosecutor Egan called Dick Burr: judge wants hearing at 4:00 p.m. tomorrow, only on the issue of whether these issues were raised before or could have been raised before; if he finds no, he'll grant a stay. Night: went over original *habeas* drafts in *Henry* with Dick and Craig; ran almost final copies and made final corrections; left at 1:00 a.m.; *Ross* opinion out in Eleventh Circuit advance sheets; so is Randy Kendale's case in the Eleventh Circuit, *Cuertos Korba*, 738 F.2d 1191: she lost.

Wednesday, September 12:
Henry Warrant: Anniversary of when Ruthann and I met in Atlanta; research "raised or could have been raised" law for *Henry*; *Thompson* lost in federal district court. 12:30 p.m.: left West Palm Beach for Orlando, on flight, decided I'd argue first, let the State argue, and then Dick Burr do rebuttal; we went to public defender's office first; Dick and Susan Cary xeroxed while I made notes for the oral argument; oral argument went well; prosecutor was awful, and Dick did *very* powerful rebuttal; Judge Cyzmanic took notes, but did not ask any of us anything during the argument; said he will rule by noon tomorrow; Dick and I feel pretty good about it and discussed strategy to get the stay upheld in the Florida Supreme Court—which is probably a little premature for us to be talking about, but it did make us feel good; dinner with Dick; Dick called Craig: Tom Ball quit the capital division; Craig "disappointed"; Dick and I drove from Orlando to West Palm Beach; back in office: xeroxed Florida Supreme Court papers; Judge Godbold gave Jack Boger, LDF and Tony a lashing at the *Billy Moore en banc* oral argument, for raising silly issues; we all discussed where all this is going: long night coming, and no sunrise in sight.

Thursday, September 13:
Henry Warrant: Arrived at office at 10:00 a.m.: no word from Judge Cyzmanic; Judge Cyzmanic's office called public defender in Orlando and said to call back at 11:45 a.m.; I started on federal *habeas* papers in the meantime; got in page proofs of *Stetson Law Review* HAC article; Greg

Thomas called: he will write to Sandy Dahlenberg and Jim Rineman about why I should get the Florida Bar job. 3:50 p.m.: we got a stay from Judge Cyzmanic in *Henry*: no order or opinion until later today or tomorrow: Evelyn Golden (prosecutor) is appealing to the Florida Supreme Court to dissolve Judge Cyzmanic's stay; briefs due tomorrow at noon in Tallahassee; Louis Trager of Orlanda Sentinel called at 4:40 p.m.: Judge Cyzmanic's stay is based on the *racism* claim. 5:00 p.m.: Judge Cyzmanic's law clerk read the opinion to us: Craig put it on the speaker phone and recorded it; Sarah Bleakley called: Eleventh Circuit remanded *Burger* (my Burger) to federal district court, according to Patsy Morris; Craig: Scharlette very worried about *Adams* (the other Adams: Aubry Dennis Adams): no issues requiring an evidentiary hearing; she is afraid he will be the first inmate to be killed on a first death warrant; drafted federal *habeas* petition in *Henry*; worked on abuse-of-the-writ/successive *habeas* petition memo; left office at 1:00 a.m.

Friday, September 14:
Henry Warrant: Today was the "notify" day on *Ross en banc*: if none of the Eleventh Circuit judges ask for a poll, I'll know next week; Dick and I agreed not to raise racism issue in federal court in *Henry*: no way around abuse-of-the-writ/successive petition; Scharlette: pessimistic about the bar program: feels like she's losing control of it; *Aldredge* record certified; brief due October 22; Craig will do *Aldredge* brief; Sarah Bleakley: law school says they won't take the project unless all Florida Supreme Court justices want them to, Jim Smith (Attorney General of Florida), Governor Graham, etc., all state in *writing* that they want the program; Sarah: Florida Supreme Court gutted *Tedder*, now that U.S. Supreme Court in *Spaziano* said jury override okay and does not need standards; Greg Thomas sent drafts of brief sections for *Jimmy Lee Smith*; we decided Craig will do Florida Supreme Court argument in *Henry*; Richard Green and I will go to Orlando to file federal district court papers, if the Florida Supreme Court dissolves Judge Cyzmanic's stay; Dick will do Eleventh Circuit argument in *Alvin Ford* in Miami; Aubry Dennis Adams was assigned to Federal District Judge Moore in Jacksonville (Moore really screwed . . . somebody recently); *Adams* hearing scheduled for Monday.

Saturday, September 15:
Henry Warrant: Dick decided to put racism issue back in *Henry*; I got pissed; I added this issue to federal abuse-of-the-writ memo of law; went over brief sections that Greg Thomas sent in *Smith*: looked good; Dick at Crystal River Life Over Death Conference, talking about psychiatric shit; printed *habeas* petition in *Henry*; xeroxed *Sireci* supplement; drafted alternative pleadings, since I did not know what the Florida Supreme Court is going to do in *Henry*,

we must have alternative pleadings ready to go regardless of the direction that the Florida Supreme Court takes in the case; I left office at 4:30 a.m.

Sunday, September 16:
Henry Warrant: Proofed *Henry* federal papers; edited memos on abuse-of-the-writ and procedural default; xeroxed *habeas* petition and abuse-of-the-writ memo.

Monday, September 17:
Henry Warrant: *Henry* oral argument in Florida Supreme Court at 8:00 a.m.: last night, Craig flew from West Palm Beach to Tallahassee; the airline delivered his suit to Jacksonville, which meant that Craig would have to do the argument in his blue jeans; no flight from Jacksonville to Tallahassee would have gotten Craig's suit to him in time for the argument; got Bob Link, attorney in Jacksonville, to put the suit in a cab and drive it from Jacksonville to Tallahassee; the oral argument went horribly: court only interested in merits of racism claim, not in whether they have jurisdiction to dissolve a trial court stay—which was our main procedural argument; since Judge Cyzmanic's stay looks ever more fragile, I flew from West Palm Beach to Orlando; plane arrived at 12:30 p.m.: called Dick: no word yet from Florida Supreme Court; Richard Green and I worked on oral arguments: I'll do abuse-of-the-writ and procedural default, he'll do the merits; ate lunch; rumor: we lost in the Florida Supreme Court; the folks at the federal court house didn't know anything about it; called Dick at 1:30 p.m.: lost 6-1, Justice Overton dissenting[593]; so at least now we know which of the alternative papers to file in federal district court; clerk's office: assistant attorney general there; filed and served each other; federal district judge is Kendall Sharp, fairly new to the bench; Judge Sharpe's law clerk said call in an hour; Richard and I went to public defender's office; at 3:30 p.m., Judge Sharp's chambers called to say we should call back at 5:00 p.m.; at 5:00 p.m., they said call at 9:00 a.m. the next morning; Richard and I ate dinner at Howard Johnson's, and Judge Sharp's law clerk came into the restaurant: somewhat awkward moment; night in the Holiday Inn hotel room: I practiced my oral argument; feel very good about it.

Tuesday, September 18:
Henry Warrant: *Ford* oral argument in Eleventh Circuit (sitting in Miami: panel is Judge Hatchett, Judge Clarke, and Judge Stafford, federal district judge sitting by designation); 9:00 a.m.: I called Judge Sharp's chambers: no

593. State v. Henry, 456 So.2d 466, 470 (Fla. 1984).

argument or hearing; opinion will be issued before noon; we all waited at the courthouse coffee shop, checking in at the clerk's office every half an hour. 10:00 a.m.: called Craig: Eleventh Circuit oral argument in *Henry* is set for 6:30 a.m. tomorrow morning, in Atlanta; Brenda Houck slipped and mentioned that Judge Vance is on the *Henry* panel. 11:58 a.m.: Judge Sharp's opinion ready; we filed boiler plate notice of appeal; read opinion to Craig over the phone, who said we should drive home; at West Palm Beach: Dick said *Ford* oral argument went very well; Judge Vance is on *that* panel, as well, and was "very friendly," according to Dick; Judge Vance also said he thinks there's an Eighth Amendment right not to be executed when presently insane; Dick optimistic, but I think we may well lose, still; *Henry*: twenty-four hour stay; oral argument at noon in Eleventh Circuit; Dick and I decided we'd divide up the argument; panel is Judge Hill, Judge Kravich and Judge Anderson—not Judge Vance; so there's a shot; Dick then decided he would do the whole argument alone, so I decided there's no reason for me to go to Atlanta with him; Scharlette called at 6:00 p.m.: very worried about *Aubry Dennis Adams*: the court is conferencing by phone now. 6:40 p.m.: stay in *Adams*, but the State is trying to dissolve it in the *en banc* Eleventh Circuit or, failing that, seeking *cert.* in the U.S. Supreme Court to dissolve the stay.

Wednesday, September 19:

Governor Graham signed death warrants in *Kenny Foster* and *Frank Smith* (Smith has no lawyer; Dick Burr represents Foster): execution set for October 16. 3:15 p.m.: oral argument on *Henry* in the Eleventh Circuit was two and a half hours; went very well; Dick thinks he made it a hard case for the judges; Brenda Houck, Eleventh Circuit clerk, said it would be a "long time" before a ruling would be issued by the court; I went over materials Greg Thomas sent me on *Jimmy Lee Smith*; discussed it with him and a Holland & Knight associate working with him on the case; in the middle of that (at about 4:00 p.m.), Craig came in to my office: "We lost" *Henry* in the Eleventh Circuit[594]; Brenda told him, "opinion may follow"; Craig tried to call Dupre (that's how he referred to James Dupre Henry: Craig had been his lawyer for more than a decade) all afternoon, but phones were messed up; Craig told me about his saga of getting to the Florida Supreme Court oral argument in *Henry* on Monday: the plane took him to Tallahassee, all right, but his bags were routed to Jacksonville, so he had Bob Link, an attorney he knows in Jacksonville, put them on a cab to Tallahassee for $200: otherwise, he would have had to have done the Florida Supreme Court oral argument Monday morning in his blue jeans; Craig and I decided we'd go to the prison and maybe one of us would

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594. Henry v. Wainwright, 743 F.2d 761 (11th Cir. 1984).

be a witness at the execution, to go with Dick Joranby; I took Ruthann home; Craig called: he is not going to the prison, so I decided against it as well; we both went back to the office. 8:00 p.m.: lost *Henry* in the U.S. Supreme Court, 7-2, Brennan and Marshall issued their standard dissent[595]; Craig and I talked; got a pizza; I went home at 11:30 p.m.

Thursday, September 20:
James Dupre Henry executed in Florida, at 7:00 a.m.,[596] with Dick Joranby as our only witness; Margaret Goode read in the newspaper that Henry fought and screamed his innocence to the end and had to be "stuffed into the chair"; I'm not sure why, because that's a horrible way to spend your last few moments of life, but deep down I was glad that Henry fought; clean desk; not able to think much about anything; Craig not in the office; Scharlette: she will have veto power over whoever gets the bar job; she thinks it will be Mark Olive as director and me as his assistant; Sandy D'Alamberte brought my name up on his own, but thinks we can't move until the twenty-fifth (final vote on funding); Steve Bright said the only problem with me was the politics with Craig: Greg Thomas sent letter to Jim Rineman and is drafting one to Sandy D'Alamberte re: me; started getting back into *Simpson*: reading cases.

Friday, September 21:
My office is now in a construction zone: construction equipment smashing walls; I worked in Dick Burr's office (he's in North Carolina, for the *Velma Barfield* clemency); read cases for *Simpson*: Ruthann and Larkin drove from West Palm Beach to Jacksonville to visit her parents.

Saturday, September 22:
Wrote prior testimony issue and the extended statement of the case and facts and procedural history for *Simpson*; worked at home.

Sunday, September 23:
Wrote *Gribsby*/prosecution proneness/sufficiency of the evidence for *Simpson* brief; worked at home.

Monday, September 24:
Gave *Simpson* draft to Craig, for typing; Scharlette called: James Dupre Henry's funeral was yesterday: very moving: she sang me some of the songs (undertaker, please drive slow/for I have to see him go); Reverend Joseph

595. Henry v. Wainwright, 466 U.S. 993 (1984).
596. Radelet & Mello, *supra* note 81 at 922.

Lowery, of Martin Luther King's Southern Christian Leadership Conference, did the service; sixty-five people there; everyone, even the reporters, were crying; Tonia Carroll of the Florida Supreme Court clerk's office called: court denied my motion to remand *Sireci* to add the ineffective assistance of psychiatry issue; *Sireci* oral argument in Florida Supreme Court scheduled for October 4; Sarah Blakely: Jim Rineman sent letter to Sandy D'Alamberte, saying I'm a "fine candidate" for the bar job; she also has letter that Greg Thomas sent to Sandy; Greg also sent it to me: Dick Burr opened it "by mistake."

Tuesday, September 25:
Stayed home with Larkin all day; preparing for *Sireci* oral argument, re-read record on 3.850 motion. Night: Jeff called to discuss final touches on *Booker* brief.

Wednesday, September 26:
Brief due in *Booker*. Morning: discussed *Foster* with Craig and Dick: may raise *Godfrey*/HAC aggravating circumstance issue; Dick Joranby: I'm to receive a $5,000 raise; I told Craig we had to discuss "the subject" *i.e.*, the bar job; lunch with Ruthann and Estella: Ruthann and I decided that I would stay in the West Palm Beach Public Defender's Office; all afternoon (four hours: talked with Craig about bar project and bar job; he made a compelling case that the project was underfunded and doomed to fail; he may pull out of the project himself (as possible director)); Scharlette: Craig may pull out; Mark Olive may not get it after all: Sandy came by and talked with her, and the FSU faculty is worried that Mark Olive would use it as a stepping stone into the FSU faculty; Ruthann typed cover letters to Sandy.

Thursday, September 27:
Discussed *Foster* strategy: may get law firm to do it, at least to front for it, since Dick and Louis Carres would have to be witnesses in the postconviction proceedings; will be a very bitter fight, since we're arguing that Virgil Mayo, the public defender who did the trial, committed perjury at the first *habeas* corpus proceeding: hardball, even for a claim of ineffective assistance of counsel in a death case. Night: read penalty phase parts of trial phase for *Sireci* oral argument.

Friday, September 28:
Final bar decision re: funding of postconviction assistant project scheduled to be made; Flo typed one issue in *Simpson*; I xeroxed cases for *Sireci* oral argument. Afternoon: discussed *Foster*: first decided to call in LDF, since they offered to do it, but they offered to do it mostly out of guilt: then decided

not to call in LDF, after debating the merits and deciding that the merits of the case were very weak: decided not to use LDF on a clear loser: save them for a case that has more of a chance of winning; an associate at Kay, Sholer's law firm DC office can do it, aided by a good trial lawyer to cross examine Dick Burr and Louis Carres; finally decided to bring in LDF: Dick mentioned *Barfield* clemency denied yesterday in North Carolina, and was very apologetic for not telling me about it earlier.

Saturday, September 29:
Wrote oral argument notes on *Cooper/Lockett* issue for *Sireci* oral argument; in office late; corrected *Simpson* brief; did front parts of brief.

Sunday, September 30:
Went over *Sireci* argument notes; called for a number of death sentences imposed during the *Cooper/Lockett* time period: called Scharlette, and she'll give me the numbers tomorrow.

Monday, October 1, 1984:
First Monday of October, beginning of U.S. Supreme Court's 1985 term: only cert. denial in Florida death case is Timothy Palmes; that's all for today; Craig: I'm going to Tallahassee; we discussed *Sireci* oral argument; Scharlette gave me the *Cooper/Lockett* numbers; Gail Rowland: Sandy says I'm really in the running for the Florida bar job; serious consideration; we will talk again on Wednesday; Scharlette: will try to set it up for me to meet Sandy D'Alamberte in Tallahassee tomorrow: I should call her from the Tallahassee airport; home: moot courted *Sireci* oral argument with Ruthann; went over argument notes.

Tuesday, October 2:
9:30 a.m.: I flew from West Palm Beach to Tallahassee; Sarah Blakely met me at the airport and said Sandy D'Alamberte can meet with me at 1:30 this afternoon; went to Clearinghouse and met Gail Rowland, Jimmy Lohman, and the rest for the first time; talked to Billy Nolis (New York lawyer doing Frank Smith death warrant solo; he's a solo criminal practitioner, but has taken six death cases, and Scharlette has Billy in mind for the bar project); went over *Sireci* issues. 12:30 a.m.: met Sandy D'Alamberte: money is there and ready to go for bar project: his first question was: "When could I start?," and his second question was: "What about Craig?"; he seemed impressed by my recommenders; he also said Steve Gey, the New York lawyer we didn't hire at West Palm Beach, wants to teach tax and stuff at FSU law school, and is attractive for that reason; I told him I want to teach law school, too, but Sandy said FSU has no openings to teach criminal law on the FSU faculty; we

discussed at length the issue development and "cutting edge" aspect of the Florida bar project, and he thinks it could get more funding once it's under way; he wants to get it going ASAP, and thinks that he and the bar would be criticized by waiting until the first of the year to get it up and running; finding office space for the project seems to be a problem: he wants it to be with the faculty offices, and Bob Kennedy (another member of the faculty who came into the meeting at this point) does, as well: Kennedy seems to be the key FSU faculty player in the absence of Steve Goldstein; I spilled coffee on my crotch: Sandy took me around the law school and left me with a professor named John Yetter and another professor named Lynn Henderson (who came from the California Public Defender's Office); Yetter seemed bored and hostile to both the bar project and to me; Henderson was very engaging and very interested in my *Stetson Law Review* article on the HAC aggravating circumstance; back to Sandy's office: timing left open; stayed the night with Sarah Blakeley and Sam Miller: I moot courted *Sireci* with her; not real helpful: I think I'm mostly nervous.

Wednesday, October 3:
Sireci oral argument in Florida Supreme Court scheduled to begin at 9:30 a.m.: Before the argument, I met most of the justices when they came into the attorneys' lounge; at the argument, they seemed bored to death by all of the constitutional issues I was trying to raise (question from a justice: "haven't we decided this issue (*i.e.*, *Cooper/Lockett*) before"); another justice asked whether we were raising ineffective assistance of counsel, and seemed pleased when I said that we were not; after the argument, went back to the Clearinghouse: Scharlette very concerned about death warrant in *Tim Palmes* case: I agreed to read the record; Tom McCoun, his pro bono volunteer lawyer, will send it; lunch with Bob Kennedy: nuts and bolts of bar job; how many people do we need to do the job right?; salaries; what will the center do at each step of the capital postconviction process?; will it really save lives or only grease the skids?; can a board of directors really insulate the project from the bar and outside pressures from the bar, the Florida Supreme Court, the trial court, the legislators, and an electorate that just wants more executions to occur faster, and won't understand why people on death row need lawyers?; Gail Rowland and I toured Tallahassee: it seemed like a nice place to raise a family; I spent some time talking with Billy Nolis; I flew from Tallahassee to West Palm Beach.

Thursday, October 4:
Simms clemency postponed indefinitely; Craig at the prison, meeting with Joe Spaziano; I worked on *Simpson* draft; Tom McCoun: the *Palmes* transcripts and records on appeal are on their way; I called Jim Rinemann, and said no

way he can do the case if warrant is signed before January; Rinemann states that he may be able to get the Governor to hold off on signing death warrants, after the center is up and running (by saying these people don't have lawyers) but can't now, since the center is not yet going, and Tom McCoun isn't really in desperate shape; *Martin*: transcript of federal district court hearing arrives at the office: forty days will start running now; *Elledge*: must do federal district court memo on why we need an evidentiary hearing; I will write it and Craig will sign it.

Friday, October 5:
Worked on *Simpson*: another draft done; Scharlette: Sandy said they've chosen the board of governors for the bar project: Craig, Steve Bright, Bob Kennedy, and Mary Scharlette McCall (a friend of Scharlette Holdman's).

Saturday, October 6:
Discussed *Foster* all day: Lewis Carres or I will argue it in the Florida Supreme Court; started on *Elledge* memo: wrote draft; I mentioned in passing an issue we might want to raise in the Florida Supreme Court for *Foster*: this is a successive *original habeas* petition, not a successive rule 3.850 motion, and, technically, there are no governing legal standards on successive *habeas* motions: so the court should grant a stay (as in *Whit*, and as the Eleventh Circuit did in *Moore*) to resolve the legal issue: a stay is needed because the legal issue is complicated and very unsettled: should they adopt the same test that governs successive 3.850 motions? Should it be the same test that applies to *Wainwright v. Sykes*/procedural default cases? Should it be the federal abuse-of-the-writ/*Sanders v. U.S.* test?

Sunday, October 7:
Dick called at home: Lewis Carres wants to argue it, but I am to write a memo to Florida Supreme Court; my lack of enthusiasm was so obvious he said "we'll talk about it tomorrow."

Monday, October 8:
Flo typing *Elledge* memo; Craig, Dick and Lewis engaged in intense conferencing; I edited *Elledge* memo; Craig: *Simpson* brief looks fine; should get *Foster* response from State at around 4:00 p.m. today; Lewis thinks they fucked the case all up by missing the good arguments (where would poor Craig and Dick be without Lewis?); *Frank Smith* filed in 3.850 trial court at 8:00 a.m. News: Walter Mondale seems to have won the presidential debate yesterday against President Reagan–who, as Governor of California, shoved through one last execution before beginning the ten year moratorium on

executions nationally that ran from 1967 until Gary Gilmore was executed in Feb. 1977.

Tuesday, October 9:
9:15 a.m.: Got box of *Palmes*[597] stuff from Tom McCoun. 9:45 a.m.: Brook, Tom McCoun's secretary, called: Governor Graham signed a death warrant today on Palmes; Gail Rowland quit at the Clearinghouse: Scharlette called Dick Burr to tell him; Scharlette: Governor Graham also signed death warrant in *Maxwell* today: Maxwell has no lawyer: hearing at 2:30 p.m. today in Frank Smith; got in *Booker* Eleventh Circuit brief: looks *fantastic*; called Judge Vance to let him know that Sand D'Alembert might be calling him for a reference on me: the judge had noticed my name on the *Ford* brief ("I was hoping you would argue it"; I told him: so did I); *Berger v. Zant* is back in federal district court for fact finding; *Roosevelt Greene* also in real trouble (cert. petition pending); Judge Vance railed against Governor Graham and the Attorney General's office for always resorting to "demagoguery" in death cases; I told him about Ross: "I was up there arguing *Thomas v. Zant*, and I still lost Ross": the judge just laughed very hard; evening: went over postconviction files in *Palmes*.

Wednesday, October 10:
Spaziano clemency interview, originally scheduled for today, moved to Friday; Florida Supreme Court oral arguments in *Smith* and *Foster*; Lewis thinks his argument in *Foster* went very well: "I educated the court," Lewis told we mortals. 2:15 p.m.: lost *Foster*: Lewis is getting a copy of the opinion now. 4:15 p.m.: it was 7-0, a unanimous loss in *Foster*: the opinion was apparently written in advance of the oral argument: Lewis called Dick, who mentioned nothing about it to me until I asked Dick about it; I proofed *Elledge* memo; Tom McCoun called me at home: discussed issues in *Palmes*: Tom has cleared his calendar next week: do not know if there's other counsel to take it over from him, so he's preparing to go it alone; called Dick: Sandy D'Alamberte called Rinemann who said he will get "right on it," but neither Dick nor I knew what the hell that meant.

Thursday, October 11:
Realized that *Palmes* has very strong *Witherspoon* issue and a rehearing still pending in the U.S. Supreme Court: maybe he could get a stay pending the decision by the Supreme Court in *Whit*: sent stuff to Tom McCoun; final proof of *Elledge* memo; called Don Dowling, who will send me Sheridan statement

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597. I discuss the *Palmes* case in MELLO, DEAD WRONG, *supra* note 2, at 184-87, 206-07.

re Simpson: clerks office looking for stuff in Simpson record, too; *Elledge* memo goes out to the court; Dick and Craig scrambling to get *Foster* out.

Friday, October 12:
Elledge memo due in federal district court; Miami Herald: Linwood Briley, scheduled to be executed in Virginia next week, was denied a stay and cert. last night by the U.S. Supreme Court, 7-2, with Brennan and Marshall writing their standard dissent; Florida Supreme Court denied a stay in Frank Smith; not sure when Smith was denied: this is the first I'd heard about this; Craig: Scharlette suggests he look at hiring a woman who just left Team Defense (is Scharlette sending her to the bar project resource center, too?); *Foster*: 3 hour hearing set for Monday: do not know if it is an evidentiary hearing or just an oral argument; Craig: Gail Rowland is back working at the Clearinghouse, part time; Scharlette is flying a legal secretary from St. Petersburg (the one she said should/would for the bar project in Tallahassee for after hours stuff); Smith's hearing is Monday morning before federal district judge Stafford; got letter from Carol Newhouse (Ruthann's psychic): stay in West Palm Beach: Ruthann and I drafted letter to Sandy D'Alembert, pulling out from my consideration for the bar job.

Saturday, October 13:
Linwood Briley executed in Virginia, a few minutes past midnight; in office: reading record in *Palmes*; found a *Green v. Zant* issue: a juror was dismissed without an adequate hearing: talked with Tom McCoun about this.

Sunday, October 14:
Finished reading *Palmes* record and outlining issues Tom McCoun may want to raise.

Monday, October 15:
Joyce Larkin, Eleventh Circuit clerk's office called: *Martin* brief is due on November 26; I wrote letter to Tom McCoun, re: *Palmes* issues. 11:30 a.m.: *Frank Smith* gets stay from Federal District Judge Stafford in Tallahassee; Dick Burr in Pensacola for *Foster* hearing; Eleventh Circuit re hearing denied in *Ross*: no judge asked for a poll of the *en banc* court. 3:20 p.m.: stay in *Foster* from federal district court: State isn't taking it up to the Eleventh Circuit to try to get it dissolved: they now say *they* need to call Virgil Mayo as a witness to testify, and he isn't ready now; told Sarah Blakeley I was thinking of not seeking the bar job: she did not think too badly of it; Ruthann typed letter to Sandy, withdrawing my name from consideration for the bar job.

Tuesday, October 16:
Proofed *Simpson*: Craig wants his name on it, as well as mine. Night: called Scharlette to discuss bar job: she also worried about Craig sabotaging my career, and sabotaging the project: she is very sensitive to the situation with Ruthann if we stay here (*i.e.*, not being able to write poetry and fiction etc.): she doesn't think this will be my last chance to leave West Palm Beach to do full-time death work somewhere else, but I must go into it in a way not to alienate Craig: she agrees it would be worse to wait, not to get the job, and then *have* to stay here with Craig and Dick. Better for me to pull out now; she does not think I'll get it anyway: too much fall out from Craig, and Sandy is too political to accept alienating Craig and risk alienating Dick Joranby; she'll call Steve Bright to sound him out on where my application really stands with Sandy.

Wednesday, October 17:
Scharlette: Steve Bright will torpedo my getting either job with the new bar resource center, as director or as staff attorney. Bright will lobby very heavily for Mark Olive because of his experience, to be director: Bright doesn't want me for the staff position (the second position) because of Craig; my *Stetson Law Review* article on the heinousness aggravating circumstance is out; Lewis Carres saw it and told me about it; I told Sarah and Gregg Thomas about my decision to withdraw my application for the bar job: only Gregg really thought it was professional suicide; Sarah and Jeff Robinson were as supportive and caring and loving as ever; gave Craig and Dick copies of my letter to Sandy, pulling out; Dick said he thought the letter was real good and "honorable"; Craig's comment was: "Great. Now we can plan."; he wants me to do *Spaziano* 3.850 and clemency; got in record on appeal of *Martin*: started organizing the massive files and records in the case, so I can start mapping out an Eleventh Circuit appellate brief within their page limits.

Thursday, October 18:
Redrafted *Lockett*/deterrence/constitutional relevancy issue in *Martin*: cut and paste, mostly, from papers I had written earlier in *Martin*; Tom McCoun called: discussed rehearing in U.S. Supreme Court in *Palmes*, which he hopes to get out to the court tonight: factual reinvestigation not going well: Jacksonville PD did some superficial search for Jane Albert and John Clifton, two critical witnesses in *Palmes*, but nothing big; Tom will have to go do the case alone: he refuses to call Rinemann about getting a lawyer, since Rinemann was so arrogant the last time Tom called for help on *Palmes*; home: Craig called: lost *Hitchcock* in the Eleventh Circuit, 2-1, Judge Frank Johnson dissenting: Craig doesn't know the details, and said he doesn't want to know, so I called Patsy Morris at Georgia ACLU: Johnson dissented on both the life

plea issue and the *Cooper/Lockett* issue (*i.e.*, the two issues I wrote for the brief); Judge Roney wrote the majority opinion in *Hitchcock*.

Friday, October 19:
Susan Carey visiting in office; received *Hitchcock* opinion from Patsy Morris: Johnson's dissent is powerful, and may well take the case *en banc*; Craig very depressed about it; Lee Curry typed deterrence/*Lockett* issue for *Martin* merits brief. Began editing and restructuring confession issues in *Martin*.

Saturday, October 20:
Edited deterrence/*Lockett* issue; worked on confessions issues in *Martin*; in office all day.

Sunday, October 21:
Day off.

Monday, October 22:
Aldridge brief originally scheduled to be due, but postponed; babysat Larkin and looked at houses most of the day; Craig: one of Holland & Knight's clients is suing the Florida bar about IOLTA attorney trust fund accounts, which is how the bar resource center project money was scheduled to come from; the lawsuit asks for an injunction forbidding distribution of any of the money–*i.e.*, to create the resource center; Ruthann and I decided to collaborate on a law review article on the jury override, based upon the override section I had written of in the U.S. Supreme Court brief in *Spaziano*.

Tuesday, October 23:
The volunteer pro bono lawyers in *Christopher* were in the office, re: advice on the Eleventh Circuit; Scharlette called from Memphis: bar has voluntarily frozen IOLTA (pro bono) funds; the lawsuit, filed in federal district court, seeks an injunction against distribution of the funds, arguing that such distribution would constitute an unconstitutional "taking" of property: the lawsuit is frivolous, but the bar has used it as an excuse to prevent distributing the funds to set up the resource center: this is their golden opportunity to torpedo the whole thing: thus, no bar project at the law school, no money for the Clearinghouse (Scharlette had counted on this money and so didn't tap any of her usual funding sources this year): she asked Jim Coleman at Wilmer Cutler to come in and mediate the dispute, and he agreed to; Scharlette told me that Sandy D'Alembert loved my letter withdrawing from consideration for the job; Scharlette also said that Sandy said that I'm "smelling like a rose," referring to my political situation at the moment; Sandy also said we can get me up there later, when there's more of a panic about the lack of lawyers for

guys on death row; all day until 11:00 p.m.: went over *Martin* suppression hearing trial transcript.

Wednesday, October 24:
Morning: met with pro bono lawyers for *Christopher*: they are in big trouble: they did not know what they were getting into when Scharlette persuaded them to take on this case; Tom Herbert, an assistant public defender in the office, jumped out of his Twelfth floor window to his death: office is stunned; Dick Jorandby, ashen faced.

Thursday, October 25:
The local police ruled out homicide in Tom Herbert's death, but do not know if it was accident or suicide—Joranby looks crushed, and Craig looks very bad; I played with *Martin* confessions issues that have been typed so far: xeroxed stuff on eighth psychiatrist issue, which I may start thinking about tomorrow.

Friday, October 26:
Dick Burr in all night doing *Velma Barfield*; called Clearinghouse—no word yet on *Palmes*—no lawyer yet for *Maxwell*; Tom McCoun called: may have a *Brady*/discovery issue in *Palmes*: main witness for State got promises from prosecutor, and *Palmes* defense lawyer at trial was not told about this: witness skipped town, but Tom got a deposition from someone she (Jane Albert, the witness) talked to about the deal with the prosecutor; he is also raising the *Greene v. Zant*/improper exclusion of ill juror issue: he hopes to file Rule 3.850 motion and stay application in state trial court Monday or Tuesday: he's already filed the rehearing petition in the U.S. Supreme Court.

Saturday, October 27:
Packed to move to new house.

Sunday, October 28:
Packed; edited *Martin* confessions issues; Dick and Craig doing *Barfield* papers all weekend.

Monday, October 29:
Craig: no lawyer yet for *Maxwell*: Parker Thompson's firm turned them down; Craig suggested I do *Hitchcock*, but changed his mind when I suggested I keep it if rehearing *en banc* is granted in the Eleventh Circuit; I started reading stuff for eighth psychiatrist issue in *Martin;* Scharlette: she's thinking about taking *Maxwell* into court *pro se*, without a lawyer: there has never been a case this close to execution before a lawyer was found: the Bar project and Rinemann

won't help, since Rinemann now says they won't find lawyers for cases in a "crisis posture"—they'll only try to find lawyers in cases that haven't had death warrants signed and execution dates set—which of course means that they won't be finding lawyers for the death row prisoners most at risk for being killed without lawyers–God, I love the Florida Bar; called Jeff Robinson to see if Wilmer, Cutler & Pickering might be able to take *Maxwell*: probably not, firm already devoting massive resources to *Booker*; Craig asked me to read *Maxwell* trial transcripts: I should get them in via bus tomorrow. Night: Tom McCoun called me at home: U.S. Supreme Court denied rehearing in *Palmes*: he filed Rule 3.850 motion and stay application in state court: we discussed abuse-of-the-writ and how to brief it during the pendency, before the Eleventh Circuit *en banc* court, of *Billy Moore*.

Tuesday, October 30:

Thomas Barefoot executed in Texas, a few minutes after midnight, and Ernest Knighton executed in Louisiana this morning — no one here knew these were coming: I learned about them from Alan Deweese, who mentioned the two executions in passing in the elevator: "it's a good day for the forces of darkness," and I didn't have a clue about what he was talking about, and only then did he tell me about the two executions; Scharlette: LDF will do *Maxwell* if nothing else happens and no other lawyer can be found; I read over the Florida Supreme Court opinions in *Maxwell*: got record from Scharlette: not much here in terms of legal issues; U.S. Supreme Court denied cert. in *Alvord* and *Raulerson* yesterday. 12:50 p.m.: *Velma Barfield* lost in trial court in North Carolina. 4:00 p.m.: Steve Malone called: if no one else will take *Maxwell*, he will: may raise right to appointed counsel in capital postconviction cases. 5:00 p.m.: Steve Malone: he's flying down tonight, and can I meet him at the airport?; Craig said that he wished that Malone and company wouldn't work here this office is already too busy and burned out with our own cases and the cases we're trying to help on; home: Scharlette called: Steve Malone will meet me in West Palm Beach and go over the record and the issues in *Maxwell*: a big pig Fort Lauderdale law firm {is this OK?} agreed to take the *Maxwell* case on–but only *after* we got a stay of the execution, so Steve and Scharlette will work out of Miami; I went into the office and read the rest of the Maxwell transcript and got stuff xeroxed for Malone; I left office at 3:00 a.m.

4. Burnside's Bridge

Wednesday, October 31:
Halloween; met Steve Malone at West Palm Beach airport at 9:30 a.m.; he does not seem to think much of the work I'd done already on *Maxwell*, so I left him in my office and went to work on the *Martin* brief in Dick Burr's office (he's still in North Carolina on *Barfield*); Scharlette arrived in the office at 1:00 p.m., while Ruthann and I were out looking at a house, which we agreed to take, but then Ruthann changed her mind; Patsy Morris sent Eleventh Circuit opinions in *Peek*: Judge Clark granted the writ based on *Green v. Zant*, and Judge Vance (who wrote *Green v. Zant*) dissented on the basis of *Green v. Zant* — Judge Vance's dissent is powerful and will, I think, take the case *en banc*–hence the end of the little good that I think I was able to do in first drafting Judge Vance's opinion in *Green v. Zant*.

Thursday, November 1, 1984:
Stayed home and babysat while Ruthann in Bartow; *Miami Herald* newspaper: *Velma Barfield* lost in Federal District Court yesterday and is now in the Fourth Circuit Court of Appeals.

Friday, November 2:
Velma Barfield executed in North Carolina, the first woman to be executed in the U.S. in God knows how many decades; *Palmes* oral argument in Florida Supreme Court was originally scheduled to occur today, but they can't possibly make this date; Governor Graham signed death warrants in *Gary Alvord* and *Jesse Tafero*,[598] setting executions for November 29; Scharlette told Craig the *Witherspoon* issue in *Maxwell* is coming along well; Tom McCoun argued *Palmes* in the Florida Supreme Court today; Tom called: lost *Palmes* in Florida Supreme Court, though the justices seemed interested in the *Brady* issue — Tom and I discussed how he might be able to milk an evidentiary hearing requirement out of the ambiguity in the *Thomas v. Zant* standards; I discussed *Martin* confessions issues with Margaret Good; Ruthann and I signed lease on Flamingo Lakes Boulevard house; Craig: "I will write the *Hitchcock* rehearing alone," *i.e.*, Craig will write the *Cooper/Lockett* argument alone: Okey dokey.

598. *Jesse Tafero* was almost certainly innocent. *See* Radlet Lofgurst & Bedau, *Prisoners Released From Death Row Since 1970 Because Doubts About Their Guilt*, 14 THOMAS M. COOLEY L REV. 907, 941 (1996). Tafero was executed in 1990. *See id.* His co-defendant was subsequently released from prison. *See id.*

Saturday, November 3:
Moved into house.

Sunday, November 4:
Moved into house.

Monday, November 5:
Craig: *Maxwell* filed in all courts today — trial and appellate, state and federal: hearing on Rule 3.850 motion and stay scheduled in state trial court for 1:30 p.m.; Tom McCoun called: lost *Palmes* in Federal District Court last night: abuse-of-the-writ on all issues: oral argument in Eleventh Circuit scheduled for 2:00 p.m. tomorrow: we discussed cert. and Eleventh Circuit stay strategy; told Dick Burr my *Peek* concern: he'll pass it on to Southern Prisoner's Defense Committee and Steve Bright; I read law review articles on eighth psychiatrist issue for *Martin* brief.

Tuesday, November 6:
Election day; voted for Mondale; Craig: *Maxwell* lost yesterday in Florida Supreme Court — oral argument scheduled today at 2:00 p.m. before Federal District Judge Kehoe. 9:30 a.m.: Mondale is ahead in early election returns. Afternoon: went to Jupiter to vote, and then to buy furniture; back home: went out to get dinner, and when I got back home, Estella and Dalia were there, with TV: Reagan had 240 electoral votes and Mondale had 3 (all from Washington, DC): we sat around drinking champagne and watching the disaster unfold on Dalia's television: Mondale conceded at 11:00 p.m., with a very dignified speech; Jesse Helms beat Jim Hunt in North Carolina (so Hunt's killing *Velma Barfield* didn't help his political chances to take Jesse Helms' U.S. Senate seat after all).

Wednesday, November 7:
Palmes and Maxwell were originally set to die today; *Hitchcock* rehearing petition due in Eleventh Circuit; *Miami Herald*: Florida Supreme Court stayed *Maxwell* yesterday; Eleventh Circuit denied *Palmes*, but denied him on the merits, cutting through the procedural screens and abuse-of-the-writ bars, but granted a twenty-four hour stay to give *Palmes* some opportunity to take cert. and seek a stay in the U.S. Supreme Court; Steve Malone called to say thanks for my help on *Maxwell* and tell me about the argument in the Florida Supreme Court: they all seemed real concerned about ineffective assistance of counsel at trial and on direct appeal: Malone thinks *Maxwell* might win on the merits, now, even without a remand for an evidentiary hearing on ineffective assistance of counsel; Tom McCoun called: his *Palmes* Eleventh Circuit panel is Judge Vance, Judge Henderson, and Judge Clarke: Judge

Vance was "very abusive: 'you were inexcusably negligent, Mr. McCoun'; 'stop pointing your finger at me, counsel'; 'don't tell me about *Thomas v. Zant*, since I *wrote Thomas v. Zant*'" — still, Tom thought the judges seemed interested in the *Green v. Zant* issue, since there is still a cert. petition in Green pending in the U.S. Supreme Court; Courtney Johnson (from Bill Shepard's office in Jacksonville) called to talk to me about competency to be executed issue in *Alvord*; I read law review articles on eighth psychiatrist issue in *Martin*.

Thursday, November 8:
Timothy Palmes executed in Florida, at 7:01 a.m.; I read cases and law review articles on eighth psychiatrist issue for *Martin*; my week to lead the recent Florida Supreme Court decisions conference; Craig: Florida Bar has frozen all funds until hearing on injunction and temporary restraining order lawsuit filed in federal court.

Friday, November 9:
Drafted eighth psychiatrist issue for *Martin* Eleventh Circuit brief; Shelly Pine called to pick my brain about Rule 3.850 strategy in some cases working on; Susan Cary here in the office, to talk about *Thomas Knight*, her case in federal district court: we discussed *Thomas v. Zant*, and how to structure her argument that she needs an evidentiary hearing on ineffective assistance of trial counsel. Night until 4:00 a.m.: wrote eighth psychiatrist issue for Martin — couldn't get started until 10:00 p.m. because of things and chores to do around the house.

Saturday, November 10:
House chores: built desks, etc. etc. Night until 1:00 a.m.: fine tuned eighth psychiatrist issue for *Martin*, did table of authorities and table of contents; I have a cold: feel awful.

Sunday, November 11:
Craig in office; Joyce typed eighth psychiatrist issue and Craig ran off other issues for *Martin* brief; ready at 10:00 a.m., so from 11:30 a.m. until 3:30 p.m., I proofed *Martin* Eleventh Circuit brief.

Monday, November 12:
Fine tuned *Martin* brief, did motion for additional pages, etc.; Marge Piercy and her husband, Ira Wood, came over to our house for dinner: Woody and I went to pick up Mexican food from Los Pieros and brought it back: nice conversation about poetry, in which I said absolutely nothing, and Woody said next to nothing: Ruthann insisted on taking a photo of Piercy holding Larkin,

where Piercy looks like she's holding a piece of rotten meat — after the photo, Piercy rushed over to our sofa and deposited Larkin there, looking confused ("but people usually like me . . .").

Tuesday, November 13:
Craig: The Martin brief came to eighty-four pages: should be printed today; *Miami Herald* published my letter-to-the-editor on the jury override; finishing touches on *Martin* brief; at office with Craig until midnight.

Wednesday, November 14:
More finishing touches on *Martin* brief—all day. Afternoon: babysat Larkin in court while Ruthann did jury trial—baby's first, jury trial. Night: finishing final, final, final touches on *Martin* brief; left office at 1:30 a.m.

Thursday, November 15:
Final final final final final final final final touches on *Martin* brief all day; got brief out to Eleventh Circuit and served on opposing counsel, Joan Fowler Rossin.

Friday, November 16;
Joan Fowler Rossin called: she got the brief, but Joy Shearer, her boss, says it's "office policy" to object to Eleventh Circuit briefs that exceed the page limit; Shelly Pine called to discuss clemency and Rule 3.850 strategy in *Williams*; I started getting back into *Simpson*: went over the brief; called clerk's office: Joyce Larkin says the Eleventh Circuit clerk's office received the *Martin* brief.

Saturday, November 17:
Had party.

Sunday, November 18:
Hung out: Estella and Dalia came over; Estella and Dalia are two lesbian friends of Ruthann, but they seem to think we are OK for a couple of straight people.

Monday, November 19:
Craig assigned me lead counsel on *Spaziano* for clemency and Rule 3.850 motion; legislative repeal of jury override: I think a major lobbying effort is in order: called Susan Care she said I should work on the override through Senator Harry Johnston, of the Florida Senate; Craig: Florida Bar dispersed IOLTA funds—this means that Scharlette and the Clearinghouse will survive—for now.

Tuesday, November 20:
Played with *Martin* brief, even though it's already filed; received State's opposition to additional pages in *Martin*— seems very half-hearted, not nearly so nasty as the opposition to the extra pages that office filed in *Ford* in the Eleventh Circuit; worked on *Spaziano*.

Wednesday, November 21:
Dick Joranby thinks mounting a political lobbying campaign to repeal the jury override in the Florida legislature is a great idea and will help organize it: he wants me to put together a memo on legislative repeal of the override, focusing on legislative concerns of fiscal inefficiency, risk of error, etc., rather than constitutional or legal concerns[599]; I called Scharlette: there is a meeting on Monday in Tallahassee of Amnesty International and religious people on legislative action: she wants me to come to the meeting; Joranby thinks it's a good idea for me to go, "as a representative of me and of the Fifteenth Judicial Circuit"; Joyce Larkin in Eleventh Circuit clerk's office called: Eleventh Circuit took my *Martin* brief and is giving us the extra pages, so must scramble to get it out to the court today: Joan Fowler Rossin's 30 days to file an answer brief begin running as of today. Afternoon: frenzied rush to get *Martin* out—did it; *Taferro* and *Alvord* had oral arguments in Florida Supreme Court: *Taferro* lost at 11:00 a.m. (one hour after oral argument ended), and I assume *Alvord* lost too, or soon will.

Thursday, November 22:
Thanksgiving; Ruthann and Larkin in Jacksonville, visiting Ruthann's parents; Estella and Dalia brought me turkey with all the trimmings; I worked on cert. petition for *Ross*.

Friday, November 23:
Worked on memo on jury override legislative repeal arguments for memo to Scharlette and Dick Joranby.

Saturday, November 24:
Wrote and edited memo re legislative repeal of jury override.

Sunday, November 25:
Flew from Ft. Lauderdale to Tallahassee, eventually, via the scenic route — was bumped in Ft. Lauderdale and promised there would be a connection in Tampa — there was, but it only held 4 people and there were at least 60

599. MELLO AND ROBSON, *Judge Over Jury*, *supra* note 121.

people screaming for the blood of Southern Express Airlines, people who were on standby for that flight—thought it the better part of valor to wait in Tampa for five hours before getting a flight out to Tallahassee; met at Sarah and Sam Miller's (her husband) house, with them, Scharlette, Jimmy Lohman, and Charles Fullwood from Amnesty International in New York (Sam is Tallahassee bureau chief for United Press International, and knows the Florida legislature well): Charles wanted to target executing juveniles, rather than targeting the jury override, but we override people carried the day: Sam Miller was very helpful in identifying people to contact, and how to make our pitch to them.

Monday, November 26:
In Tallahassee: Pastoral letter against death penalty announced by Florida religious leaders; met with Tom Horkin, Executive Director, Florida Catholic Conference and Florida legislative lobbyist, Karen Woodall (social/religious issues lobbyist) for two hours: they were extremely helpful and very specific about who we need to contact, and how—for me, it was a real insight into politics here; after lunch, I went back to Clearinghouse: the governor's psychiatric commission unanimously found *Alvord* incompetent to be executed—Governor Graham is expected to permanently lift Alvord's death warrant tonight; flying saga: Airline found my bags ten minutes before my flight left (on a different airline) to head back home.

Tuesday, November 27:
Craig: Eleventh Circuit thought the size of the type we used in the *Martin* brief was too small, but he convinced them it was the *pitch* that made it look small, not the type size, which was odd, because the Eleventh Circuit's rules don't specify pitch—only size of type (I'll bet they'll specify pitch soon); went over cases with Craig: *Spaziano* clemency and *Aldredge* brief are my priorities; Governor Graham announced that when *Alvord* regains sanity, he'll be killed.

Wednesday, November 28:
Finished discussing cases: I will do *Spaziano* Rule 3.850 motion and supporting memo of law. Night until 11:30 p.m.: reworked and restructured draft memo on legislative appeal of jury override.

Thursday, November 29:
Alvord and Tafero were scheduled to die today: Governor Graham lifted the *Alvord* Warrant temporarily (until Alvord can be restored to sufficient sanity), and Tafaro got a stay from the Eleventh Circuit at 11 p.m. last night; Art Weidinger, Governor Graham's clemency aide, told Craig that the *Spaziano*

clemency hearing before the Governor and cabinet has been moved back to March 13th of next year.

Friday, November 30:
Dick Burr was supposed to have taken the deposition of strategy, on how to convince Judge Vance how to *reach* him, the trial lawyer in *Foster*, but it was postponed until February, 1985; Jeff Robinson called: *Booker* Eleventh Circuit panel is Judge Vance, Judge Henderson and Judge Clark: Jeff and I discussed at length; Craig: Mark Olive formally accepted the Bar job.

Saturday, December 1, 1984:
Cleaned house.

Sunday, December 2:
Drove to Coconut Grove with Stella and Dahlia to do Christmas shopping for Larkin and Ruthann and parents.

Monday, December 3:
Jeff Robinson: Steve Bright called and called: Judge Vance "vicious and evil": Bright will moot court Jim Coleman on *Booker* on Tuesday (Steve Bright should be able to do a very convincing Judge Vance imitation for the moot); drafted and proofed minutes of my meeting on legislative repeal of the override, and gave to Dick Joranby; discussed *Aldridge* at length with Craig: sounds like a very weak ineffective assistance of trial counsel case; news: the Eleventh Circuit (per Judge Roney) reinstated its prior holding in *Amos King* case, granting the *habeas* writ and ordering re-sentencing based on penalty phase ineffective assistance of counsel, notwithstanding the U.S. Supreme Court's remand of *King* for reconsideration in light of *Washington v. Strickland*: Eleventh Circuit also issued a stay and probable cause to appeal in *McCorquadale* (Georgia case); doing research, I found a Third Circuit case (called *Martin*) granting *habeas* writ on facts identical to those of *Ross*—thus, good conflict between the Third Circuit and the Eleventh Circuit, to take to the U.S. Supreme Court on cert. petition in *Ross*.

Tuesday, December 4:
Evidentiary hearing in *Foster* in Pensacola: Dick Burr subpoenaed to testify: judge said to start from scratch: every issue, including abuse-of-the-writ, should be revisited anew—not a hopeful sign: no rulings yet, but there's a status conference today: Dick depressed: the position of the prosecutor is that Dick Burr is a "professional delayer" in death cases—that's been Dick's entire career as a lawyer; my legislative repeal of the jury override memo not being

typed; nothing happening in *Simpson*, either; my parents arrived in West Palm Beach for a visit—first time they had met Larkin.

Wednesday, December 5:
Booker oral argument in Eleventh Circuit; spent the day at home with my parents.

Thursday, December 6:
Jeff Robinson called: yesterday's oral argument in *Booker* went well: Judge Vance was civil, and, in the end, complimented Jim Coleman and talked about the need for pro bono counsel in death penalty cases—all three Eleventh Circuit judges asked good questions, and obviously had read and understood the briefs, even Henderson—Judge Vance said *Shriner* is "the hard case" for us, but seemed to want a way around it: Steve Bright has "genuine hatred" for Robert Vance: "Bright's loathing came through very clearly," Jeff said; lost *Rose* in Florida Supreme Court (direct appeal; Louis Carres case); received briefs in *Jimmy Lee Smith*: very different from the way I would have structured the issues and the arguments, but Gregg Thomas and Sarah Blakely did a wonderful job.

Friday, December 7:
Received legislative materials from Jimmy Lohman; listened to tapes of Florida legislative hearings from last session of the legislature.

Saturday, December 8:
Parents.

Sunday, December 9:
Hung out with parents.

Monday, December 10:
Memo on legislative repeal of override still not typed; dictated letter to Governor Graham on why death penalty does not deter any better than life imprisonment; called Joan Fowler-Rossin, Assistant Attorney General: she's willing to stipulate that the Sheridan statement is accurate, so no need to ask Florida Supreme Court to remand *Simpson* override; memo typed—I corrected it. Night: Sarah Blakely called: Florida amended Rule 3.850 to add a statute of limitations and abuse-of-the-writ provision for successive Rule 3.850 motions; Dick Burr: *Songer* has been passed over twice in the U.S. Supreme Court cert. conference—the Justices asked for the Eleventh Circuit record in *Songer* to be sent up, probably for a dissent from cert. denial, but maybe. . . hope springs eternal.

Tuesday, December 11:
Worked on legislative override memo; discussed Rule 3.850 change: Craig does not think it's too bad, but Dick thinks it's a disaster; 4:20 p.m.: *Alpha Otis Stevens* lost in the Eleventh Circuit, 3-0 (panel of Judge Kravich, Judge Fay and Judge Vance)—this is the *Stevens* of *Stevens v. Zant* fame—he's due to die at 12:15 a.m. tonight; Ruthann is sick, so took her home early; worked at office until 8:00 p.m., when Lee Currie finished override hearing transcript; then went home and worked and took care of Larkin until 2:00 a.m.: Larkin not feeling well, either: the two of us finally fell asleep on the living room floor at about 4:00 a.m.

Wednesday, December 12:
Alpha Otis Stevens executed in Georgia, a few minutes after midnight; *Spaziano* clemency originally scheduled for today, but put off to March 13, 1985; gave corrected legislative override memo to Lee to type; Dick Burr talked to Miguel Cortez, Eleventh Circuit clerk: Judge Hatchett recused himself in all cases raising the *Brown/Ford v. Strickland* issue, which I had raised in *Martin*: Dick and I discussed whether we should delete it from the brief, since Hatchett is so good on confessions issues and mental illness issues—but we may lose him from the *Martin* panel anyway, since the notice of appeal was filed in the Florida Supreme Court in 1978, and Hatchett didn't leave the court in 1979—I decided to delete the *Brown* issue from *Martin*, in the hopes of holding onto Judge Hatchett.

Thursday, December 13:
Craig: Richard Luben, *Martin's* trial lawyer, said he thought my *Martin* brief was "a work of art"; Mike Radelet called to talk about the jury override and about innocent people sentenced to death and executed; Flo typed finals of override memo; I put appendices in order; Craig: mandate issued from the Eleventh Circuit in *Roosevelt Green* (*Green v. Zant*): Deval Patrick says execution to be set for December 24 (Christmas Eve? That's a little tacky, even for Georgia); Florida Supreme Court sent *O'Callahan* (Steve Winter's old case) back to the trial court for an evidentiary hearing on ineffective assistance of counsel issue; news: *Stevens* was a "bad execution—it took two tries to kill him, fifteen minutes apart"—Cruel and Unusual Punishment!; well, cruel, at any rate: not so unusual, anymore; home: big mistakes in typing of legislative override memo—must be edited and reprinted.

Friday, December 14:
Memo on legislative repeal of jury override goes out to Scharlette, Tom Horkin, Karen Woodall, and Mike Radelet; Scharlette: J.C. Shaw due to die on January 11 in South Carolina: Roosevelt *Green* does not have execution

date yet, but probably will be December 26 or December 27 in Georgia; I called all over trying to locate Joseph Ross (my client in *Ross*), so he can sign papers for *in forma pauperis*—he was paroled from federal prison in 1982. . . .; xeroxed legislative memo and appendices and sent copies to Joranby.

Saturday, December 15:
Home.

Sunday, December 16:
Home.

Monday, December 17:
Swearing in to the federal Bar, Middle District of Florida, in Orlando: drove three hours each way for a ten minute ceremony—by Judge Sharp, who treated us so shabbily during the *James Dupree Henry* death warrant; Craig: a former law clerk of U.S. Supreme Court Justice Sandra Day O'Connor may come here to work—sounds too good to be true.

Tuesday, December 18:
Read State's papers in *Foster*: very nasty and personal attack on Dick Burr—our response will be to put Florida's system of "providing" counsel for postconviction in death cases on trial: Scharlette and Craig will testify; Jeff Robinson called: "the night before the *Booker* oral argument in the Eleventh Circuit, Jim Coleman read only two cases, and one of them was your opinion in *Thomas v. Zant*."

Wednesday, December 19:
Ruthann ill; I watched Larkin in morning; played with *Ross* cert. petition; Craig: the O'Connor clerk (Hubert?) may actually come to work here Harvard Law School dean says he's the best student there in five years, "a second Tony Amsterdam"; "and all he wants to do is death cases," he really wants to go to LDF, but they have a hiring freeze now, so we might well get him.

Thursday, December 20:
We won *Randolph*!: remanded for re-sentencing—our rehearing petition swung the one vote that we needed, so the original 4-3 loss, became a 4-3 win: Terry Farley at the Clearinghouse read the opinion to Craig and I over the phone—we got Justice Shaw, which made it 4-3 the other way: very sleazy opinion, not really addressing the death presumption, proportionality, or other issues we raised in the rehearing, but a win is a win is a win.

Friday, December 21:
Drafted *Ross* cert. petition; finally tracked down Ross's probation officer, who will see that Ross gets the *in forma pauperis* papers; received the Florida Supreme Court's opinions in *Randolph*: Justice Atkins dissented, by calling our rehearing arguments improper—his dissent also argued proportionality, not addressed by the majority opinion, but which was my portion of the rehearing (so was that what convinced Shaw to change his vote?).

Saturday, December 22:
Ill—stomach flu.

Sunday, December 23:
Ill—finished *Ross*; dropped it off at the office to be typed.

Monday, December 24:
Eleventh Circuit brief in *Martin* originally due today, but prosecutors got an extension of time (just like the State in death penalty cases—delay, delay, delay); enjoyed Larkin and Ruthann; went to dinner at Estella's parents' house.

Tuesday, December 25:
Hung out; Estella and Dahlia came over for dinner.

Wednesday, December 26:
Fine tuned *Ross* cert. petition.

Thursday, December 27:
Read.

Friday, December 28:
Robert Willie executed in Louisiana: no advance warning: Craig heard it on the radio last night: victim's family watched the execution; *Palm Beach Post* newspaper quoted the victim's father as saying, "I'd rather see Willie die than have a million dollars . . . it's going to be quick for him, and I'd rather it was a lot slower": Willie's own father also was in favor of his execution; Craig: Steve Winter assigned *Thomas v. Zant* as required reading for his law school class at Rutgers.

Saturday, December 29:
Home. Ruthann and Larkin headed to Jacksonville to visit her parents.

Sunday, December 30:
Home.

Monday, December 31:
Aldredge brief originally due in Eleventh Circuit, but Craig got extension of time; Ruthann and Larkin returned to West Palm Beach from Jacksonville.

C. 1985: Fredericksburg; West Palm Beach, Florida

> *Always mystify. Mislead and surprise the enemy if possible. And when you strike and overcome him, never let up in pursuit so long as your men have strength to follow, for an army routed, if hotly pursued, becomes panic-stricken, and can then be destroyed by half their number.*
>
> *Another rule—never fight against heavy odds, if by any possible maneuvering you can hurl your own forces on only a part, and that the weakest part, of your enemy and crush it. Such tactics will win every time, and a small army may thus destroy a large one in detail, and repeated victory will make it invincible.*
>
> T.J. Jackson, describing his tactics in the Valley campaign[600]

Tuesday, January 1, 1985:
New Year's Eve: bottle of Cordon Negro champagne, with Ruthann and Larkin; rested and talked about years past and future—the old questions: should I quit West Palm Beach to teach law school? Or go to work for a law firm (Wilmer, Cutler & Pickering, maybe?)?; should Ruthann stay home to write full time?; only matter of time until Larkin will be too mobile and destructive to bring to work every day, at her job or mine, and then what?; decided to sit tight until next summer and write the law review article on the jury override.

Wednesday, January 2:
Craig: Scharlette says *Green* (my Green) set to die on February 8 in Georgia, *Shaw* for February 11 and *Martin* February 14—little hope for any of them:

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600. BURKE DAVIS, THEY CALLED HIM STONEWALL 194 (1954).

Florida Bar/FSU Law School Resource Center to open on February 15; I called Elizabeth Taylor: she said the *Spaziano* brief in the Supreme Court was "terrific: I knew you wrote it"; she also said Craig's oral argument was "horrible, painful: he should have let you argue it: he obviously didn't know the brief or the issues"; also: "Justice Blackmun and I went to the mats about it," but, of course, Blackmun won and she lost, the same as Vance always won and I lost—he was, after all, the judge, and I was the law clerk: Elizabeth drafted Blackmun's opinion for the majority of the court in *Spaziano*: did a draft and gave it to co-clerks to see if it passed the laugh test: her co-clerk said it did, but it was too obvious that the opinion's writer didn't believe in the result, so Elizabeth rewrote it and circulated it to all the law clerks for "damage control": Justice Brennan's clerk were especially helpful on this: "it was the hardest thing I had to do all year" during her clerkship for Justice Blackmun.

Thursday, January 3:
Xeroxed cases for Ruthann; Craig: Governor Graham signed warrants in *J.D. Raulerson* (Steve Bright's case) and *Johnson* (no lawyer); I finally reached Tom Whittaker (Ross' parole officer): he gave Ross *in forma pauperis* papers last week: he gave me Ross's address and telephone number—at last!!; I phoned Ross, but no one home: called back later, and reached Ross: he will get *in forma pauperis* stuff off to me tomorrow: I explained to Ross Steve Bright's and SPDC's concerns about his case being the vehicle to decide the counsel issue, and he made clear that he wants me to pursue it anyway: so I will—Mr. Ross is my client, not Steve Bright or SPDC or anyone else in this case.

Friday, January 4:
David Martin executed in Louisiana; Carl Songer (Deval Patrick's case) scheduled to be conferenced in U.S. Supreme Court; *Miami Herald* had no coverage whatsoever of *Martin* execution: very small blurb in the "Around the Nation" section of the *Palm Beach Post*; I called Richard Bard at the Miami Herald: the Herald would like a "Viewpoint" from me on executing the insane: there has been big debate since Robert Sherrill's *Nation* magazine piece, on killing crazy people in Florida, was reprinted in the *Herald*; I wrote the Viewpoint piece; *Ross*: Dick Burr and Jeff gave comments: Jeff's very useful; Dick's worthless; Lee Currie finished typing *Ross* U.S. Supreme Court cert. petition at 5:30.

Saturday, January 5:
Proofed *Ross* petition at home; *Miami Herald* blurb on Martin said he was the second execution in Louisiana in a week—did I completely miss someone

who was executed in Louisiana? No: *Robert Willie* was killed on December 28—I had just forgotten . . .

Sunday, January 6:
Hung out with Larkin and Ruthann at home.

Monday, January 7:
Dictated a letter to the editor of the *Miami Herald*; Sarah Blakely: State's brief in *Jimmy Lee Smith* is in: she wants me to read it and to discuss reply brief with she and Gregg Thomas on Wednesday; Craig: *Larry Joe Johnson* (warrant) has a lawyer now.

Tuesday, January 8:
Ross cert. petition mailed to U.S. Supreme Court; Craig says my Roosevelt Green set to die tonight in Georgia; *Foster* evidentiary hearing in Panama City; Craig: *Messer* won in Federal District Court (Judge Stafford), based, Scharlette thinks, on *Cooper/Lockett*. Noon: no word on *Green*; received State's *Smith* brief from Sarah: it's moderate, tightly reasoned, fairly well researched and, I think, powerful: *Smith* may be the first case since *Stanley* to lose on an ineffective assistance of counsel claim without ever getting an evidentiary hearing in federal court; called Patsy Morris in Atlanta: all *Green* has left is the Pardon Board, but there's hope—for the first time ever, the Georgia pardon board agreed to hear live testimony in a capital clemency application; Larry Helm Spalding, an ACLU attorney and lawyer for *Virgil Douglas* (jury override case that won in Eleventh Circuit) is considering writing an article for the *Florida Bar Journal* on the jury override, and wants to plagiarize parts of my legislative memo: told him to help himself: everything I write is plagiarizable, so far as I'm concerned, by any member of The Conspiracy.

1. Jackson's Woods

Wednesday, January 9:
Roosevelt Green—my Roosevelt Green—executed in Georgia at 12:01 a.m.: heard on National Public Radio—Pardon Board denied him yesterday afternoon; Craig: *Foster* evidentiary hearing in Panama City went great and ended a day early: no abuse-of-the-writ: Mark Menser, Assistant Attorney General, was *destroyed* in court by Dick Burr; I was fine until I got into the office—then I closed my door, unplugged my phone and cried—I didn't think *Green* would come so soon . . .; got Federal District Court opinion in *Messer*: not really *Cooper/Lockett* issue: seems wrongly decided to me anyway, and vulnerable to being reversed in the Eleventh Circuit; spent most of the day

correcting *Herald* Viewpoint piece, giving it to Flo who would miss most of the corrections, back and forth and back and forth and back and forth again: finally sent it off to the *Herald*; Sarah Blakeley called: I think I really scared her on the ineffective assistance of counsel claim in *Smith*: good!!!

Thursday, January 10:
Governor Graham signed death warrant in *Carl Songer* (Deval Patrick and LDF's case), cert. denied on Monday: LDF will continue as his lawyer: execution date set for February 5; discussed *Smith* with Sarah and Gregg: we talked about why *they* moved the trial lawyer's affidavit into the record on appeal, and how to control the damage from that: I have an awful feeling that they won't correct the fatal problems in the reply brief (I really don't think Sarah understands how dangerous it is to base an ineffective assistance of trial counsel claim on only one discrete error, here the failure of the trial lawyer to move to suppress the confessions): I sent her my cert. petition in *Ross*: she and Gregg may still raise the *Cronic/Washington* interplay.

Friday, January 11:
J.C. Shaw executed in South Carolina: read it in the *Evening Times*; Craig: the Florida Public Defenders Association is raising hell about our office's representation of capital cases in post conviction litigation: this is fallout from the attack in *Foster*, Foster's trial lawyer: setting up an investigation: Craig and Dick Joranby planning a spirited defense and may even pull out of the association; U.S. Supreme Court granted cert. in *Jean v. Nelson*, where Judge Vance, for the *en banc* court, held that aliens in the United States have no rights whatsoever under the Constitution; Craig: *Bassett* was the other death warrant signed yesterday: no lawyer; Sarah: Rineman told Scharlette that Bar project wouldn't get involved in finding lawyers for people with death warrants: Johnson's lawyers are shaky and may pull out of the case: Steve Malone taking on part of *Johnson* case; big news: Eleventh Circuit granted rehearing *en banc* in *Hitchcock*.

Saturday, January 12:
Janice's (Federal District Judge Castagnia's secretary and Ruthann's friend) retirement party; Ruthann and I drove from West Palm Beach to Tampa.

Sunday, January 13:
Tampa.

Monday, January 14:
Called Jeff Robinson for advice on ethical issue: I feel a conflict of interest between *Sireci* and *Hitchcock*—both cases raise *Cooper/Lockett* issue: If we

lose *Sireci* in the Florida Supreme Court, should we take cert.? If so, that may hurt *Hitchcock* in the Eleventh Circuit *en banc* court; I asked Jeff to take over *Sireci* for the purpose of filing a cert. petition only (to think about it and float it, really, within the law firm); started reading *Spaziano* rape trial transcript and appeal: he is sentenced to death in the capital murder case because he had already been convicted, and received a life sentence, for the rape of Vanessa Dale Croft: the rape conviction is bullshit—based on testimony of Tony Dilisio, States's star scumbag witness in murder case; Barbara Chapman, Eleventh Circuit calendar clerk, called: *Martin* oral argument is March 13th in Atlanta at 2:00 p.m.; Craig: *Songer* in real trouble: no lawyer knows what he's doing in the case (huh? I thought Deval Patrick and LDF were doing *Songer*); Steve Malone called on *Johnson*: will send stuff tomorrow morning for me to look over.

Tuesday, January 15:
Miami Herald: *Skillern* set to die tomorrow night in Texas: lost in Fifth Circuit yesterday—now only has Governor White and clemency and cert. to the U.S. Supreme Court; I saw Dick Joranby in the elevator, and he said "we must get together on the jury override, but I've been busy . . ."; I left a message for him two weeks ago; Richard Bard, editor at the *Miami Herald*, called: wants to omit history and focus the Viewpoint piece just on the procedure and need for reform; will call back; Craig: *Collins* set for January 30th in Georgia: Steve Bright/SPDC case; *Songer*: state court has appointed Skip Babb, state public defender, to the case: he called Craig, asking for help: Debbie Fins, LDF, is also in it, along with Joe Jordan and a law professor in Michigan who did the cert. petition; finished reading *Spaziano* rape trial transcript; Jerry Justine is meeting with Anthony Frank DiLisio, State's main witness at the murder trial and the rape trial: if there was a deal between DiLisio and the prosecutors or the police, may be a *Brady/Giglio* issue worth fighting.

Wednesday, January 16:
Doyle Skillern executed in Texas; met all morning with Craig and Dick: Dick working on *Songer* (merits and getting a lawyer to represent him): discussed whether to ask Eleventh Circuit to recall mandate in *Songer*, or to start over with a successor Rule 3.850 motion in state court: Craig said (I asked) that he, Craig, will argue *Hitchcock* before the *en banc* Eleventh Circuit and do the *en banc* brief (due on February 7), but he probably won't change it much from my ("our") panel brief on the two *en banc* issues (Craig said my brief was just on an issue he has been litigating for eight years: not really different from his *Hitchcock* Florida Supreme Court brief: ho ho ho; got very good letter from *Nollie Lee Martin*; we decided not to drop issue 10 from *Martin* (the *Brown*

issue): we've probably lost Judge Hatchett from the panel already, since panel is already constituted (we know that because the date for oral argument has been set).

Thursday, January 17:
Learned in *Miami Herald* that *Doyle Skillern* was executed yesterday in Texas; Craig: *Collins* not have execution date set: Eleventh Circuit is refusing to issue mandate until after *en banc* cases come out (on presumption of intent and prosecutorial misconduct, probably)—this suggests taking *Songer* to the Eleventh Circuit now, and moving to recall the mandate; *Miami Herald*: very small blurb about *Skillern* execution—that's how I heard he was killed yesterday; Dick talked to Shelda Harris, Eleventh Circuit clerk's office: *Lee Martin* would keep the same panel as granted the stay of execution, including Hatchett, so Dick and I decided to delete the *Brown* issue from the *Martin* brief: I called Joan Fowler Rossin, the assistant attorney general, and told her; I was very moved by *Lee's* letter yesterday—tried to draft an appropriate answer—I may send him some poetry (T.S. Eliot's *Hollow Men*) and "treatise" from the *Steppenwolf*. 1:30 p.m.: upon returned from lunch at Kent's with Ruthann and Larkin, found message on my desk: "Just got call from Eleventh Circuit—lost *Ford*—don't know anything else. Patsy will call. Dick"; I found Dick in his office: it was two to one, per curiam opinion: majority just said *Solesbee* controls—the opinion was only seven pages long—Judge Clark wrote a nineteen page dissent, following the structure and argument in our brief: Dick thinks Judge Vance is setting *Ford* up for consideration by the *en banc* Eleventh Circuit.

Friday, January 18:
Craig: Susan Carey is in a bind, could I write a brief for her? I said, "you know what I'm working on: can I take time off from *Spaziano* to write a brief for Susan Cary?" He sort of decided no ("I'll talk to her again ..."); Sarah Blakeley called: she's pregnant, and due in September—*Smith* oral argument set for February 13; received Eleventh Circuit opinion in *Ford*: Judge Vance wrote majority opinion, and there's no analysis in majority opinion: Dick reads this as meaning Judge Vance really wants to rule for us, but feels bound by the U.S. Supreme Court's 1950 decision in *Solesbee* and the Eleventh Circuit's recent decision in *Goode*: Ruthann reads it as saying we, the Eleventh Circuit, are sick of Alvin Ford's case—we agonized over it once already in the *en banc* court, but enough is enough: very difficult for me to read what Judge Vance is doing here—told Dick I thought he needed to stress the difference between an Eighth Amendment argument and a Due Process argument (*i.e.*, the difference between *Furman v. Georgia* and *McGautha v.*

California): Craig thinks the *Ford* opinion is intentionally bad to send it *en banc*—Dick asked how, since *Solesbee* was Due Process case, could do this, when the Supreme Court (in upholding the Eleventh Circuit's stay in *Ford*) seemed to be saying that this is the case to revisit *Solesbee*: I told him about *Lummis v. White*, where the Supreme Court first said revisit a case from Judge Vance's court and then reversed Judge Vance after he did so—that taught him not to follow the dicta of Justices in opinions dissenting from the denial of *cert.*; got *Smith* reply brief from Sarah: very good: they recovered much ground lost in the initial brief: made an excellent *Cronic/Washington* argument (taken from my *Ross* cert. petition, in part) and now should get an evidentiary hearing on ineffective assistance of counsel, per the rule of *Thomas v. Zant*; called Eleventh Circuit clerk: *Peek* (Georgia case: battle between Judge Vance and Judge Clark) still pending on *en banc* petition; Craig: *Songer*: talked to Debbie Fins and Deval Patrick, who want to come down to Florida to work on it: Skip Babb, the PD on *Songer*, asked for assistance working on the case: Dick Burr in touch with Doreen in Michigan: Joe Jordan floats in and out of the *Songer* case—some conspiracy we are.

Saturday, January 19:
Picnic with Stella and Dahlia and Larkin and Ruthann in John Prince Park. Night: Ruthann read my memo on legislative repeal of the jury override: decided I would do an intro to our override law review article and discussion of *Spaziano* in U.S. Supreme Court.

Sunday, January 20:
Read law review articles on jury override; Stella and Dahlia came over to wash cars and play "Trivial Pursuit"; *Miami Herald* published my "Viewpoint" on executing the insane; inauguration day for Ronald Reagan and Super Bowl Sunday—Miami Dolphins got slaughtered by San Francisco 49ers in San Francisco: Miami crushed. Also, it's cold outside.

Monday, January 21:
Got Joan Fowler Rossin's brief in on *Martin*: looks pretty much the same as before—I not read it carefully yet; started writing introduction to jury override law review article; Craig: "I heard you were published on Saturday . . ."; Tom Ball said my *Herald* Viewpoint was too legalistic, but the photo of me was nice; Dick: Deval Patrick is taking over *Songer* and coming to Florida to litigate it—Dick had two-hour conference call with Deval over the weekend. 2:45 p.m.: Sarah Bleakley called: lost *Witt*, seven to two, in U.S. Supreme Court: Sarah said, "We lost it really big": the majority in *Witt* held that *Witherspoon* qualifications are questions of fact, upon which the federal courts must defer to the state court determinations—seemed to have limited

or gutted *Witherspoon* substantive holding as well; Raulerson: lost in Florida Supreme Court; Sarah: Baya Harrison and Steve Seleger are now doing *Johnson*, working around the clock all weekend (with Scharlette, Terry Farley and Jimmy Lohman).

Tuesday, January 22:
Ruthann drove from West Palm Beach to Bartow to West Palm Beach; I watched Larkin at home; I finished introduction to jury override law review article; *Richard Bard* of Miami Herald called: will pay honorarium for Viewpoint; called Florida Bar for statistics on race, sex and age of Florida circuit judges, for jury override article; called Mike Radelet: told him I was doing article, and he said let's do it together: "if only we'd gotten our shit together five months ago . . ."—I told him I thought I had suggested that to him five months ago, but I was too subtle about it: he described the jury override article he was writing: statistical analysis of override; he will send draft, and we'll see if we can integrate our two efforts into one joint authored law review article; read Joan's *Martin* brief for the State: we weren't damaged at all by it.

Wednesday, January 23:
Called Joan Fowler Rossin, my opponent in *Martin*: told travel schedule: we will try to coordinate: she thinks the confessions issues are the only thing even arguable in *Martin* and, even if not reversible error, she thought that arguing that the state court made a presumptively correct fact finding that *Martin* did indeed make an equivocable invocation of the right to silence during the first confession (and so that fact finding is subject to the *Sumner v. Matta* presumption of correctness) was "clever" of me, and that it means she "loses the case"; Joan said Joy Shearer, her boss, is bitter about *Ford*—says the Eleventh Circuit "wimped out" and really wants *Ford* to go *en banc*: Joan mentioned, with apparent approval, that Russ Bohn "threw" death cases: I wonder if that's what she's doing now in *Martin*? *Raulerson*; Dick says Federal District Judge Moore is out of town for a week: may hold abuse-of-the-writ hearing on Monday, but probably not before that, so things look pretty okay for getting a stay. Night: worked on jury override article.

Thursday, January 24:
Worked on jury override law review article; started reply brief in *Martin*: read and organized; Craig: Eleventh Circuit stayed mandate in *Corn*, after cert. had been denied (same thing that happened in *Collins*), pending decision in other cases then before the *en banc* court; State of Georgia has asked full *en banc* Eleventh Circuit to consider Judge Tjoflat's decision staying the mandate in *Collins*, and Miguel Cortez (Eleventh Circuit clerk) told Christie Freeman of

SPDC that the full court would consider it; *Songer*: a juror now says that they wanted to vote for life imprisonment, but felt that they couldn't because they were limited to the statutory list of mitigating circumstances: this makes *Songer* a slam dunk *Cooper/Lockett* case, if not a straight-up, traditional *Lockett* case: real good prejudice showing for *Cooper/Lockett* issue.

Friday, January 25:
Ron Bishop, reporter at *Palm Beach Post*: they want to do a major piece, taking *Martin* from the start and picking it apart: will take several months to do: wants to go to Eleventh Circuit oral argument in Atlanta: he's doing it with Jim Poliston, who Craig knows and trusts: Craig says he's very good on death penalty issues and thinks *Simpson* (which is still not typed) is innocent; Craig: *Raulerson* hearing set for Monday at 2:00 p.m.; news: *Curfew Davis* lost, seven to five, in the *en banc* Eleventh Circuit: *Sandstrom* error; that means that *Collins* and Corn will soon have their mandates issued; Julien Clarkson, majordomo at Holland & Knight law firm, called me to talk about *Jimmy Lee Smith*: agreed that *Witherspoon* and *Brady* issues were worthless, and not inclined to raise them during the Eleventh Circuit oral argument: sounds to me like he's really ready to go and on top of the facts and the law: Sarah screwed up part of the record on the sequence of the confessions: Clarkson pointed out that *Smith* was tried by the sa.m.e trial judge who tried Clarence Earl Gideon in *Gideon v. Wainwright*, and Clarkson will find some way to get that tidbit of information across to Judge Tjoflat during the oral argument. Night: Ruthann started working on our jury override article; up until 1:00 a.m.

Saturday, January 26:
I worked on *Martin* reply brief, while Ruthann worked on jury override article text; Mike Radelet called: I do not have his draft, and now he sounds hesitant about pooling the two articles; they really are pretty different articles, and his isn't a piece of advocacy, whereas the one that Ruthann and I are working on is advocacy scholarship: Mike and I decided to talk again on Monday.

Sunday, January 27:
Worked on *Martin* brief and jury override article; Estella and Dahlia came over to fix Ruthann's bike and hung out until about midnight; text of override article almost done.

Monday, January 28:
Larry Joe Johnson oral argument in Florida Supreme Court; *Raulerson* hearing on abuse-of-the-writ in Federal District Court; Ruthann printed the text of our jury override article; Craig says Justice Stevens gave speech at

University of Florida Law School, blasting the jury override and calling for reform: this could mean the jury override bill has a chance this year in the Florida legislature, so maybe Ruthann and I should publish our override article in a Florida law review, rather than with Mike Radelet in the University of California at Davis Law Review — death warrant signed and execution date set; *Raulerson* at 11:00 a.m. this morning, Judge Moore ruled against them; oral argument in Eleventh Circuit is set for 2:00 p.m. today (panel: Judge Tjoflat, Judge Hill, Judge Anderson); Scharlette: *Bassett* has no lawyer except Steve Malone: thirty-five constitutional issues: wants to talk to me about confessions issues in *Bassett*; got Radelet's draft: it's excellent: Ruthann thinks we should do two separate articles: two pieces, twice the coverage, twice the readership: her concerns were similar to those expressed by Mike Radelet on Saturday: I called him, and we agreed to do the next article together (Radelet and I); *Bassett*: Dick wants me to go to Daytona to help Steve Malone: I can't, since I must watch Larkin tomorrow: Dick will probably go (he's pissed off at me ...). 6:30 p.m.: *Raulerson* lost in the Eleventh Circuit, three-one.

Tuesday, January 29:
Raulerson: twenty-four hour stay from Eleventh Circuit, until 7:00 a.m. Wednesday; *Johnson* lost in Florida Supreme Court, and had oral arguments in the Federal District Court until 11:00 p.m. last night (Judge Maurice Paul, same judge as *Booker*). Last night: Ruthann, Estella, and I worked on jury override article until midnight: Ruthann and I compared edits and started on the footnotes; I proofed *Simpson* brief; got *Martin* brief back: went over it and made corrections; Craig got Dick out of going to St. Petersburg: Craig talked Malone out of wanting Dick or I to go there to help him with *Bassett*. 5:30 p.m.: lost *Spencer* and systemic racism issue in Eleventh Circuit *en banc* court — only three dissents. 6:30 p.m.: phone ringing as we got home: *Johnson* lost in Federal District Court, but stayed until 11:58 tomorrow. 7:30 p.m.: Eleventh Circuit stayed *Johnson*: appellate brief due next week; I worked on jury override article until 3:00 a.m.

Wednesday, January 30:
James David Raulerson executed in Florida: I heard about it on National Public Radio in the morning; Craig: Jim Smith, Florida Attorney General, said that he thinks a centralized capital post-conviction program has a good chance of passing in the legislature—any director of such a program must have 10 years of experience in the Florida Bar, and assistant must have two years of

experience—office will be in Tallahassee[601]; our office will go back to direct appeals only—get out of the business of capital post conviction in state and federal courts; *Miami Herald*: *Johnson* oral argument set for February 3: said Judge Paul's stay only ran until 11:50 a.m.—ten minutes before the death warrant expired—not 11:58, as Craig had said last night; *Herald* also said *Songer* lost in trial court on Monday, on Rule 3.850 motion; *Bassett*: stay in state trial court; *Songer* argument in Florida Supreme Court today; Scharlette called: she and Susan Carey made two "stupid clerical errors that almost got *Bassett* and *Johnson* killed"; Ron Bishop of *Palm Beach Post* newspaper came by: gave him my *Martin* briefs and we talked.

Thursday, January 31:
Miami Herald newspaper front page story on *Raulerson*: victim's father watched the execution, a grave side promise he had made to his murdered son: fifty police officers held vigil at Florida State Prison, wearing T-shirts saying, "Raulerson, make my day" and "Crank up Old Sparky": some cops cheered when the white flag dropped (indicating that the execution had been carried out) and, again, when the hearse went by: one cop said, "This is a great day. I feel relieved": Steve Bright and victim's partner on the police force witnessed it; last night: *Songer* lost in the Florida Supreme Court; front page picture of the cops clapping as *Raulerson's* hearse goes by; Craig: *Arango* got new trial in Federal District Court (later: learned that it was Florida Supreme Court that did it); fine tuned *Martin* reply brief; added some cases and footnotes to *Martin* brief; suggested to Gregg Thomas that he talk to Shelly Pine about what strategy most likely to work to reach Judge Tjoflat (Shelly Pine clerked for Tjoflat): Shelly thinks it's a great idea to talk to Gregg, on *Jimmy Lee Smith*: Shelly is working on Rule 3.850 motion in *Williams*; Ruthann home ill all day with the flu.

Friday, February 1, 1985:
Steve Malone called to talk to me about Judge Vance: Malone has oral arguments in Eleventh Circuit next week in a handicapped discrimination case (*Arline*): I told him Judge Vance is great on civil rights issues and civil rights cases: gave him some examples and encouragement. Night: typed footnotes on override article: I typed about 90 of them, printed them out at 2 a.m.; Larkin up all night with flu.

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601. This idea evolved into CCR. *See* MELLO, DEAD WRONG, *supra* note 2, at 166-91.

Saturday, February 2:
Went over footnotes on override article; Craig called: *Martin* brief draft is printed; I came in to the office and corrected it; Ruthann and I worked on override article: I went over footnotes; Ruthann and Larkin both have flu; Larkin up all night.

Sunday, February 3:
Final corrections on *Martin* reply brief: dropped off at night for final typing; finished correcting footnotes on override article; Ruthann started putting text corrections in computer.

Monday, February 4:
My *Martin* brief due: got in to mail to Eleventh Circuit; *Songer* lost in Federal District Court, and is now; in Eleventh Circuit (panel: Judge Godbold, Judge Kravich and Judge Hill); spent all day on *Martin*: proofing, proofing, proofing; Dick writing *Ford* rehearing brief; Craig working on *Hitchcock* (Tony Amsterdam Fed Ex'd letter yesterday, but it did not arrive—frantically trying to trace it—it finally arrived at 4:30 p.m.); started to move stuff from old office to my new office (Richard Green's old office, office next door to Dick, across the hall from Craig, Lee and Flo); Gregg Thomas: the good guys won *Grigsby* in the Eighth Circuit *en banc* court, five to four: my fantasy—in *Wainwright v. Witt*, the U.S. Supreme Court cut back on *Witherspoon* substantive standard, because they're going to affirm *Grigsby*, so *Grigsby* is really setting the stage for clearing death row: anyway, now there's a conflict between *Grisby* in Eighth Circuit and *Hutchins* in Fourth Circuit so cert. grant likely. 7:00 p.m.: reality check: *Songer*: twenty-four hour stay: Palmer Singleton, SPDC: "Did not look good at oral argument"; got *Martin* out in mail at 10:30 p.m.

Tuesday, February 5:
Original date that *Songer* and *Bassett* were scheduled to be killed: *Bassett* safe, *Songer* not. 12:00 noon: *Songer* went *en banc*, but the State is taking it up to the U.S. Supreme Court—but I think it will hold up: fear is that the U.S. Supreme Court, in dissolving a stay in *Songer*, will say something about the merits of the issue that will zap, in Eleventh Circuit *en banc* court, *Jim Hitchcock* specifically and the *Cooper/Lockett* issue generally (for *Sireci* and everyone else); Dick gave me *Ford*'s *en banc* rehearing brief to look over and we discussed it at length—I think he needs to discuss the difference between Eighth Amendment and Fourteenth Amendment analysis more, but that's our old disagreement. 8:30 p.m.: Craig called me at home: U.S. Supreme Court upheld Eleventh Circuit *en banc* stay in *Songer*, with only Justice Rehnquist dissenting; I sent a copy of my *Martin* reply brief to *Nollie Lee Martin.*

Wednesday, February 6:
Sarah Blakeley called: they have new Eleventh Circuit panel in *Jimmy Lee Smith* case: Judge Godbold, Judge Kravich and Judge Hatchett; I called Eleventh Circuit clerk's office: I have the same panel in *Martin*; read *Ford* opinion: very nasty ("shell game . . . confused . . . anomalous . . ."); read *McCleskey/Spencer* opinions from Eleventh Circuit: the race issue is dead: Judge Rony wrote the majority opinion and Judge Vance wrote a nice little concurrence—only Judges Johnson, Hatchett and Clark dissented on the race issue[602]; finished footnotes for jury override article; read cases for recent Florida Supreme Court decisions meeting tomorrow.

Thursday, February 7:
My week to do recent Florida Supreme Court decisions meeting; State's opposition to my cert. petition due in *Ross*; Craig's brief in *Hitchcock* due in Eleventh Circuit *en banc* court; letter from Lee Martin: don't talk to press—he asked me to call his mom and tell her how things are going: I did: I will call his brother and sister later. News: *Tucker*, a death row inmate from Broward County, in for killing two lovers at Lovers Lane, hanged himself in his cell. Night: did cover letters for jury override law review article: article ready to go out tomorrow morning; *Hitchcock* got out to Eleventh Circuit tonight.

Friday, February 8:
Angela Bickers, Eleventh Circuit death clerk, called, and I panicked: certain she was going to reject my *Martin* brief as too squeezed on pitch and type size, but she only wanted me to send back the Record on Appeal; received "mentor's packet" from Florida Bar Resource Center project: lists me as having "written" many cases while working for Judge Vance—Judge Godbold and Judge Rony, who will get this stuff, should be interested to read that: called the Bar, and told them that law clerks in Judge Vance's chambers don't "write" opinions, although we do *draft* opinions; Jimmy Lohman called: jury override effort is gearing up in Florida legislature wants to send my memo (or Ruthann's and my Law Review article) and appendix to newspapers over the next two weeks: Senator Ed Dunn, who shepherded Florida's post-*Furman* capital statute into being, is into it again, and Tom Horkin seems to be pushing it, too; Ruthann drove from West Palm Beach to Jacksonville.

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602. I discuss Judge Vance's opinion in *McCleskey* in Mello, *Rough Justice*, *supra* note 445.

Saturday, February 9:
Palm Beach Post: Governor Graham signed *Witt* and *Middleton* death warrants yesterday; Ruthann in Jacksonville.

Sunday, February 10:
Larkin's *first* birthday party: had party with Dahlia, Estella, Denora and her kids, when Ruthann got back from Jacksonville at about 5:00 p.m.

Monday, February 11:
Met all morning with Craig to go over pending cases: I'm to start on *Spaziano* Rule 3.850 motion and cert. petition in *Randolph* (after rehearing is denied in Florida Supreme Court); Ron Bishop, from *Palm Beach Post* newspaper, came over: told him about *Lee Martin's* instruction that I not talk to him: he will write Lee: he stayed most of afternoon going over *Martin* trial transcript; got good letter from *Butch Sireci*: he wants to meet me; *Witt* and *Middleton*: neither one has a lawyer: we tried to think of someone; Scharlette: the Rineman package reference to my "writing" opinions for Judge Vance was a "clerical error."

Tuesday, February 12:
2:00 p.m.: Basil interview: he may apply for job doing death work here. NUT!; started reading *Spaziano* trial transcript; Judge Davis set hearing on *Elledge*: found we've shown substandard performance by trial lawyer, under *Strickland v. Washington*, and now need evidentiary hearing on prejudice showing only; copying of my jury override memo—appendices, etc. all messed up and must start over on them; put *Simpson* appendices together: final of text run.

Wednesday, February 13:
Oral argument in *Jimmy Lee Smith* in Eleventh Circuit in Atlanta: Julien Clarkson, major domo at Holland & Knight, will argue; oral argument in *Johnson* (*Larry Joe*); Eleventh Circuit death clerk Angela Bickers called: she only got one box of *Martin* Record on Appeal: Fed Ex tracing it; Jimmy Lohman called: wants my jury override stuff ASAP for legislature; Allen Fields, Editor in Chief *Florida State University Law Review* called: *FSU Law Review* very interested in jury override article: they'll decide tomorrow—want to see if our piece conflicts with Justice Stevens' speech, which they're going to publish: it would come out in March: I called *Harvard Civil Rights and Civil Liberties Law Review* and *University of Florida Law Review* for status, but no one home. All afternoon: got jury override legislative packets together (stapled, sorted, etc.)—20 of them now ready to go; Craig: Bill McClain coming tomorrow to strategize on *Witt* brief and oral argument in U.S.

Supreme Court: the ineffective assistance of counsel claim is based on the trial lawyer's not getting psychiatric stuff—maybe a tie in with eighth psychiatrist issue in *Martin* and *Ake v. Oklahoma*; Craig asked me to talk to Jeff Robinson about possibility of Wilmer, Cutler and Pickering law firm taking *Witt* for successor *habeas*.

Thursday, February 14:
Jeff Robinson called: if ineffective assistance of counsel claim is real in *Witt*, Jim Coleman is inclined to take *Witt*: we talked about merits of claim at length (what little I know about it): if psych is all there is, it's probably not enough to get a stay; Sarah Bleakley: *Smith* oral argument went great in Eleventh Circuit—Julien Clarkson had read the record twice, and tore the prosecutor to shreds: sounds like a pretty clear remand for an evidentiary hearing on the basis of *Thomas v. Zant*; I spent almost all day with Bill McClain on *Witt*: very weak merits claim (there was a psychiatric defense at trial, but Witt did not have organic brain damage) and not a *Booker* case (different lawyers did *Witt* trial and first Rule 3.850 motion and federal *habeas*); Richard Cross of *Harvard* called: *Civil Rights and Civil Liberties Review*: can't make decision on jury override article until end of March; I called Ruthann, and she wants to go with *FSU Law Review* so when Allen Fields called, I accepted: it will be in Volume 13, Issue 1, on the streets at the end of March.

Friday, February 15:
Talked with Steve Malone about *Middleton*; Angela Bickers, Eleventh Circuit death clerk called Dick: *Aldridge* set for April 22 oral argument in Atlanta: panel is Judge Roney, Judge Fay, and Judge Johnson; worked on *Spaziano* transcripts.

Saturday, February 16:
Read 800 pages of *Spaziano* transcript at home.

Sunday, February 17:
Ruthann in Clewiston interviewing Seminole Indians for lawsuit; I watched Larkin at home and finished *Spaziano* trial transcripts.

Monday, February 18:
Talked with Craig about *Spaziano* clemency and Rule 3.850 theories and best way to approach Ed Kirkland (trial lawyer) when I meet him on Tuesday; *Gerald Stano*: a mass murderer with very similar MO as in *Spaziano* murder case, was killing young women in Altamonte Springs area in 1973: he was a traveling cook, same as Beverly Fink and Jack Mallan said Spaziano was; Craig called Chris Quarrels, *Stano's* lawyer, to see if we can talk to *Stano;* Ed

Kirkland can't meet with us on Tuesday: now set for Friday or Monday in Orlando; read re-sentencing trial transcripts in *Spaziano*; Scharlette to Dick: Mark Olive hired Steve Malone and Margaret Vandiver to work at the Bar Resource Center.

Tuesday, February 19:
At Florida State Prison: I met with *Joe Spaziano*, *Nollie Lee Martin*, *Sireci* and *Jim Hitchcock*; Dick and I flew into Gainesville and met Susan Carey at FSP; *Spaziano*: slim, short and wiry, who spits out energy that just stops now and then, he says, "I'm lost," with a quizzical look: spent most of our two hour meeting talking about his art and his daughter Mary (he gave me a hand-drawn card to give to Larkin, and promised a painting): he gave okay to our looking into *Stano*; *Martin*: an hour-long sermon about the evil of other death row inmates: didn't seem to talk to me, but Dick later said he did: he's a person plagued by demons ("for 24 hours a day, I can stand with my heel on the head of the serpent, thrashing"): hates other inmates, but is tormented by God's command that he love: tormented soul; *Sireci*: an Iowa farm boy: crazy, but in a gregarious way; *Hitchcock*: very nervous and fidgety, waiting for us to leave him alone.

Wednesday, February 20:
Van Roosevelt Solomon executed in Georgia, a few minutes past midnight: George Kendall witnessed the execution; Dr. Harry Krop to examine Witt today. News: U.S. Supreme Court denied cert. in *Douglas*, reaffirming Eleventh Circuit grant of *habeas* writ on ineffective assistance of trial counsel; I first learned about Solomon's execution when I read it in the *Palm Beach Post* at 3:30 in the afternoon: no one here knew it was coming; Sarah Blakeley called: *Darden* had cert. granted and vacated and remanded back to the Eleventh Circuit in light of *Witt*—damn: I thought they had slipped *Darden* through; Dick called George Kendall: he witnessed Solomon's execution because of a rumor in Georgia that there are two lists of death row inmates, one for those they plan to torture before killing and one for those they will just kill; also: *Peak* (Georgia case) went *en banc* in Eleventh Circuit: George Kendall worried about *Peak*, since Fourth Circuit just rejected the *Spivy* line of Fifth Circuit cases, in an opinion written by J. Harvie Wilkerson, my old Federal Courts professor at UVA.

Thursday, February 21:
Called U.S. Supreme Court clerk's office: *Ross* cert. petition to be conferenced on March 15; *Spaziano*: Ed Kirkland can't meet us Friday, so reset for Monday at 9:30 a.m. in Orlando; saw *Anderson v. Smith* in most recent advance sheets: Second Circuit applies *Thompson/Nash* equivocation

doctrine to right to silence/*Miranda* case, thus closing a big hole in my *Martin* argument—I added *Anderson v. Smith* as supplemental authority in *Martin* and sent to Eleventh Circuit and opposing counsel; Craig told me he's inclined not to go to Tallahassee if the state-wide postconviction program is actually created: said he's been doing this work for ten years now, and he's just tired; Dick told me, on trip to Florida State Prison, that Dick wouldn't go: his wife Carolyn just got the job she wanted here in West Palm Beach, and he promised not to make another move "for the death penalty"; *Elledge*: State wants to postpone hearing set for next Wednesday. Night: read *Stano* presentence investigation report: *Stano* confessed to killing two Orlando women, bodies never found—the timing might be right for *Stano* to have committed the Harberts murder, for which *Joe Spaziano* now lives on death row.

Friday, February 22:
Ron Bishop, *Palm Beach Post* newspaper, in office reading *Martin* transcript: we talked about hard questions; *Spaziano*: Jerry Justine, investigator: talked about *Stano* strategy and how best to approach Detective Crow, the cop *Stano* confessed to: also tried to find how best to get the facts of DeLisio's hypnotism in *Spaziano*; Sarah Blakeley: Florida State Senator Malcolm Beard, head of Judi-Crim Committee, just switched parties, from Democrat to Republican, so he will now lose his committee chairmanship: he's a killer on jury override repeal legislation, and he is being replaced by Peter Weinstein in Miami, who is good for us; Jimmy Lohman called: Governor Graham signed death warrants in *Agan* and *Waterhouse*[603]: neither have lawyers; a senator saw my column in the Miami Herald and wanted to know if execution competency statute should be amended along the lines I advocated in the op ed piece: Jimmy and I talked about the issue and also about possible arguments and counter-arguments: he worked with Sarah and Gregg Thomas on *Jimmy Lee Smith*, and so he also was into *Godfrey*/heinousness aggravating circumstances issue: also discussed override and legislative effort to repeal it this year. All afternoon: met with Craig on *Spaziano*: meeting on Monday with trial attorney Kirkland: discussed how to approach Kirkland (not really go into ineffective assistance of trial counsel issue: mostly focus on clemency and how to structure clemency) and Rule 3.850 issues (hypnotism, *Stano*, etc.)—not much there, really.

Saturday, February 23:
Read cases and law review articles on hypnotism at home.

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603. I discussed *Agan* and *Waterhouse* in MELLO, DEAD WRONG, *supra* note 2, at 191, 249.

Sunday, February 24:
Big fight with Ruthann about chores, which ended with her telling me to go to work, which I did; read over *Spaziano* transcript notes, PSIs, mental health reports and evaluations, etc., for meeting tomorrow with Kirkland; called Susan Cary to divide duties for tomorrow (I'll do innocence, and she'll do mental stuff).

Monday, February 25:
News: Attorney General Jim Smith will not run for Governor and will not change political parties to become a Republican: Gunter is all there is, now; *Spaziano*: met Ed Kirkland at 9:30 a.m. in Orlando: Jerry Justine and I drove from West Palm Beach to Orlando: met Susan Cary there Kirkland said Joe stonewalled him on issue after issue, refusing to let him investigate things that might damage his status with the Outlaws: Kirkland said Joe was adamant about not presenting any mitigating evidence ("burn me or cut me loose") (question: is this true, or is Kirkland simply now trying to cover his ass and extort me not to raise a claim of ineffective assistance of trial counsel): Kirkland says he's interested in the hypnosis issue, and said that if he knew then what he knows now (*i.e.*, what we have told him now), he would have challenged it at trial: He said that the hypnotist, who he identified as a Dr. Joe McCaulley, "the dean of ethical hypnotists in Orlando," was good: Jerry Justine will meet with the hypnotist: Kirkland not enthusiastic about *Stano* issue, without more Kirkland did agree to argue Joe's clemency.

Tuesday, February 26:
Talked with Barb Williams at *FSU Law Review* on jury override article citations; received Mike Radelet's final draft of U. Cal. Davis override article; *Spaziano* sorted through what issues are left after meeting yesterday with Kirkland: decided to file federal corpus petition in *Spaziano* on prior rape conviction, tattoo issue; Jeff Robinson ran a Lexus computer research on tattoos for me; I wrote petition, based on Ninth Circuit *Bay* opinion; Jeff: the good guys won *Ake v. Oklahoma* in U.S. Supreme Court, eight to one; Dick Jorandby called: he's talking to Florida Senate President Harry Johnston tomorrow and will bring up override issue; Dick: talked to Miguel Cortez, Eleventh Circuit clerk: new system for dealing with death cases: there are four standing panels of three judges, which get the case as soon as a Notice of Appeal is filed in the lower court; Dick and I discussed ways to time it so that we can pick our panel: looks like we'll keep the awful *Aldridge* panel and also the good *Martin* panel.

Wednesday, February 27:
Dick Jorandby: yesterday he talked to Senate President Harry Johnston, and he'll support the bill repealing the override: the problems will be in the House and in the State Attorneys' offices: it's all politics: Dick Jorandby said that he would pass it on to "my people," and Scharlette loved it: Dick says Johnston will really push the override bill, since he and Dick are personal friends and he'd never lie to Dick — so we have his full support; Jeff: *Ake* opinion says you only get one shrink — sounds bad for *Martin's* claim that he was entitled to an eighth shrink; Scharlette: *Witt* is in federal court, even though he hasn't yet been through State Rule 3.850 proceedings, according to the newspapers; *Spaziano* called *Bay's* lawyer in San Francisco: he'll send brief: Ninth Circuit rehearing in *Bay* still pending; came back to work after dinner and stayed until 11:00 p.m.: redrafted *Spaziano* rape case *habeas* petition, and went over notes on clemency memo; got in *Ake* opinion from Jeff and went over that; still no word from Susan Carey, so do not know what's going on next week or whether she will be able to help me write the *Spaziano* clemency memo that Ed Kirkland will sign.

Thursday, February 28:
Drafted letter to Florida Senate President Johnston, for Dick Jorandby's signature, reaffirming his support for the override bill: Jorandby had asked me to do this yesterday; Dick Burr: Bar project is a "fraud": no volunteer lawyers at all: they just brought in Mark Olive "to work him until he collapses, so as to get the appearance of counsel without the reality"—Dick thinks we need to take the offensive and go public: he also thinks we should ghostwrite the papers in *Again* and *Waterhouse*, neither of whom still have lawyers—Mark Olive and Steve Malone "just can't do this again": Dick will talk to Craig and Jorandby when they return from Tallahassee meeting tomorrow about all of this; Scharlette thinks she can get a lawyer for *Again*, but *Waterhouse* is an asshole and fired Covington & Burling law firm in D.C. because he didn't like their cert. petition in his case; Dick Burr thinks my *Spaziano* rape case *habeas* is very weak: Dick thinks maybe we shouldn't file it; Susan Carey agreed to write personal history portion of *Spaziano* clemency memo.

Friday, March 1, 1985:
Craig: Chris Quarrels says *Stano* denies killing Laura Lynn Harberts (*Spaziano's* alleged victim) — *Stano* says he was living in Philadelphia at the time, and that he is not willing to talk to us about it; *Randolph* rehearing denied in Florida Supreme Court; talked to Jerry Justine about his meetings next week with the DiLisio hypnotist and with Detective Crow, on *Stano*; spent most of morning talking about counsel problems in Florida: whether to expose the Bar Resource Center as a lie or just continue to work with —Mark

Olive told Dick he'd resign rather than do these back to back to back ghostwriting jobs in warrant after warrant after warrant; *Witt* in federal court: hearing in Tampa: the public defender who filed the first appeal is screaming about suing Bill McClain for libel and defamation; *Middleton* is in Florida Supreme Court, but lawyer is refusing to raise nine of the ten issues identified by Steve Malone and Mark Olive—*Middleton* will fire this lawyer after the argument; Dick Burr called Chief Judge Godbold to talk about counsel problems in Florida: went through cases: Godbold said he'd call Jim Rineman of the Florida Bar, "to get to the bottom of this": Dick very excited and we all waited for Godbold to call back, but he hadn't by the end of the day; I started drafting memo; came back to office after dinner and worked until 11:00 p.m.; went home and worked until draft was done, at 2:30 a.m.

Saturday, March 2:
In office from 1:00 p.m. to 11:30 p.m.: Raymond here and started typing memo; went back over it; made notes for meetings on Monday and Tuesday; Craig in working on *Aldridge* reply brief and very depressed about his Eleventh Circuit panel in *Aldridge*: even without such a killer panel, very hard to win this kind of case; *Miami Herald* newspaper: *Witt* lost in Federal District Court (Judge Carr, of *Lindstrom* infamy): *Witt* now in Eleventh Circuit, but also in Florida Supreme Court on Monday (??).

Sunday, March 3:
Raymond finished typing draft of *Spaziano* clemency memo; I corrected it at home.

Monday, March 4:
Middleton oral argument in Florida Supreme Court; called Angela Bickers, Eleventh Circuit death clerk: *Martin* panel is Judge Godbold, Judge Kravich and Judge Hatchett: forty-five minutes each side; made frantic plans for trip to Atlanta for argument (plane canceled, etc.); flew West Palm Beach to Orlando to Gainesville; met Jeff Robinson, who is meeting *Booker* tomorrow: we went to lunch, then called Craig from hotel: *Witt* lost in Florida Supreme Court and Eleventh Circuit—*Middleton* pending in Federal District Court, before Judge Alcee Hastings, whose clerk said, "not to worry" about getting a stay; went to Gering's Book Store in Gainesville; drinks at hotel, and fine dinner with Jeff overlooking the city (two bottles of wine and prime rib); went back to hotel and watched ABC special on Scharlette, entitled "The Mistress of Delay": Hokey, but good press, or at least interesting press.

Tuesday, March 5:
Drove with Jeff to Florida State Prison: met with *Joe Spaziano* at 10:00 a.m.: Joe in good spirits: he has had tattoos all his life, and he doesn't know why Kirkland didn't connect it up at rape trial, since it would have been very easy for him to do so: Joe said he sees me as a friend, and that he can see that I really care for the guys on the row; our meeting was over at noon, and I waited in the FSP parking lot until 2:00 p.m., when Jeff was done meeting with Booker.; 4:30 p.m.: met Dr. Harry Krop in Gainesville: Susan Carey was half an hour late: I tried to focus the direction his psychiatric report would take; Susan will be doing *Witt* until tomorrow afternoon, so I will have to do mental portion of *Spaziano* clemency memo.

Wednesday, March 6:
Johnny Paul Witt executed in Florida, a few minutes after 7 a.m.; Middleton also scheduled to be killed today, but Federal District Judge Alcee Hastings stayed it; *Spaziano:* Jerry Justine: Detective Crow was helpful and will cooperate with us on *Stano/Spaziano*; Dr. McCaulley (sic), the hypnotist of Tony DiLisio, is a mercenary sleaze whose main concern is getting paid—he said he taped his hypnosis sessions with DiLisio and gave the tape to the cops (so *Brady v. Maryland* violation?): we decided just to deal with doubt about guilt in the clemency memo and do the mental/ psychiatric stuff in a supplemental memo to be filed after Kirkland's oral argument before the Clemency Board and the Governor; *Palm Beach Post* newspaper: U.S. Supreme Court Justice Stevens joined Brennan and Marshall in dissenting from denial of stay in *Witt* (on the *Grigsby* issue?); Ron Bishop, of *Post*, in my office all afternoon; I came back to office at night, after dinner, to do *Spaziano* clemency appendix; I also called *Lee Martin's* mother to warn her about Ron Bishop coming to North Carolina this weekend: she said someone called last week, using my name: I called a month ago, so was it Ron Bishop, checking to see if he had the right Mrs. Martin, or did she just misjudge the time?: she was adamant about not talking to Ron, and said she would pass it on to Harry (Lee's brother) and the other family members: she talked very tenderly of Lee ("he was gentle before he left home—he couldn't even watch his daddy kill a hog").

Thursday, March 7:
Corrected *Spaziano* clemency memo: gave back to Lee Currie; Jon May called: "great brief in *Martin* — the *Thompson/Nash* right to cut off questioning *Miranda* issue is a winner"; told Ron Bishop he'd be wasting his time going to North Carolina to talk with *Lee Martin's* mother or family; talked to Jerry Justine: still looking for Tony DiLisio, and still trying to nail down when Joe got his tattoos; *Miami Herald*: at the *Witt* execution yesterday,

death penalty proponents outnumbered opponents, nine to seven, at the cow pasture outside FSP; *Spaziano:* Jerry Justin: wants to send memo to Detective Crow: I said okay, but identify it as my work product, *not* Ed Kirkland's work product, since Kirkland had not approved it yet. Night: I called Kirkland at home: he said my clemency memo looks good, and I should do it up in final form, so I went over it and made final corrections; final run; Raymond and I photocopied copies for Governor and Clemency Board and staff; left office at 10:30 p.m.

Friday, March 8:
Mike Radelet called: wants us to do co-author paper on *Henry* case:[604] will send draft to me in a month; finalized *Spaziano* clemency memo: had pretty blue covers printed: sent memo out to governor and cabinet; got Radelet letter commenting on Ruthann's and my override draft Law Review article: very helpful: I sent Radelet's comments and the draft to Judge Vance; Dick asked if I wanted someone to go with me to the *Martin* oral argument in Atlanta: I said no; got great card from Joe: "friendship, love and truth..

Saturday, March 9:
Worked all day getting *Martin* files in order for oral argument: took notes on eighth psychiatrist issue; Craig: he or Dick Jorandby may come with me to the argument. Night: went over *Martin* briefs, leisurely.

Sunday, March 10:
Palm Beach Post newspaper: Florida Senate President Harry Johnston may run for Governor now that Jim Smith is out; *Marin*, in Texas, is set to die on Wednesday, and wants to die (*i.e.*, volunteer); *Miami Herald* lead story was that executions aren't news anymore in Florida.

Monday, March 11:
Lee Rosenthal, Assistant Attorney General on *Simpson*, called asking for more time to file his responsive pleading: I said sure; final legal research for *Martin* oral argument: U.S. Supreme Court issued a horrible opinion in a noncapital case last week, *Oregon v. Elstad*, which could zap the confessions issues in *Martin*; Ron Bishop, the reporter, called to say he's not going to the *Martin* oral argument or to North Carolina to talk with *Lee Martin's* family: he sounded pissed: Joan Fowler Rossin told me he was bugging her, too: good: maybe we've shut him down; called Joan with more cases to add as

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604. Michael Mello & Michael Radelet, *Executing Those Who Kill Blacks*, 37 MERCER L. REV. 911 (1986).

supplemental authority for *Martin*: she is very confident she will win *Martin* with a very short oral argument: "that works in DCA," Florida's intermediate court of appeals, the District Court of Appeals; Joan and I will meet at airport and share cab into Atlanta; spent day writing confessions issues for oral argument; discussed stuff with Craig and Dick; agreed that supreme court's *Ake v. Oklahoma* decision guts the eighth psychiatrist issue, but need to try to salvage something from it at the argument; *Spaziano*: Susan Carey talked with Ed Kirkland: he's going up Wednesday morning to Tallahassee for the clemency argument: he does not want to meet with her before the argument.

Tuesday, March 12:
Martin oral argument in Eleventh Circuit, in Atlanta: Flew from West Palm Beach to Atlanta: left West Palm Beach at 9:50 a.m. on Eastern Airlines: met Joan Fowler on the plane and had pleasant chat, mostly about things other than the *Martin* case: office politics: I jokingly suggested we would plead *Lee Martin* to life imprisonment without parole if we win in the Eleventh Circuit; met Patsy Morris for lunch, at Herren's; went to hotel room and wrote out oral argument and read cases — again; called Craig, who wished me luck, etc., tomorrow; had dinner with Jim and Nancy Fleming; worked until 1:30 a.m., practicing oral argument, mooting with myself; Ruthann called at 11:30 p.m. to wish me luck.

Wednesday, March 13:
In Atlanta for *Martin* oral argument: *Steve Morin* executed in Texas, a few minutes past midnight; *Martin* woke at 8 a.m., in controlled panic: *this is my first Eleventh Circuit oral argument*; went over briefs and notes; had room service breakfast at 10:00 a.m.: oral argument is at 2:00 p.m., and must report in to clerk's office by 1:30 p.m.; Craig called: no word on *Spaziano* clemency argument yet; met Joan Fowler Rossin at Eleventh Circuit library at 12:30 p.m.: we were both nervous and agreed to waive oral argument (ho ho); Patsy Morris came and sat in on the argument, which started promptly at 2:00 p.m.: Oral Argument: Judge Kravich did not say much, just sat there and glared at me: Chief Judge Godbold and Hatchet were very active, mostly about confession issues, but also eighth psychiatrist issue (!!): Chief Judge Godbold gave long, hard-to-follow hypotheticals: after one such hypothetical, he asked if I wanted him to "run that by you again," and I said yes, please: Chief Judge Godbold and Judge Hatchett very concerned about *Oregon v. Elstad*, the Supreme Court's *Miranda* case decided last week — they approached the *Elstad* decision from every angle, and I really wish I would have read the damn thing more carefully and memorized it before the argument: the judges were very well prepared and asked the right questions: I did not really like my performance—not fluid, too hesitant; Joan did great: concise, to the point:

they questioned her hard, too; afterwards, she asked if I thought I had won, and seemed to hope so (wishful thinking); I went to ACLU and did postmortem with Patsy and George Kendall; met Joan at Peachtree Sundial for drink: she really did not want to win this case—seriously talked about pleading Martin out to a life sentence; I called Craig from the airport: *Spaziano* clemency argument went great: Kirkland "had them in tears, on the edge of their chairs"; Patsy: we lost *Burger* in the Eleventh Circuit; flew from Atlanta to West Palm Beach.

Thursday, March 14:
Governor Graham signed death warrants in *Clark* and *Michaels*; big meeting at Tampa scheduled for the 20th to discuss counsel problem; I called Lee Martin's mom and tried to call him, but prison wouldn't let me through; Barb Edwards called from *FSU Law Review* to go over article, page by page, footnote by footnote.

Friday, March 15:
Ross set for conference in U.S. Supreme Court: cert. petition will be decided, if the justices get to it on the list today; Nola Conn, Tallahassee ACLU, called: press packets from override legislative memo go out today, again; stay from state trial court on Rule 3.850 motion: he *still* has no lawyer; Dick Burr: if we get a new trial for Lee Martin, he (Dick) and I should do it. Dick is certain he can make Lee into a real sympathetic person—we would get help from a real trial lawyer, of course, on things like cross examination of Forbes, etc.; *Waterhouse*: scheduled to file today in state trial court: Steve Bright is representing him, and is in Florida to do it; Dick heard that Palmer Singleton, the SPDC lawyer who did *Raulerson*, is bleeding from the brain and has emergency brain surgery scheduled for today; Craig; stay in *Waterhouse*: State is appealing both *Agan* and *Waterhouse*[605] stays to the Florida Supreme Court, to try to dissolve stays; Oral argument is set for Monday.

Saturday, March 16:
Beach.

Sunday, March 17:
Hung out; nursed sunburns from beach.

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605. I discuss *Agan* and *Waterhouse* in MELLO, DEAD WRONG, *supra* note 2, at 191, 249.

2. Marye's Heights

Monday, March 18:
Called U.S. Supreme Court at 10:05 a.m.: cert. denied in *Ross*; Florida Supreme Court in *Agan* (still no lawyer) and *Waterhouse* on State's appeal to dissolve stays; Scharlette: Oral arguments were "surreal": in *Agan*, defense counsel's chair was empty—as good a metaphor as any of the counsel crisis in Florida. 11:30 a.m.: Florida Supreme Court affirms stays in *Agan* and *Waterhouse*[606]; Scharlette called Craig; I wrote motion to stay the mandate in *Randolph*; *Agan*: while waiting for elevator, Scott Lang mentioned to me that he is doing *Agan*, and that he took it over from Jack Goldberger; I mentioned this to Craig, who called Goldberger to say it isn't true: Goldberger came by, and the three of us talked at some length—"testified"—about Lang's incompetence (Lang was Ruthann's opponent in her first jury trial for Florida Rural Legal Services.)

Tuesday, March 19:
Agan and *Waterhouse* originally scheduled to be executed: both stayed in state trial courts, and stays affirmed by Florida Supreme Court; I corrected *Randolph* motion: did appendices; talked to Craig about *Aldridge* and *Hitchcock* reply briefs; thinking about *Ford*: Judge Vance wrote panel opinion in *Ford*, and Judge Henderson didn't even want to grant a stay of *Ford's* execution— seems to be no "middle" of the court in our favor—if all of the judges go along strictly political/ideological lines (and Judge Hatchett doesn't vote, because he is recused), we should lose *Ford* in Eleventh Circuit *en banc*, 6-5.

Wednesday, March 20:
John Young executed in Georgia: Craig told me about it when I got in to work: Patsy Morris had told me, when I was in Atlanta for the *Martin* oral argument, that this was coming; Mary Cribbs, Lee Martin's sister from Milwaukee, called to ask how my oral argument went: good talk, for about half an hour; *Evening Times* newspaper: three U.S. Supreme Court Justices dissented in *Young*—was Justice Stevens the third dissenter (in addition to Brennan and Marshall)?

Thursday, March 21:
10:00 a.m.: Florida Supreme Court death clerk called: we lost *Sireci*, unanimously— 4-page opinion, McDonald joined with special concurrence;

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606. *See id.*

I called Scharlette, who read me the opinion over the phone: "all the critical issues were 'raised on direct appeal . . . .', and thus procedurally defaulted from being raised now in postconviction"; I called the prison, and they said they'd have Butch Sireci call me this afternoon; I think we'll take U.S. Supreme Court cert. on the *Cooper/Lockett* issue in *Sireci*; Craig and I met on *Sireci*: now, Butch is at grave risk of a death warrant: discussed options to stave one off—maybe Rule 3.850 on ineffective psychiatrist issue, maybe Florida Supreme Court rehearing, maybe cert., maybe federal *habeas*; Dick wants to raise mega-psych issue in *Sireci* (Florida's legal system of providing mental assistance to capital defendants is itself incompetent under the requirements of *Ake v. Oklahoma*); Butch called at 2:00 p.m.: took it hard, but seems okay; I went over *Hitchcock* and *Sireci* briefs.

Friday, March 22:
Tampa: big meeting on counsel crisis meeting in Florida: it was good to get everyone together to talk about the problem, but the only real resolutions we made were to try to keep up the pressure on Jim Rineman: no support at all for section 1983 lawsuit, or class action *habeas* (along the lines Toby Simon used in 1967 in Florida)[607]: it was especially good to see Jeff Robinson and Marion Lindberg; I talked with Dick about *Sireci* mental issue: decided to file successive Rule 3.850 motion on why the psychiatric evaluations were "incompetent" (in *Akes* language); Scharlette gave me the Florida Supreme Court's opinion in *Sireci* and the audio tape of the *Spaziano* clemency; found out that Joel Rosenthal never filed a cert. petition in *Francois*: the State hasn't realized that yet, and that's why no death warrant so far.

Saturday, March 23:
Cleaned house; hung out.

Sunday, March 24:
My 28th birthday; went to Miami for birthday; shopped and relaxed in Coconut Grove and ate at seafood place at the Falls Mall.

Monday, March 25:
Letter from *Joe Spaziano*: sounds like the prison did the neurological exam. anyway last Thursday, despite promises by Art Weidinger to Craig that they wouldn't; I called Susan Carey to check; received Mike Radelet's draft of law review article on *Henry*: looks very good; went over penalty phase transcript in *Sireci*: risky to charge psychiatric malpractice if we can't prove it; Dick

607. *See* MELTSNER, *supra* note 83.

thinks we can prove psychiatric malpractice: my problem with this is the same as with the mental stuff/eighth psychiatrist issue in *Martin*: it's just new facts, *coram nobis* stuff, not error of federal constitutional magnitude—if it's error at all.

Tuesday, March 26:
Craig: his contact in the state legislature thinks the override repeal and the bill to create a new statewide capital public defender postconviction office will both fail this year— no one is really pushing them: "these bills aren't the ones being talked about in the halls and in the corridors"; Scharlette: Representative Jim Burke introduced a death row lawyer's bill: she thinks it *does* have a chance, and Craig's contact (Sheldon Gusky) is "all fucked": Attorney General Jim Smith is still pushing it hard —a fact about which Scharlette and I both have very mixed feelings; all morning: talked to Craig about *Sireci* strategy of staving off death warrant. Afternoon: wrote motion for Florida Supreme Court rehearing and request for remand in *Sireci* to allow us to raise psychiatric malpractice issue.

Wednesday, March 27:
Received upset-sounding letter from Nollie Lee Martin: Craig talked to Susan Carey: Martin is okay—he just wants a minister to see him regularly; Joe Spaziano answered some psychiatric questions on Wednesday but refused to cooperate with the neurologist on Thursday; I corrected *Sireci* rehearing; Craig asked me to talk with Jeff Robinson about his taking *Rose*, Louis Carres' case: lingering doubt about guilt, ineffective assistance, etc.; *Spaziano*: I talked with Jerry Justine on investigations: he's *found* Tony DiLisio in Vista, California; Jeff: 85% chance he (or another DC lawyer's committee law firm) can do *Rose*: gave him cites to Florida Supreme Court opinions in *Rose*: Craig says Louis will do memo on the issues; *Miami Herald* newspaper: editorial on legislative repeal of jury override, apparently based on my memo.

Thursday, March 28:
Ruthann and I gave speech at Twin Lakes High School, on property law, and the death penalty: it was a depressing experience: they all want to be cops or prosecutors; called Professor Steve Goldstein, FSU Law School, on symmetry argument in opposition of jury override legislation repeal: he and I disagreed on whether a judge must have the power to override jury *death* recommendations: I said that in Georgia there is no such power, and that there is no such power in virtually any other American jurisdiction; I called George Kendall to double check this: he is in the middle of *Peak en banc* brief: we talked about that; long battle with Craig over whether I should file a *cert.*

petition in *Sireci*: Dick is afraid it would short-circuit *Cooper/Lockett* issue in *Hitchcock*, and it's better to have a good Eleventh Circuit case to take up on cert.: this means to me that our office has a conflict of interest between our two clients — Jim Hitchcock and Butch Sireci: also, I think *Sireci* has a better record than *Hitchcock*: I think *Sireci* is a better test case vehicle for taking the *Cooper/Lockett* issue the to U.S. Supreme Court because (1) *Sireci* had real nonstatutory mitigating circumstances *presented* at trial, but not *considered* by judge or jury because of confusion in Florida law over the consideration of nonstatutory mitigating evidence, so any *Lockett* error can't be dismissed as harmless (*Hitchcock* had virtually none – he "sucked gasoline" when he was a kid), and (2) it's better to go up from the state courts, rather than the federal *habeas* courts, because this U.S. Supreme Court is so hostile to *habeas corpus*—plus filing for *cert.* may hold off a death warrant being signed in *Sireci*, and *Sireci* is far more at risk of getting a warrant than is Hitchcock.: I decided to do the *Sireci cert.* petition. Night: wrote *Sireci* cert. petition on *Cooper/Lockett/Hitchcock* issue.

Friday, March 29:
Finished first draft of *Sireci cert.* petition; *Miami Herald*: James Briley is scheduled to die in Virginia on May 18, got married yesterday; Scharlette: *Tampa Tribune* newspaper, "one of the most fascist newspapers in the state," just did a great editorial on legislative repeal of the jury override: she will send it to me: significant, also, because Florida House of Representative member Elvin Martinez, a key vote on override legislation in the House, lives in Tampa. Afternoon: worked on *Henry* law review article: did my "new" portions of Mike's draft, but essentially this project was written by Mike Radelet, and I'm not sure my name should be on it; finished *Henry* work at night.

Saturday, March 30:
Picked up *Sireci cert.* petition draft; corrected it at night; played with jury override law review article.

Sunday, March 31:
Played with override article.

Monday, April 1, 1985:
April Fool's Day: orders day in U.S. Supreme Court, which is appropriate; Dick: U.S. Supreme Court granted cert. in *Alcorn*, to decide if ineffective assistance of counsel can ever be "cause" under *Sykes* procedural default doctrine; Scharlette asked me to call Eva Davis, the legislative assistant in the Florida Senate, who is doing the bill analysis on the jury override bill; Ms.

Davis wanted some statistics, and I sent her to Mike Radelet for the numbers: she also wanted to talk about the death penalty in general, which was weird, since she's really not too smart: lots of cliches; got good tape of *Spaziano* clemency argument: Ed Kirkland did good; Flo made corrections on *Sireci* cert. petition; I finalized *Sireci* rehearing in Florida Supreme Court, and got it in the mail to Tallahassee; called Elizabeth Taylor: she suggested we file for cert. in *Sireci*—Supreme Court may hold *Sireci* until *Hitchcock* reaches them from the Eleventh Circuit *en banc* court, and then decide the two cases together—either way, filing a cert. petition in *Sireci* won't hurt *Hitchcock*'s chances, and could well stave off a death warrant in *Sireci*.

Tuesday, April 2:
Legislative session opens; blurb in *Palm Beach Post* newspaper: the U.S. Supreme Court "agreed to consider throwing out the twelve-year-old murder conviction of a New Jersey man who confessed to the crime after police promised him psychiatric help"—that same thing happened in *Martin*: must get cert. papers in New Jersey case; met with Jerry Justine and Craig and Dick and Richard Green on status of investigations in pending capital postconviction cases; corrected *Sireci* cert. petition. News flash: the New Jersey case is *Miller v. Fenton*, where the 3rd Circuit Court of Appeals held that voluntariness is a question of fact subject to the statutory presumption of correctness in *habeas corpus* proceedings—if true, this fucks Martin, if the Eleventh Circuit doesn't find that his first (July 4) confession is involuntary, then the only thing wrong with it is a *Miranda* violation—that kills us under the recent *Oregon v. Elstad* case; I called Paul Klein, Miller's state public defender in New Jersey; Paul told me that the cert. grant *was* in *Miller v. Fenton*, and he thinks he's going to lose in the U.S. Supreme Court: *Miller* will be argued in the Fall; I spent afternoon worrying about *Miller* and its implications for *Martin*: at least *Miller* wasn't a capital case, but that will be a distinction without a difference for the Eleventh Circuit: hard to see why "death is different" for purposes of confessions/*habeas* law.

Wednesday, April 3:
Met to discuss *Michaels*, the latest uncounseled case with execution date, and what Mark Olive should do: file an amicus brief, with developed issues (as in *Agan*) or just to allege error, without saying what those errors are in any detail (as in *Waterhouse*): since there was no time to investigate or write much of a 3.850 motion, I liked the *Waterhouse* option. Night: did crap for weekly meeting on recent Florida Supreme Court decisions.

Thursday, April 4:
My week to do recent Florida Supreme Court decisions conference; Craig: Florida Representative Peter Deutch, chair of House Judiciary Crime Committee, is blocking override bill. Deutch went to Yale Law School, so Scharlette is having the Dean call him: old professors calling him, too; Dick spent all day in the medical library, and came back absolutely convinced that psychiatric exams in *Sireci* were negligent malpractice; Radelet: likes my additions to his *Henry* article draft: will put them in his computer and run another draft for me to look at.

Friday, April 5:
Craig: Scharlette says that Representative Elvin Martinez, House Judiciary Crime Committee, who opposed jury override bill last year, is now for it (influenced by recent *Tampa Tribune* editorial) and can pull it back to the committee from the subcommittee chaired by Representative Deutch. Morning: met with Frank Kessler and Craig. (Kessler represents *Bivens*, a first-degree murder trial case): regarding penalty phase issues; Scharlette: Governor Graham won't oppose jury override bill or veto it: Scharlette thinks Martinez support means the bill will pass: "incredible chance of passing it next year, and maybe even this year": vote scheduled on Wednesday; Calvin Fox, Assistant Attorney General in *Washington v. Strickland* in U.S. Supreme Court, wrote letter to the editor in *Herald* on jury override repeal: I wrote the response.

Saturday, April 6:
Easter Egg Hunt at Dreher Park; came in to office to edit letter to *Miami Herald*: sent it to newspaper.

Sunday, April 7:
Worked on *Randolph* cert. petition at home.

Monday, April 8:
Craig: Governor and Attorney General are privately telling people to support jury override bill are grateful to Rep. Burke for sponsoring the capital post conviction bill (to create new, statewide public defender office to do death post conviction); met in morning to discuss psychiatric stuff in general: Craig and Dick see our efforts in this regard directed towards sensitizing the law and judges to this neuropsych stuff, even though we won't win cases on the basis of it: that's insane to me, since it diverts from our real work—saving the individual lives of our individual clients; Patsy Morris sent Dick *Blake v. Zant* opinion, granting *habeas* writ based on *Ake*, with Judge Tuttle writing and

Judge Tjoflat dissenting: good chance of *en banc*: also sent *Peak en banc* briefs, based on my *Green v. Zant* case for Judge Vance.

Tuesday, April 9:
Nola Conn, of ACLU, called: Representative Burke seems very "scattered" on override bill: know if he has the votes now, but wants it to come to vote tomorrow at 9 a.m.: she and I went over everyone who is on the committee, and it comes out to 7-6 against us, with 3 undecided: Attorney General Jim Smith's capital representation bill also comes up tomorrow, and maybe the two really are linked, and Burke wants them voted on together: all in all, Nola sounded very grim; put *Sireci* in final form and mailed to Jeff, to hold until rehearing denied; Barb Edwards finally returned my call: *FSU Law Review* jury override article won't be out until late May, out in galleys by April 26: will send final manuscript this week.

Wednesday, April 10:
Nola Conn called: about House Judiciary Crime vote on override bill: looks bad: Academy of Trial Lawyers lobbyist, Steve Masterson, was good: then Buddy Jacobs, lobbyist for State Attorneys, made the "tinkering with the statute" argument[608], "and you could feel the ground move"; vote is scheduled for 1:30 p.m. tomorrow, but she doesn't think it will pass: Senator Dunn is pissed about the way things are going in the House, and wants me to testify tomorrow: Scharlette will call Burke in the House and see: meanwhile, I talked with Dick Jorandby about going: he says to do it; Nola: Burke does not want more testimony: convinced he has the votes: Senator Dunn is really pushing in the Senate, even though the House may not pass the override bill: Nola says "there's a way to pull that off"; talked with Dick Burr about mental issue in *Sireci*: how to frame it, and how to approach the doctors: hope to file Rule 3.850 motion next week.

Thursday, April 11:
Margaret Good talked to me about *Fitzpatrick*; Shelly Pine called on *Williams* Rule 3.850 issue; received draft of override article from *FSU Law Review*. 11:30 a.m.: called Nola Conn: on TV last night, Governor Graham blasted the override bill as "tinkering" with the statute: Jim Smith, on TV, said he did not care about the bill: rumor is that the State Attorney will testify in favor of the bill today: Senator Dunn has eighteen cosponsors lined up in the Senate, but Representative Burke will pull the bill in the House if he doesn't have the votes to get it out of committee today. 2:50 p.m.: Dick Burr spoke with

608. See Mello & Robson, *Judge Over Jury*, *supra* note 121.

Margaret Vandiver: override bill tabled today in House, counsel for *habeas* bill passed out of committee; *Michaels* got stay from state trial court on Rule 3.850 motion; Nola Conn called: bill "temporarily passed": Dunn has twenty sponsors, and since there are only forty people in the whole Senate, it's as good as passed there Attorney General Jim Smith testified on need for counsel and for capital postconviction public defender office bill: "If we are going to continue to have executions in Florida, I think there is obviously still broad support for that state policy, I think this is a step we should take."[609] With friends like these . . . .

Friday, April 12:
Discussed jury override with Craig, who was there at the legislative hearings yesterday: he thinks that a "symmetry"[610] amendment would be "playing with fire" and would legitimate the statute against our constitutional challenges to it; went over status of investigations with Jerry Justine and Dick Burr; spent most of the day going over the override article: called Barb Edwards twice, but she did not call back; *Martin*: U.S. Supreme Court advance sheets: court granted *cert.* in two exhaustion of state remedies cases: *Vasquez v. Hillary*, to decide whether exhaustion of *facts*, as well as legal issues, is required, and *Smith v. Alcorn*, to decide whether a state can waive exhaustion: these could do in the *Miranda/Michigan v. Mosley* invocation-of-the-right-to-silence issue in *Martin*—we did not really raise this, in exactly this way, in the state courts in *Martin*—I argued, at oral argument, that the state waived it by not raising it in district court, and these new cases could really hurt us there.

Saturday, April 13:
Corrected override article in office; Ruthann, Larkin and Ruth Dickinson went to Delray Fair, but got rained out; I called FSU and spoke with an executive editor: will send article back to them on Monday morning.

Sunday, April 14:
Went to Delray Fair, but rain, again; went to mall and lost wallet; went home and, as we were sitting down to dinner, a person called saying they'd found my wallet: went to get it, and by that time, the day was over.

Monday, April 15:
Penalty phase in *Bivens*; went over *Spaziano* record, to give Jerry Justine direction on his trip to California to interview Tony DiLisio; sent jury

609. See MELLO, DEAD WRONG, *supra* note 2, at 192.
610. Mello and Robson, *Judge Over Jury*, *supra* note 121.

override article to *FSU Law Review*; received Assistant Attorney General Margene Roper's response to rehearing in *Sireci*: called her and suggested she not oppose *cert.*, once rehearing is denied; Scharlette called: jury override bill "will sail through the Senate, but it looks bad in the House Judiciary Crime Committee": Senator Dunn now has twenty-one sponsors of the override bill in the Senate.

Tuesday, April 16:
Clarke and Michaels originally scheduled to die in Florida, but both cases stayed; Dick: counsel bill (CCR) is going through, according to Scharlette: Chairman of Senator Appropriations Committee is a sponsor, and House Appropriations chair is in support: no opposition to the bill so far, and Governor Graham says he won't veto it: they want to pick a director of CCR by July: expect to get $2,000,000: want public defenders to nominate a director in two weeks: we all discussed what to do: Dick says he can't go for at least a year: Craig extremely noncommittal; override bill: twenty-five sponsors in the Senate, Scharlette told Jeff Robinson; Mark Olive was in the office here all afternoon to discuss CCR, override bill, *Agan*, general strategy, etc.; Dick Jorandby offered to help on override bill: Scharlette said for him to call three members of the House Judiciary Crime Committee; Craig passed this request on to Jorandby; worked on *Spaziano* all day.

Wednesday, April 17:
Read cases and law reviews for *Randolph* cert.; Craig: Scharlette says the votes in House Judiciary Crime Committee are 9-7 against us on the override: Florida Impact lobbying group is pushing it, and that's their number one priority; *Spaziano*: Jerry Justine called Dick from California: He spoke with Tony DiLisio, but he's very scared and uncooperative: says the case ruined his life and now he'll have to move on again: Outlaws blew up his car: Jerry's plane almost crashed, on his way to California, when an engine fell off in mid-air.

Thursday, April 18:
James Briley executed in Virginia; *Spaziano*: Jerry Justine called: nothing from DiLisio; Scharlette called Craig: only one vote short of passing the override bill in the House Judiciary Crime Committee: U.S. Supreme Court denied cert. in *King*; I dictated cert. petition in *Randolph*; Steve Malone called for cites on jury override cases; override bill: it's now 7-6 in the House — need two more votes: Nola Conn: House will delay vote on override bill until they can get it through the Senate; vote scheduled for Tuesday won't happen; came back to office at 10:00 p.m., to pick up *Randolph* cert. petition draft: corrected it at home.

Friday, April 19:
Palm Beach Post newspaper had front page story on *Briley* execution: Briley "led the nation's largest death row escape" from Virginia: other inmates in Virginia rioted yesterday, hoping to stop the execution, and nine guards and an inmate were hurt; I played with *Randolph*, while corrections were being typed; Tom Horkin called to thank me for my work on the override bill and to ask some questions on jury override numbers; came back to office at 11:30 p.m. to pick up *Randolph* draft; corrected at home.

Saturday, April 20:
Put *Randolph cert.* petition in final form: Ray made corrections: I xeroxed the copies and put the appendices together and Xeroxed those.

Sunday, April 21:
Home.

Monday, April 22:
Aldridge oral argument in Eleventh Circuit today; Craig: Scharlette says vote is 7 for override bill, 6 against and 3 undecided: they're trying to convince those undecided not to show up for the vote: no word on vote in the Senate; sent out *Randolph cert.* petition to U.S. Supreme Court; Dick called Craig: *Aldridge* oral argument in Atlanta (panel: Roney, Fay and Johnson): court didn't seem well prepared or interested at all—a dead, flaccid court, not engaged at all: Craig says Dick is very depressed about it; visited Tall Pines Day School, for Larkin, in morning: seems okay: two rooms, one for infants and one for toddlers: reading time, a tunnel of blocks: seems creative: other kids friendly.

Tuesday, April 23:
Left Larkin at Tall Pines Daycare for morning; *Aldridge* oral argument yesterday: Dick: Judge Fay was rude to Joy, Assistant Attorney General: turned his chair around during her oral argument and glared at her the rest of the time; Governor Graham signed death warrants in *Marvin Francois* and *Paul Magill*: talked with Margaret Good, who represented *Magill* on direct appeal (it was in her Florida Supreme Court oral argument in *Magill* direct appeal that the *Brown* issue first surfaced—she was asked by a justice about a psych evaluation that wasn't in the record, and that's how we learned of the court's practice of receiving secret, *ex parte* information from the prison on death row cases on direct appeal)[611]; Phil Padavano is doing it now and may

611. The *Brown* issue was discussed in the previousously.

call me later on AJC issues and on "killing-a-juvenile" issue (*Magill* was seventeen years old at time of crime); Scharlette called at 4:00 p.m.: Senate Judiciary Crime hearings tomorrow: eight-member committee and five are sponsors of the bill: wants me to testify: Craig approved it reluctantly: frantic plane and hotel plans made; flew to Tallahassee: stayed at Terry and Margaret's; strategized with Scharlette on symmetry issue, and what to do if asked how I personally feel about death penalty, etc.: called Tom Horkin on this: meeting broke up at midnight, and then I wrote outline of my testimony tomorrow.

Wednesday, April 24:
Tallahassee: Woke at 6 a.m. and went over testimony; went to Clearinghouse and met with Scharlette and Bud Bell of ACLU: warned me that Senator Beard, an ex-sheriff, would be hostile, but that five of the eight committee members were sponsors of the override bill; went to Capitol cafeteria and met Bob Townsend, Nola Conn, Steve Masterson (Florida Trial Lawyers' lobbyist), Tom Horkin and Radelet: compared statistical notes with Mike Radelet and went over new Senate bill analysis (Eva Davis), which got stuff wrong: decided I'd speak first; met Senator Dunne(sp?) in hall and went into the chamber; CCR bill up first: Attorney General Jim Smith said we need it for the killing to go on; testimony on override bill: Senator Dunn(e) led off, with history of capital punishment statute: I then gave reasons to pass the override bill and why arguments against it were wrong—questions focused on symmetry: Buddy Jacobs testified against the bill; vote was 5-2-1; my flight back to West Palm Beach was canceled, so I stayed overnight.

Thursday, April 25:
Flew from Tallahassee to Orlando. 10:00 a.m.: met with Ed Kirkland, *Spaziano* trial lawyer, in Orlando: he is upset about our raising ineffective assistance of psychiatrist in *Sireci* (against his brother, who was the psychiatrist in *Sireci*): I decided not to challenge tattoo issue in *Spaziano* rape trial, at least not right now; Craig: Buddy Jacobs met with Governor Graham and got Graham to pull out all the stops to kill the jury override bill, including possible veto: Jacobs met with Dunn, who agreed to make it binding for life or death (symmetry): Tom Horkin will meet with Dunn tomorrow to change his mind on symmetry: Jacobs says they have 9-6 vote victory in House Judiciary Crime Committee: the problem is if it's binding both ways, they should make other changes (unanimity of jury verdicts, etc.), and these would be "tinkering with the statute" that would kill the whole thing; flew from Orlando to Jacksonville, rented car and drove to Starke.

Friday, April 26:
At Florida State Prison: met with Nollie Lee Martin, Butch Sireci and Joe Spaziano: Lee Martin very uptight and anxious and quiet; *Sireci* is jovial as ever: he thinks Kirkland (the shrink Kirkland) messed up the trial; *Joe* was great: gave me a coloring book for Larkin: very close talk about the Outlaws: He asked me point blank if he was going to die, and I told him I didn't think so, but who could tell?; flew from Jacksonville to West Palm Beach.

Saturday, April 27:
Miami Herald newspaper published my letter on jury override; news story that Harry Johnston and Jim Smith are running for Governor and Lieutenant Governor: this could be very good for the jury override bill: as Governor, Johnston could get the bill passed, and even if its prospective only, he could grant clemency to the override cases presently on the row or just not sign death warrants on them (*i.e.*, Joe Spaziano): to late for *Dobbert,* but nothing to change that.

Sunday, April 28:
Home.

Monday, April 29:
Dictated letter to the editor of *Palm Beach Post* newspaper on jury override legislation: got it out to them; Scharlette: may need me to testify in House on Thursday: jury override bill assigned to Corrections Committee in Senate, but Dunn not worried: five people on committee, and two are cosponsors; Barb Edwards, *FSU Law Review*: changes being made to override article: hopes to get it to printer by end of the week; nightly radio (NPR): Justice Alderman, the youngest and smartest and most vicious Florida Supreme Court justice on capital punishment cases, is leaving the court: Harry Johnston announced candidacy for Governor and was immediately asked about the death penalty: he said he'd sign death warrants, but only after "careful study" of each case.

Tuesday, April 30:
Miami Herald newspaper: Supreme Court Justices Brennan and Marshall wrote strong dissent from cert. denial arguing that electrocution is cruel and unusual punishment: front page story: the case was *Glass v. Louisiana*; helped Florida Rural Legal Services move offices; up all night with Larkin, who was sick; Mike Wytrowski called (Florida Atlantic University professor): he read my jury override letter in *Miami Herald* and wants to get together to talk about co-authoring an article together, a comprehensive piece on the whole process of deciding who dies.

Wednesday, May 1, 1985:
Terry Nelson at Clearinghouse called: Senator Elaine Gordon (liberal who opposes capital punishment) is planning to kill the CCR counsel bill in her committee: she bought Attorney General Jim Smith's line that it will kill people, and she's against the death penalty: Scharlette is deciding how to approach her; Shelly Pine called to talk about *Williams* Rule 3.850, which he sent last week, but which I haven't yet had time to read; called Tom Horkin: no need for me to come up tomorrow to testify: jury override bill won't be heard in House Judiciary Crime Committee until next Tuesday: Senator Dunn still trying to pull it from Appropriations Committee; called Scharlette: Dunn still optimistic: has drafted a symmetry Amendment, patterned after the Georgia statute (unanimity, etc.), but no political deal has been cut between Dunn and Buddy Jacobs on any of this: prosecutors met and decided killing this bill isn't a legislative priority for them.

Thursday, May 2:
Morning: home with Larkin, who's still sick; Debbie Fins (LDF) called, asking me to do moot court on Saturday with Erwin Block in *Proffitt*'s case, now in Florida Supreme Court: she said that Scharlette said that there would be no testimony in House J Judiciary Crime Committee: they would just take a vote; Scharlette: she met with Jim Burke, and now she is very impressed with how on top of things he is: he's done his homework: knows votes, etc.: Chairmen of Senate Corrections and Appropriations Committees agree the bill never should have been assigned to those committees in the first place: full Senate vote expected on override bill next week: Burke will bring it to vote in House Judiciary Crime on Monday, if he has the votes, but it looks like 8-8 tie: He'll wait until it passes the Senate and then move his House committee into special session and yank it directly to the full House of Representatives: should be two weeks or so: they all decided not to have more testimony.

Friday, May 3:
Penalty phase in *Frank Kessler Bivens* case; *Palm Beach Post* newspaper: Dunn declares for Attorney General's race; *Post* editorial page editor called me with a question on my op-ed; Shelly Pine called and we talked about *Williams* Rule 3.850 motion; lunch with Mike Wytrowski: sort of decided to do a law review article on racism in the Florida system of capital punishment; Felt like hell all day. Night: threw up all night: fever: cold.

Saturday, May 4:
Fifteen years since killing of four white students by Ohio National Guard at Kent State University; canceled *Proffitt* moot court (my role, at least: I'm not sure whether the moot court went on without me); Ruthann and Larkin went

to Jacksonville; I was home ill all day; Miami Herald reports that Bivens got a life recommendation from sentencing jury.

Sunday, May 5:
Ill.

Monday, May 6:
Home ill.

Tuesday, May 7:
Palm Beach Post newspaper: printed my jury override op ed: story that Bivens escaped prison: this would make for an interesting jury override issue: what happens when the judge's override of a jury's life recommendation is based on an intervening event that happens after the jury's verdict but before the judge's sentence, here the escape from prison?: somewhat similar thing occurred in *Spaziano*—that judge had access to information (*i.e.*, the Vanessa Dale Croft rape conviction) that wasn't told to the jury; Barb Edwards called from *FSU Law Review* with edits: I gave her mine; Mark Olive called for "dope" on Judge Roney of Eleventh Circuit; Scharlette: CCR bill is in real trouble: Public Defenders are killing it because of money, and fears that CCR will divert funds that otherwise would go to Public Defender offices—it really is a sha.m. to suggest that a CCR office could be set up and funded for only $500,000 a year—it will be more like $2-3,000,000 a year; fifteen years since two Black students were killed at Jackson State Mississippi University.

Wednesday, May 8:
I happened to come across an article in *Palm Beach Post*: Ken Adams, County Commissioner, is afraid that if he's in the same building as the Public Defender—our clients might offend him in the elevator: his comments set off a firestorm in our office: Dick Jorandby very pissed and called Craig ten times within half-an-hour of finding out; I read through *Spaziano* medical records for Rule 3.850 motion; informal meeting with Craig and Dick at the end of day: Pat Griffith, the lobbyist for Attorney General's office, who is orchestrating the CCR bill, says it will pass easily—Appropriations Committee should okay it tomorrow—approval will be fast, and it should start up on July 1: Craig and Dick Jorandby are "in the middle" on whether Craig will go to the new CCR: Craig also said he feels that Jorandby may leave as West Palm Beach Public Defender soon, maybe to be a Federal District Judge; *Palm Beach Post* newspaper quotes Ed Dunn as saying "as attorney general, I will work diligently to assure that the death penalty is administered in Florida fairly and judiciously but also expeditiously."

Thursday, May 9:
Long talk with Scharlette: CCR bill[612] in good shape: override bill not expected to pass the House, but they're still working on it; *Palm Beach Post* newspaper reports that Dunn, in campaigning for Attorney General, said he'll work for death penalty; Florida Supreme Court decided *Bundy* II: hypnotism requires exclusion of testimony per se (this is very good for Spaziano, except that the hypnotism rule of *Bundy* is not retroactive—still, might be able to get around that rule for (akward)case-specific case involving lingering doubt about guilt; Governor Graham signed death warrants in *Lightbourne* and *Mason*, set for June 4: Mason has no lawyer, and Lightbourne's lawyer was recruited by Jeff Robinson.

Friday, May 10:
Jeff Robinson: the Philadelphia firm that has had *Lightbourne* for a year has done nothing, not even called the client or the Clearinghouse: Jeff, Coleman and Marion are trying to find out what's going on; *Spaziano* Rule 3.850: discussed hypnotism issue at length with Dick: it's not really a *Brady* issue, since the audio tapes probably won't be exculpatory: also the State's discovery compliance told Kirkland that they had a statement from DiLisio: that leaves it as a straight ineffective of assistance trial counsel (Kirkland) claim, which will piss off Kirkland mightily: might even screw up *Sireci*, which may give me a conflict of interest. Night: drafted prejudice portion of ineffective assistance of counsel claim in *Spaziano* Rule 3.850: worked until 4 a.m.

Saturday, May 11:
Dahlia, Estella and I installed new seat covers on my VW bug, and then realized that my engine had died: the battery had actually fallen through the floorboards onto the ground: jump started it and went to Sears and bought a new battery; had big battle with Ruthann, which has been building for a long time: it cleared the air, and we really decided that I would go to Tallahassee alone and she would follow in a year with Larkin: idea here is to give her some "space," as she put it.

Sunday, May 12:
Relaxed at home; my mother, who is due to retire from the Air Force at the end of this year, she is thinking of moving to Florida: I'll send her stuff on apartments and retirement communities, etc. Night: wrote "performance" prong portion of ineffective assistance of counsel argument in *Spaziano* Rule

612. I discuss the history behind the creation of CCR in MELLO, DEAD WRONG, *supra* note 2.

3.850; *Palm Beach Post* newspaper: convenience store clerk stabbed 40 times: the cops think Bivens did it.

Monday, May 13:
Craig: Pat Caddell, Jimmy Carter's pollster and the one hired by Governor Graham and by Amnesty International to do a poll on Florida's death penalty (and also the guy who, along with Millard Farmer, invented direct mail advertising—that's how Millard financed Team Defense) will talk to Graham about how politically stupid it is to oppose our override bill; got very depressed and suicidal letter from Lee Martin—he said that if he dies, tell the people of Palm Beach County (where he committed the crime, was tried, and was sentenced to die) that he understands their actions and doesn't hate them; Nola Conn: one of the override sponsors on Senate Corrections Committee has pulled out: jury override bill in trouble there wants me to come up to testify on Monday: Scharlette says Buddy Jacobs and Ed Austin are cranking up the scare tactics, and that it will be a battle to get it even to the full Senate for a vote; called Radelet and told him to send a letter to all Committee members explaining the numbers; Barb Edwards, *FSU Law Review*, says she will Fed Ex the manuscript to me, so I can give it to the legislators.

Tuesday, May 14:
Miami Herald newspaper: Texas Pardons Board denies *Jesse Delarosa*: U.S. Supreme Court denied *cert.*; also denied *cert.* in *Stano* and *Freddy Lee Hall* (from the Eleventh Circuit?); *Spaziano*: wrote competency issue all day, and at night until 2:00 a.m.; Craig in Michigan with Susan Cary, fighting efforts to reinstate capital punishment there.

Wednesday, May 15:
Jesse Delarosa executed in Texas, a few minutes after midnight; Scharlette: very intense meeting with Tom Horkin: Horkin talked to Vogt, the key voter, who said that he was going to talk to Jacksonville State Attorney Ed Austin (at Senator Carlucci's behest): so Horkin wants me to meet with Vogt, at his house in Cocoa Beach on Saturday or Sunday, and for me to come to Tallahassee to testify on Monday and to talk to some other people on the committee privately; got reply brief in *Simpson*: not bad, and not too bright; *Palm Beach Post* newspaper: convenience store clerk stabbed on Sunday said it *wasn't* Bivens who did it; *Spaziano*: I edited and added case law and law review cites to competency issue: talked to Jerry Justine—he'll talk to Susan Carey next week about family member affidavits for *Spaziano* Rule 3.850 and clemency: Jerry will also try to get dirt on McColley, the hypnotist, while in Orlando looking for the actual audio tapes of the hypnosis sessions with McColley and the cops with Tony DiLisio.

Thursday, May 16:
Palm Beach Post newspaper: Jesse Delarosa was only twenty-four years old at the time of his execution, the youngest ever killed in the post-*Furman* years, and he maintained his innocence until the end: Texas plans to kill five more people by July 22 (these may not all be real dates, *i.e.*, cases have not been through the state postconviction and federal *habeas corpus* yet); Scharlette: CCR bill passed full House and Senate, as part of general appropriations package: money will come from corrections officers' salaries, which means that the whole thing is very solid: she says she doesn't know what Craig will do yet about coming up to run CCR—he says he won't leave West Palm Beach without Dick Jorandby's approval, and Dick says he won't oppose it: Craig will have to decide when he comes back from Michigan: Scharlette sent my jury override article manuscript to legislators; Tom Horkin called: wants me to meet Vogt Monday morning and testify in legislature Monday afternoon. Night: went over jury override article.

Friday, May 17:
Went over jury override article making corrections: talked to Barb for three hours on corrections; *Spaziano* Rule 3.850 motion and memo typed; Scharlette: she had long talk with Attorney General's office: Sheldon Guskie and Mike Allen are still trying to kill the CCR bill, saying it's underfunded and that it means that all Public Defenders (including West Palm Beach) must drop current capital post-conviction cases and dump them on new CCR: Pat Neil of Appropriations, said the bill does not say that, but Allen worries that the person selected as the CCR head must be a good person, but not someone who will frustrate the system by delaying executions: Scharlette says all of this is a pretext to kill the bill.

Saturday, May 18:
Home.

Sunday, May 19:
Day: shopped for San Francisco trip; night flight to Tallahassee: at airport waiting room, the south Florida legislators gathered: all on my flight, including Senator Johnston; on the flight, I drafted a letter to Ed Kirkland, *Spaziano's* trial lawyer; Jimmy Lohman met me at the Tallahassee airport, and at his house we watched a Motown TV special and talked about legislative strategy: Jimmy said that Bob Townsend will give me details tomorrow morning on how to approach Senator Vogt, the key vote: Jimmy warned me that Carlucci was hostile and had slaughtered Steve Masterson when he

testified on the override bill on Monday; wrote outline for testimony until 1:00 a.m.

Monday, May 20:
Tallahassee: Got up at 6:30 a.m.: went to Clearinghouse with Scharlette, then on to Capitol cafeteria to meet Bob Townsend: he did not know a thing about Vogt or how to package an argument for him; I went to Vogt's office, and his secretary said I did not have an appointment and he was not in: as we talked, he came in and said to come back in half-an-hour; at 9:15 a.m., Vogt and I met, alone, and he wanted to cover two things: one, judge's knowledge of other cases, so the cases in which death sentences were imposed would be proportionate to other cases that have come up in Florida—I went into the Florida Supreme Court proportionality review response: two, *Dobbert* and factual innocence—I went through the interplay between residual doubt about guilt and really bad cases: he was very attentive and polite and warned me about Carlucci during the hearing; the Committee met at 10 a.m.: Senator Dunn called the bill up, without new testimony (it had been voted on on Monday): Carlucci was very insulting, and Hill and Dunn stuck it right back in his face: Carlucci kept calling jurors "amateurs," and he introduced a hostile Amendment to gut the bill, which failed 3-2: the bill passed the committee 3-2: Representative Burke was pulled from the floor—he said the override bill looks bad in the House Judiciary Crime Committee: 8-8 tie most likely: may not bring it up in Senate again until next year; lunch with Phil Padovano (*Magill's* lawyer): good lawyer, but not up on cases or literature—hearing in Federal District Court tomorrow; Scharlette does not think Craig will take the CCR job: he said he'll be the next Public Defender in Palm Beach, when Dick Jorandby leaves; I flew from Tallahassee to West Palm Beach through Orlando.

Tuesday, May 21:
Jim Cooney called from North Carolina: has a death case: asked for my general advice, etc.; *Palm Beach Post* newspaper: Bivens recaptured in South Carolina; Craig: Jerry Justine found a transcript of Tony DiLisio's hypnotism sessions in Ed Kirkland's trial files—no, actually, Craig's not sure if it's a transcript of the hypnotism sessions or just a statement: if it is a transcript of the hypnotism sessions, then no *Brady* issue as to hypnotism issue, but strong ineffective assistance of trial counsel claim against Kirkland for not doing anything with the transcripts; Louis Carres asked how the override effort was going in Tallahassee and wished me luck: the first time we've talked about the override since *Spaziano* opinion came out of U.S. Supreme Court; called Senator Dunn's office: they're trying to get the override bill pulled from the Appropriations Committee and on to the floor of the full Senate for a vote.

Home: *Bar News* article by Gary Blankenship; makes me sound like a teeny bopper about to throw pig's blood on the floor of the Capitol: quotes me as saying "the death penalty is gross . . ."—*this* is why I hate to talk to reporters, even for innocuous publications like the *Florida Bar News*.

Wednesday, May 22:
Joan Fowler Rossin called: U.S. Supreme Court will initially conference on *Randolph* in June and probably ask her to file an opposition to my cert. petition in July: finally will decide on cert. petition in September: Scharlette: Phil Padovano got stay in *Magill* on killing kids issue; Dick: *Florida Bar News* piece "could have been worse . . . a real injustice to you"—my main fear is that it will hurt the override bill: I can see Buddy Jacobs on the floor of the house saying, "their expert thinks the death penalty is 'gross'"; *Spaziano*: Jerry Justine: no actual audio tapes of hypnosis sessions yet, but got transcript of hypnosis sessions from Ed Kirkland's trial file; *Spaziano*: called Mike Millman in California, who said Dr. Bernard Diamond is a good expert on hypnosis; Legislative Information Service: the override bill is still in the Appropriations Committee in the Senate—*Spaziano* not the agenda: Tom Horkin's office also said it's still in appropriations committee. Night: spoke with Dr. Diamond in San Francisco: he normally charges $200 an hour, and didn't sound real pleased about cutting his rates for looking over the *Spaziano*/DiLisio hypnotism materials, but finally said he would: sent package of stuff on *Spaziano* hypnotism off to him.

Thursday, May 23:
Spaziano: One of the trial lawyers suggested I contact Dr. Robert Buckhout, in New York, as an expert on hypnotism: I called him, and he charges $60 per hour: sent him *Spaziano* stuff; *Palm Beach Post*: Florida Supreme Court denied *Francois* a stay; *Sireci* still pending on rehearing in Florida Supreme Court: I called the clerk's office: it's been seven weeks; Ruthann, Larkin and I flew from West Palm Beach to San Francisco, via Atlanta (changed plans, of course) and Los Angeles (very long wait on ground): awful flight: gross people on left: the planes were very cold; in San Francisco, I went by cab (great cab driver) to hotel and changed clothes: by that time it was getting light outside, and we were to meet Casey Hill (Ruthann's editor), for breakfast; San Francisco is chilly, which Ruthann hates: we didn't bring nearly enough warm clothes.

Friday, May 24
San Francisco: met Casey and two effete intellectual snob friends of his for breakfast; headed over to American Booksellers Association ("ABA," the other ABA, the fun ABA) Convention, where Ruthann stayed in *New Pages*

booth with Casey and I got books autographed; called Craig: CCR bill passed Senate (this is the actual bill, the substantive legislation to create the office: earlier it was just the funding, which actually was the most important part anyway): some Amendments to the bill (Senate confirmation of the CCR director, etc., so must go back to House or Conference Committee): Langley put up a big fuss and tried to kill the bill, but it's safe now: jury override bill is stalled, 8-8, in House Judiciary Crime Committee: they want to get Speaker Thompson to let Elaine Gordon come in to break the tie in our favor.

Saturday, May 25:
San Francisco: Ruthann at ABA; I watch Larkin.

Sunday, May 26:
San Francisco: Ruthann at ABA; I watch Larkin.

Monday, May 27:
San Francisco: Ruthann at ABA; I watched Larkin, and we wandered around the city; called Craig from Castro Street payphone: *Francois* lost in Federal District Court: 24-hour stay; U.S. Supreme Court ordered Joan to answer my cert. petition in *Randolph.*

Tuesday, May 28:
San Francisco: Francois and Magill originally set to die: *Magill* safe with stay, *Francois* lost in Eleventh Circuit panel (panel: Judge Vance, Judge Henderson and Judge Clark); ABA in morning, and in afternoon went to City Lights Bookstore (Lawrence Fehrlinghetti's store) in Chinatown.

Wednesday, May 29:
San Francisco: Craig: *Francois* lost in Eleventh Circuit *en banc*, unanimously: no panel oral arguments: Craig sounds very depressed and is worried about Mark Olive and Steve Malone, who now have to jump into *Mason* and *Lightbourne*—no stay papers or Rule 3.850 or *habeas* or anything yet written in those cases: CCR bill passed House, with changes—Senator Dunn has "changed" his strategy (??!!) and is bringing the jury override bill up to the full Senate tomorrow (so he must have gotten it out of Appropriations Committee, one way or another): no word on status of override bill in House.

Thursday, May 30:
Marvin Francois executed in Florida, a few minutes past 7:00 a.m.; San Francisco: Ruthann's Women's Writers Conference starts today in Berkeley (all men, Larkin as well as I, excluded from even entering the building); Ruthann at conference all day; Larkin and I spent all day bouncing around

Berkeley, which is everything I'd hoped: everything from the graffiti in the bathrooms to Cody's Bookstore to the street musicians to Sproul Plaza speakers (today it was anti-apartheid protestors, rather than Berkeley Free Speech Movement and Mario Savio as in the good old days); warm weather, too; called Craig from payphone: Francois killed this morning: Florida Supreme Court ordered life sentence in *Barclay* (based on jury override) and re-sentencing for *Dugan, Barclay's* co-perpetrator: jury override bill is "dead": Senator Dunn pulled it from special calendar, after more sponsors defected. Night: Susan Griffin read from her new book on war: she was spellbinding.

Friday, May 31:
Berkeley: Larkin and I ate a huge breakfast at a diner (I ate most of his), then we stretched out on a grassy hill and looked at the sky and watched the clouds go by for most of the afternoon; called Dick: Craig has set Monday as his date to decide whether to go for the CCR job: Dick thinks Craig will do it; Mike Corin in Tallahassee might go after the job, too, but he'd rather work in the program with Craig as the director than to run the program himself: Governor Graham signed two more death warrants today.

Saturday, June 1, 1985:
San Francisco: Fisherman's Wharf, trolley car, general tourist stuff with Ruthann and Larkin; flew from San Francisco to West Palm Beach.

Sunday, June 2:
Rested at home.

Monday, June 3:
Spent morning briefing Mike Lehman, new summer clerk in office from Columbia Law School (tall and skinny and smart as hell) on *Spaziano* hypnotism issues; *Ford en banc* petition denied, following poll of judges; Scharlette: four override sponsors defected from our side of the bill: Craig to decide today on whether to take CCR job; I asked Craig: no decision today; Florida Supreme Court granted stay in *Mason*, denied stay in *Lightbourne*. 5:00 p.m.: no word yet on *Lightbourne*: the case is sitting in federal district court in Jacksonville (Judge Moore); Craig: he needs to talk to Susan Cary before deciding on CCR job: he thinks I would need to stay here for a "while" to get *Spaziano* in shape: this whole CCR thing is getting messy: he says I can go to CCR "anytime" later: Hmmmm.

Tuesday, June 4:
Mason and *Lightbourne* set to die today: *Mason* has Florida Supreme Court stay, *Lightbourne* stay application pending in Federal District Court; talked to Mike Lehman about *Spaziano* and Craig about money for Dr. Diamond and Dr. Buckhout to be our experts on hypnotism: Craig said that if I haven't heard from them by Friday, I should call to see what's going on; Mike Lehman will start researching the state of the scientific knowledge of hypnosis at the time of Joe's trial (January 1976), since the research done so far is unacceptable—what we have to do is establish what scientific literature on hypnosis Joe's trial lawyer *would have found at the time* of the trial, had he bothered to look for it, which he didn't; Craig: Judge Moore stayed *Lightbourne* execution at 9:00 p.m. last night, after oral argument; Max Rudman, former Assistant Attorney General, now has a jury override case, and is coming in on Thursday to talk with me about it; I went over latest override article draft; confusion over *Griffin*: Scharlette told Craig *Griffin* had lost, but others say he got a remand on racism issue: Griffin's case had case-specific racism, in the record; *Spaziano*: I talked to Dick about meeting with Ed Kirkland: I decided to be straight with him that I was raising a claim of ineffective assistance of trial counsel, and that I was trying to gauge his strategy (such as it was) at the time of trial.

Wednesday, June 5:
Flew from West Palm to Orlando: *Miami Herald*: *cert.* denied in *Rose* (Louis case); beginning at 2:00 p.m., met with Ed Kirkland for three hours: the first thing he asked was whether I felt hypocritical asking for his cooperation, at the same time I was challenging his effectiveness at trial (I admitted that I did, a bit): he was hostile to that claim, and loaded with "strategy" bullshit reasons for not challenging hypnotism at trial: he was vague on his pre-trial investigation, but it seems that he limited it to Florida cases, which would have meant he didn't find anything of value, had he looked, which I am still convinced he didn't: but he is into the waiver/competency issue, and will give me an affidavit on this: I walked through the claim with him, and probed logical flaws (he's a syllogism nut, fancies himself something of a student of philosophy): in all, it was a very intense meeting.

Thursday, June 6:
A trial lawyer told me that Judge Mounts (the trial judge in *Martin*, and the smartest and most scholarly judge in Palm Beach County) has my jury override article in the *Palm Beach Post* newspaper pinned to his bulletin board; *Spaziano*: Mike Lehman: Ed Kirkland messed up bad in deciding, without investigation, not to challenge hypnotism in 1975 and 1976—even then, he could have mounted a powerful challenge to the admissibility of

DeLisio's hypnotically influenced testimony, based on a lot of published scientific literature, and even a few cases from other states; *en banc* Eleventh Circuit opinions are out: the *Sandstrom* cases came out well, but the prosecutorial argument/misconduct cases overruled most of *Hance v. Zant*: still, the things they say about deterrence are good for the *Lockett*/deterrence issue in *Martin*, except that Judge Kravich (who is on my *Martin* panel) dissented on this point; Craig worked on *Hitchcock* argument: talked to me about it until Dick came in; *Simpson* oral argument set: panel is Downey, Anstead and Rivkind; I called Judge Vance to chat—he does not understand why we don't raise hell about Governor Graham's "games" in signing death warrants on people Graham knows are not presently represented by lawyers—he says Judge Kravich is getting mean in death cases—he was glad to hear about CCR, and hopes I will go work there, but is worried that it would burn me out.

Friday, June 7:
Craig: he won't decide on CCR job until after *Hitchcock* Eleventh Circuit *en banc* oral argument on Monday: he talked to Scharlette for two hours last night, and Susan Carey for two hours the night before, and he's "split down the middle": says he must decide by the end of next week: nominations for CCR must go to Public Defender subcommittee by June 17: Bob Link (who signed off on our last-minute papers in *Sullivan* in Jacksonville) is interested; spent three hours on phone with Kim, executive editor of *FSU Law Review*, making changes: hoping to send to printer next week; *Spaziano*: Mike Lehman is done researching cases and law reviews on hypnotism—needs to go to medical school library at University of Florida, so he and I plan to go up this weekend and to stay with Radelet to do the research; last night, Estella and Dahlia had a three-hour screaming match in our house, which ended with Dahlia's "confession" to Ruthann and I that they are gay (no shit, Buckwheat): Estella does not want Dahlia to go on a trip with her: this continued by phone at work today: Estella is hiding from Dahlia in our house.

Saturday, June 8:
Estella spent last night at our house taking harassing calls all night, presumably from Dahlia (call and hang up) until we disconnected the phone: Estella went home at noon and came back later: Dahlia enlisted Estella's sisters, and is telling everyone that Estella and Ruthann are fucking each other: phone calls kept up until I threatened to call the phone company on Dahlia: Estella went home last night, finally.

Sunday, June 9:
Estella and Dahlia reconciled: Dahlia called to apologize, and I said we have nothing to say to her: then Estella came over and said it was all a big mistake: later, Dahlia called again and Ruthann told her the same thing that I had; no harassing phone calls all day; *Miami Herald*: Joseph Mengele's body thought found in Brazil: the "Angel of Death" at Auschwitz.

Monday, June 10:
Hitchcock and *Songer* oral arguments before Eleventh Circuit *en banc* court in Atlanta; went over the new Eleventh Circuit *en banc* opinions: Steve Bright won *Brooks* on jury instruction on intent issue, and Joe Nursey lost *Tucker*; Craig called Dick and I from Atlanta about Hitchcock oral argument: Judge Tjoflat dominated the argument with his procedural default stuff: no one else could get a word in edgewise, except Judge Godbold who kept asking what our theory was ("it's time to fish or cut bait, counsel"): Craig said it was a "hot" bench, and that he got emotional: Judge Morgan was there, since he was on the panel: we need seven votes in the *en banc* court to win: should be a long time until opinions come out, since Tjoflat will write something, and that always takes a long time; U.S. Supreme Court granted *cert.* in *Burbine v. Moran*, confession issue: bad sign for *Martin*; Mike Lehman came home with Ruthann and I, after being robbed and almost stabbed in his apartment: he'll stay with us the rest of the summer.

Tuesday, June 11:
End of *Spaziano's* ninety-day grace period from the Governor: he is now at risk of warrant; *Miami Herald*: Mengele's body may now be a hoax: still very unclear; Craig: sounds like *Hitchcock* oral argument went well: Judge Vance asked him about life plea issue: court understood the *Cooper/Lockett* issue and seemed concerned, but it's hard to find seven votes on that court; Susan Cary in office, until Saturday, working on getting affidavits from *Spaziano* family members (and a million other things); Craig: "I'm not impressed by your (read my) court ... I was throwing pearls before swine" at the oral argument yesterday; got State's reply in *Randolph*: I may respond, since Joan says that his house was not surrounded by cops, which may hurt the *Payton*/Fourth Amendment search and seizure issue. Afternoon: wrote *Randolph* reply to Joan's op cert. 4:00 p.m.: left to get Larkin (Ruthann all day in meetings). 6:30 p.m.: came back to pick up Mike Lehman and correct *Randolph* reply brief, and left it with Ray. 8:30 p.m.: back in office to make final corrections on *Randolph* reply.

Wednesday, June 12:
Day fourteen of Craig/CCR job watch: Craig: feels he has no choice but to take CCR job, since no one else really on the horizon: he was called by Skip Babb, Judge Lucky, etc., urging him to apply: Dick's argument to Craig is that he can't take it just because he's being pressured into it: he has to want it; I xeroxed and put together *Randolph* reply brief: Fed Ex'd to U.S. Supreme Court; called U.S. Supreme Court clerk's office: still have not received Joan's op cert. in *Randolph*: Justices may conference *Randolph* on June 27, or may be held until end of the summer; *Spaziano* got call from Dave Hill, from State Attorney's office: no tape recordings were ever made of Tony DiLisio's hypnotism sessions—Claude Van Hook, *Spaziano* prosecutor, does not recall anything about hypnosis; Florida Supreme Court rehearing denied in *Sireci*: I called Jeff to file our cert. papers in *Sireci* immediately. News: U.S. Supreme Court decided *Caldwell v. Mississippi*, vacating death sentence, saying the jury was mislead about its crucial role in the capital sentencing process: must see how this effects jury override cases in Florida[613]; spent long time talking about *Sireci* mental issues with Dick.

Thursday, June 13:
Called Kim at *FSU Law Review*: jury override manuscript sent to Darby Publisher yesterday: galleys should be in to FSU on Monday, and to me on Tuesday: will then have forty-eight hours to make corrections and get back to them: they want to send back for page proofs by next Friday; called Jeff Robinson: he's a father, again, to a son named Joshua: he also filed the *Sireci* cert. papers yesterday; talked to Susan Carey, who is getting together information on *Joe Spaziano* as a person—background, family history, medical history, etc.; Craig: only wants me to go to CCR if he goes, too: "we have developed a symbiotic relationship . . .": he is still very undecided on whether he will go: "in the mornings, I decide to stay in West Palm Beach, and in the afternoons, I decide to go to CCR."

Friday, June 14:
Called U.S. Supreme Court clerk's office: *Randolph* conference set for June 27; *Palm Beach Post* newspaper: *Jones* and *Harris*, the two active death warrant cases, lost in Florida Supreme Court yesterday; got in jury override article manuscript: went over it, and it's much better than I had expected: Kim is much better than Barb; Dick thinks Craig is inclined not to take CCR job, mainly because he does not think he can survive death warrant after death

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613. Mello, *Taking* Caldwell v. Mississippi *Seriously: The Unconstitutionality of Capital Statutes that Divide Sentencing Responsibility Between Judge and Jury*, 29 B.C.L. REV. 233 (1989).

warrant: thinks he'll tell someone this weekend, but big outcry might change his mind back again: Dick thinks Mike Corin will get the CCR job; oops: *Jones* and *Harris* aren't the warrants: *Wilson*, one of them, is about to go into Rule 3.850 or Federal District Court—it's great having the Resource Center to worry about these cases, rather than us, since, otherwise, Craig and Dick and I would end up working on them; at the end of the day, Craig still hasn't decided on CCR job.

Saturday, June 15:
Talked to Jimmy Lohman for an hour: he has no idea what Craig is going to do: thinks Mike Corin or Bill White are the other strongest contenders: he does not know Monday is the deadline: he thinks Corin would be okay, although he may be difficult to work with (moody, burned out, extremely cynical), but really cares about the people on the row and has helped Scharlette in the past: Jimmy also said Scharlette said the *Hitchcock en banc* Eleventh Circuit argument doesn't look good: Team Defense is very bitter about the Eleventh Circuit and the recent *en banc* cases.

Sunday, June 16:
Mike Lehman left for Gainesville with Susan Carey to do research at medical school library on hypnotism issue for *Spaziano*.

Monday, June 17:
Read cert. petitions in *McCleskey*, the big Georgia racism case: brilliant; Dick thinks Craig won't take CCR job; Susan Carey spent all weekend lobbying Craig to take the job: she found it very hard to do, as Scharlette had earlier; Scharlette called, sounding bitter: Craig has not decided, but leaning very strongly against it; Governor Graham told Sharon Jacobs that he wouldn't appoint Craig as CCR anyway; Public Defender Association pushing Mike Minerva, the PD *Bundy* fired as his lawyer, who Scharlette called "a washed-out alcoholic has been": she called Craig "just another white man deciding whether to take one $50,000-a-year job or another, with more loyalty to his career than to poor people": Governor may veto funding for CCR if Craig is the only real person nominated by the Public Defenders' Association; at the end of the day, Craig told me that he had decided: decided not to do it; Minerva is most likely person now; worked on *Spaziano* all day.

Tuesday, June 18:
Sarah Bleakley called: Scharlette suggested she apply for CCR job: we talked about problems getting experienced staff and in dealing with the legislature on issues like CCR autonomy, successor *habeas* petitions, etc.; *Spaziano*: Dr. Diamond called: hypnosis of DeLisio was suggestive and incompetently done:

the state of medical knowledge in 1975, at the time of Kirkland's preparation for Joe's trial, doesn't kill Kirkland: it will make an ineffective assistance of trial counsel claim hard; I talked to Dick at length on *Elledge* and *Spaziano*: I will do the direct exam of Daniel Elledge, the brother; I went over *habeas* petition and State's answer in *Elledge*; Scharlette called at home: said *Hitchcock* oral argument went badly: every judge who spoke focused on procedural default and prejudice, which Craig and Dick had avoided in the briefs: Judge Anderson said to Deval Patrick, during *Songer* oral argument, "I was impressed by your papers, but I'm not now": she thinks *Songer* will win and *Hitchcock* will lose: she said CCR nominating deadline has been pushed back to Friday, and that Public Defender Association will recommend their three names on June 27: only three names have applied so far (Mike Corin, Bush and Helm), but other possibilities: Mike Von Zampt, Sharon Jacobs, Bob Link, Larry Spalding: she is now worried that I can't leave here, since probably can't take *Martin* case with me to CCR.

Wednesday, June 19:
Rich Rosen, U.N.C. Law School called: working on his HAC article: wants to send draft to me; got in galley proofs for jury override article: bad shape: spent all day on them; *Johnson* got stay: court appointed CCR to represent him, even though CCR doesn't exist yet.

Thursday, June 20:
All morning: talking with Dick about dividing up *Elledge* issues; Bivens gets life sentence, even after his escape: Frank Kessler thrilled; Radelet sent copy of Florida State Prison's internal "execution guidelines" covering internal administrative procedures during the week of Deathwatch prior to the killing—these things are blood-chilling and bloodless bureaucratese like Arendt's discussion, in *Eichmann in Jerusalem*, about how the final solution euphemized the killings, calling them anything other than "killings"—these FSP guidelines are typed on a manual typewriter, with typos and filled-in letters, which somehow gives them a banality-of-evil quality (or maybe an evil of banality quality)—the graphic description of electrocutions; Scharlette: Florida Supreme Court ordered new trial for *Hill*, if State can show he was mentally competent; stay in Wilson; the Public Defender Association's CCR nominating committee is Louis Frost, Bennett Brummer, and Virgil Mayo (!!!): will interview Wednesday: Mike Corin refuses to be interviewed ("they want me or they don't"): names before the committee are Von Zampft, Corin, Austin Maslonic, John Middleton, Bush, Helm and Larry Spalding. Night: Mike Lehman back from Gainesville, and his research into hypnotism went well: Susan Cary took him to Florida State Prison for visit: he met Ford,

Spaziano, Elledge and McCray: Joe gave him a painting to give to me, and he did.

Friday, June 21:
Called Kim King, *FSU Law Review*: they got my revised galleys, and will put changes in computer this weekend: off to Darby printer on Monday, and hopefully the page proofs will be back next week; Eleventh Circuit denied relief in *Adams* (*Aubrey*), with Judge Frank Johnson writing the opinion (same Eleventh Circuit panel as in *Aldridge*: last September, Eleventh Circuit had granted stay in *Adams*): *Adams* is Ken Hart's case: although the court affirms denial of *habeas*, it criticizes Judge Moore's conclusory treatment of the case (his haste in denying a stay and lack of calm deliberation on the merits?); *Cape*, Georgia case, Steve Bright: Eleventh Circuit denied rehearing *en banc*; Jeff Robinson called: lost *Booker* in Eleventh Circuit, three-zero: told him to call Steve Booker before he heard it on the evening news: but what the fuck can you say? To Jeff or to Steve?; gave article corrections, including misspelled words, to Kim at FSU.

Saturday, June 22:
Drafting *Elledge* memo on deterrence; *Miami Herald*: experts say body is Mengle's: Simon Weisenthal says he's "99% certain" it's him.

Sunday, June 23:
Worked on *Elledge* memo; more corrections to Kim at FSU; called Scharlette: Jimmy Lohman will send me audio tapes of CCR legislative hearings: she's working on questions to be asked at CCR interviews on Wednesday (Louis Frost asked her to do this): Craig will be there representing Dick Jorandby on the PD Association: Scharlette visualizes me "selling" issues to the skeptical people in the legislature (*i.e.*, explaining why claims of ineffective assistance of counsel aren't a waste of time, etc.): she's talked to Mark Olive about this.

Monday, June 24:
Wilson and *Johnson* set to die in Florida; Anne Olsen called from Steptoe and Johnson law firm in DC: they represent *Miller*: wanted information on *quorum nobis* (newly discovered evidence of innocence) issue in *Henry*, and jury override; Jeff Robinson called: I suggested he do the *quorum nobis* attack, too, in *Booker*, as the second successor *habeas* issue (linguistic question: should we call a third *habeas* petition a third *habeas* petition, or a second successor?): sent him *Henry* papers; drafted confession issue in *Elledge* memo; *FSU Law Review*: decided to go through the second set of galleys on jury override article: they should arrive here Friday; I noticed, in flipping through recent U.S. Supreme Court orders, in U.S. Law Week, that *Stano* has

had *cert.* denied; Jeff called: Steve Goldstein of FSU called: it's the first salvo of FSU Law School's campaign to get him to come there to teach: Jeff and Goldstein will meet at Airlie Conference in Virginia next month.

Tuesday, June 25:
Charles Milton executed in Texas (I did not hear until Wednesday, reading in *Miami Herald*): Maurice Mason executed in Virginia: eight years since the crime in *Martin*; Kim at FSU: now decided not to run another set of galleys: page proofs should be in next week; drafted confessions issue for *Elledge* memo.

Wednesday, June 26:
Miami Herald: two executions yesterday; *Palm Beach Post*: Mason's lawyer was Lloyd Snook, who I met at Airlie last year; I looked up the two federal appellate court decisions in *Milton* and *Mason*: the *Mason* opinion from the Fourth Circuit was only three pages long, and he had an *Ake* claim: Professor Richard Bonnie of UVA was on the brief for *Mason*: U.S. Supreme Court decided *Baldwin v. Alabama*: mandatory death recommendation statute is okay, so long as jury sentencing recommendation is nonbinding and subject to judge override: affects 10 cases in Alabama: this may mean that errors before jury don't matter, though *Tedder* may save us in Florida; there have been fourteen executions so far this year—last year, as of this time, there had been nine—the year before, there had only been one; drafted *Elledge*.

Thursday, June 27:
Ruthann's birthday; U.S. Supreme Court conference on *Randolph* cert. petition; Dick made more *Elledge* corrections last night, so memo not done yet; U.S. Supreme Court decided *Jean v. Nelson*, affirming Judge Vance's result against the Haitian refugees, but not reaching the constitutional issues; Scharlette called: still no word on the seven CCR candidates interviewed yesterday: the PD committee may announce their three choices today or take it under advisement for three weeks: she said some of "our" choices are "scum": One is "stupid, malleable and handsome": he was very rude and condescending to Scharlette (he doesn't think CCR should file any successive *habeas* issues, etc.): Ed Stafman she "liked until he walked into the interview": her "favorite is Larry Spalding, since he's so stupid": she thinks Van Zampft is the more likely choice: Stafman said they said that Mike Van Zampft is the only one they all agree on so far: Corin still in the running, even though he didn't go to the interview; Dick: Van Zampft said that if he gets CCR job, he wants Dick to run a South Florida office: Sandy D'Alamberte will give Craig a teaching job at FSU if Craig would take CCR job; Dick: Judge Davis's law clerk said he expects the court to rule from the bench on

Wednesday in *Elledge*. All day and night until 10 p.m.: edited and produced *Elledge* papers; Craig: no Public Defender Association nominations for CCR until July 16; Steve Malone stayed the night: talked mostly about CCR (he'll work there, in St. Petersburg).

Friday, June 28:
Called U.S. Supreme Court clerk's office: cert. result in *Randolph* won't be released until Monday; putting *Elledge* papers in final form: that took all day; Florida Supreme Court affirmed jury override in *Brown* yesterday: I read this in *Palm Beach Post*; Ray corrected and printed *Spaziano* 3.850 motion: I sent to Tony Amsterdam; Craig told me that he had sent a confidential and personal letter to Louis Frost, giving his choices for CCR, in order of preference: Corin, Von Zampft, Spalding, Stafman, Middleton, Maslonic, Helm, and Bush.

Saturday, June 29:
Worked on *Elledge* hearing; did direct examination questions for Roach and Don Elledge.

Sunday, June 30:
Ray typed *Elledge* questions; I went over them with Ruthann and made corrections.

Monday, July 1, 1985:
Bill Elledge evidentiary hearing in Miami before Federal District Judge Davis begins tomorrow: Dick and I will do it: our witnesses come in today: prep them for tomorrow's hearing; Jeff: *Booker* Eleventh Circuit opinion, written by Judge Henderson, is "garbage"; called U.S. Supreme Court clerk's office: *cert.* denied in *Randolph*. 11:00 a.m.: drove West Palm Beach to Miami, with Dick and Mike Lehman: checked into hotel and met Connie and Danny (Bill's brother and sister): I went over direct examination with Danny for three hours, until 6:30 p.m.: Danny and Connie met Bill at the jail, and we went to airport to meet Ken Roach: went to hotel and went over testimony until 1:30 a.m.: then met with Dr. Dorothy Lewis in Dick's room: went over possible cross examination of her, focusing on discrepancy between statements by Bill on sex with Connie and what she'll testify to under oath: also a problem that she's never done a psychiatric evaluation of Danny or Connie, and they come from the same hell of a home life as Bill—but they never killed anyone.

Tuesday, July 2:
Bill Elledge evidentiary hearing in Federal District Court in Miami: our evidence: Connie went on first: Dick did direct examination: then I did Danny

Elledge and Ken Roach: uneventful: the witness preparation really paid off: the State's cross-examination was light and cordial, showing how normal they were (Connie and Danny were): I took Roach through facts of Bill's other killings: then to Dr. Dorothy Lewis, who was great: reasonable, explained her reasons for conclusions, witty and engaging: prosecutor Michael Satz did a hardball, nasty, ridiculing cross-examination, belittling her impatiently, trashing her resume, and hitting very hard on those parts of her report that were based solely on Bill's own statements: he hit the Bill/Connie sex thing: he called her "doc" and said snide things; but she stood up well: as Satz was going, it seemed to me that they would call no one of their own to testify; I helped Dick prepare for closing argument at night and went to sleep about midnight.

Wednesday, July 3:
Bill Elledge evidentiary hearing in Miami: State's evidence: State decided not to put on any witnesses, so we went straight to closing arguments: Dick did ours, Penny Brill did the State's, using some of the invective tone that Satz had used yesterday: Dick's rebuttal was great: Judge Davis didn't rule from the bench; drove from Miami to West Palm Beach: *post mortem*: roller coaster, from a very high on Tuesday night, that Dorothy Lewis had beaten Satz to a pulp, to a low today, tempered by knowledge that Dorothy really had done well and no case is perfect: Judge Davis seemed to like Dorothy and should be savvy enough to see through the State's slime: but Jerry Justine and Ken Roach thought that Satz had really hurt her and made her seem unprepared for her testimony.

Thursday, July 4:
Independence Day from work: beach and relax.

Friday, July 5:
Worked on *Spaziano* 3.850; Steve Bright called: he is concerned about CCR: wanted to talk about Mike Von Za.mpft: Steve Bright said *he* is thinking about seeking the CCR job, but only if Von Za.mpft is a clear disaster: Steve said he had heard that I was considering working for CCR, and I said I was thinking about it, depending on who the director was and how the office would be structured: Steve was concerned that whoever the director was they might not hire Mark Olive; Scharlette called: all of the CCR candidates are "pretty mediocre": Sandy really dislikes one of them and wouldn't let the CCR into the law school if he's the director—Sandy thinks he's crude, alienates people, etc.: Sandy (and his wife) are making a big effort to get Steve Bright to come

down to the CCR: Sandy's wife is pushing for Mark Olive to be litigation director of CCR: Hmmmmm.

Saturday, July 6:
Got jury override memo from Scharlette in meeting last Monday: Senator Dunn not expected to sponsor override bill again (because of his running for Attorney General): mapped out legislative strategy for next session: create an "umbrella" committee of big names (former Florida Supreme Court Justice England, former Governor Askew, John DeVault—the lawyer in *Lindstrom*) to hold press conference in support of override bill, etc.: Amnesty International (Charles Fulwood) has done opinion poll, the results of which are being compiled now.

Sunday, July 7:
Beach.

Monday, July 8:
Dick Burr: if Steve Bright does CCR job, then Mark Olive will take over SPDC in Atlanta: we talked about a possible "draft Craig" effort, now that we know for sure who the other CCR possibilities are very remote possibility of success for such an effort; *Spaziano*: called Ed Kirkland: he is not there, and did not call me back: same with Dr. Diamond; no air conditioning in office: putrid in here most people left at noon; Kim King: page proofs should be in tomorrow on jury override article; Jack Boger at LDF: wants me to be on a panel at Airlie for Friday morning, with Joe Nursey, Tim Ford and Ken Rose, on *habeas* litigation generally in federal court: panel would be three hours, from 9:00 a.m. to noon; called Joe Nursey: he and I will just meet on Thursday: he said that *Thomas* lost in federal district court after the evidentiary hearing, following *Thomas v. Zant*, and is back in Eleventh Circuit: he argued in April (panel: Judge Fay, Roney, and Johnson) and can't really call it; last week, the Florida Supreme Court affirmed the jury override in *Brown*, thus continuing the post *Spaziano v. Florida* trend of affirming jury overrides in Florida Supreme Court, rather than reversing three quarters of them, which it had done pre-1984; U.S. Supreme Court granted *cert.* in *Carrier v. Hutto*, to decide whether ineffective assistance of counsel can be "cause" under *Wainwright v. Sykes* procedural default law; Supreme Court also decided an awful discovery (*Brady*) case, which probably guts the issue in *Sireci* and *Spaziano* — which was not strong on the facts to begin with in *Sireci.*

Tuesday, July 9:
National Public Radio: there was an execution in Texas this morning, the guy's name is Henry Porter: nothing about it in *Miami Herald* or *Palm Beach Post*; got in page proofs of jury override article and went over them; Mike Radelet: neurologists in Gainesville are doing research on the brains of the executed men: I put him in touch with Dick Burr and Dorothy Lewis; Scharlette: she talked with Low Frost: Frost is pissed at Corin, worried about Von Zampft's temper, liked Larry Spalding and Ed Stafman: Scharlette is pushing Spalding: "I want his name to be one of the three"; *Spaziano*: Dr. Diamond called: his report on DeLisio hypnotism is on the way to me: Buckhout will have his report by July 19; shouldn't be more than $500 for Buckhout; talked with Craig and Dick about *Spaziano*: Craig called Art Weidinger to explain why we need more time without a death warrant: hypnosis issue, family history, etc.

Wednesday, July 10:
Associated Press: U.S. Supreme Court Justice Louis Powell considering resignation due to illness (cancer surgery); finally found out the name of the person Texas killed yesterday: Henry Porter: small story about it in *Palm Beach Post* newspaper; Rhoda Kibler called: wants me to speak about jury override legislation at section meeting of Florida Bar Individual Rights and Responsibilities Committee on September 9, in Tampa; on June 3, U.S. Supreme Court denied *cert.* in *Curfew Davis* (Roosevelt Green's co-defendant) following loss in Eleventh Circuit *en banc*: Eleventh Circuit reinstated panel opinion requiring new sentencing on jury composition—Green had exactly the same issue, but now he's dead, so he can't raise it; headed for Airlie Conference in Warrenton, Virginia: flew West Palm Beach to Washington National Airport: dinner with Jeff (who met me at airport) at Ethiopian restaurant in DC; arrived at Airlie as cocktail party was in progress, and Joe Nursey immediately took me aside by the bar, and told me that the Eleventh Circuit had just ordered a new trial in *Thomas*—not just a new penalty phase, but a whole new trial, based on *Sandstrom* jury instruction issue that didn't even exist in 1983, when I drafted Judge Vance's opinion in *Stanley*, or in 1984, when *Stanley* was executed—only came to be recognized in last year and a half—*Stanley* had the identical jury instruction, Patsy Morris told me—not raised on appeal by *Stanley's* lawyer, the great ACLU lawyer, who filed the amicus brief in *Gideon v. Wainwright*.

Thursday, July 11:
Airlie Conference in Virginia in Warranton, Virginia: Millard Farmer gave an eloquent speech warning of the dangers of state-funded and controlled institutions like resource centers and CCR (he did not mention CCR by name,

but. . .he didn't have to) becoming "masks of the executioner"—so domesticated and co-opted that all they'd do is grease the skids: later, I spoke with Millard privately and told him he'd talked me out of going to CCR, but he said that wasn't his intent—go, just go with my eyes open, aware of the dangers, risks and seductions of working within the system to change it; Florida people met to discuss CCR: finally decided to support Von Zampft for CCR, after initially going for Larry Spalding: a speech by Pat Doherty turned it around: Steve Goldstein putting the hard sell on Jeff Robinson to come teach at FSU: Jeff got sick and stayed night in my room at Airlie while I prepared for my seminar tomorrow morning.

Friday, July 12:
Airlie Conference in Warranton, Virginia: my portion of seminar was a total disaster—Steve Bright went before me and said everything I had planned to say: Florida people pretty much ignored me the rest of the day: this is why I hate public speaking, and would be much happier just left in a back room to write briefs, with someone throwing sandwiches to me every once in a while; Florida people met to discuss death row conditions suit under section 1983: LDF could fund it; Scharlette said that Von Za.m.pft had offered her a job at CCR: decided we would all go meet with him in Miami, to "bond" before the Governor announces his choice: talked about whether CCR would take the thirty presently unrepresented people, or just take new cases in post-conviction as they came off of *cert.* denial from direct appeal—these thirty are the ones most at risk of death warrants, which means they'll be the hardest cases to find volunteer lawyers for—exists and "solves" the counsel crisis, taking pressure of lawyer to take (and continue with) these cases—some will be dumped on CCR.

Saturday, July 13:
Airlie Conference in Warranton, Virginia: Dick Burr did seminar on burnout, which really hit a nerve with the group—Jack Boger pointed out that we also need to be able to get *out* of deathwork, without guilt, which hit a nerve with me, because by now I feel almost completely alienated from the people around me, the community of death workers, my family; left Warrenton by bus at 2:00 p.m. for Washington National Airport: most Florida people on the same bus, but I kept to myself; very wonderful homecoming with my parents in Virginia.

Sunday, July 14:
Alexandria, Virginia: Stayed at mom's; dad came over for a visit.

Monday, July 15:
Alexandria, Virginia: Still at mom's apartment; had been scheduled to call Dr. Buckhout for a progress report, but didn't do this.

Tuesday, July 16:
Dumfries, Virginia: Went to dad's house, after visiting Uncle Eli in DC.

Wednesday, July 17:
Dumfries, Virginia: Visited at dad's house in Dumfries, Virginia; drinks with Jim Coleman, Marian Lindberg and Jeff Robinson: a little awkward at first, but generally fun: three hours or so: then went to Jeff's house and saw Donna, Josh and Michelle: Jeff says they're trying to get Lloyd Cutler, the grand old man of the Wilmer, Cutler & Pickering Law Firm, to sign the *cert.* petition as lead counsel in *Booker*.

Thursday, July 18:
Dumfries, Virginia: At dad's house: Dick Burr called: Public Defender Association nominated Von Zampft, Larry Spalding and Dave Bush: Dick said that the group decided to meet Von Zampft tomorrow, which means I can't attend, but I do not really care too much about that: Dick says Craig isn't totally opposed to opening a CCR branch out of the West Palm Beach Public Defenders' Office (Dick and I discussed this at Airlie).

Friday, July 19:
Relaxed with parents in Northern Virginia.

Saturday, July 20:
Flew from DC to West Palm Beach: took cab to house from West Palm airport: flight arrived at about 10:00 p.m.

Sunday, July 21:
In office: *Spaziano*: got Dr. Diamond's hypnoses report, and it's great: Kirkland wants summary of what I need in his affidavit, so I wrote down some notes to send him; wrote supplemental authority notice for *Simpson*; read State's opposition to my *cert.* petition in *Sireci*: nothing new; revised page proofs of FSU jury override article: will be Fed Ex'd to FSU from Darby on July 23.

Monday, July 22:
Spaziano: Called Dr. Buckhout: his report is on the way: sent him Dr. Diamond's report; revised *Spaziano* 3.850 to include Diamond's report: called Ed Kirkland's secretary: the summary he requested is on the way; Dick: the

meeting with Von Zampft went very well, except that he said something that offended Scharlette and now she doesn't want to work at CCR, if he's the director: big lobbying effort on now to change her mind on this; later: Dick thinks she's really decided not to work at CCR, and Debbie Fins thinks so too; met with Steve Ellman, Mike Lehman's supervisor at Columbia Law School, on how great the internship program here is, and how we want them to send someone next year, again: he said they may be able to send two people next year; Dick: Von Zampft really wants Dick and I to come to work for him at CCR: he had heard of me from somewhere; *Spaziano*: Jerry Justine: tomorrow he will call relatives of Spaziano for affidavits on family background: on Wednesday, he goes to meet with the hypnotist, McColley, to nail down where the transcripts of the hypnosis sessions of DiLisio came from; Radelet sent latest draft of our *Henry* article; came back to work after dinner: worked on *Simpson* argument until 11 p.m.

Tuesday, July 23:
Jeff Robinson called: he is having an interview lunch with one of Judge Vance's new clerks, someone from University of Chicago: Jeff is also getting amicus briefs together in support of *Booker cert.* petition; I did outline of oral argument for *Simpson*: have to leave work early to watch Larkin, until Ruthann gets back from meeting in Sebring; Eleventh Circuit denied *habeas* relief in *Daniel Thomas*, a Florida case, with Judge Johnson joining the majority on the panel; went home at 2:00 p.m. to watch Larkin; Lee Currie called: one of the *Simpson* judges is stuck in Tallahassee, so the oral argument is rescheduled for Thursday at 8:30 a.m.—very bad weather here in West Palm, too; Scharlette called: Von Zampft is a "scumbag motherfucker": he asked her, at the meeting, to take everyone's sandwich order: very sexist and white generally: no way she would work for him: she's waging an all-out war to get Larry Spalding appointed as CCR: has enlisted Sandy, etc.; Mark Olive said the same thing about Von Zampft and Spalding, and he sounded like he was in tears: Steve Malone refuses to work at CCR; good news on override bill: Senator Dunn will continue to sponsor it this year: he has a strategy to neutralize the State Attorney's lobby.

Wednesday, July 24:
Spaziano: Talked to Jerry Justine: went over the hypnotist's affidavit with him: he meets with the hypnotist tomorrow; wrote letters and memos; got in new page proofs from Darby printer, on jury override article: went over them: called Kim King at Law Review: final changes tomorrow; met with Dick Jorandby: he approved Dr. Diamond's bill, and he initialed it; case status meeting with Craig and Dick and Jerry Justine: mostly went over *Spaziano* and *Sireci* (Jerry doing reinvestigation of mental background and family

history stuff in both cases): set internal deadlines on finalizing investigation on mental issue and drafting Rule 3.850 and clemency in *Spaziano* and *Sireci*: deadline of September 15. Night until 11:00 p.m.: worked on *Simpson* oral argument at office.

Thursday, July 25:
Simpson oral argument in Fourth District Court of Appeals: argument went okay: many questions of me, very few of Lee Rosenthal, Assistant Attorney General: court will probably PCA (*per curium affirm*: summarily affirm, with no opinion) it; *Spaziano:* I met with Dick Jorandby: told him that Dr. Burkhout's bill would be less than $500: discussed the real need for these experts in *Spaziano*; called in corrections to Kim King at FSU: advance copies of the published article should be out in two weeks; Dick Burr: Scharlette is now calling CCR "Rosemary's Baby"—with her as Rosemary: Craig and Dick did not know she is now opposing Von Zampft's appointment, and they still think it could work out with her working with (for) Von Zampft: no way, not in this lifetime.

Friday, July 26:
Spaziano News Flash: Jerry Justine found audio tapes of Tony DiLisio's hypnotism sessions—he found them in the attic of the dead chief homicide detective on the case, George Abbgy—the problem now is that Dr. Dia.m.ond's and Dr. Buckhout's reports were based on partial transcripts of the hypnosis sessions, so now we need to go back to the starting line and have them do the whole thing over, with the actual audio tapes, but, still, it's very good news—Jerry driving up there today to get the tape from wife of one of the investigating officers; *Daniel Thomas*: has same issue as my *Ross* case: Dick Burr sending my *Ross* papers to Doug Duncan, Thomas's lawyer; the bad news from Patsy Morris: *Darden* lost in the Eleventh Circuit *en banc* court, seven to two: *Brooks* and *Tucker* had rehearing denied (rehearing had been sought in light of the U.S. Supreme Court's recent decision in *Caldwell v. Mississippi*): *Bowden* lost in Eleventh Circuit (on remand from U.S. Supreme Court); *Spaziano*: Jerry Justine in Orlando got the DiLisio hypnotism tapes from Mrs. Abbgy: played snippets to me—they *are* the hypnotism tapes we've been hunting for, all right, plus others we didn't even know about—six tapes in all; *Spaziano*: I talked with Dick Jorandby: he approved Buckhout's bill, and agreed to spend more money to get the tapes analyzed by Dr. Diamond and Dr. Buckhout so that their reports can be complete.

Saturday, July 27:
Miami Herald: Roberta Fox, powerful Florida senator who is indebted to Graham for pushing a child abuse package through the legislature this year,

is fighting Von Zampft's appointment at CCR, because he has been too zealous in representing daycare providers accused of molesting children (Country Walk case): Von Za.mpft is calling it a campaign of hysteria: when I spoke with Scharlette last week, she said she had enlisted Fox, after Von Zampft told the meeting that she is his enemy; worked in office on *Spaziano* until 1:30 a.m..

Sunday, July 28:
Worked on *Spaziano* in office all day.

Monday, July 29:
Governor Graham back in Florida: may get death warrants today: may decide CCR director today; Scharlette: Von Zampft sent letter to her: he seems to know she's behind the campaign to torpedo his appointment, or he's so arrogant that he doesn't see what's going on; called Scharlette: Von Zampft really messed up in attacking Fox: could have neutralized her by saying, "of course I care about kids, but I represent a man, a citizen accused of crime . . .": this only proves, to Scharlette, that he's too heavy-handed to run the CCR: Sid McKenzie told her personally that Bush is out of the running for CCR: Sid called her, off the record, for input: no decision this week or next week on CCR director: she says that she needs about 500 copies of my jury override article, to give to legislators: law school may pay for these; Craig: Art Weidinger, Governor's clemency aide, says hypnosis tapes in *Spaziano* should keep him safe from a death warrant for a month: says it's likely governor will appoint CCR tomorrow; called Steve Malone: he says Von Zampft is a "fucking pig": the whole meeting with Von Zampft and the group was degrading: Von Zampft lectured them on how great a lawyer he is: "I know you're all here to help me get appointed: here's how to do it . . .": no give and take at all: Von Zampft definitely wants Mark Olive, Steve Malone and Dick Burr to work for him: Larry Spalding clerked for Judge Goldberg, the great Fifth Circuit judge: that seems to me pretty impressive.

Tuesday, July 30:
Spaziano: Jerry Justine: the tapes in the attic *are* of the hypnosis sessions and prehypnosis interviews of Tony DiLisio: Jerry is copying the tapes, to send to Dr. Diamond and Dr. Buckhout: I called them and told them they're coming; Eleventh Circuit deleted footnote forty in *Brooks*, which I used in *Martin* deterrence issue; spent whole day on *Spaziano* doing letters and memos on hypnosis tapes: got everything out to Diamond and Buckhout. 5:00 p.m.: Scharlette called Craig: no warrants and no CCR appointment today; I think the Eleventh Circuit modified *Brooks* because otherwise *Martin* would have to win—this looks very bad for the deterrence issue in *Martin*—they're going

to say that prosecutors can argue deterrence in favor of a death sentence, but that the defense can't present evidence about it; Scharlette: a Miami judge told her that Spalding would be the CCR: Graham will be in Miami tomorrow and may announce it then: Fox is head of Appropriations Committee, where CCR must go for funding next year: bad for Von Zampft to piss her off; in office until 9:30 p.m.

Wednesday, July 31:
Called George Kendall, Georgia ACLU: nothing about deleting footnote forty in Eleventh Circuit rehearing petition in *Brooks*; so the court must have done it on it's own—I'll *bet* it was because of *Martin*, and, if so, it looks bad for our *Lockett*/deterrence issue; Scharlette called Craig: nothing on CCR appointment or death warrants: Governor Graham left for a week; Craig: Art Weidinger called him: the only reason the CCR appointment hasn't been announced is that the candidate hasn't been able to be contacted: this means it's Von Zampft, since he is in a trial in Georgia this week: that's how Craig reads it; Graham gone until August 7.

Thursday, August 1, 1985:
Spaziano: Craig: Susan Carey has problem with writing family history portion of *Spaziano* clemency because she "doesn't like him"—says she will do it, but that I should be aware of this—Craig talked with Susan, and she'll do family history and mental part of *Spaziano* clemency memo draft by end of this week. News flash: Scharlette told Craig that Larry Spaulding is getting CCR job: Governor called Larry, who called Scharlette; *Spaziano* met with Jerry Justine and Susan Carey: coordinated affidavits effort for *Spaziano*; Scharlette called to tell me about Spaulding: a little ecstatic: this news still isn't official yet, and may not be for several days: Governor wants press conference; Ruthann and I decided to go to Tallahassee: called Scharlette and talked to her for two hours: she said I'm "crucial" to CCR, and that Mark Olive would help smooth things over with Dick Jorandby and Craig: she said that everyone there is very supportive of my coming to CCR; I worked in office until 11:00 p.m., editing *Spaziano* 3.850.

Friday, August 2:
Called Mark Olive: he will call Craig and Dick Jorandby about my coming to CCR; Craig: Von Zampft didn't get the CCR job because of client complaint, not because Roberta Fox succeeded in torpedoing him; Radlet called: does not think our *Henry* article is worthy of *Journal of Criminal Law and Criminology*, but thinks it worth publishing since, "any paper is worth publishing": maybe in a public opinion journal: he assures that such places must exist; Susan Carey: *Douglas* resentenced to death: no one knew it was

coming: his lawyer went ahead with the resentencing, unprepared: did not return Mark Olives phone calls: Larry Spalding, who was lead counsel for *Douglas* in Eleventh Circuit, is beside himself with grief; updated my resume.

Saturday, August 3:
Did errands with Ruthann all day; called Mark Olive: he called Craig today, but did not talk about me, because it was "too weird": Olive said that Craig acted so strange that Mark just let it be a getting-back-in-touch phone call: he will call again on Monday morning: Mark very up on my working for CCR, only says I may be more needed in St. Petersburg CCR office with Steve Malone; Ruthann typed my resume; Mark Olive called: we shouldn't wait until Dick comes back from vacation: Dick "has his own agenda," which includes a CCR branch to be opened out of the West Palm Beach office, but Mark says that's not in the current CCR plans.

Sunday, August 4:
In office with Larkin, working on *Spaziano* Rule 3.850 (me, not Larkin).

Monday, August 5:
Spaziano: Jerry Justine: got affidavit from DiLisio hypnotist in *Spaziano*; called Kirkland: Rachel (his secretary) says his affidavit will be in the mail by Wednesday, he's just been busy, moving offices, trials, etc.: but he *will* do it (she interrupted him in conference to make sure); read that U.S. Supreme Court denied *cert.* in *Celestine*, Millard Farmer's and Joe Nersey's case (in Louisiana); talked with Craig about my going to CCR: he thinks I'm more needed here in West Palm Beach, and that Mark Olive must bring in new people from the outside, rather than "rating existing people": it was a very moderate discussion, though loyalty was an important undercurrent: Craig would be "very disappointed" if I left Palm Beach for CCR: part of it is that he doesn't feel he can go on without Dick and I working here, too; called Scharlette: Governor called Larry Spaulding at home and gave him a "non-firm commitment" not to sign death warrants until October 1, the day CCR is scheduled to open its doors for business, though it won't be running smoothly until January: Governor says he did not want to bury the CCR with warrants at the outset; I understand and appreciate that Craig wants me to stay, but it seems to me that my fight now is with CCR in Tallahassee—here, we have three full time people working on about a dozen cases, from one appellate district—CCR, which at the moment solely consists of Mark Olive and soon Steve Malone as well, will be responsible for *everyone* on Florida's death row who doesn't otherwise have a lawyer, which just about means everyone on Florida's death row who have had cert. denied from Florida Supreme Court direct appeal—and we should expect that many, possible most, *pro bono*

lawyers in capital cases will dump their cases on CCR, once CCR is operational, because most of those *pro bono* lawyers took the cases in the first place only because of the desperation in Scharlette's situation, and, more recently, under moderate pressure from the Florida Bar.

Tuesday, August 6:
Craig: David Bruck in South Carolina is working on the *Hall* remand and may go to CCR and teach at FSU Law School; talked to Jerry Justine about affidavits in *Spaziano*: he's going to visit Joe's family tonight; Mark Olive called: he will call Craig today; Craig called Scharlette: "this is *deja vu*: your calling the shots and I'm really pissed": Scharlette denied it to Craig and said that Craig needs to deal with Mark Olive and me directly, rather than going through her: she also said that there is no chance that David Bruck is coming to CCR; Craig: told me that he talked to Mark and Scharlette, and told them why I should stay here: he also said that he gave them names of other people to recruit into CCR. This afternoon, Craig walked by my office several times and just said, "stay"; Mark called: he had a "very unpleasant" conversation with Craig: Craig got very defensive: "I've been taken to the woodshed by Craig"; Mark: talked about what we should do now: may wait until Dick Burr comes back from vacation and after the big meeting this weekend between Larry Spalding, Mark and Scharlette; worked on *Spaziano* all day (for the hell of it, I decided to do the *Spaziano* pleadings in Law Review form with cites in footnotes, rather than embedded in text—it came to 1,721 footnotes, or, rather, it would have had the computer's numbering system not turned over at 531—which is interesting to know I guess).

Wednesday, August 7:
Governor back in town: may get warrants; *Spaziano*: Jerry Justine got Joe's mom, brother and sister to sign affidavits; Ray finished typing draft of memo of law in support of 3.850 in *Spaziano*: received Doctor Buckhout revised report; Steve Malone called for my opinion on legal issue and to check out my status here sort of an awkward phone call; Scharlette: to be safe, wait until after the Saturday meeting with Larry Spaulding to set off the bomb here, by announcing my formal resignation: I plan to do that on Tuesday—Dick will be back then, and Larry Spaulding will be on board; sent resume and jury override article to Larry Spaulding as writing sample; Ray destroyed *Spaziano* 3.850 in computer, and it must now be totally reconstructed from old drafts "it's about 250 pages". News: things coming apart in South Africa: riots, state of emergency: 600 killings there last year; *Spaziano* 3.850 all day.

Thursday, August 8:
Craig: death warrant in Bill Harvard—this means big trouble for us, since virtually no work at all has been done on a 3.850 motion or memo, since we had thought that Governor Graham seriously considering clemency—execution scheduled for 7:00 a.m. September 4; Scharlette called Craig: also death warrant in *Willie Jasper Darden*: "he lost in Eleventh Circuit *en banc* and is working on cert. petition: none filed yet"; told Richard Jorandby I'm considering going to CCR: he just thanked me for letting him know, and then just sat there—very awkward meeting; *Harvard* has exhausted, through state court system, lingering doubt about guilt issue, so, if we want it, we could take that issue directly into federal *habeas corpus*, while at the same time litigating *Cooper-Lockett* issue in 3.850 motion in state court: I'm going over files and old briefs to see exactly what we have exhausted and what we haven't; *Spaziano* got in Dr. Diamond's hypnotism report: Dick Jorandby approved bill, and I gave it to Gloria; Craig talked to Mark Olive about giving *Harvard* to CCR: that might help get a stay, since impossible for CCR to effectively represent him yet, since CCR not yet operational—real concern that some appellate Public Defenders are encouraging volunteer pro bono lawyers to drop their cases, since CCR will do them, which could swa.mp CCR before it even goes on line; worked in office until 11:00 p.m.

Friday, August 9:
Harvard Warrant: Dick Jorandby was taking a Mr. Adcock around the office (seems he's running for president of the Florida bar), and Jorandby introduced me as someone "the CCR is trying to raid" from his office and that he is "none too happy about it"; *Spaziano*: got affidavit from Ed Kirkland: it's bullshit: he won't talk about hypnotism because of "attorney client privilege" — affidavit on mental stuff hurts us more than it helps—in sum, Kirkland's affidavit seems motivated more by a desire to save his own professional butt than to tell the truth about what he didn't do in preparation for *Spaziano's* trial and penalty phase; Craig: "we will all be disappointed if you do that to us," *i.e.*, leave for CCR: he told Dick Burr that I was leaving, and Dick got "very depressed": he said Dick would be in the office tomorrow; Steve Goldstein in office: talked about CCR, Spalding and Von Zampft: he suggested that Ruthann apply to FSU to teach: Steve said they're looking for women to add to the faculty.

Saturday, August 10:
Harvard Warrant: In office: Ray worked on *Spaziano* supplemental clemency; I talked to Craig and Richard Green about *Harvard* issues: I will do two issues; Dick Burr not in office because his wife is ill: he may be in tomorrow; Craig and I came up with a burden-shifting jury instruction issue, and a

Cooper/Lockett/Sireci/Songer/Hitchcock issue for *Harvard*—we're both very excited about it: I'll draft it tonight; Craig: *Nollie Lee Martin* is his "last chance at a victory" – he thinks we will lose *Aldridge*, *Ford*, and *Hitchcock* within the next year; I feel like I'm coming down with a cold: massive intake of vitamin C; maybe I *should* stay at West Palm Beach rather than go to CCR, and leave Craig and Dick Burr and Jorandby hanging: CCR will be a madhouse, but it feels like the madhouse, I should be at, where I can do the most good for the greatest number of death row people.

Sunday, August 11:
Harvard Warrant: In office: drafted *Harvard* jury instruction issues; Craig here drafting *Cooper/Lockett* issue for *Harvard*; Larkin with me in office; met with Dick, Craig, Richard Green (while Larkin was asleep): we went over status of issues; Ray finished corrections to supplemental clemency memo in *Spaziano*. Night: went over memo for *Spaziano*; worked until 2:00 a.m.

Monday, August 12:
Harvard Warrant: Drafting 3.850 motion and stay memo in *Harvard*; Mike Radlet: *Darden* is arguing that a ten-year stay on death row is Cruel and Unusual Punishment and therefore unconstitutional: I sent stuff on death row stress to Scharlette (Richard Straefer Law Review article in *Journal of Criminal Law and Criminology*, etc.) Dick Burr: wants me to do Florida Supreme Court oral argument in *Harvard*; Scharlette called: the meeting on Saturday with Larry Spaulding was "perfect": she, Steve Malone, and Mark Olive are in charge of the new agency: "the CCR job is yours," but they want me to avoid talking with anyone here at West Palm about it: they want to talk with Craig on the nineteenth when he goes to Tallahassee for "Life Over Death" conference: CCR won't be housed at FSU Law School, but nearby, in the Independent Life Insurance building "??!!"; picked Larkin up at 4:00 p.m. and worked at home, editing *Harvard* 3.850; Scharlette called: jury override article is out and looks good; worked on *Harvard* 3.850 stay memo until 1:00 a.m.

Tuesday, August 13:
Harvard Warrant: Meet all morning, weeding out issues in *Harvard*—all afternoon, too, until 5:30 p.m.; then stayed in office and worked on 3.850 memo: weeded out ineffective assistant of counsel issues that are clearly frivolous; refined *Cooper/Lockett* issue; worked in office until 9:30 p.m.; felt awful all day: I definitely have a cold.

Wednesday, August 14:
Harvard Warrant: Lost *Simpson*, 3-0: no opinion: several reporters called, but I avoided them; got in advance copy of *FSU Law Review* on jury override: still words some run together, but Kim says this is the final run: reprints will go out "sometime"; putting *Spaziano* supplemental clemency memo in final form; left at 5:00 p.m.; feel awful.

Thursday, August 15:
Harvard Warrant: Lee Currie making final corrections on *Spaziano* clemency memo; went over jury instructions for memo and 3.850 in *Harvard*; *Wilson*: Florida Supreme Court granted *habeas*, and new direct appeal; left work at 4:00 p.m.: feel awful.

Friday, August 16:
Harvard Warrant: Nightmare of small errors in *Spaziano* clemency memo: it was in final form, and Mike Lehman stapled it wrong: that was ok, but the whole thing had to be done again—Joe Spaziano's name was spelled wrong, on all of the memorandum and appendices: we finally finalized the thing and got it in the mail at 6:00 p.m.; Dick Burr meeting with *Harvard*'s trial lawyer; I worked on jury instruction issue for 3.850 and stay memo in *Harvard*. News flash at 5:00 p.m.; *Songer* won in Eleventh Circuit *en banc* court: this may mean *Hitchcock* will be out soon, since same issue as in *Songer*—same issue in *Harvard* and *Sireci*, too; left office at 6:00 p.m.

Saturday, August 17:
Harvard Warrant: Rested all morning; came into office at 3:30 p.m. to correct jury instruction issue in *Harvard*; worked until 9:30 p.m.

Sunday, August 18:
Harvard Warrant: Took Mike Lehman to airport for return to law school in New York; Mark Olive called to talk about *Darden* and CCR: Craig not going to Public Defender meeting tomorrow, which was when Larry Spaulding was supposed to talk to him about my going to work at CCR: Mark says we should lay low for awhile yet; still correcting jury instruction issue for *Harvard*; did some research on *Darden* for Mark Olive; Mark: *St. Petersburg Times* did awful article on CCR, saying it will speed up the killings in Florida; Steve Malone called to convince me to come to the St. Petersburg office of CCR, rather than Tallahassee: "no one wants to come here to St. Pete; everyone wants to go to the main office, where the power is."

Monday, August 19:
Harvard Warrant: Craig gave me *St. Petersburg Times* article on CCR: really not so bad; stresses the paradoxes of CCR—a public defender office created by a legislature and supported by a Governor and an Attorney General determined that CCR will speed up executions, but staffed by people like Mark Olive and Scharlette Holdman (and me) equally committed to keeping our clients alive indefinitely; Craig: *Songer* was a very short pre curriam opinion by the Eleventh Circuit *en banc*, a straight up *Lockett* issue "much like the issue before the *en banc* court in 1983 in *Ford v. Strickland*"; the *Songer* court didn't reach *Cooper/Lockett*?: not help or hurt *Hitchcock*, although great for *Harvard*—if we can snooker the 3.850 state trial judge into saying that, earlier, at the time of *Harvards* original trial, the judge felt *he* was limited at sentencing to consideration of statutory mitigating circumstances—*Harvard* trial lawyer signed affidavit - Dick thinks we will get a *Harvard* evidentiary hearing and stay in 3.850 state trial court: I'm not at all sure about that: many gaps in our arguments; Craig: Art Weidinger says were are safe on *Spaziano* and *Sireci* from warrants at the moment; Jeff Robinson called: rehearing *en banc* denied in Eleventh Circuit in *Booker*: Sixty or ninety days to file cert. petition; *Adams* (*Aubrey*) had rehearing *en banc* denied in Eleventh Circuit; Craig: Dick Jorandby called, from public defender conference in Destin, where Craig had planned to go (and Larry Spaulding was to talk to him): Craig said that Dick Jorandby was "pissed" about our office being "raided" by CCR: so did Larry talk to him? Craig says that Larry didn't talk to him about me, but Jorandby mentioned CCR and me to Craig.

Tuesday, August 20:
Harvard Warrant: Original target date to file 3.850 and stay application in *Harvard*: now trying for Thursday or Friday; started working on HAC-*Godfrey* issue for federal *habeas* in *Harvard*; Dick going through all the 3.850 stuff and harmonizing it; I worked on HAC-*Godfrey* issue; talked to Craig and Dick Burr about challenging electrocution as unconstitutional, in light of Justice Marshall's dissent in the Louisiana case, *Glass v. Louisiana*: they don't think it's worth it: hopeless after Eleventh Circuit decision in *Sullivan* and opinion by Judge Johnson in *Ritter*, co-defendant to John Louis Evans—but I talked them into it and drafted issue; Craig talked to *Bill Harvard*: Bill is in very good spirits and certain we will get an early stay; Dick Burr drove me home and talked about CCR: he recognizes legitimate reasons for my going and distrusts our office's "false privilege," *i.e.*, having three lawyers doing twelve cases while the rest of the state is falling apart—still, he and Craig are "burnt out, he said, and need me to stay, etc.

Wednesday, August 21:
Harvard Warrant: Must watch Larkin tonight; putting *Harvard* 3.850 and stay application together; edited jury instruction issues again; read Dick Burr's *Harvard* issues and edited them; mad dash to get *Harvard* 3.850 and stay memo done: edited electrocution issue; left office at 2:00 p.m. to get haircut and edited jury instruction issue while I waited for barber; back in office at 3:00 p.m. and edited more stuff; must leave to get Larkin at 4:30 p.m., to come back when Ruthann returns from Tampa (hearing before Judge Castagnia on AFDC case), probably around 10:00 p.m.; we will be here late tonight. 9:00 p.m.: Ruthann not home yet; called office: *Harvard* 3.850 done, and stay memo being corrected. 11:30 p.m.: Ruthann home; Craig says no need for me to come in to office.

Thursday, August 22:
Harvard Warrant: *Harvard* 3.850 and stay motion filed in state trial court; I'm working on Florida Supreme Court brief in *Harvard*, and I'm drafting HAC issues for federal *habeas*; Reagan is said to veto South African sanctions; Judge MacGregor (3.850 judge in *Harvard*) set hearing (non evidentiary *i.e.*, oral argument) for tomorrow; Scharlette: warrants in *Booker* and *Buford White*: no one talked with Dick Jorandby in Destin about my going to CCR: Mark Olive decided to "pull back" until after the *Harvard* Warrant is resolved; called DC: Jeff Robinson in court; Coleman in California: Marion said, "it's all our fault," for not moving to stay the mandate in the Eleventh Circuit: I told her, no way - it's *not* your fault: it's the Governors office fault for jerking around the Eleventh Circuit – Governors office did not even called them to tell them about the death warrant—Booker himself called his lawyers to tell them that a death warrant had been signed on him; Jeff called: Booker's execution date is the 30th: trying to set up a meeting with governor Graham or at least Art Wedinger; *Harvard* 3:30 p.m.: Judge MacGregor called Dick Burr: status conference on Monday at 3:00 p.m.: Judge MacGregor wants the State and us to "work something out" on the need for a stay and evidentiary hearing—judge says if we need a hearing, then we may need a stay: Dick called Chris White, state attorney on *Harvard*, who says we need an evidentiary hearing: they will talk again tomorrow; I drafted HAC issues for *Harvard*; guess this means no hearing at all tomorrow in *Harvard*.

Friday, August 23:
Harvard Warrant: Talked with Craig and Dick about *Booker* strategy; *Harvard*: Dick called Chris White: prosecutor now backed on need for evidentiary hearing—will decide for sure later today on whether they will oppose our request for evidentiary hearing; Dick: at Mondays hearing he wants me to do the jury instruction and the electrocution as Cruel and Unusual

Punishments arguments: he will do the rest of the arguments, including *Cooper/Lockett*; Mark Olive: at CCR I would be a "senior" level position, same level as he and Steve Malone: salary between $28,000 and $32,000: I decided to tell Dick and Craig this weekend that I'm going, so they will have 30 days notice; Ruthann had psychic Carol Nuhouse do reading: she had concluded that going to Tallahassee is the best idea, and, although she is not sure, she thinks I will loose *Martin*, 2-1 in the Eleventh Circuit, with Judge Kravich writing the opinion for the court, and that the Eleventh Circuit will decide *Martin* in three weeks or so.

Saturday, August 24:
Harvard Warrant: Drafted jury instruction and HAC issues for Florida Supreme Court Brief in *Harvard.*

Sunday, August 25:
Told Dick and Craig I'm going to CCR: Dick said it breaks his heart: Craig only said, "when do you go?": telling them was awful, awful, awful: my hand is still shaking as I write this, and it probably shows.

Monday, August 26:
Status conference in *Harvard* is scheduled for 3:00 p.m. in Sanford, before trial Judge McGregor: got up at 5:00 a.m. and wrote argument; came into office at 8:30 a.m. and told Dick Jorandby I'm leaving for CCR: he was very decent, and said he understood and that I should follow my conscience; when I told Burr, he said, "so you bit the bullet," but he said it sort of nicely; Dick and I flew to Orlando from West Palm Beach and drove to Sanford: Dick did all the arguing: Judge McGregor evidentially denied us—but in so doing he made the *identical error* as did the trial judge in *Songer* in denying *Songer's* 3.850 motion way back when—McGregor said *he* felt limited to the statutory list of mitigating circumstances at the time of *Harvards* original trial—in fact, McGregor was about to say it several times, but Dick Burr kept cutting him off and interrupting: I finally passed a note to Burr, and he asked the question, and after Dick gave him the opportunity, he answered it–exactly the right way for us to get a stay in the Florida Supreme Court or the federal courts, based on *Songer en banc* decision—hard strategic call now is how honestly to give the issue to the Florida Supreme Court: given the Florida Supreme Court's history of fibbing about the applicability of *Lockett* to Florida, if we give them the issue honestly and straightforwardly, they might find some procedural way of avoiding it and torpedoing subsequent consideration by the federal courts in *habeas corpus*—but if we give it to them straight, that also maximizes the likelihood of our getting a stay from the Florida Supreme Court, it seems to me; during the day, got a call from Eleventh Circuit clerk's office: I'll bet I

lost *Martin*, 2-1, just as the psychic predicted: torture that I didn't get the message until after the Eleventh Circuit clerks office closed, so I can't find out what the message was really about until tomorrow morning; left office at 11:00 p.m.

Tuesday, August 27:
Harvard Warrant: Walking into office, Janice told me we lost *Martin* yesterday: it was on the radio: came into my office and called the Eleventh Circuit clerks office: Judge Hatchett dissented: *Palm Beach Post* says the court threw out *Martin's* first confession, but, while criticizing the cops, said it was voluntary–it only violated the *Miranda* right to cut off questioning (*Michigan v. Mosley*); I called Lee Martins mother, Sadie Martin and sister, Mary Cribb and brother Harry: they were very upset; Craig was being an asshole all morning: not saying anything to me about *Martin*, not even "I'm sorry you lost the first case you argued in the Eleventh Circuit"; Scharlette: *Darden* motion to stay the mandate lost in the Eleventh Circuit; Craig is coming up tomorrow to argue *Harvard* in Florida Supreme Court; Larry Spaulding called Jorandby yesterday to say he had offered me a job and I had accepted it "???: what the hell is this about?"; Dick said he appreciated the call from Larry; Craig finally got around to asking me how I was "doing," *i.e.*, *Nollie Martin*-wise, I guess; Tom Wagner of Associated Press called: he told me that Judge Hatchett *didn't* dissent: the majority opinion in *Martin* was based on *Oregon v. Elstad*, the U.S. Supreme case I hadn't really understood at the time of the argument; called the prison twice and left messages for Lee Martin to call me back; Lee called back at 2:00 p.m.: he was very sad: he hadn't heard about the Eleventh Circuit's decision yet, and he didn't really want to talk to me about it; wrote *Simpson* rehearing: it went out to the court today; corrected HAC issue for federal *habeas* in *Harvard*; Craig: Florida Supreme Court oral argument in *Harvard* is 3:00 p.m. Thursday; my strep throat is back: went to doctor for more antibiotics; Jeff Robinson called: meeting with Art Weidinger and Sid McKenzie this week: he will be meeting with *Steve Booker* at the prison, too; left office at 7:45 p.m.

Wednesday, August 28:
Harvard Warrant: Received *Martin* opinion in U.S. mail: Judge Hatchett *did* dissent, on the *Lockett*/deterrence issue, not on confessions issue: Judge Kravich "the woman" the psychic had predicted would write the opinion for the court in *Martin*, did indeed write the opinion and she extended *Thompson/Nash* equivocation doctrine to Fifth Amendment invocations of right to silence, which may get us some right wing votes for *en banc* consideration, added to the left-wing votes we should have because of Kravich's majority opinion: Judge Hatchett's dissent specifically suggested

en banc consideration of *Martin*; I came back from lunch and gave a copy of *Martin* to Dick Jorandby: we had a nice chat, while he thanked me profusely for inscribing a copy of the jury override article; when I returned to the eleventh floor, Flo said we lost *Hitchcock* today: Steve Bright read it over the phone to Dick and me (Craig didn't want to hear it): the Eleventh Circuit bought the legal theory, and left it open for a case by case determination, but killed *Hitchcock* himself from the facts of case–which always were pretty weak in terms of prejudice in *Cooper/Lockett* era; Scharlette called: she is "exhausted" and she "doesn't know how Mark is still standing up": *Darden* state court papers filed today: oral argument tomorrow; Jeff Robinson and Jim Coleman and Marion Linberg are there in Tallahassee for *Booker*; I came back into office at 8:00 p.m.: ran printer on *Harvard* federal *habeas* petition—180 pages—until 11:00 p.m.: proofed it all night until 2:30 a.m., when I had to leave, because my throat was in serious pain.

Thursday, August 29:
Harvard Warrant: We lost part of *Harvard* federal memo in support of stay in computer: spent morning reconstructing it; Dick Burr wants me to argue the "big" issues in federal district court in *Harvard*: *Songer* issue and *Cooper/Lockett* issue; my throat still hurts like hell: only aspirin makes it tolerable: got more drugs from doctor this morning. 3:50 p.m.: Craig called Dick Burr: no way to call how the *Harvard* Florida Supreme Court oral argument went this morning—we may get ruling in *Harvard* tonight or tomorrow morning: the only issue the Florida Supreme Court justices wanted to talk about was *Lockett*. 5:00 p.m.: Florida Supreme Court clerk told Craig we have a stay "until further notice," but it may not last beyond the death warrant—no one knows what the fuck that means, so we continue to produce the federal *habeas* paper, since we can't tell whether we have a real stay yet out of the Florida Supreme Court; Craig called Dick Burr: *Darden* oral argument went very badly: Bob Harper did it for *Darden*: also says that Sid White, Florida Supreme Court Clerk, says there's a big fight within the court about *Harvard*, but he thinks our stay will hold; Susan Carey called at 6:50 p.m.: *Darden* lost in Florida Supreme Court; I went home at 7:30 p.m.

Friday, August 30:
Harvard Warrant: 10:00 a.m.: the stay in *Harvard* is real, will last past expiration of the warrant.: Florida Supreme Court called Craig; Scharlette: having trouble filing *Darden* 3.850 because Hurricane Elena is battering the Gulf Coast of Florida: having to drive the papers to Bartow; Dick Burr said that he's afraid my leaving West Palm will leave bitterness between the branches "of the family": says he sees distance already, between Craig and CCR: Craig told him that Scharlette and Mark acted like "puppies who had

pissed on the carpet" when Craig was in Tallahassee, referring I guess to my decision to go to CCR; got very depressed letter from Lee Martin—he sounds suicidal.

Saturday, August 31:
In office to pick up stuff for *Martin* hearing; worked on it at home (Ruthann in Jacksonville); Steve Malone called from Orlando—he's being evacuated due to hurricane: we talked about *Bassett* strategy; wrote *Martin* rehearing in Eleventh Circuit until 2:00 a.m.

Sunday, September 1, 1985:
Fine tuned *Martin* rehearing at home; Mark Olive called to talk about *Darden*: hearing on 3.850 motion and stay is tomorrow: he agreed to look at *Martin* rehearing petition next week (after Wednesday): he also said that the Eleventh Circuit in *Booker* recalled the mandate, but not sure what that means in terms of the stay—but sounds like good news of sorts.

Monday, September 2:
Rewrote parts of *Martin* rehearing all day; Mark Olive called Craig at 4:00 p.m.: *Darden* hearing began at 11 a.m.: Bob Harper is ill, so Bill Shepard doing it: they just lost: trying to get Florida Supreme Court argument tomorrow: federal *habeas*, also.

Tuesday, September 3:
Cert. petition originally due in *Ford*, but got thirty-day extension; reworked *Martin* rehearing. 1:30 p.m.: *Darden* lost in Florida Supreme Court, "before we got out of the parking lot," as Scharlette put it; discussed what cases I will take with me to CCR: *Nollie Martin* (Dick Burr will stay involved in the Eighth Amendment psychiatrist issue litigation in a successor *habeas*, if need by); *Joe Spaziano*, *Terry Sims*, *Rose*, *Sireci* (hope to have successive 3.850 on ineffective assistance of psychiatrist at trial filed by the time cert. is denied from U.S. Supreme Court on October 1); Terry: Chris Vasil, U.S. Supreme Court death clerk, told Mark Olive not to file anything else in *Darden*: it's a "very close vote"—wait until Supreme Court rules on application for stay, then possibly file cert. petition. 8:15 p.m.: called Scharlette: *Darden* lost stay application, 5-4: *Darden* also lost in Federal District Court on *habeas*, without a hearing, and the case is in the Eleventh Circuit now: she very pissed at Craig for dumping *Sims* and *Rose* on CCR—those are not even my cases here at West Palm Beach: it's just punishment for my leaving; corrected *Martin* rehearing at home until 1 a.m.

Wednesday, September 4:
Harvard and Darden originally scheduled to die: Harvard has stay, Darden in trouble; heard on morning radio that Darden got stay from U.S. Supreme Court two hours before execution, which means at 5:00 a.m. this morning—not say if it's a real stay or not; Craig: the *Darden* stay came at 11:30 p.m. last night: they also lost in Eleventh Circuit on successor *habeas*, after only an hour's consideration: Eleventh Circuit panel was Judge Fay, Judge Clark and Judge Morgan, same as first time *habeas* in *Darden*, when Ruthann drafted the opinion from Judge Fay and Judge Clark dissented (on prosecutorial misconduct) during closing argument: the issue that the U.S. Supreme Court had once granted once granted cert. to consider in *Darden* and then "dismissed cert. as improvidently granted" and which is now a hot issue after *Caldwell v. Mississippi* decision by U.S. Supreme Court; *Palm Beach Post*: Court agreed to hear *Darden* next Term—sounds like an outright cert. grant; called Resource Center: Supreme Court *did* grant cert. in *Darden*, by a vote of 8-1: oral arguments in December; spent most of day putting together *Martin* packets for Tony Amsterdam, Steve Winter, Mark Olive, Steve Malone, and Jeff Robinson.

Thursday, September 5:
Went through another generation of the *Martin* rehearing edits; Radelet: *Mercer Law Review* is doing a special issue on the death penalty, and wants to use our *Henry* article, which they haven't even seen yet: told him to go for it and trusted his judgment. Night: made 20 copies of jury override article with Ruthann, for tomorrow: did outline of comments for tomorrow's presentation to Individual Rights and Responsibilities Committee of the Florida Bar on jury override repeal legislation.

Friday, September 6:
Spoke in Tampa to Individual Rights and Responsibilities Committee of Florida Bar on jury override legislation: drove there with Ruthann, who is on the committee; I spoke first, and they were very active and engaged, asked good questions, and seem to be really in favor of legislative repeal of the override: if anything, they were more "radical" than I, not willing to compromise on the "both ways binding" matter of symmetry: we passed out copies of our *FSU Law Review* article, which were very well received—several members of the committee had already seen it: discussed a Resolution supporting the override bill, which now goes to Board of Governors of Florida Bar; met Cynthia Meltzer; drove to Tampa and met Jane, Judge Costagna's secretary: drove most of way to Captiva Island for vacation: got lost: got stuck turning car around.

Saturday, September 7:
Drove rest of the way to Captiva Island, and found "Tween Waters End": secluded and pretty unspoiled: decided to stay through Monday.

Sunday, September 8:
Captiva Island: fantastic dinner at the Bubble Room Restaurant: wonderful bread, filet mignon and fabulous wine.

Monday, September 9:
Drove from Captiva Island to West Palm Beach; read *Martin* rehearing to Ruthann on the way; in office: *Booker* got a stay pending cert. from the Eleventh Circuit: panel of Judge Vance, Judge Henderson and Judge Clark: called Jeff: the stay is solid, but the State is taking it up to the U.S. Supreme Court to dissolve it; got very helpful letter from Tony Amsterdam on *Martin* rehearing: revised the *en banc* petition at night.

Tuesday, September 10:
Craig: U.S. Supreme Court called LDF to learn how many death sentences were imposed in Florida between 1976 and 1978—the *Cooper/Lockett* time period—good for *Sireci's* chances on cert., and *Hitchcock's* too; Dick: lost *Elledge* in Federal District Court: Dick got the opinion today; Steve Winter called with suggestions in *Martin*: helpful, but nothing really new: he volunteered his opinion that the *en banc* would probably be denied, given who the panel was— he's probably right; worked on *Henry* Law Review Article at home.

Wednesday, September 11:
Charles Rumbaugh executed in Texas: I heard on morning NPR; went over *Henry* article changes with Radelet; Dick Burr at Florida State Prison; Craig meeting with Tabscott, trial lawyer in *Hitchcock*, to try to get a new affidavit to give to the court along with the petition for rehearing; Mark Olive called from Atlanta: good comments on *Martin* rehearing draft; put *Martin* appendices in order; Jeff called with comments on *Martin* rehearing; Dick called from Florida State Prison: *Lee Martin* is okay, but it's very heart-wrenching to watch: he wants to tell us his whole life, and today he made it to the North Carolina arson crime, which he did to get his wife's attention - he still sees the people he killed there Bill Elledge is very down; "he deflated before my very eyes," Dick said. Night: final corrections on *Martin* rehearing; put appendices together; Mark Olive called.

Thursday, September 12:
My week for meeting on recent Florida Supreme Court decisions, but Craig said he would do it, because "you're bailing out on us anyway"; did table of authorities and table of contents for *Martin* rehearing; called Judge Vance to tell about new job at CCR: talked about jury override article and Tallahassee; Craig doing *Hitchcock* trial lawyer affidavit and not want to talk now about date I leave West Palm Beach; *Palm Beach Post*: Rumbaugh was seventeen years old at the time of the crime: the first minor to be executed in 20 years—did not bode well for Paul Magill, but the 5th Circuit is free fire zone in capital cases anyway, and at least the Eleventh Circuit might take a hard look at the juvenile execution issue.

Friday, September 13:
Friday the Thirteenth: spent all day producing *Martin* papers: after the briefs were put together, the cover started to smear, so they had to be done over again . . . got it out at exactly 5:00 p.m., just in time for Federal Express (this work would be impossible without Federal Express); Craig: the National Bar Association (the Black bar association) is going after Steve Winter for "off color" and supposedly racist remarks he made while teaching at Rutgers Law School: sounds like bullshit to me, but also sounds like a big fight might be brewing: really sad.

Saturday, September 14:
Miami Herald and *Palm Beach Post* report that the Eleventh Circuit denied Martin's appeal *yesterday*—very strange, but they probably only mean that the slip opinion advance sheets came in yesterday: called Jo Bennett at *Herald,* to find out, but she did not know.

Sunday, September 15:
Our deadline for mental health 3.850 motion and clemency memo for *Sireci*; relaxed with Larkin and Ruthann all day.

Monday, September 16:
Got in *Martin* slip opinion from Eleventh Circuit; got in final draft of *Henry* article for *Mercer Law Review*; started to clean out office and get files in order.

Tuesday, September 17:
Tried to talk to Craig again about setting a date for my leaving, and how to structure the transition: he said he hadn't thought about it yet and we'd talk this week, even though he knows I want to start in Tallahassee on October 1—the day CCR opens its doors; read Dick's motion for rehearing in *Elledge*

in District Court: Dick's rehearing is very hostile—he basically tells the District Judge that he's stupid and misunderstood Dorothy Lewis's testimony; worked on *Spaziano* 3.850 - adding *Songer/ Harvard/Cooper/Lockett* issue; Eleventh Circuit affirmed *Straight* and *Funchess*; Ruthann drove from West Palm Beach to New Orleans, Louisiana, for AFDC conference: I will watch Larkin until Friday night.

Wednesday, September 18:
Told Dick Jorandby that next week will be my last week: he said how much he respected my work and my input and will miss me: said that he "is pissed at Scharlette, and will forgive, but never forget this"; put case files in order.

Thursday, September 19:
When I came into the office this morning, Craig, Dick and Richard Green were talking about the transition and meeting with Mark Olive next week to discuss my departure. Their conversation stopped when I came in: Craig thinks the meeting is about the five cases he wants me to take to CCR: I had thought it was more general, about the CCR caseload of 37 cases plus my 5, as well as long-term strategy on fighting the death penalty; still cleaning out files; got in recent cases from Patsy Morris: Judge Frank Johnson affirmed death penalty in *Jones*, an Alabama case (death imposed in 1982): Judge Anderson did also in *Mulligan* (Georgia case): *Corn* wins: *Straight* affirmance of death sentence was unanimous, Judge Frank Johnson writing: *Funchess* was 2-1, with Judge Johnson dissenting (*Funchess* Eleventh Circuit panel same as our *Aldredge* panel).

Friday, September 20:
Harry Martin, Lee Martin's brother, called me for update; rewrote *Spaziano* memo of law to add *Harvard/Cooper/Lockett/Songer/Hithcock* stuff; Steve Malone called to tell me that the *Martin* rehearing petition looks okay: his input came a little late, but we did talk about the CCR and the thirty-seven cases that need 3.850 motions filed by the end of this year, unless the new statute of limitations period is changed and extended: he thinks there might be a federal civil rights Section 1983 law suit there; I called Florida State Prison and made plans to visit there next week. Night: edited *Spaziano* 3.850 motion, until Ruthann got home from New Orleans.

Saturday, September 21:
Relaxed with Larkin and Ruthann at home.

Sunday, September 22:
Hung out at home. Night: edited *Spaziano* 3.850 motion; long talk with Ruthann about Tallahassee, when she will come up to join me, how to manage finances in the meantime, whether she will teach or practice law or write or all of the above: her moving to Tallahassee depends on whether and when Cynthia Metzler leaves Florida Rural Legal Services, since much of Ruthann's desire to stay in West Palm Beach office is based on loyalty to Cynthia.

Monday, September 23:
Ruthann got interoffice memo: Cynthia leaving in December—so Larkin and Ruthann can join me in Tallahassee after first of the year; Harry Martin (Nollie Lee Martin's brother) called: Lee tried suicide last night—chaplain called Harry and said that Lee had a fight in the yard and got a DR—last night he cut his wrists—I called Chaplain Jolly, who said that Lee tookay cold pills (nonlethal) in addition to cutting—now he is in Alachua General Hospital in Gainesville— no longer in any danger now—he only cut tendons, not major blood vessels: I passed this information on to Harry—I feel really guilty and lousy about this: I knew from Lee's letter that he was very depressed about the Eleventh Circuit loss (I feel bad about that too, since maybe I got his hopes up too high) and I should have visited him at the prison right away, rather than dealing with my own job future at CCR or here; dentist appointment at 3:30 p.m.; Mark Olive called at home in evening: U.S. Supreme Court dissolved Eleventh Circuit stay in *Booker*: he also worried about *White*, since no one has heard from the volunteer lawyer: he offered condolences on Martin's suicide attempt; called Jeff: it was 5-4 in U.S. Supreme Court: they will file cert. petition and state and federal papers in *Booker* on Wednesday: we talked about strategy for trashing trial lawyer Bernstein in successive 3.850 motion; Craig called: Lee was operated on tonight at Alachua General Hospital.

Wednesday, September 25:
Lee Currie talked to me about possibility of her coming to CCR to work for me; Susan called Dick Burr: she saw Lee Martin and his right arm is heavily bandaged—she think he's not really serious about killing self, since he cut crosswise, rather than down length of his arm—mainly it was an attempt to keep from going to the DR punishment wing (for possession of contraband: fruit cocktail)—now he's mostly mad about the way he's being kept (strip cell with only a mattress, no shaving gear or cigarettes or toothbrush, 24-hour-a-day suicide watch); Craig: Art Weidinger says that Rosemary Barkett will be named to Florida Supreme Court on Monday: warrants next Thursday, but not on our clients; Gina Cohen, University of Florida law student, called to say she liked Ruthann's and my jury override article and is doing a note on it; Jeff called at night: hearing tomorrow morning in *Booker*.

Thursday, September 26:
Craig: this office may have to start doing direct appeals again: lawyer in *Wilson*, who got a new direct appeal for Wilson, wants us to do it, so Sid White called Craig to say they want to re-evaluate their order of 4 years ago taking us off direct appeals cases: it is hard to see—from the Florida Supreme Court's point of view—why we should keep our post conviction cases, now that there is a CCR, but not get back into our jurisdictional business of doing capital direct appeals; Mark Olive called: stay in *Booker* from state trial court—another goddamn miracle—stayed at 10:30 a.m. 2:50 p.m.: called Scharlette: after stay, Ray Markey, head of the death squad in the Attorney General's office, flew down to argue that Judge Crews (the state trial judge now, and the same trial judge at trial and first 3.850 and second 3.850) should dissolve his stay—that oral argument is going on now: Jim Coleman to arrive in Tallahassee any minute. 3:45 p.m.: Jeff called: the stay stuck: Mark Menser came to argue it for the prosecution and just got the judge pissed off at him, just like he did in *Spaziano* and *Foster*: State is appealing the stay to the Florida Supreme Court, but it's too late for oral argument in the Florida Supreme Court tonight, and tomorrow several Florida Supreme Court justices are "out of pocket" (as Sid White put it) since it's Friday — so it sounds like the trial court's stay of Booker's third warrant to hold; started putting case files in boxes.

Friday, September 27:
Finished cleaning out office; Dick very friendly (gave me a Garrison Keeler book and set up a farewell lunch); Craig has flat affect about the whole thing. 10:50 a.m.: Craig called Clearinghouse and talked to Jim Coleman: *Booker* stay looks solid—Sid White told Coleman and Jeff no oral argument, and only four justices are there in Tallahassee; nice farewell lunch with everyone, including Dick Jorandby: he and Dick Burr made a little speech and so did I; upon getting back to office, we learned from Jeff (who had called) that the Florida Supreme Court upheld the stay in *Booker*: the stay is solid indefinitely; Leon Wright told me he is interested in coming to CCR as an investigator.

Saturday, September 28:
Relaxed with Larkin and Ruthann.

Sunday, September 29:
Relaxed; filled car with boxes from office.

Monday, September 30:
Booker and *White* originally set to be murdered by their government: solid stays in both cases. Morning: saying good-bye to the folks at work: Craig very nice: shook hands; I got on the road about 1:00 p.m., after lunch with Ruthann; drive from West Palm Beach to Tallahassee, it took about 8 hours; in Tallahassee, I called Mark from FSU Law School: he said, "welcome to Tallahassee, we have two death warrants that were signed today": *Jerry White* (no lawyer: Steve Malone will do *White* from St. Petersburg CCR office) and *Raleigh Porter* (Miami law firm, but no 3.850 investigated or in the works: it's a jury override case): we also need to do *Straight* Eleventh Circuit rehearing (should be able to get time extension, but if not, it's due on Thursday); we meet on Friday with the *Porter* lawyers; I went by the new CCR office: it's on the top floor: big offices: great location, easy walking distance to Florida Supreme Court, FSU Law School library, capitol, decent restaurants, and the Chi Omega Sorority House where *Bundy* went on his ra.m.page; stayed night with Susan Carey: the CCR isn't even an office yet, but the office gossip is that Faith Blake, office manager and apparent lover of Larry Spaulding, is a disaster and dividing the office.

3. The Stone Wall

Tuesday, October 1, 1985:
Tallahassee: CCR to open doors : in office at 6:30 a.m. and started reading the trial transcript and records on appeal in *Straight*;[614] met Larry Spaulding, Faith Blake, Eloise Williams (head secretary); big meeting with Larry and Scharlette and Mark Olive about Faith: Larry said he would talk to her; I decided to sublet Gail Anderson's house, while she is in St. Petersburg training the staff there (she's an FSU Law School student and CCR investigator/intern): it's an old, dirty house, but it's furnished and the rent isn't bad—call it a quaint fixer upper; Mark Olive leaves in afternoon to teach a seminar at Yale Law School.

Wednesday, October 2:
Tallahassee: Got in office at 8:00 a.m. and worked on *Straight* Eleventh Circuit rehearing: it's a *Cooper/Lockett/Sireci/ Songer/Harvard* issue:[615] researched and started to draft; I set up a meeting for 10:30 a.m. on Friday with the *Porter* lawyers; Leon Wright called from West Palm: told him that Scharlette is Chief Investigator here, and that he should talk to her about job;

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614. I discuss the *Straight* case in MELLO, DEAD WRONG, *supra* at 206-17.
615. *See* MELLO, DEAD WRONG *supra* at 210-11.

panic—*Straight's* pro bono lawyer from Jacksonville filed his own Eleventh Circuit rehearing, and I'm afraid that ours won't get to the court in time to displace his—his cover letter said to withdraw his if ours gets there (ours is written and would be filed under his name)—so we must scramble to get it done tonight and on a plane to Atlanta tomorrow; Gail Anderson did fabulous typing job—*Straight* rehearing totally done by 9:00 p.m.; Scharlette and company packed up the Clearinghouse to be transplanted into CCR: end of an era, and beginning of an era.

Thursday, October 3:
Tallahassee: *Ford* cert. petition due to be filed today, but *Ford* is West Palm's case now, not mine; more warrants today, according to Art Weidinger; Mark Olive still gone in New Haven; another disaster in *Straight*—the plane to take the rehearing to Atlanta was canceled—put it on the next flight, but it might not arrive in time; I read through *Porter* trial transcript and record on appeal; Clearinghouse moved bag and baggage to CCR building; many phone calls from prospective CCR applicants; waited at new building for Jerry Justine until 11:30 p.m., but he never came with my *Spaziano* case files.

Friday, October 4:
Mark and I flew to Miami to meet with *Porter* lawyers, which took all day, until 7:00 p.m.: first met with Ben Ried, Doug Chumbly, and others: Mark outlined timing and issues—he is very, very good: he is really on top of things: later met with about 20 associates at the law firm doing *Porter*, who divided up assignments amongst themselves; talked to Mark about Leon Wright coming to CCR: he agreed he would be great, and we need him, and Ken Roach, too, if possible: even if it means downgrading Terry Farley and Gail Anderson to secretary positions; met Ruthann at West Palm Beach airport then drove home to Jupiter.

Saturday, October 5:
Jupiter: Relaxed with Larkin and Ruthann at home; called Leon and brought him up to date.

Sunday, October 6:
Jupiter: *Miami Herald* lead story: the brains of executed death row inmates in Florida are being used for medical experiments at the University of Florida Medical School: Mike Radelet had told me a while ago about this practice, and I told Dick Burr, and he told Dorothy Lewis, during the *Elledge* hearing: Susan Carey is quoted in the story, and I will bet that she broke the story to the media; flew from West Palm to Tallahassee. 10:30 a.m.: helped Mark Olive with opposition to State's motion to dismiss *Darden* cert. as improvidently

granted—edited his draft, and looked up cases, etc.; Mark and I wound up working on *Darden* all night (Mark, Tim Schroeder and Gail): Bob Harper came by with his silly suggestions on how the pages should look: Mark and I disagreed on how an argument he wrote should run: he sort of summarily dismissed what I thought, which is annoying.

Monday, October 7:
First Monday in October: opening of U.S. Supreme Court's 1985 Term: Court will probably deny cert. in *Sireci* today: called the Court—no *Sireci* decision yet, and won't say when it will be conferenced; first day in new CCR building: moved furniture, general meeting, our first real staff meeting: it mostly concerned housekeeping things (phones, credit cards, travel expenses): Mark made a pitch for a "cop- investigator" (*i.e.*, Leon Wright), and Scharlette did, too; talked about changing the Florida Supreme Court's statute of limitations rule on 3.850 motions: Jim Smith would agree to an extra year, but we are afraid that it would hurt us: in a year, Smith could say, "You said a year was all you needed a year ago"; Larry Spaulding gave the "chain of command," under which I "answer" to Mark. Night: worked on *Spaziano* appendices until 11:30 p.m.

Tuesday, October 8:
Chatted with Larry Spaulding, really for the first time: He said "they" met this morning and decided that I would do a death penalty newsletter: he also wants to do a "cold edit" of our pleadings (huh?). 10:15 a.m.: warrant in *Robert Preston* (no lawyer, so CCR case) and *Leo Jones* (Erwin Block's firm: very shaky: clemency hearing was only three weeks ago); *St. Petersburg Times* newspaper: U.S. Supreme Court granted cert. in a case that sounds like *Grigsby*; called Craig: agreed to do death penalty newsletter as a joint venture: he'll do Florida cases and I will do federal cases (just like old times): good talk: big issue in West Palm is the "brain snatchers" issue that the *Miami Herald* broke last week: Susan Carey is into it: medical examiners meet in West Palm Beach on Monday: Larry agrees a joint venture newsletter idea is good; Larry: meeting with Craig has been converted into a meeting of the "Ad Hoc Committee on Responsible Representation," on Rule 3.850 changes, pace of death warrants, etc.; worked on *Spaziano* until 3:00 a.m.

Wednesday, October 9:
Mark wants me to read *Porter* record all the way through—neither of us has done that yet; spent most of the day editing *Spaziano*. At night, re-read *Porter* transcripts and record; left office at 3:00 a.m.; Scharlette is now keeping a "Faith Blake hit list of blunders," to be used against her: office consensus is

that Larry and Faith are sleeping together and that she'll scream "sexual harassment" if she's fired.

Thursday, October 10:
Dick Burr called: wants CCR to be on amicus brief in *Ford* cert. to U.S. Supreme Court, if American Psychiatric Association won't do it: Sandy Bohrer is writing the amicus brief, and, maybe us and Wilmer, Cutler and Pickering will all join: called Jim Coleman, who liked the idea: so did Larry Spaulding; Leon called for a status report: said he had good talk with Scharlette; Mark: meeting today to see if we can drop a staff attorney's position to hire Leon as "cop—investigator"; I met with legislative people; Scharlette: we can do what we want in terms of investigators and lawyers—the question is what we want to do; no decision yet. At 6:00 p.m., we all had drinks with Dan Rabinowitz, who represents *Herring* and who teaches Yale Law School seminar: he is in town to stroke Art Weidinger; after drinks, ate pork ribs with Jimmy Lohman, Gail Anderson, Terry Farley, Tim Schroeder; at house, called Leon and talked about where we stand on job: he still wants to come to CCR, if Ken Roach can come, too.

Friday, October 11:
Sarah Bleakley came by office, with new baby; I interviewed Lisa for legal secretary job; Mark took Terry and I aside, closed the door, and said Scharlette will be out for a week or so with her daughter Summer, who is very depressed and needs Scharlette there with her; I started reading *Preston* transcript: it's about 4,000 pages long; LDF called Mark: U.S. Supreme Court sent *Arango* back to the Eleventh Circuit for reconsideration; the "dump Faith" effort is picking up steam: she was nasty to an interviewee, and can't even get us a Xerox machine or copy cards—which is not good on an office that exists on photocopies; talked to Mark about *Jones*—is there a requirement that one be competent to pursue 3.850 remedies?; Steve Malone called from St. Petersburg office to talk about *Jerry White*: trial lawyer was drunk, on drugs; worked on *Preston* until 1 a.m.; *St. Petersburg Times* newspaper did big article on Scharlette coming to work at CCR: very sympathetic to Scharlette and CCR.

Saturday, October 12:
In office at 10:00 a.m.; interviewed a person Steve Malone wants to hire in St. Pete (Gina? Carol?), who just graduated Stetson Law School: Larry and I met with her, and Larry was preoccupied with whether she writes in "legalese," his pet passion—he's even written a booklet on it: she seems very enthusiastic about deathwork; I added to *Spaziano* 3.850 and started going through *Preston* record again; Larry: Pat Griffith says that State Attorneys are complaining to

Attorney General Jim Smith about CCR's hiring Scharlette: "I thought this office was to grease the skids to the electric chair," the prosecutors have been saying; worked on *Preston* until 3:00 a.m.; finished voir dire (he has a *Grigsby* issue) and started on sentencing transcript: seems like a well and fairly tried case, and probably no ineffective assistance of trial counsel claim, but very strong *Grigsby* issue, which should be enough to get him a stay.

Sunday, October 13:
Met with Mark, Gail, Jimmy, etc., from 10:00 a.m. to 1:00 p.m., to go over cases; Mark and I will go to Miami on Wednesday to see how the *Porter* law firm (Kimbrell and Ha.men) people are doing on *Porter*; Gail will go to St. Petersburg to help Steve Malone with White; Mark gone from this afternoon to Wednesday on *Miller* (his Tennessee re-sentencing case); Scharlette asked Mark if he wanted to hire Leon and Ken and he said yes and grimaced: that means only four more lawyers can be hired: Mark suggested we make *Preston* a CCR case and argue that we are just not ready to do it, given our startup time and the fact that at present we have no furniture in the office, only two phone lines, no photocopying machine, etc.: Scharlette and I will talk to Larry tomorrow about that; worked on *Preston* all day—finished sentencing and motions—found a *Brady* issue that needs re- investigation—keys found in victim's car, with the name "Marcus Morales" on them – *we need to find Marcus Morales*; Scharlette brought me a dinner of spaghetti, at the office; worked until midnight.

Monday, October 14:
In office at 6:45 a.m.; at office meeting, we decided to make *Preston* a CCR case: Larry will fund it, arguing that Governor Graham is trying to bury us before the office is even fully operational; went over *Agan* and *Waterhouse* papers and transcripts on getting stays for not having a lawyer; *Spaziano*: Ed Kirkland called: nothing more to say to me about *Spaziano*, and wants to deal with me in the future "at arm's length" —I told him I not mean anything by saying "devastating" in the letter – Kirkland was very abrupt, defensive about ineffective assistance of trial counsel claim: now saying his failure to investigate hypnotism was "strategy"—which is bullshit; Joan Bickerstaff, *Preston's* appeal and clemency lawyer, called and spoke to Jimmy Lohman: she was very conciliatory, realized she screwed up, and wants to help now; I put *Preston* transcripts in Larry's office, but he says he doesn't have time to read it: "Faith is in my office all the time with administrative stuff"; spent most of day dictating notes on *Preston* transcript and possible legal issues to investigate and litigate; worked until 11:30 p.m.
Tuesday, October 15:

William. Vandiver executed in Indiana—the first nonconsensual execution outside of the South, I think - - capital punishment is no longer a southern thing; Larry Spaulding agrees to our idea of interviewing jurors in *Preston*, but edited the motion to omit "legalese," such as "comes now"; Baya Harrison called to talk about *King* re-sentencing, which is coming up in November—trial judge ruled that lingering doubt about guilt is irrelevant, as a matter of law, in deciding who dies in Florida: I think this is a great issue for federal court, in *King*, as it is in *Spaziano*; Scharlette called U.S. Supreme Court: *Darden* is being held and no word on *Sireci* (not on calendar or scheduled for conference) (waiting for *Hitchcock*?); long argument with Faith and Larry about my travel expenses, especially the Miami to West Palm Beach leg of *Porter* trip last week: I offered to pay it myself, but Faith said there was no need to do that, since it was business, because I talked to my old office about *Sireci* while I was in West Palm (talked about *Ford*, too) and, anyway, the State is getting its money's worth from me, Faith said; spent all day dictating notes on transcript in *Preston*, working on it until 4:00 a.m.

Wednesday, October 16:
Mark and I fly to Miami on *Porter*, expecting to go there, find that the law firm had everything under control, give them a pep talk, and leave; 8:30 a.m. flight from Tallahassee to Miami; firm was in a disaster: no one knew what was going on: they had a bunch of vacuous memos (one said the jury override is a big issue because cert. has been granted in *Spaziano*): Mark and I decided that one of us needed to stay with the law firm and write the stay papers and produce them and staple them; *Spaziano*: Ed Kirkland called: he now says he met with Joe and decided not to raise hypnotism issue—just to trash Tony DeLisio on cross examination—more post hoc retrospective strategy excuses; Mark got Jim Liebman and LDF people to write *Darden* brief in U.S. Supreme Court, which is due on the 28th; I talked to Craig, who told me we lost *Foster*; Mark and I worked at the law firm until 1:00 a.m. and went to hotel near airport, to fly from Miami to Tampa.

Thursday, October 17:
Porter Warrant: Mark and I caught early flight from Miami to Tampa for meeting of Ad Hoc Committee on Responsible Representation: decided at the meeting that CCR would take the lead in the effort to get the Rule 3.850 time limits changed: Larry Spaulding will draft letter on how impossible it is for us to get 40 cases filed by December 31: Attorney General Jim Smith has agreed to an extension, but Mark was afraid that then we would lose momentum that might get the statute of limitations requirement thrown out completely; after meeting, Mark flew to Tallahassee and I flew back to Miami, planning to rent a car and drive to West Palm Beach—but my driver's license

has expired, I discovered, so I flew to West Palm Beach and Jupiter, editing the *Porter* 3.850 and memo on the plane.

Friday, October 18:
Porter Warrant: In Jupiter: Home, Ruthann at work, and Larkin with me; finished editing *Porter* papers, and after battles, convinced a *very* stupid associate at the Miami law firm to send a courier to pick it up, so that someone at the firm can start typing it today and tonight: very hard to convince the firm that someone really did need to type late tonight and tomorrow night; Craig said the *Porter* 3.850 memo would be ready at 11:00 a.m. tomorrow.

Saturday, October 19:
Porter Warrant: Drove from West Palm Beach to Miami in Ruthann's car, arriving at the law firm at 9:00 a.m. — and nobody was there; I rewrote statement of facts and started drafting the federal *habeas* petition, and associates came in at 11:00 a.m. or so (Craig and Joe) — they said the typing was almost ready, but then the printer went down; no one knew how to get it fixed—I got testy, and Craig the associate lumbered off to work on the printer: Ben, the main partner, it seems, on the case, finally came in: after talking about the need to get the printer fixed, we talked about strategy for Tuesday, which is when we want to file the 3.850 and stay motion in the state trial court: he will argue it; Doug Chumbly, a senior associate, will do the Florida Supreme Court oral argument; I wrote until 1:00 a.m. and drove to West Palm Beach; Terry Farley to come here from CCR tomorrow to help on *Porter*.

Sunday, October 20:
Porter Warrant: Ruthann drove me to Miami and we had breakfast in the Grove: she not happy about this "visit," and I can't say I blame her; I arrived at the law firm at 1:00 p.m. and Ben was there corrections done and typing done and printer fixed; we talked about calling the trial lawyer and the State Attorney tomorrow; Terry Farley arrived at 2:00 p.m. and started working on the form motions; associates at the law firm proofread, but they were totally incompetent; Terry and I decided to work through until there was a pretty complete version of the State papers: 3.850 motion, stay application, form motions and form orders; Ben and company left in the afternoon; Doug came in around midnight, shocked that Ben wouldn't put us up in a hotel (Ben had fibbed and said that the law firm didn't have an account at any hotel) —so Terry and I slept for an hour on the floor of the conference room, but other than that, we worked all night: made good progress: big documents in reasonably non- horrible shape.

Monday, October 21:
Porter Warrant: In Miami: Spent the day editing and proofing; pestered the law firm partner all day to call the trial lawyer, and when he finally did, the trial lawyer said everything he did at trial was "strategy": obvious to me that Ben and Frank (managing partner, who is now set to do the Florida Supreme Court oral argument) haven't read the record or the transcript or any of the previous briefs in the case; found out that our judge on 3.850 motion and stay application isn't McIver, whom we had hoped, but it is Elmer Friday, and Judge Friday has set hearing for 1:30 p.m. tomorrow; Ben the partner finally offered to put Terry and I up in a hotel room ten blocks away (two rooms, of course): I negotiated one room at Brickell Holiday Inn, two blocks from the firm, and Terry and I will sleep there in shifts; worked at law firm conference room until about 2:00 a.m., producing the State papers in the empty law firm that is representing Raleigh Porter.

Tuesday, October 22:
Porter Warrant: In Miami: Overslept until 8:00 a.m.: dashed to law firm, and Ben and Frank had already left for the airport: they had not taken any of the papers they needed, so Terry and I had to fly to Fort Myers and drive to Pontogorda, talking strategy on the way; when we hooked up with them, Ben seemed on top of the case; filed 3.850 and stay application at about 12:30 p.m.: Ben talked to the judge and was convinced we would get a stay: the judge knows his law firm, etc.; dropped service copy of papers off at State Attorney's office, and had lunch. 1:30 p.m.: Ben gave good argument: prosecutor said a minute of nothing—judge did not leave the bench, and wrote his order then and there, putting us at ease while he did it—obvious he was going to nail us and, at about 4:30 p.m., he did—Frank and Ben crushed, but they are being nicer to us, now; flew back to Miami and worked until 2:30 a.m. on Florida Supreme Court brief and stay application.

Wednesday, October 23:
Porter Warrant: In Miami: Finished Florida Supreme Court brief last night, and in office at 8 a.m. to write federal district court papers: *habeas corpus* petition, stay application, form motions, etc.; pared down Florida Supreme Court brief from 170 pages to seventy pages to fifty pages; met with Frank at length on strategy: he is very enthusiastic about the case, mad about what happened in the trial court and convinced his client has a right to an evidentiary hearing: good attitude; Terry and I stayed until 4:00 a.m., finishing the Florida Supreme Court brief, which must be put on a plane at 7:00 a.m. tomorrow (this morning: in three hours); during the day, Ben said that he didn't think I needed to go with them to Tampa, if we have to go into Federal District Court—which I read as his not wanting to pay for me to go to

Tampa—told him CCR will pay my expenses, and suddenly he wanted me to come.

Thursday, October 24:
Porter Warrant: In Miami: I slept until 8:00 a.m., when Frank called with questions; Terry went in early and took Florida Supreme Court papers to airport with Doug; she went to bed, and I went to the law firm and wrote the Eleventh Circuit stay papers; I was going to try to sleep at 11:00 a.m., but I ran into Doug, who was paranoid about getting the Federal District Court papers filed on time—by the time that was cleared up, I was awake again and stayed until Terry came in to help in producing the papers; news from Scharlette in Tallahassee: *Jerry White* got a trial court stay: prosecution stipulated to a stay; *Porter*: Frank called in periodically with questions: he's very optimistic about getting a Florida Supreme Court stay in *Porter*; news: *Dennis Smith* got new trial on federal *habeas* from Federal District Court; *Porter*: Terry and I finished up Eleventh Circuit papers in afternoon and night; left at 9:00 p.m. for dinner and drinks.

Friday, October 25:
Porter Warrant: In Miami: Got up at 7 a.m.: called CCR, and Mark wants me to go to Tampa to help Malone; Ilene Rooney, superb paralegal who seems to be the most competent and professional person at this law firm, is to drive us to airport, but the filming of a *Miami Vice* episode had the street blocked off —so Terry and I missed the flight; called Mark from airport at 11:00 a.m.: three justices hostile during *Porter* oral argument, and two sympathetic: the new justice, Barkett, not there yet; Terry got noon flight to Tallahassee; I called Mark at 1:00 p.m.: we lost *Porter*: do not know vote yet: Jimmy is getting the opinion from the Florida Supreme Court clerk's office - - I must run for plane now—at Tampa, Steve Malone and Carol have papers; called Mark: we lost *Porter* unanimously, 6- 0: he reads the opinion to me: tells me where to find Doug and Frank in Airport Marriott: they rented a car (big spenders) and we all drive to Federal District Court: our judge is Kovocavich she calls us in for a summary to "focus" the issues, but Frank does okay—full oral argument on all the issues scheduled for 1:30 p.m. tomorrow; I went back to hotel; Frank offers to let me share his hotel room (end of big spender); dinner and strategy; talked to Mark about pulling witnesses together, if Judge Kovocavich calls for an evidentiary hearing on Sunday—which she might, and, if she does, we're screwed.

Saturday, October 26:
Porter Warrant: Spent morning talking to Mark and Scharlette about getting witnesses lined up for possible evidentiary hearing under warrant in *Porter*;

Ben, the important partner at the law firm, got into town last night, and is very cavalier and arrogant about getting a stay in Federal District Court; went over procedural default, cites, etc., but he not seem to be hearing any of it; The *Porter* oral argument/ nonevidentiary hearing began at 1:30 p.m.: Ben's opening argument was okay, but then he fell apart under questioning from the judge—he conceded crucial point after crucial point, including that we didn't meet the prejudice test of *Strickland v. Washington* (which means no evidentiary hearing on ineffective assistance of counsel, which means no stay) —during this disaster, I passed him notes, but he just ignored them—he just *rolled over*, and it flashed through my mind that he did it to avoid jeopardizing a big civil case that his law firm has pending before Judge Kovocavich; court recessed at 2:00 p.m. for a ruling at 4:00 p.m.; atmosphere very grim: Steve and I all but told Ben what he had to say to save his client in the Eleventh Circuit, since it's clear that this judge is going to kill us in every possible way she can think up: her questions just set us up for that; Ben sent word to the judge that he wanted to put some things on the record before she came back with her order: she sent word back that he could do that when she came back on the bench; 7:00 p.m.: Judge Kovocavich convened court to give her ruling: Ben said his things that he wanted to say before she gave her ruling: the ruling, of course, was no stay, *habeas* denied, but CPC for appeal granted—which means an almost certain Eleventh Circuit stay, probably without even oral argument; went to clerk's office and talked to Angela Bickers, Eleventh Circuit death clerk, by phone, who wanted to know if we had anything else to file: I said yes: Ben, et al, wanted to get a flight to Miami, so we rushed to airport; I talked to Mark and Steve about filing something else; at 8:45 p.m., Angela called me at a payphone (Mark had given her the number): *Porter* stay granted by Eleventh Circuit: left messages at Ben's and Frank's home and flew to West Palm Beach.

Sunday, October 27:

Preston Warrant: West Palm Beach: rested with family in morning; got 1:00 p.m. flight to Tampa; Vicky met me at airport in fire engine red sports car and drove me to Steve Malone's CCR office: he and his new girl friend were at lunch, but Terry Farley was there and we went to eat; she gave me the scoop on her and Malone: Malone had been going with Theresa Westerfield, a friend of Scharlette's so Scharlette decided to get Terry and Steve together, to induce him to come to Tallahassee and run the Resource Center: during *Maxwell* Warrant, Terry and Steve got together, but, contrary to what Steve told Terry, Theresa did not know about it: so when Terry later came to St. Petersburg, Theresa was upset: all three of them stayed in the same house, Steve with Theresa: meanwhile, Terry thinks she's pregnant, and she hasn't told Steve: then Steve dumps Theresa for Andrea, his student at Stetson Law School: so

things are a little tense all around here, especially since Terry and I will stay at Theresa's house on the bench while we are in St. Petersburg; we went back to St. Pete office and talked to Steve about issues; read *Peek* transcript on hair analysis.

Monday, October 28:
Preston Warrant: Divided up issues between Steve and I: he will do the trial stuff with Larry Spaulding, and I will do Florida Supreme Court arguments; spent all day drafting and talking to PCP experts, etc.; never made it to Theresa's house to sleep—just worked all night.

Tuesday, October 29:
Preston Warrant: In St. Petersburg: Drafted 3.850 and stay application issue; talked to Steve about whether we should file a 3.850 motion or just a letter saying we're not ready to file a 3.850 motion and we need more time to investigate and prepare one; I was writing on automatic pilot— very poor quality—no real thinking at all: I'm just dead tired.

Wednesday, October 30:
Preston Warrant: In St. Petersburg: Florida Supreme Court tentatively scheduled *Preston* oral argument for 9:00 a.m. on Friday: state trial court set hearing for 3:00 p.m. tomorrow; spent afternoon and night producing the 3.850 motion and stay application; I wrote an affidavit outlining this last month and saying why, if we are forced to proceed now, I am rendering ineffective assistance of counsel to *Raleigh Porter*—I'm too exhausted and brain dead and stressed to do anything else; I worked until 4:00 a.m. on Florida Supreme Court brief; Terry still there when I left, producing the 3.850 motion; I stayed at Steve Malone's house, near the law school: my clothes were still at Theresa's: I haven't had a shower in two days.

Thursday, October 31:
Preston Warrant: In St. Petersburg: In office at 9:00 a.m.: wrote Federal District Court papers; Steve delayed in leaving for trial court in Sanford by Federal Express being late in delivering the expert's report on PCP; Hurricane Jose also is bringing rain and wind, and the local Grand Prix, set for tomorrow, is bringing traffic and parking problems; Eloise called from Tallahassee: Florida Supreme Court rescheduled *Preston* oral argument for Saturday morning; Terry and I went to Theresa's house to shower at 3:00 p.m.; when we got there, Vicky told us that Andrea had called with word of a stay of *Preston's* execution: no other information, and Terry is frantic: they didn't call CCR or Mark or Scharlette; Mark: no stay in *Jones*, but he does not

need me to come to Tallahassee to help him on *Jones*, so I flew home to West Palm Beach.

Friday, November 1, 1985:
West Palm Beach: relaxed and slept at home: several naps; Larkin home with me, while Ruthann at work; Craig called: Art Weidinger indicated *Spaziano's* warrant would be signed this week: I called Art myself, and got the same feeling as Craig had: I told Art that Dr. Krop's new report was on the way, and that it was pretty powerful stuff; Scharlette: Tom Horkin and former Florida Supreme Court Chief Justice Ervin will be with me on the papers in *Spaziano*, which is wonderful news: I spoke with Horkin, who said he and Justice Ervin would come into the Florida Supreme Court for the oral argument, too.

Saturday, November 2:
Rested: took Larkin to zoo: when we returned from zoo, Ruthann said that Scharlette had called to say that the Florida Supreme Court had granted a stay in *Jones*; called Leon Wright: Craig talked to him about CCR's heavy caseload and seems to have convinced him that CCR is too poor and too busy to let him really be a professional investigator: he wants to set up a meeting with CCR and him and Ken Roach to talk it over.

Sunday, November 3:
Rested at home; flew from West Palm Beach to Tallahassee, by way of Tampa, in afternoon; went into office and cleared desk; Scharlette: *Straight* rehearing *en banc* denied by Eleventh Circuit.

4. Aurora Borialis

Monday, November 4:
10:30 a.m.: Art called: warrants in *Spaziano* and *Trodel* (he says *Trodel* has lawyer—Scharlette says no)—set for December 3— probably no warrants until end of year, but maybe soon after; I tried to call *Joe Spaziano*, but Mathis said he's being transferred to Deathwatch; called Craig, and *he* was on phone with Joe—set up conference call—Joe sounds like he's ready to explode—set up visit for tomorrow; called Ed Kirkland: I can go through his files and will do that later in week or next week; called Tom Horkan and set up meeting with he and former Justice Ervin for Wednesday morning; Talked about strategy on when to file—Mark and Scharlette want to wait; talked to Susan Carey: Rosemary Barkett wont start on Forida Supreme Court until 15th so we can't file until then—also good to have Horkan there, for Catholic angle.

Tuesday, November 5:
Spaziano Warrant: In office at 8:00 a.m.; at 8:30 a.m., a Fed Ex from Craig arrived: *Spaziano* memo and letter from J. Letts of 4th DCA . . . complementing me on jury override article, etc: decided to get judges to testify this year in legislature; left at 9:00 a.m. for FSP with Gail and Terry, driving; met with Joe for 2 hours: went over issues, strategy, timing for filing, etc.—he is in same spirits as ever; also visited Lee Martin and he's very withdrawn and depressed and talking about dropping his appeals if we lose the Eleventh Circuit rehearing.

Wednesday, November 6:
Spaziano Warrant: Met with Tom Horkan: he'll do whatever we need: gave him copies of papers (3.850 came in today): no one has talked with Justice Ervin—I'll do that today or tomorrow; talked with Dick and Craig about timing: they think we need to file ASAP, to increase J. McGregor's chances of reading the papers and granting a stay—Mark and Scharlette very resistant; decided on Nov. 18: Called J. McGregor's office and state attorney—said I'm counsel for *Spaziano*; worked on *Spaziano stay* memo all day

Thursday, November 7:
Spaziano Warrant: Long talk with Craig about *Spaziano* issues: I won't do fed pleadings on *Allen* charge (dead issue in Eleventh Circuit: only argued in state court as due process issue); Justice Ervin called; he'll do Florida Supreme Court argument on override; called Tanya Carroll at Florida Supreme Court: tentative date is Nov. 26th: talked about our problems with last four Warrants and *Trodel* (told her Rineman is looking for a lawyer); stay memo.

Friday, November 8:
Spaziano Warrant: Mother to arrive in Ft. Lauderdale at 10:50 a.m., NY Air #143: picked up mother and drove to West Palm Beach (drove from Tallahassee, after Mark told me that Larry was bitching about my travel expenses); left Tallahassee at midnight and arrived in West Palm Beach at 8:00 a.m., then drove to Ft. Lauderdale to get mom). Scharlette: Florida Supreme Court set *Spaziano* oral argument for the 25th at 2:00 p.m.

Saturday, November 9:
Home, at Jupiter: visited with mom.

Sunday, November 10:
Jupiter: Mother to leave Ft. Lauderdale 1:20 p.m. in afternoon. Drove her to airport and then back to West Palm Beach: big fight with Ruthann, but sort of worked it out.

Monday, November 11:
Spaziano Warrant: Drove West Palm Beach to Orlando to meet with *Spaziano* juror—met her at home and talked on her porch, where we sipped ice tea and talked—she very angry at judge for overriding jury ("why have a jury . . .") —she did not want to come into court or be bothered by Outlaws, but finally got her to sign affidavit—found notary at real estate office; drove to Tallahassee; called Joe: he was in good spirits, talked about artwork—we were both excited about the juror's affidavit — Joe invited me for Thanksgiving dinner with his family.

Tuesday, November 12:
Spaziano Warrant: Called Craig: went over *Spaziano* issues: researched juror issues and state law on override; did form motions; Mark wants to edit *Spaziano* 3.850; I see a fight coming; worked until 11:30 p.m.

Wednesday, November 13:
Spaziano Warrant: Fly to Orlando to go through Ed Kirkland's trial files—flight canceled due to fog—rescheduled for tomorrow; Mark editing *Spaziano*; Mark and I edited Larry's draft of petition on Rule 3.850 change; Joe called: invited me again to his house for Thanksgiving—his brother did some legal research for him and is sending it to me on *Beck* issue; Mark and Larry had a spat about Larry's refusal to let Mark rewrite the 3.850 proposal; Eloise printed out *Spaziano* memo; I added in new state constitution and jury override stuff; picked up Kirkland's *Spaziano* files at bus station at midnight.

Thursday, November 14:
Spaziano Warrant: meet Tom Horkan here at 10:00 a.m. to go over issues; went over issues; picked up Kirkland's files from bus station; in office at 8:00 p.m. left at 1:00 a.m; James Johnson, lawyer from Pensacola, called: has penalty phase coming up and wanted to talk about doubt about guilt; turns out he has same *Beck* issue as in *Spaziano*, but there was no personal waiver of lesser—no objection—wants me to testify as expert on death penalty; *Spaziano*: continuing battle over when to file *Spaziano*; Sid White called Larry, saying Florida Supreme Court Chief Justice Boyd asked us to file *Spaziano* early and not interfere with Thanksgiving;

Friday, November 15:
Spaziano Warrant: Rosemary Barkett starts on Florida Supreme Court; I meet with Justice Ervin at 10:00 a.m., after xeroxing for him override cases—he seemed frail and had recently had a stroke, but was very willing to argue the override issue; Joe called to see how things were going— talked about family

and about the rib place he'll open up when he gets out; very little progress on *Spaziano* pleadings; clear we're not filing on Monday; called Joe, talked for one and a half hours—he read me letters from his outlaw brothers.

Saturday, November 16:
Spaziano Warrant: Mark now talking about filing Tuesday or Wednesday; Craig called: *Esquire* Magazine did a story on Scharlette as a "leader in America"; we have very fundamental differences in how to approach the cases and the courts (guerrilla war or not); Mark will edit 3.850 and memo; may file Wednesday or Thursday; Called Dr. Harry Krop, Dr. Bernard Diamond: very hard to come to hearing next week; Worked on *Spaziano* until 1:30 a.m.

Sunday, November 17:
Spaziano Warrant: went over sentencing hearing record—if *Gardner* hearing wasn't limited, then *Songer* issue may evaporate; talked with Mark on and off all day about issues; Scharlette: 55 cases have been affirmed by Florida Supreme Court and don't have lawyers; Mark wants to challenge Joe's rape conviction—resurrected my old federal *habeas* draft on tattoos issue— Mark wants to challenge other stuff and maybe allege that West Palm Beach was ineffective; worked on *Spaziano* until 2:30 a.m.

Monday, November 18:
Spaziano Warrant: target date to file *Spaziano* 3.850 in trial court—not even close; Tom Horkan in Mobile, Alabama—will call; called Joe, and he was depressed—"My life is in your hands"— chilling; Rhonda Kibler called: wants me to testify before Florida Bar Board of Governors on jury override; called Joe's mother—she worried, but in good spirits—invited me for Thanksgiving; worked until 6:00 a.m.; Mark doing what I'd call a light style edit and he'd call and edit to make it into a persuasive litigation document, but I accept all changes—we joke, but it has an edge.

Tuesday, November 19:
Spaziano Warrant: in office at 10:00 a.m., working on federal papers; Mark wants to reorder appendices (pull them apart and reorder); Mark has *Esquire* article—among other things, Scharlette said that repealing the override would bring the whole statute down, problem with 3.850 verification: Susan says she can't get it to us until tomorrow night; called Judge McGregor's office: okay to give unverified motion to him tomorrow and file Thursday morning—hearing Friday afternoon; called Craig to tell about hearing: rehearing denied in *Hitchcock* and lost *Aldridge*; worked on *Spaziano* all night; slept for 2 hours on couch.

Wednesday, November 20:
Spaziano Warrant: Called Judge McGregor's secretary at 9:30 a.m., and told her we'd probably get there a little after 5:00 p.m.—she said someone would be there to take the papers; Florida Supreme Court Chief Justice Boyd called Scharlette: wanted to know why Malone wasn't filing *Trodel* earlier ("I told him to be here Monday")—Scharlette thinks Boyd is setting Steve up to be held in contempt; spent morning and afternoon rushing to get *Spaziano* 3.850 printed and copied; while at lunch (with Sarah Bleakley), Judge McGregor's secretary called and talked to Scharlette—no need to rush to Orlando—filing tomorrow is fine.

Thursday, November 21:
Spaziano Warrant: Scharlette and Mark picked me up to go to airport—picked me up at 8:15 a.m. to catch an 8:20 a.m. plane—Scharlette said she called the airport and the plane was an hour late; but it took off on time; rented car and drove, just ahead of the hurricane hitting Tallahassee; talked on the way down about office politics, power and gossip—Mark suggested I run an appellate division within the office, taking cases not under warrant; we filed the 3.850 at 2:30 p.m. and served the State Attorney; went to Holiday Inn and waited in room—planes and phones out in Tallahassee, same in South Florida—couldn't get Ruthann, or office, or Stella or Joe's family — finally got Joe's mom; I went over issues and did outline; worked until 1:00 a.m.; talked with Tom Horkan—he has no electricity, so he read our papers by candlelight—he had problems getting here.

Friday, November 22:
Spaziano Warrant: In Sanford: woke up at 7:00 a.m. and finished outline in hotel dining room; Mark moot courted me; called Tom—no planes out of Tallahassee and she decided not to drive; hearing started at 2:00 p.m.—Mark did opening on CCR, but McGregor only wanted to know why it took us 10 years to file, bad faith, etc.—then I got up to argue merits, but McGregor kept at it— I went over my involvement with the case, from law school to present— judge gave us *Songer /Harvard* issue and doubt about guilt issue, but clear he's going to stomp us—and he did, in nasty little order; called Joe from pay phone in court — he expected it; I talked to his parents, who were there in court; Tallahassee has no power and 7:00 p.m. curfew, due to hurricane. (Stay due to hurricane, too?) Drove to Gainesville and stayed with Radelet.

Saturday, November 23:
Spaziano Warrant: left Gainesville about 10:30 a.m. and drove to Tallahassee; Scharlette said my house and car are Okay—much of city hit hard by

hurricane; called Sid White (Florida Supreme Court clerk) at home; argument still on for Monday, but may be moved to Tuesday: no need to get trial court papers in tomorrow: he did not know that McGregor had ruled until I called; spend rest of day writing Florida Supreme Court papers. Night: to take break, I calculated my hourly rate since starting to work at CCR: it came to $.97 per hour—I could make three times the money at minimum wage job, flipping burgers at McDonalds or pumping gas; well, back to work.

Sunday, November 24:
Spaziano Warrant: finished drafting Florida Supreme Court issues: Scharlette got appendices bound and delivered to Florida Supreme Court; called dad—his voice hoarse again—last time, when I was in college, this meant cancer—tests not in until Tuesday; called mom and she very, very upset; *battle royal* with Scharlette over footnotes in my *Spaziano* Florida Supreme Court brief: without telling me, she unilaterally directed the typist to suck all my footnotes into text: I was furious, and glared Mark into fixing it, with my fingers drumming on a metal file cabinet and my eyes undoubtedly filled with fury—Scharlette storms out, and I get my footnotes; Mark increasingly concerned about scope of *Gardner* remand as killing the *Harvard/Songer* issue— long talks about dealing with it; record came in at 6:30 p.m.—sent to Florida Supreme Court; Florida Supreme Court brief being edited, etc.; worked at office until 2:30 a.m.; others still working on papers when I left—listened to *Harvard* oral argument tape before going to sleep.

Monday, November 25:
Spaziano Warrant: Florida Supreme Court set oral argument for *Spaziano* for 2:00 p.m.; come into office at 9:00 a.m.: Margene's Answer Brief in—our brief almost finished being copied— Jim and Terry asleep on floor; called former Justice Ervin, to suggest he not do arguments, but he was so up for it that I didn't; called Sid White, and he said its okay to split argument; moot courted with Mark and Scharlette and went over to court at 1:30 p.m.; met Ervin in lounge and we chatted until Tom and Sid White came in—told we had 30 minutes for argument: I went first and stressed hypnotism—court seemed very concerned about it in *Bundy*—many questions from all sides—my yellow light was on before I was into *Coope/Lockett/Hitchcock/Harvard/Songer* issue; they did not seem concerned about it; Ervin was great: folksy, simple Justice (the Justices addressed him as "Mr. Justice Ervin")—they loved him: Margene was okay— delay, bad faith, etc. —court not seem to be buying it: I got fired up on rebuttal; afterwards met clerks for Justices Shaw and Boyd—good reviews from Tim and Jimmy; went back to office to wait and by 4:00 p.m. decided we'd lost; at

4:15 p.m., Sid White called: stay, 4- 2; I called Joe, his mom, the clubhouse —cheers.

Tuesday, November 26:
Slept in and arrived at office at 1:30 p.m; cleaned up; talked to Roger Lowenthal of *Wall St. Journal* about override; called mom: dad is okay—I'll go home tomorrow.

Wednesday, November 27:
Housekeeping stuff at work; was supposed to catch 1:40 p.m. flight to DC: changed flight to 6:30 p.m., because Malone is in trouble on *Trodel*—State is agreeing we have a hearing, but wants it today, so Mark wants to play hardball—as a state agency, we just won't do a hearing now, only 3 weeks after getting the case—we'll all resign before we do that; as of 11:00 a.m., Larry had done his *Trodel* intro argument on why CCR wasn't ready and Steve was arguing the merits of the issues on phone with Craig on strategy when Scharlette came running down hall looking for Mark— judge denied *Trodel* at 12:15 p.m.; conference call with Steve—no hearing; Craig said that Monday is traditionally a big orders day in U.S. Supreme Court—Expect *Ford* denial. 2:00 p.m.: Sid White called: *Trodel* transcript can't be done—so I did application for stay on that basis (can't have meaningful appeal without a transcript of trial court proceedings denying a stay, South Florida Supreme Court grant stay): denied half hour later; Sid called; flew from Tallahassee to DC.

Thursday, November 28:
Dumfries, Virginia: spent last night and today relaxing with dad; slept until 1:00 p.m.

Friday, November 29:
Dumfries, Virginia: at Dad's; *Trodel* Florida Supreme Court argument this morning: called office at 10:30 a.m.: Sid watched argument and said it was a disaster—justices didn't scream about delay in the argument itself, but clearly they were hostile to the merits, especially Steve's argument that they improperly considered the record of co-defendant Hawkins on *Trodel's* appeal—Justice McDonald, who was out on a limb in *Hawkins*, accused Steve of insulting the court and demanded an apology, which he got: Sid also told me about a letter Justice Boyd sent to Larry, saying unreasonable delays won't be tolerated, that we're expected to be in Florida Supreme Court 10 days before execution date, that we're presumed to represent everyone on death row, reminding us of 3.850 rule charge which means they've decided to deny

our petition. Called later: *Trodel* lost—Scharlette and Jimmy agreed the argument was awful.

Saturday, November 30:
D.C.: Ruthann and Larkin arrive in D.C.: I meet them at Shorham hotel; Scharlette wants me to pick *Trodel* U.S. Supreme Court papers at airport: good panel in Eleventh Circuit: District Court Judge is Kehoe—they filed today, in Miami.

Sunday, December 1, 1985:
DC: I took Larkin to mom's for day; Scharlette calls at my dad's: *Trodel* stay from J. Kehoe.

Monday, December 2:
Alexandria, Virginia: I bring Larkin to my mom's for the day—we will stay the night; called U.S. Supreme Court—no decision on cert. in *Sireci* or *Ford.*

Tuesday, December 3:
Alexandria, Virginia: Spaziano and Trodel scheduled to be killed: both have solid stays; Larkin at my mom's apartment in northern Virginia during the day; Jeff called: the good guys won *Miller v. Fenton*, the confession case, in U.S. Supreme Court, 8- 1; at night, long and good talk with Ruthann about future of CCR, whether I want to hunker down for a long siege of (stupid) guerilla warfare with the courts, Scharlette's manipulations during *Spaziano*, etc.: Ruthann suggests the possibility of my coming to D.C. to work for Wilmer, Cutler and Pickering, at least for a few years: we were in the lobby of the Shorham hotel when she brought it up, waiting for Jeff to meet us: then we all had drinks, then Ruthann and Larkin and I had dinner; then Jeff took me back to my dad's house: Jeff and I had good talk about the law firm on the way.

Wednesday, December 4:
D.C.: went with Larkin to death penalty seminar in NLADA convention: Dennis Balske, Kevin McNally and Bill McClain were there; called in to office: Mark said that Larry testified in legislature (Senate Judiciary Crime Committee, I think) on CCR, and that he did okay, unless you know the great things he *could* have said: Eva Davis gave her report on jury override bill—indefinite, but it did not really hurt us, except that she did notice that since *Spaziano v. Florida* was decided by the U.S. Supreme Court last year, the Florida Supreme Court isn't reversing nearly as many jury overrides as it had in the years leading up to *Spaziano*; Jeff, Larkin and I went to dinner with Jeff's family: Larkin and Michelle really hit it off.

Thursday, December 5:
D.C.: spent day book shopping in Georgetown with Larkin and Ruthann; Ruthann thinks Scharlette just can't be trusted, that eventually she would do me in, and that her main interest is self promotion and self aggrandizement: that sort of deceit by coworkers with influence is just not acceptable; had dinner at Cantina D'Italia on DuPont Circle, where Jeff took me for my going away party after the end of our summer working together at Miller, Cassidy, LaRocca and Lewin; after dropping Ruthann and Larkin off, I called Roger Lowenstein of the *Wall Street Journal* (Mark had told me this afternoon that he had called): he is in Miami, interviewing Florida Supreme Court Justice McDonald and others for big article on jury overrides: McDonald thinks Justice Barkett will bring the court back into line on jury override cases—reversing almost all of them.

Friday, December 6:
DC: Carrol Cole executed in Nevada; called office from DC: Scharlette said the Public Defender's Association met yesterday, and that CCR and her profile in *Esquire* magazine were on the agenda: they tied 8- 8 on whether to exclude CCR from their annual Life Over Death conference—then someone came in, broke the tie, so now we get to go: Larry on phone all day to smooth the ruffled feathers; called Craig: Dick Jorandby was upset, because he thought that others at the meeting thought that Scharlette's slurs in *Esquire* magazine article were directed at *him*, since he is the only Public Defender Scharlette has worked with—among other things, apparently Scharlette called him a "scumbag"—Craig looked up the word "scumbag," while I was on the phone with him, and learned that it apparently is a condom filled with semen, and then Craig was *really* angry; spent day with mom and dad; at night, flew from Washington National Airport to Tallahassee.

Saturday, December 7:
Back in Tallahassee: Mark was the only one in the CCR office; read *Johnson* Eleventh Circuit opinion, written by Judge Vance, denying *habeas* relief (Mark's first case at the Resource Center); Mark gave me draft letter of response to Florida Supreme Court Justice Boyd—a not too subtle "fuck off"; yesterday, dad mentioned that Carrol Cole was executed in Nevada: Gail Anderson showed me today a blurb in the Tallahassee Democrat newspaper that he was scheduled to die: today's *St. Petersburg Times* newspaper had an article, saying that Cole was an execution volunteer who refused to pursue further appeals challenges to his death sentence; I redid and updated my resume; Jim Smith pulled out of race for Governor, leaving Harry Johnston high and dry, with no running mate.

Sunday, December 8:
I "edited" Mark's letter to Chief Justice Boyd, to tone it down and decrease the volume; I talked to him about Sidney's wanting to do more substantive work, and he said it was up to Scharlette whether Sidney has "paid his dues" yet at CCR; I spent most of day writing letters, clearing off desk; read Eva Davis's report on the Judiciary Crime Committee, on jury override: nothing much new.

Monday, December 9:
Called U.S. Supreme Court clerk's office at 10:05 a.m.: *Sireci* cert. petition still pending, but cert. *granted* in *Ford*—called Craig to congratulate him, and, while we were on the phone, Dick called me; did notice of supplemental authority in *Martin*; Scharlette spent weekend at ACLU meeting, with *St. Petersburg Times* publisher: they want to do a book on her, will bring her in for seminars at the Poynter Institute, etc.; Mark Evans started working as CCR attorney today, for a month, until he goes to St. Pete to work with Malone; talked with Mark briefly about *Spaziano*, control of cases, etc. — he hostile, but then he said he was just "joking," in part, he says, because he's pissed that Larry doesn't like his letter to Justice Boyd; also, Larry is in Sarasota; later, had three- hour talk with Mark and Scharlette about it: control of cases (a notion they say is alien to a "team approach, but which Mark will clearly continue to exercise when push comes to shove") and guerilla warfare tactics with the courts (where I clearly have a fundamental difference in approach than Mark and Scharlette): seems to me that credibility with the judges is critical: the importance of not having judges think you're a "scumbag": the bottom line is Mark is the boss, but he hopes not to have to exercise it much: this meeting got nasty at times, with them saying my position comes from being intimidated by the courts, that clerking for Judge Vance made me respect the "scum judges"; Jimmy Lohman says that the jury override bill is in trouble again: Senator Dunn not seem to care he's too busy running for Attorney General now, and does not want to open himself up to losing political capital for being soft on capital punishment or "tinkering" with the capital statute.

Tuesday, December 10:
Atmosphere in office grim: everyone knows that Mark and Scharlette took me to the woodshed last night; *Johnson* rehearing: Mark says he and I will divide up issues; I worked on and made plans for jury override bill speech to Florida Bar on Friday; talked to Margo; stopped by Sam Miller's office—jury override bill has "no chance at all this year"—Johnston is fighting for his political life and hitting Padjic for being a capital punishment abolitionist—Dunn seems not to be into the override bill this time around;

Scharlette and Mark talking about *Bundy*, set for clemency on December 18—no lawyer now: (maybe Ed Stafman or Bill Shepard).

Wednesday, December 11:
Talked with Margot Piquinot and Scharlette periodically about legislation committee strategy on jury override bill for Friday: who to contact (Horkin will contact Emmanuel, Jorandby will contact Reiter, I will contact Ufelder): decided to ask for full Bar endorsement, not just permission to let the Individual Rights and Responsibilities Committee lobby in favor of the bill: I called Ufelder, who didn't know anything about the bill, said he supported us and would call Raford Taylor, the Bar's lobbyist; Scharlette called Chan Muller, who was just appointed to the Legislation Committee, and will be a good ally for us, since he just did a jury override trial; Mark: oral arguments in Florida Supreme Court on Wednesday on change in Rule 3.850: Larry will do the argument; Scharlette's birthday today: Mark suggested a male stripper and Eloise set it up, but then Mark and others backed out—sent the stripper to Jimmy's; good talk with Jeff Robinson; told him about meetings on Monday with Mark and Scharlette: asked him to test the waters at Wilmer, Cutler and Pickering with Jim Coleman, without really committing me to apply for a job there, he'll talk to Coleman tomorrow or Friday.

Thursday, December 12:
Tour of Florida State Prison, arranged by Larry Spaulding: I left for the prison in Starke at 6:30 a.m., in "nonsmoking" car with Larry, Lisa, and Sidney: the four and a half hour tour started at 9:15 a.m.—Mathis and Reddish lead us through the whole prison complex, from psych wings to Death Row cells (saw Bill Elledge there)—life there can't be described: tiny cells, only bars between them, two rows of bars to the catwalk where we stood—tour ended in death chamber, electric chair (I sat in chair), witness room: saw the switches — Mathis went through the whole "procedure" in an awful bureaucratic monotone ("then I help strap them in...")—I felt very weak and ill and dirty—then we went to Deathwatch cells, only 10 feet from chair; then we all went to Mike Radelet's house in Gainesville for meeting of the "family": Susan Carey talked about dealing with dying people, and Mike about research he wanted to do: people were whispering that Michael Minerva, rather than Larry, should argue the 3.850 rule change in the Florida Supreme Court next week: deathwork politics flying around the Radelet living room.

Friday, December 13:
Friday, the 13th: my day to testify on jury override legislation before the Legislation Committee of the Florida Bar: 7:10 a.m. flight to Tampa: met Margot at 9:30 a.m. and went over strategy and who's who on the Legislation

Committee (she not really know who's who, actually): the meeting heard my bill at 10:30 a.m.—my formal presentation was flat, and it didn't go over well, but questions and answers went fine—Chan Muller took the floor and gave a nice speech in favor of the committee's endorsement of legislative repeal of the override—committee unanimously voted to recommend that the full board of Governors of the Florida Bar support the bill at its meeting on January 8 to 11; spent afternoon with Neil Skene (at Scharlette's request) in his editor's office at *St. Petersburg Times* newspaper: his law review article on Florida death penalty generally will come out in *Stetson Law Review*; called Jeff: Coleman was sad about problems at CCR, but happy that I might apply to Wilmer, Cutler and Pickering law firm: he shares my and Jeff's fear about the direction where CCR is headed; flew from Tampa to West Palm Beach.

Saturday, December 14:
Jupiter: relaxed with family: shopped at flea market.

Sunday, December 15:
Jupiter: rested at home for most of day: Ruthann and I really decided that I would go to DC: went over resume and cover letter: Ruthann will type them up this week; flew from West Palm Beach to Tallahassee at 8:30 p.m.: Steve Goldstein on plane: he said that if I applied for an adjunct teaching job at FSU (death penalty seminar or federal *habeas corpus* seminar), I would probably get it. In office: Read Steve Seleger's rehearing in *Johnson*—it's awful—does wrong issues and does them very badly—must be rewritten from scratch.

Monday, December 16:
Jim Rineman- ism: how do you cook a frog? Start off with the water cold, otherwise the frog will jump out, put the frog in the water, gradually increase the heat, until the frog is cooked; Mark is cooking me like a frog in *Johnson*—now I'm doing all of the rehearing (last week he and I were dividing up the issues); started reading briefs and opinions in *Johnson*: Jeff called from San Francisco: talked about mechanics and timing of applying for job at Wilmer, Cutler and Pickering; Mark: Bill Shepard will do *Bundy* clemency and, once he's hooked into it, he won't be able to pull out (the cooking frog idea, again); Steve Seleger came by: finally convinced him to just let me write the damn rehearing for him, and he would still sign it solo; Scharlette: trying to calculate which warrant s will come in January: her guess is *Ted Bundy*, *Larry Mann* and *Edward Dean Kennedy*.

Tuesday, December 17:
Craig called: radio yesterday had long story about *Bundy*[616] clemency, Bundy's firing of Bob Harper as clemency and cert. lawyer, etc.; *Tallahassee Democrat* newspaper story today: Art Weidinger quoted as saying that clemency in *Bundy* won't be postponed, even though Bundy has no lawyer at present; drafted issues in *Johnson* rehearing: Eloise typing it; Scharlette asked me to meet with Phil Padovano on *Magill* (Eleventh Circuit brief is due on Monday—7 days from today)—Phil did horrible job on killing kids issue and other issues, including very strong *Lockett* issue—talked to him for about an hour—he asked me to be co-counsel with him—no real work has been done on the brief—talked to Mark, who called in Scharlette: not want us to come on as co-counsel, since that undermines CCR's "we're not ready" refrain in other cases: they said it okay for me to ghostwrite the killing kids issue and other issues: Phil will come back tomorrow to talk; spent rest of day, until 11 p.m., reading Law Review articles and other stuff on killing kids: Professor Victor Streib, at Cleveland State Law School, wrote a brilliant and extremely plagiarizable Law Review article on executing juveniles issue.

Wednesday, December 18:
Tallahassee Democrat quotes Larry Spaulding as saying that *Bundy* would get a warrant as early as January 3 or maybe "closer to election time": Art Weidinger quoted as saying the *Bundy* clemency is today; oral argument in Florida Supreme Court on Rule 3.850 change: Larry did okay, except for concession that time limit was workable—the justices seemed sympathetic to a one- year extension, but wanted to know if we would keep filing a 3.850 in every case—no sympathy within the court for getting rid of the 3.850 time limit totally—Justice McDonald was frisky on this—Ray Marky argued for attorney general: good, down home job—he agreed to a one- year extension: Mike Minerva argued for Public Defender Association; *Magill* Eleventh Circuit brief: Phil Padovano came over for four hours: went over *Magill* issues: he missed a lot of them: we decided I would be on the brief with him and do part of the oral argument: Mark and Scharlette agreed to this, under pressure; Steve Seleger came over: went over *Johnson*: he bought my version of how to structure the arguments. Night: drafted *Magill* issues, except for killing kids issue.

Thursday, December 19:
Tallahassee Democrat headline is, "Bundy gets no support at his hearing": the clemency was yesterday, with no lawyer for Bundy: Governor Graham says

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616. I discuss the *Bundy* case in MELLO, DEAD WRONG, *supra* note 2, at 97.

Bundy has 30 days to file clemency papers, but Graham will uphold "the integrity" (ho ho) of clemency by not letting an individual avoid carrying out the sentence; *Magill* Eleventh Circuit brief: Phil Padovano here all day: he typed as I drafted issues for *Magill* Eleventh Circuit brief; lunch with Steve Goldstein: he mentioned Ruthann as a legal writing instructor: I called her, and she said she would send resume to FSU Law School, which she did later in day; Florida Supreme Court decision on 3.850 rule change — one- year extension, but nothing more; Sidney: Mark fired him today; Mark called from Florida State Prison: Seleger was appointed to do *Bundy* clemency memo: Mark met with Bundy today; I worked in office until 3:30 a.m.—*Paul Magill* could end up being a landmark case—the first time a federal court of appeals has really been asked to consider the legality of executing someone who was a minor at the time they committed their crime—*Magill* could go up to U.S. Supreme Court, too.

Friday, December 20 - Sunday, December 22:
In office at 9:30 a.m.: Phil here, typing kids issue in *Magill* but he's only on page 2 of my draft: his typing was very slow: big gaps of time with nothing being done: we argued all day about getting a time extension, and he finally called Angela Bickers in the Eleventh Circuit, but she intimidated him away from the idea: Chris Cox worked on brief most of afternoon. 5:00 p.m.: Phil's computer ate the whole brief, while Terry Farley was hooking up the printer: spent next three hours trying to reconstruct it: Phil started retyping it from the beginning. At 8:30 p.m., I declared an emergency and called in Terry, Gail, et al.—they divided up the work and finished the brief at 3:30 a.m.: Phil and I went over it: proofed it and went to Phil's office at 5:30 a.m. to xerox it, but he not have copy paper for his single-copy Xerox machine—no automatic feed—he didn't want to use good paper: finally found some paper and made the copies—first good draft of Eleventh Circuit brief in Paul Magill's case done at 6:30 a.m. In office at 9:30 a.m.: Mark and Sidney having final showdown, and Sid wants me there that took an hour; went over drafts from last night; Eloise in typing for an hour, and Chris Cox came in for the duration, and edited issues and gave them to her; Mark: "Scharlette has to go: she is history . . . there is nothing in this office that she can do that someone else here can't do as well, and it's just hell to work with her . . . since she seems so unhappy here, too"; Chris ran *Magill* draft at 1:30 p.m.: big problems with printout: Phil went home: I proofed until Mark came in at 7:00 p.m., and he took over: I went to rest on Larry's couch, and fell asleep until noon on Sunday; woke up at noon on Larry's couch, as final run of the *Magill* brief was coming out of the machine: went home, packed and left for West Palm Beach (driving): got there at about 8:00 p.m.

Monday, December 23:
Jupiter: home with Larkin; Ruthann: hearing in *Lee* (AFDC case) set for Friday, in Tampa, before Judge Castagnia.

Tuesday, December 24:
Jupiter: home with Larkin.

Wednesday, December 25:
Home with Larkin.

Thursday, December 26:
Home with Larkin.

Friday, December 27:
Ruthann and Larkin leave for Jacksonville; spent day at my old office, seeing Craig and the two Dicks: very pleasant time, but they made it clear that I wouldn't be asked to come back there to work if I left CCR: now they want a trial lawyer: while I was there, the Eleventh Circuit called to say that rehearing had been denied in *Aldredge*, only three weeks after it was filed.

Saturday, December 28:
Rested at home.

Sunday, December 29:
Ruthann and Larkin return from Jacksonville: hung out at home.

Monday, December 30:
Home with Larkin.

Tuesday, December 31:
Ruthann and Larkin at home: went to movie, "The Color Purple": our first movie together: at night, we smoked our first hand-rolled cigarette together (a holidays present from Mark and Susan).

D. 1986: Chancellorsville, Tallahassee, Florida

It's been 10 months now
Since I arrived,
Can't say how long I'll stay.
I feel I've aged 10 years,
With how I look today.
My nose, ears and eyes
Are open wide,
And let this war inside,
Where my own spirit
Fights like these men
Just hoping to survive

Unsung Stories of the Civil War[617]

Wednesday, January 1, 1986:
Ruthann typed resume for adjunct prof. job at FSU; I decided not to go to D.C., at least not until Ruthann and I talked about it a lot more; we did talk about distance, the strength of our love and revolution and selling out, the essential futility of CCR, fighting to buy time, but no more for clients; finally did resume and cover letter, but will wait to send. Ruthann preparing for *Lee* oral argument.

Thursday, January 2:
Aric Press of *Newsweek* called about *Magill* (executing kids); they're doing a story on *Roach* in South Carolina; set to die next week; clemency coming up; also very interested in new *Spaziano* stuff on innocence; wants me to send it. Ruthann leaves for Tampa.

Friday, January 3:
Spend day with Larkin. Ruthann comes home at 9:30 p.m.; argument went well in *Lee*.

Saturday, January 4:
West Palm Beach to Tallahassee; rain and fog most of the way; office: Mark Evans, Mark Olive and Scharlette going over issues in *Mann*; Scharlette thinks

617. *The Ca.m.p Follower* on *Bruce Bernside's Unsung Stories of the Civil War* (Tortoise Humor Recordings 1999).

Susan Schaffer sold him out and, of course, she and Pat Doherty were incompetent.

Sunday, January 5:
Staff meeting on cases (Malone here); Moran, the trial lawyer in *White,* filed bar grievance against Malone; I'm to do *Straight* cert. and *Kennedy* post conviction and successor in *Funchess and Straight*; Mark E.: S.C. Gov. denied clemency in *Roach;* set to die on 10th; during lunch, someone mentioned that Lisa was quitting, ostensibly to study for Ph.D. Comps (real reason was being treated like dirt by Terry); Mark reiterated that Scharlette is "history," but that she's positioning everyone in the office as allies; he thinks she'll be gone by April; dinner with Mark and Susan; mostly talked about books and food and the south, but office politics, too;

Monday, January 6:
Wall St. Journal article on jury override out; very good; Roger talked to many jurors in other cases; called Jim Burke, who suggested we get together for lunch tomorrow; called Margot: Bar Board of Governors will deal with override issue on Thursday at 2:00: I may need to go; called Frank Shepphard: his brief filed in *Porter* (an idiot associate did it) on expedited schedule.

Tuesday, January 7:
Warrants: *Blanco* (Yale Seminar working on it) and *Mann;* Feb. 4 Ruthann called: she won *Lee;* Larry: Met with Senator Upchurch, who said that no controversial bills (*i.e.*, override) would pass this year, because of election; met with Burke: plans to push the bill hard: liked mine and Ruthann's article and gave it to Congressional Black caucus; Scharlette: Gov's officer told *Burr* clemency attorney that no more clemencies would be heard until new Governor; Neil Skene sent his *Stetson Law Review* article draft: great, nasty rhetoric, jumping in the face of Florida Supreme Court; also possible *Sanger* issue for *Booker;* called Jeff and told him about it.

Wednesday, January 8:
Margot: Chan Muller wants me to come to Board of Governors meeting tomorrow; I talked to her about possible IRRC endorsement of a bill to outlaw killing kids: she very enthusiastic: I'll bring it up at meeting on 23rd; Researched and did outline of killing kids issue for reply brief; Phil brought full *Magill* files by; *Zeigler* lost in Federal District Court; Mark says I'll do appeal, maybe with Rieser.

Thursday, January 9:
8:50 a.m.: Flew to Orlando, and hung out at airport (reading *Magill* stuff); went to Bd. of Gov.Board of Governors meeting at 2:00 p.m.; but they were engrossed in mandatory CLE and title search debates; Margot came in and assured me that I wouldn't need to talk, just answer questions; talked to Chan and met Ted Klein and Mike Nachwalter; hung out until 5:00; when override bill came up, Ray Ferraro introduced me and I gave brief talk: they then voted, by 23- 6, to endorse the bill and lobby for it; Margot drove me to Tampa Airport: talked about amicus brief on killing kids, legislative action, etc.

Friday. January 10:
Tom Horkan called: Terry Roach executed in South Carolina; Chief Justice Boyd a had heart attack; Read *Zeigler* order: killer; told Dunn and Burke's offices about Bar action on override: Dunn's secretary seemed very friendly: she also seemed excited about *Wall Street Journal* article and a call from *20/20*: may mean Dunn will push the bill this year after all; spent most of day reading *Magill* papers clemency (225 page autobiography by Paul) and briefs and pleadings; Phil explicitly did not raise kids issue in Florida Supreme Court; listened to argument tape.

Saturday, January 11:
Mark, Scharlette and I decided not to file district court rehearing in *Zeigler;* did not buy us much time (Judge will deny it quick); we do not want to appear in district court, especially since there's no real time to repair the damage already done; Mark and Scharlette leave for D.C.; Jeff: trial lawyer Bernstein in *Booker* forged documents in his file to torpedo the IAC claim: J. Crews has ruled against them. All day reading *Magill* transcripts. Talked with Ruthann: decided to send letter to Wilmer, Cutler and Pickering.

Sunday, January 12:
Read *Magill* transcripts all day. Scharlette called: They hired Marshall Ryan to start in May; lawyer for *Darden* will be a disaster tomorrow.

Monday, January 13:
Jeff: Jim Coleman very pleased I'm sending letter applying for job at Wilmer, Cutler & Pickering; Steve Winter: won *Vasquez* (exhaustion case) in U.S. Supreme Court: *Grigsby* oral argument went very well; he'll be in Miami, interviewing at law school, this weekend; Mark called in and spoke with David Rieser: arguments in *Darden and Grigsby* were mediocre; met Jimmy, Horkan, Jim Hartison, Bud Bell, Maxi (Amnesty) at capital on override: agreed to push bill hard, because of *Wall St. Journal* article: it fired up Dunn: Tom will talk to Herb Morgan; Speaker Thompson is the key: Maybe Sandy

or Mike Allen, via David Bush. All day: worked on *Magill* reply; 11th Cir. granted extra pages, in order signed by PTF.

Tuesday, January 14:
Called Craig: Dick thought *Grigsby* oral argument went great and will be a close vote, maybe going off on retroactivity; *Darden* oral argument went horribly: lawyer only argued facts and did not have a clue about the law. Mark did not think lawyer did so bad, but he looks depressed. I did *Magill* all day.

Wednesday, January 15:
David Bush called: wants to set up meeting with him, me, and Allen; Allen is close to House Speaker Thompson: Scharlette hates idea since she hates Allen: Larry thinks it's a good idea; *Talle Democrat:* editorial on killing kids; Mark: Marshall Ryan not hired; Scharlette: Yes, he is.

1. Demonstration

Thursday, January 16:
Warrants: *Kennedy*[618] (my case) and *Johnson* (Malone's). *Martin*: rehearing denied on 14th; finished *Magill* draft on kids; started writing *Straight* cert.: the group decided to find some way to bring Eleventh Circuit lawyer's incompetence to the attention of the Eleventh Circuit (Maybe motion to recall mandate); Craig sending *Sims* to CCR, since Mark Wilinsky has vanished; Mark and Scharlette very down on Craig; I saw note in Scharlette's *Ford* file, telling Phil to raise *Brown* issue in *Magill:* he did not do it; read *Kennedy* papers; Camille Bell started background investigation on family history in *Kennedy*.

Friday, January 17:
Lost *Hall* in Dist. Ct., on remand from 11th Cir.; finished *Straight* draft; Jeff: Letter arrived: initial decision to be made Tues or Wed. Talked to WPB on *Straight*.

Saturday, January 18:
Relaxed at home. Called Craig: *Sims* not to be sent to CCR.

Sunday, January 19:
Relaxed. WPB to Talle.

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618. The Kennedy case is discussed in Mello & Medlin, *supra* note ___ at 997- 1001.

Monday, January 20:
Frantic call from Sonny Goldenfarb, who is panicked over Malone's dumping *Preston* 3.850 on her with no guidance or help: amended 3.850 due next Friday; *Hill* on FSC remand: Trial Ct. suppressed all of the State's evidence: Malone trying to get him out on bond; edited *Straight* cert.: read record; much activity in office, between *Darden* (Mark and David arguing about strategy) and *Straight; Magill* reply typed; went over it.

Tuesday, January 21:
Met with Camille for 2 hours on her meeting with *Kennedy* yesterday: he is not crazy, but seems very sad: there is much racism where he grew up; started going over *Kennedy* files, briefs, etc.; Margot: will talk to Jean Adams, an aide to Gov., who is former law partner to Thompson, the key to the House; long talk with Neil Skene on his article: I made suggested edits: he mentioned possibility of Sandy being appointed to Florida Supreme Court; put *Straight* in final form.

Wednesday, January 22:
Scharlette: Federal District Judge Sharpe (of *Henry* infamy) is our Dist. Ct. in *Kennedy;* lost *Cabana* in U.S. Sup. Ct., 5-4: Jeff sending opinion; lunch with Joyce Davis, an FSU writing teacher; faculty is petty and backbiting: much freedom with your time; Good meeting with Dr. Brown, Camille and Scharlette: he'll do psych evaluation on *Kennedy:* seems in tune with the right things; *Kennedy* has *Grigsby* issue: raised in big way on direct appeal and cert.; David and I talked about doing original *habeas* in Fla. Sup. Ct. on that alone, then going up on cert. and stay: any chance of slipping this by the FSC, under warrant, and getting them to hold they have jurisdiction over original *habeas* as to issues not passed on direct appeal—thus allowing us to bypass trial Court on 3.850, go directly into FSC and avoiding having to investigate and litigate 3.850 under warrant; Scharlette: *Blanco* and *Mann* arguments set for Mon; *Kennedy* and *Johnson* for Eleventh.

Thursday, January 23:
Arrived at Orlando Airport at 11:00 a.m.; ate breakfast and made outline of killing kids presentation; took limousine to Marriot; saw Margot and Rhoda on way to meeting room: Margot said that the criminal law section was pissed about "not being consulted" on override issue and may vote to oppose it and ask Board of Governors to reconsider; meeting: killing kids thing went well: good discussion: was sympathetic and intelligent: committee voted to take legislative and judicial action (*Magill* amicus); I decided to stay for dinner with them: reception first, where I met Charlene Carres (Lewis' wife), who is a lobbyist and interested in working on override; John Harkness told Margot

the crime committee was split; Ray Ferraro said they might oppose it; Raford Taylor said, as always, don't worry; Margot said Jean Adams not promising. Dinner with "old girl network" of bar, plus Dick Beltz and Pat Griffith; flew to Talle.

Friday, January 24:
Met Camille Ball at office at 7:00 a.m. and drove to FSP; she and I talked to Kennedy: they have good rapport: he really is tragic, with a stutter; I met with Ronnie Straight: very appreciative of our work for him ("there would be a lot more suicides if it wasn't for you"): smart and articulate: in tune with cert. and asked hard questions: I was frank about the outlook, and he seemed glad I was; meeting with *Joe Spaziano* was same as always: mostly talked about his art: good and relaxing for me; met with Nollie Lee Martin: he took the rehearing denial very hard: "this is last page of the last chapter"; terrified of electric chair and said "I can't imagine them coming for me at 2:00 a.m. . . .": alluded to suicide; everyone asked about *Grigsby* issue; called Scharlette: Bar is in on override; won *Spencer* (Baldus race discrimination study in Georgia); Mark got good info in Cuba on *Omar Blanco*; on ride back, Camille talked about her son being murdered in Atlanta, she worked for *Williams* case; left office at midnight.

Saturday, January 25:
David working on *Grigsby* issue in *Kennedy;* Scharlette getting *Magill* stuff together to send to her psych friend; I spent day on *Kennedy* record; Left, to have dinner with David, at 8:00 p.m.

Sunday, January 26:
Worked on grand jury issue and record in *Kennedy*: David writing major work on *Grigsby* issue for Florida Supreme Court. Worked until midnight.

Monday, January 27:
Art: Gov. asked him about *Magill* the other day; I sent him our brief: told him status of *Martin* and *Straight* and about firms dumping cases on CCR; Jeff: will look for amicus in *Magill*: someone for *Martin;* Margot: Criminal section voted 9 to 7 to support override; nothing to write about there; *Porter:* Got in brief: same thing I wrote during warrant: did not deal with Dist. Ct. killer fact findings: disgraceful. Scharlette: Bob Link says *Kennedy* trial lawyer is nice guy; may help us on IAC Claim; met Dr. Brown: Problem in negating premeditation in *Kennedy:* goes to FSP Tues.; Ruthann: Wilmer, Cutler letter came: want full day of interviews; *Kennedy:* I'm inclined to do original *habeas* in FSC [Florida Supreme Court] on *Grigsby* alone and take cert. on that and stay from U.S. Supreme Court: not much downside risk: if FSC says

no jurisdiction, then nothing really is lost (we finish the 3.850 family history/IAC investigation, file 3.850, and go through usual drill); but if FSC says it does have jurisdiction, and rules against us on *Grisby* alone, then we go directly to U.S. Supreme Court for *Grisby* stay, bypassing 3.850 and need to do 3.850 fact investigation and litigation under warrant: In rush of warrant, and FSC's desire to get rid of us, they may just use their boilerplate "we have jurisdiction" and deny us on merits, giving us a clean shot at U.S. Supreme Court *Grisby* stay.

Tuesday, January 28:
Kennedy: appellate attorney will do IAC affidavit; I called her: she came by; I called trial lawyer: *Kennedy* refused to let him put on a humanizing penalty phase; he wanted to; David: real grand jury issue in *Kennedy;* Larry: *Magill* killing kids brief "isn't as bad as I first thought"; Camille: Dr. Brown was not helpful at all: says *Kennedy* isn't a sociopath: but he is a hardened criminal, like Nat Turner; called Radelet at home: he thinks Comfort and Morin just did a Florida study; that will really help *Grigsby* claim in *Kennedy,* since its new stuff. Left at 3:30 a.m.: car problems with fanbelt; did not get home until 5:00 a.m.

Wednesday, January 29:
Rhoda called: wants me to be vice chair of Florida Bar Individual Rights and Responsibilities Committee next year: I said sure; Sen. Dunn's aide called for info on Bar endorsement of jury override; Dr. Brown: Ed isn't a sociopath, he's hardened criminal; Mark: I'm to do part of *Blanco* 3.850 on IAC on robbery conviction; read record and wrote it. Left office at 2:00 a.m..

Thursday, January 30:
Edited my part of *Blanco* 3.850; drafted 3 issues for *Federal habeas*; *Talle Democrat*: Cuban Archbishops ask Gov. to stay *Blanco;* Mark pushing hard to file *Blanco* tomorrow; looked over David's draft of *Grigsby* issue in *Kennedy:* looks great: aiming for Monday filing; David talked to Sam Gross: he does not care if we take *Grigsby* issue to U.S. Supreme Court in *Kennedy:* he thinks we'll lose it, probably in March or April; worked all night; slept for 3 hours in morning.

Friday, January 31:
Lost *Mann* in trial court yesterday: lost before they even filed; Tania in, FSC called Malone: may not give oral argument at all; *Blanco* 3.850 almost done; Met with Dr. Brown for 2 hrs: his report can explain *Ed Kennedy,* but maybe not in a mitigating way; Brown seems very sensitive to the complexities of the man; called Kennedy: we went over issues in detail ("If electrocution is so

clinical, why the hood; I don't want the hood; look them in the eye"). 6:30 p.m.: Scharlette called from her house: hearing is 2:00 Mon; not clear if its just oral argument or evidentiary hearing: she thinks no stay.

Saturday, February 1, 1986:
Mark: looks bad for *Mann*; I'm to do FSC original *habeas* on *Grigsby*; Fight with David about *Kennedy* original *habeas* in FSC, whether to put stuff in appendix: I did not explain things to him enough; Ca.mille: birth records show *Ed Kennedy* is illegitimate; conference call with Craig and Dick on Blanco strategy; do we file FSC *habeas* now? 6:15 p.m.: lost *Mann* in FSC: no argument: left opinion with guard: footnote about how we missed OA date: could hurt us later. 10:30 p.m.: Malone called: *Mann* panel is FMJ, Clark and PTF: Dist. Ct. Is Hodges or Costagnia; drafted *Blanco* issues; in office all night; slept on couch 6: 00 a.m. - 11:00 a.m.

Sunday, February 2:
Wrote some *Blanco* FSC papers; *Kennedy* coming out of machine; Mark wants me to come to Miami with him tomorrow: we'll have 14 witnesses there, at CCR expense; madness in office: drafting, proofing, editing; Finished *Kennedy* original *habeas*: will file tomorrow; slept on couch.

Monday, February 3:
When I woke up, Mark and others had left for Miami: seems that I'm not going after all; went home and slept until 2:00 p.m. Came in: *Mann* stay from Dist. Ct., Kovacavich; called Sid White in FSC about getting *Kennedy* OA moved up, just on *habeas* case: no ruling in *Blanco;* Mark: Justices left FSC; I called individual chambers, until Adkins' clerk said he'd heard unofficially that state trial court had granted stay; I couldn't get through to trial ct to confirm. 5:55 p.m.: Terry called: heard evidence all day: then stay came down: real stay, not just a 24 hour baby stay.

Tuesday, February 4:
Malone very depressed about *Mann;* J. Kovacovich wants to rule by Wed and is pushing him to file anything he wants to; conference call with Malone and Mark Olive: decided to challenge *Mann* 10 day rule; long meeting with David and Mark on *Kennedy:* grim, no evidence hearing 3.850 issues: I've never seen a death case with not a single decent issue.

Wednesday, February 5:
Warrant in *Bundy*;[619] drafted *Kennedy* issues; Mark Olive: Mark Evans is about to resign: wants more money: Mark Olive plans to accept his resignation. 3:00 p.m.: Warrants in *Adams* (successor) and *Bundy* (85 volume record); Craig offered to read *Adams* record: talked about 6- 6 jury issue in *Bundy;* press reported jury was 6- 6.

Thursday, February 6:
Democrat quotes Larry as saying *Bundy* will be a "horrendous job" to do and that we represent *Dennis Adams;* David: *Adams* has a *Grigsby* issue; long talk with Craig about *Kennedy*; David: no *Grigsby* issue in *Adams;* Craig: won re-sentencing in *Harvard*: Terry got opinion and I read it to Dick and Craig; Dr. Brown came over: Killer report: SH and I agreed he need not write it; called Ed Kennedy: he's doing well: brought him up to date.

Friday, February 7:
Mark Olive: David and I are taking lead in *Adams*: he and Malone taking lead in Bundy; I dictated federal *habeas* issues for *Kennedy*; State's answer in *Magill* came in: no surprises; Mark Olive wants me to do extraordinary rehearing in *Mann,* going after the 10- day rule footnote: I think that's bad strategy; Set up conference call with Steve, Mark Evans, MO: decided Malone would draft something, send it here for editing and file it Tuesday; Met with MO and SH on timing for U.S. Supreme Court stay application in *Kennedy*: I wanted to push for Monday and 3.850 for Wednesday; drove all night from Talle to WPB.

Saturday, February 8:
Rested at home in WPB. Took Larkin to park.

Sunday, February 9:
Picnic with Ruthann and Larkin. Little birthday celebration. Left WPB at 8:00 p.m.; drove all night.

Monday, February 10:
Called Sid White at FSC: No word on whether they want argument just on the *habeas* in *Kennedy,* or whether they'll wait for 3.850; David did draft of U.S. Supreme Court stay papers: they went out at night; SH left early: ill: talked by phone about conditions at UC; Mark back from Tennessee tonight: at that time

619. *See* MICHAEL MELLO, DEAD WRONG, *supra* note 2, at 97.

Kennedy broke out of there, and, while he was and escapee, got into fire fight, killing two cops; got continuance in *Miller.*

Tuesday, February 11:
Mark: *Bundy* fired us as his lawyers, since we're so busy: Mark talked him out of it and went to FSP today; David working on prison conditions at time *Kennedy* escaped UCI; IAC to fail to tell jury how bad it was there; *Zeigler:* letter to David: no penalty issues; MO: *Kennedy* argument tomorrow on *habeas*; called Jean Howarth, ACLU and Amnesty in LA: they'll do amicus for *Magill* in Eleventh Circuit, out of time: she talked to Paul Hoffman; conference call with Dr. Krop, SH and Camille: UCI was a bad place; SH: national opinion poll says people do not like killing kids: not public yet.

Wednesday, February 12:
Saw Mark and Larry's letter to FSC: I'm afraid it will piss them off and hurt *Kennedy;* argument with Mark: he grudgingly agreed not to file until after the argument; Mark and I mooted David at law school: pretty good; argument: very active court: J. Boyd and Adkins asked if CCR can do its job: McDonald said *Grigsby* is harmless because of weight of evidence: J. Barkett asked one question about jurisdiction, he talked for about 3 minutes. 3:40 p.m.: Sid called: lost 4- 3 on stay; I called Chris Vasil at U.S. Supreme Court to say we're on our way: he said to ask for FSC stay pending cert., which was denied 8 minutes after we filed it; David very depressed; worked on 3.850 UCI/prison conditions prison issue until 2:00 a.m.

Thursday, February 13:
Went over *Kennedy* production plans with SH; David doing UCI/prison conditions issue: plans to make big push tonight and file 3.850 tomorrow, if the U.S. Supreme Court denies a stay from the FSC *habeas*; called J. Mitchell's office: on vacation; called Chief Judge Santora. 10:30 p.m.: got FSC opinion in *Kennedy*: court said "we have jurisdiction," so it's straight up to U.S. Supreme Court to ask for *Grigsby* stay; Chris Vasil in U.S. Supreme Court told Mark they may rule tonight, but they want to wait for State's response; Sid White called: Justices out of town over weekend, but good chance of argument on Monday: said there's no policy on 10- day rule: it is case by case; Craig: Sid thinks CCR is in good faith; Malone not filing *Johnson* until Monday; worked on *Kennedy* 3.850 and *Magill* reply.

Friday, February 14:
Called J. Santora's office: secretary was a bitch: "how can you expect a ruling today, since Monday is a holiday, how can you get stay?"; called Sid White, who said argument may be tomorrow if J. Santora rules today; I called and

spoke to Santora; he'll wait for J. Mitchell, which means a stay until Tues or Thurs and stay pending appeal to FSC: looks very good; *Kennedy*: called Chris Vasil at U.S. Supreme Court: State's answer on FSC *habeas* appeal not in: it finally came in at noon, and Chris said it would be a few hours yet; left for Jacksonville with Dave at 12:30 pm.: stopped at every exit to call office, but no word from U.S. Supreme Court; Mark Olive in with J. Santora; Dave getting testy; got lost in Jacksonville at 4:30 p.m.; called court and J. Santora gave directions: got there at 5:00 p.m.; J. Santora's law clerk said U.S. Supreme Court had stayed it: Santora had set 4:30 p.m. argument; drove back with Mark and Dave, after stopping at Jax Liquors drive — in booze store; Dave drove while Mark and I drank Wild Turkey.

Saturday, February 15:
We all interviewed Beth Brinkman (Eleventh Cir. Judge Kravich's clerk) and liked her: she accepted job; I went over *Magill* killing kids reply; Mark wants me to argue *Johnson habeas* in FSC on Mon *(Grigsby* issues); started thinking about it and decided we should go for broke and ask for a moratorium on all Florida executions pending the U.S. Supreme Court's decision in *Grigsby;* Malone loves it; Mark will come back into office at 10:00 p.m. to help; Steve modemed (*i.e.* computer modem) his draft from St. Pete: disaster: must be totally rewritten; I wrote it, starting at 3:30 p.m.; Mark here until 4:00 p.m.; I wrote until 8:00 p.m. and left draft on Mark's desk and slept on couch; Malone called periodically and I was clear that I thought his draft was awful.

Sunday, February 16:
Mark came in around 9:00 a.m.: got *Johnson* production started; I went home and showered around noon: came right back; the *Johnson habeas* was filed at 3:30 p.m.; called Sid White at home, who said we may have argument at 8:00 a.m.: just show up ready to argue: so I worked on argument; finished U.S. Supreme Court stay application around 5:00 p.m.

Monday, February 17:
Came in at 7:00 a.m. and worked on my *Johnson* oral argument; went to FSC at 8:00 a.m. and talked to Sid White for half an hour basically gave him my *Grigsby* argument and why we need a moratorium on executions in Florida until *Grigsby* is decided; he agreed: then I waited in rotunda, with Scharlette and David, and saw Sid go from chambers to chambers: he came to us at 9:00 a.m. and said there's a stay in *Johnson*: I was thunderstruck and was rude in just gaping at him; came back to office; David went back and got the stay: unanimous; called Art, who said he'd run moratorium idea past the Governor: asked to see *Kennedy* papers and I sent them over; David: No *Grigsby* jurors

excluded in *Bundy*; Mark: Malone says IAC, not *Grigsby,* got the stay in *Johnson*; his girlfriend at *Tribune* is doing big story; argument set for March 3.

Tuesday, February 18:
Tampa Tribune: Steve Malone quoted as saying a *Grigsby* moratorium on executions is on; CJ Boyd said the stay was granted in *Grigsby; Flambau* newspaper: I'm quoted as saying the stay means no more executions in cases raising the *Grigsby* issue: Mark was very pissed; Mark: Malone is going: St. Pete is shutting down; the office is in a shambles; worked on *Dennis Adams* FSC *habeas*; Mark got Jeff to try to find someone in firm to do *Bundy*'s out of time cert. from direct appeal: filed pro se now: to get stay, must first ask FSC; Jeff Robinson found new associate named Polly Nelson to do it: she sounded bewildered.

Wednesday, February 19:
All morning meeting with support staff on the work load, no time for families, etc; obviously orchestrated by SH; Mark later said it was aimed at him, which in retrospect seems true; David thought it involved an undercurrent of reluctance to work on Bundy; spent most of day on *Adams* FSC papers: edited: went over all prior pleadings; Mark: Lost *Mann* in Dist. Ct: very nasty opinion, saying Steve was on a "witch hunt" and inviting the Governor to sign another warrant; worked on *Adams* until 4:00 a.m.; SH sent support staff home at 7:00 p.m., so not likely *Adams* will be filed in time to make a difference; Mark had a tense discussion with Jeff, Coleman and Polly about *Bundy.*

Thursday, February 20:
Got in at 10:00 a.m.: Warrants in *Roy Harich and Davidson James: Harich* has NY firm: *James* is in St Pete.; Craig: "I'm shocked at warrants"; *Talle Democrat* quotes Larry as saying we don't represent *Bundy,* but 3 lawyers here are working around the clock on the case; Eloise took Mark and I into my office: told us about the support staff meeting/lunch that led to yesterday's meeting; MO just looks exhausted; Mark later demanded to know (jokingly) if I was leaving: talked about liquidating St. Pete. CCR office; Conference call with Dick Burr and Mark: *Bundy* stay pending cert. (his first cert. petition) is serious; I called Rich Brody, who told me about *Francis* in Texas: stay on out-of- time cert.; Malone in town: got wind of what's coming for St. Pete.

Friday, February 21:
Finishing touches on *Adams habeas* in FSC: Mark read it; Polly Nelson here to file in *Bundy*: did FSC stay pending cert. in *Bundy* she did draft last night and Mark rewrote it today; Jeff: great interview with Senate Judiciary

Committee: to be Biden's expert on all Con Law matters; scrambled all day to get *Bundy* and *Adams* filed by 5:00 p.m.; on phone several times with Tania; got *Bundy* in; *Adams* in at 5:30 p.m.; Tania said guard would distribute to Justices; I started on hypnotism issue for *Bundy*: reading *Bundy* transcript.; Came in on SH and MO conversation about SH's role at trial: to help *Bundy* kill himself: offered him pills: part of Millard's plan to get *Bundy* to take a plea of life; SH mentioned guilty plea issue: just like in *Hitchcock;* dinner with David; left at 3:00 a.m.

Saturday, February 22:
Came in around noon; continued on hypnotism in *Bundy* until Mark asked me to write *Grigsby* issue for *Bundy* original *habeas* in FSC; read Mark's transcript notes on *Bundy* voir dire: skimmed transcript; Mark said that Malone said he's arguing *Johnson* in FSC, mainly because his *Trib* girlfriend will be covering the argument, but still odd since Steve had nothing to do with *Grigsby*: said I'll probably argue *Grigsby* and Steve will argue IAC; David very depressed: "I lost it today and went home to work on *Bundy* bite mark issue."

Sunday, February 23:
Worked all day on *Grigsby* issue for *Bundy*: very frail claim; Mark, David and I were all testy and tense: David kept implying I lacked integrity in raising the issue; we all met to go over *Adams* issue: SH told MO he needs to take charge of *Adams* more, and so he is; Malone told MO he wants to do the new warrants and leave *Bundy* and *Adams* to us: MO said no; Mark decided he and I should read *Adams* transcript: started at midnight, ended about 2:00 a.m.; Mark: attorney's file came on bus and Tim Schroeder got excited, thinking he'd found a *Grigsby* juror, but the juror wasn't excused for cause; trial judge picked them up: Mark went over them.

Monday, February 24:
Got in at 9:30 a.m.; David going to FSP; at 10:00 a.m., FSC called: *Bundy* stay pending cert. denied: no opinion; A Mrs. Perry called from Miami: her son sentenced to die over jury override by J. Ellen Morpheneous: lawyer won't call her; I wrote him, giving him info on MO and override generally; U.S. Supreme Court: cert. denied in *Funchess* (successor): granted in *Tison, Arizona* and *Gray, Mississippi* (Tison is Alan Dershowitz's case); denied in *Thomas* (successor); Joe Kasane called: he was given *Raleigh Porter* Eleventh Circuit brief to do without new research or changes, that's why it read like the stay papers I wrote; I read *Adams* transcript; Mark panicked that Polly won't get U.S. Supreme Court stay papers in *Bundy* in before 5:00 p.m.; Mark filed

at 4:45 p.m.; Polly said: Malone coming tomorrow to work on *Bundy;* I decided to take U.S. cert. on *Grigsby* issue in *Straight* from FSC.

Tuesday, February 25:
Called Tanya at FSC: argument tomorrow on *Adams habeas* alone: State did not file anything yet. Noon: Mark found out the *Bundy* U.S. Supreme Court papers weren't filed yesterday: Polly just sent them over with courier, who left it with a guard and there they sat until 10 minutes ago: just now filed; worked on *Adams* oral argument: thought out reply brief; State's response in *Adams* came at 4:30; worked on it; Malone gave me a hard time for reading States response: "I've never read one": he did not seem to be joking (I asked him); malpractice panic: very tight stomach while writing the *Adams* reply; Chris Cox came in to type: finished reply at 1:20 a.m.: finished argument notes at 2:30 a.m.: finished everything at 3:00 a.m.

Wednesday, February 26:
Came in at 7:00 a.m.; sent *Adams* reply to Florida Supreme Court: went over oral argument notes; went to FSC: Sid White thinks *Bundy* will get stay in U.S. Supreme Court; *Adams* oral argument: very hot: Barkett was a dream: Adkins all over me: the subtext of the argument was moratorium: they backed me into saying this *Grigsby* claim is in every case, except where individual voir dire *(Bundy).* 11:00 a.m.: Tanya called: *Adams* stay denied by FSC: opinion ready: she did not know vote. 11:15 a.m.: Terry Farly got opinion, 4-3 on stay: majority very nasty; I wrote FSC stay pending cert.: denied at 3:10 p.m., 5-2; Jeff: lots of anonymous *Bundy* witnesses popping up; Art to Mark: don't expect the pace of death warrant s to let up. 5:20 p.m.: U.S. Supreme Court stay in *Bundy;*[620] miracle.

Thursday, February 27:
Got in at 10:30 a.m. and called Chris Vasil: They got our *Adams* papers for stay pending cert.: waiting for Margene Roper's response; Mark: think about taking competency issue straight into Federal Court: worked on closing argument issue; Susan Cary: riot at FSP. 1:00 p.m.: called AG: their response in *Adams* zap mailed to DC and us; Dennis Adams called: good talk: brought him up to date. 3:50 p.m.: Mark called Chris: outside chance U.S. Supreme Court will rule tonight: conference tomorrow. 8:30 p.m.: went over issues with Dennis Adams; wrote issues for 3.850 memo all night; we were all in

620. *See* Bundy v. Florida, 475 U.S. 1041 (1986); *see also* MELLO, DEAD WRONG, *supra* note 2, at 102.

high gear, fueled by caffeine, adrenalin and naked fear; wrote stay pending cert. on closing argument issue; Slept on floor—3:30 a.m. to 4:00 a.m.

Friday, February 28:
Editing and producing *Adams* 3.850; Trial Ct secretary told Mark they were leaving at noon; Mark called Sid White at FSC and got it straightened out; got in *Moore* (Louisiana) voir dire, *no Grigsby* jurors excluded; Called Chris: too late to file (stay pending cert.) on *Moore,* since conference of Justices' has started; dictated letter to Wilmer, Cutler; Craig and Dick think we should raise execution competency (*Ford* issue) in *Adams*: I'll draft. 4:00 p.m.: Mark called Chris: we'll hear soon from U.S. Supreme Court: agonizing paralyzing wait. 4:30 p.m.: Chris called: lost 5- 4: I converted it into a cert. petition;[621] Mark: no 3.850 hearing until Monday; I'll do FSC argument on *Johnson* for Malone; met on strategy for cert. on *Grigsby* and FSC *habeas* on execution competency: I'll draft both; slept on couch from 5:00 a.m. to 10:00 a.m.

Saturday, March 1, 1986:
Edited *Adams* execution competency papers: he has no memory of crime and thus guilt, so I based it on the definition of execution competency we're shooting for in *Ford* (especially the amicus brief by the APA): *Adams* doesn't know if he did the crime for which he's set to die, so he doesn't understand why he's being executed, so he's mentally incompetent to be executed: shit, this is *weak,* probably wont get Dennis Adams a stay from U.S. Supreme Court, and could even screw things up for Alvin Ford and jeopardize the execution competency issue in the Supreme Court in the *Ford* case—by showing the hostile justices (Rehnquist, Powell, and CO) what a greasy slope they'll be getting on if they buy over execution competency issue in *Ford*; conflict for me: now I'm Adams' lawyer and I now have other clients who are really crazy (i.e., *Nollie Lee Martin*), who could really benefit by a win in *Ford*; talked to Chris Vasil in U.S. Supreme Court about getting *Adams* cert. papers and *Grigsby* in on noon plane; SH: 3.850 papers can't be ready until end of day: people in trial court say nothing will happen before Monday anyway. 1:00 p.m. called Art at home and triggered the execution competency statue: he said he'd pass it to the Governor. 2:40 p.m.: trial court will tell us Monday whether there will be a hearing. 5:40 p.m.: Chris Vasil called: cert. is in, as is opposition; nothing before Monday; I wrote competency cert. petition: production and movies going on. 12:50 a.m.: Got in State's *Grigsby*

621. A stay of execution in the U.S. Supreme Court requires five votes. But it only takes four votes to grant cert. Our hope, in converting the stay application into a cert. petition, was that, if we had four votes to grant cert., a fifth justice would join to grant the stay to give the court time to receive briefs and oral argument on the merit of the issues presented in cert. petition.

opposition: Faith got it from bus stop; slept on couch at 3:00 a.m.; up at 8:00 a.m.

Sunday, March 2:
Final edits on *Adams* execution competency and closing argument certs.; production on fed *habeas* papers. 12:30 p.m.: called Art's house: no answer: called all afternoon. 3:00 p.m.: brought Chris Vasil up to date. 4:20 p.m: Art called: nothing definite yet, but he's "reasonably confident" that the Governor will order a psych exam.: probably not tomorrow, maybe not even Tues: he agreed that a Tuesday exam means a stay: discussion of handling with Art; I agreed to pursue it. Finished execution competency FSC petition and filed it; worked on *Johnson* argument: found old case saying the Governor must trigger competency statute if requested; Art said he glad to have the case: he said *Ford* pendency requires stay.

Monday, March 3:
Came in at 7:30 a.m. Went to FSC and talked with Sid: possible *Adams* oral argument this afternoon, if 3.850 is denied in trial court early. 8:50 a.m.: called office: trial court set argument for 1:00 p.m.; Argument: Awful, obviously not my case; at end of argument, Larry said that the Governor had triggered competency statute and stayed Adams; called Art: the Governor is "very concerned" about issue: told Art not to rush the exam: no date or time, maybe not even tomorrow: no due process beyond the statute's requirements.; conference call with Craig and Dick: probably have exam tomorrow morning and then lift stay. 11: 00 a.m.: trial court denied 3.850: met on strategy: we'll file small brief on 3.850 appeal. 3:40 p.m.: called Art: he still did not have names of 3 psychs, much less have 3 people. 4:00 p.m.: Mark called FSC: Sid with Justices; waiting in front room. 5:15 p.m.: Sid called: 3.850 appeal and competency *habeas* denied, 6- 1 (J. Barkett dissenting); called Chris: no U.S. Supreme Court action tonight; called Art at home: probably okay through Wednesday: earliest psych. evaluation would be late tomorrow, but unlikely: 24 hr. warrant likely, he is getting heat from courts on what stay meant.

Tuesday, March 4:
Called Art at 10:00 a.m.: found 2 Shrinks for *Adams;* psych exam probably will be tomorrow morning, not later than Thursday. 10:30 a.m.: FSC opinions come out: only Barkett wants more time; called Chris Vasil: go ahead and file U.S. Supreme Court cert.: stay status unclear: no warrant now, but possibility of 24 hr warrant; Swedish TV in office: had me and Larry re- enact my telling him about my talk with Art; David: Mark seems ready to file federal *habeas*, since no stay in effect. 1:10 p.m.: Conference call on federal *habeas*: Mark wants to wait. 4:00 p.m.: Susan Cary called: Dugger said 24 hour warrant

possible. 5:00 p.m.: Called Art: psych exam. is 8:00 a.m. Thursday: told me the names of the shrinks: we can give them info, but they need not consider it. 7:30- 9:30 p.m.: long conference call with us, Craig, Dick and Malone about dropping *Ford* issue from federal *habeas*: decided not to run it, for fear of federal abuse of the writ problems: Reiser does not agree; later, more meetings: talked with Dennis Adams at length at 11:00 p.m., small talk.

Wednesday, March 5:
Final edits on *Ford* issue cert. in *Adams;* Mark at FSP, meeting with Dennis Adams: Dennis okay and ready for tomorrow; expects warrant; Exhaustion: paper production winding down. Afternoon: ABC *Nightline* show doing piece on Adams: SH thinks I should talk to them ("C'mon no one watches this show, it comes on in the middle of the night— that's why it's call *Nightline*"): camera crew coming tonight. 3:50 p.m.: Mark said Norm Sherman said U.S. Supreme Court would conference on Friday. 4:00 p.m.: rumor from Art Norman: no Adams warrant tomorrow. 4:50 p.m.: Art says no truth to rumor of no Adams warrant this week. 5:15 p.m.: Mark called Dist J. and Moore wants him to stay there: order in *Adams* tonight; Larry: Sen. Appropriation Committee voted to cut our budget by $50,000. 6:00 p.m.: J. Moore set non-evidentiary hearing for 4:30 a.m. Friday; Jeff: was offered job with Senate Judiciary Committee; had several Wild Turkies and did *Nightline* show: 3 hr interview: Mark Potter very prepared and good: had read the *amicus* briefs in *Ford* I'd given him.

Thursday, March 6:
In at 9:30 a.m.; Mark and David at FSP. 9:50 a.m.: Mark called: Adams was great in psych evaluation: shrinks awful and stupid and they have their report done already: Art is bringing it back with him. 12:30 p.m.: Mark returned from prison: shrinks file one paragraph report: he expects warrant later today; Dash to airport to catch flight to DC, via Atlanta (Wilmer, Cutler interview). 2:00 p.m.: called office from Atlanta airport: Steve Walters said "You know about the warrant" and we were cut off: called back: Adams warrant signed, to expire on 13th: death set for 10:00 a.m. tomorrow; got boarding pass and called back: Federal District J. Moore set hearing for 5:00 tonight; Mark going. Arrived in DC and called office from airport: no news. Met Jeff and Jim at firm: good dinner and much wine: went back to firm and called office at 11:00 p.m.: U.S. Supreme Court stay in *Adams*, on *Grigsby:* they revised earlier ruling; *Nightline* frantically trying to find me, but too late; watched myself on *Nightline* at firm; went to Jeff's for night.

Friday, March 7:
Job interviews at Willmer Cutler & Pickering firm all morning, surrealistic, after last night: everyone seems decent and seems to like my death work; In the afternoon, I met with the people in firm working on death cases: fun get together: several people I interviewed with had seen me last night on *Nightline*.

Saturday, March 8:
Visited with parents in Northern Virginia.

Sunday, March 9:
Flew from DC to WPB. Relaxed with Ruthann and Larkin. Good talk with Ruthann.

Monday, March 10:
Jeff called: Firm will offer me a job, for 1984 class; long, wonderful talk with Ruthann; called Mark to check in: he asked how it went on Friday.

Tuesday, March 11:
Checked in at office and Mark asked when I was quitting to become an "oinker"; also mentioned that *Magill* oral argument in Eleventh circuit is set for March 28 in Atlanta; called later: Warrants in *Dan Thomas* (successor) and *Edward Thomas* (first time): I asked if he was joking— two warrants, signed on the same day, on two CCR clients with the same last name? Is this the Governor being cute? This will drive the clerks' offices nuts.

Wednesday, March 12:
Jeff called: Texas had an execution this morning: Charlie Bass; Steve Hutt called from Wilmer, Cutler firm: offer for 1984 class; Ruthann not sure that's enough money; told Mark about offer; okay talk; talked to Craig about *Dan Thomas,* cut in CCR funding, no end in sight, etc.; Mark called Chris Vasil: *Bass* did not raise *Grigsby* issue, even though jury was death qualified; long meeting on *Harich* issues, with Jon Horn, Mark, etc.: Mark mentioned that George Kendall lost *Peek* in Eleventh Circuit and that District Court ruled against us in *Adams.*

Thursday, March 13:
Moved out of Gail's house and into Ron and Mary Anne's house; talked Wilmer, Cutler firm strategy with Polly Nelson; worked on *Grigsby habeas* in *Harich.*

Friday, March 14:
Malone filed *James habeas* in FSC; worked on *Harich habeas* on *Grigsby* claim; trying to file *Harich* by Sunday: asked for argument on Monday; SH met with Jim Smith and got a commitment to push for $300,000 increase in funding, if Larry will stop doing media. 3:30 p.m.: Sid White called: *Davidson James* denied unanimously in FSC: J. Barkett was not there; talked to SH about leaving CCR; argued with Mark about issue order in *Harich;* Joe Kisane called: no time to do *Porter* during week: sent me stuff Fed Ex.

Saturday, March 15:
Tim Schroeder and I moved furniture to Gail's mom's; SH: Steve Goldstein says Ruthann is his "number one choice" for FSU legal writing job; Ruthann pleased: this puts the DC option on hold (is this SH's plan?); meetings all day on *Harich* strategy; Called Sid at White home: Oral argument unlikely in FSC on *Harich,* unless we can convince them in the papers that *Grigsby* was the basis of the *Adams* stay: Malone did not show that in *James*; worked until 2:30 a.m. on *Grigsby habeas.*

Sunday, March 16:
Slept in: arrived at noon; Drafted some issues for *Davidson James* fed habeas; no energy: office tensions very high: SH and Riser snippy; prepared for possible FSC oral argument in *James*; wrote *James* cert. papers on *Grigsby* issue. Left at 4:00 a.m.; woke at 7:00 a.m. and came back to office.

Monday, March 17:
In office at 7:50 a.m., preparing for *James* oral argument in FSC; went over to FSC at 8:00 and talked to Sid White: Court did not really think *Grigsby* was the basis of the stay in *Adams* ("They just denied a stay on that ground last week"); court will conference at 3:00 p.m. and he'll let us know if they want oral argument in *James; Porter* draft arrived: not Sat. delivery. 10:30 a.m.: Sid called: No oral argument in *James*: ruling will probably come between 3:00 to 5:00 p.m. this afternoon; went over *James* fed papers; Jon and Reiser went to trial court to file 3.850 in *Harich.* 4:00 p..m: Mark called FSC: still in conference. 4:30 p.m.: Mark called FSC: we lost *James* 7- 0. 5:15 p.m.: FSC opinion out; the plane with *James* cert. papers late and did not arrive in DC by 5:00 p.m.; Trial court sets non- evidentiary hearing for 10:00 a.m. tomorrow in *Harich.* Dinner with everyone; I got hideously drunk: slept on couch in office.

Tuesday, March 18:
Morning: Worked the phones on *Harich* for U.S. Supreme Court, Eleventh Cir and Dist Ct. 9:30 a.m.: Terry Farley called: *Harich* Federal District Court

papers lodged. 10:00 a.m.: Waiting for prosecutor to show up; Mark called: trial court hostile. 10:40 a.m.: Jon Horn called: 3.850 denied in *Harich* without hearing. 12:45 p.m.: Sid called: FSC begins *Harich* conference at 1:00 p.m. and he very interested in need for hearing ("There were facts you needed to put in"); Federal District Court Sharp's clerk called on logistics and let it slip that he thinks no hearing is needed; SH: talked to Goldstein and Ruthann is in final cut before interviews at FSU; Steve Hutt called: salary based on 1983 class; Mark checked in periodically: J. Sharp wants them there one and a half hours after FSC rules in *James*; I took nap on couch. 4:30 p.m.: called Sid: no word yet, they're working on it, *i.e.*, we lost; *James* was denied in FSC: Malone later confirmed it went 5- 1 (Barkett dissented). 6:00 p.m.: Lost *Harich:* Sid called: SH got opinion; Barkett and McDonald dissented, but still trashed us for filing late; called Chris Vasil: no word; Mark called: District Court oral argument is 8:00 a.m.; Roy Harich called, panicked. 8:30 p.m.: St. Pete called: *James* stayed by U.S. Supreme Court. 9:20 p.m.: Terry called: J. Sharp denied everything in *Harich*; Chris called: *Harich* denied 5-4: he read orders to me. 11:00 pm.: Mark called: J. Sharp denied CPC in *Harich*: we decided that I'd dictate something to someone in DC to file in U.S. Supreme Court, just in case Eleventh circuit denies stay (never happen before on a first *habeas*, but always a first time. . . .): 11:10 p.m.; Mark called: Eleventh Cir granted stay and CPC in *Harich*; I called U.S. Supreme Court and Frank Lorsen said "wonderful"; wrote and dictated op cert. papers for U.S. Supreme Court, just in case.

Wednesday, March 19:
Slept on couch last night until 11:00 a.m. Worked on logistics of *Harich* op cert., until Jon Horn called to say that State won't appeal Eleventh Circuit stay in *Harich*; on to *Dan Thomas* Warrant. Rumor: We won *Joseph Green Brown*[622] (of "Brown issue" in Fame) in Eleventh Circuit: Reiser confirmed it; Reiser says he's close to quitting CCR; wrote *Grigsby* petition for *Dan Thomas;* finished at 2:00 a.m.

Thursday, March 20:
Worked on *Grigsby habeas* for *Dan Thomas*. Ping- pong conversations with Tanya in FSC about *Dan Thomas habeas*: want to file only on *Grigsby*, with leave to amend; Tom Horkan called: D'Alamberte will talk to Speaker Thompson; Warrants: *David Bush* and *David Funchess* (now it's two guys with the same first name, unlike the two Thomases who got warrant s last week; now we have four active warrants, two guys with the same last name

622. I discuss *Brown's* case in MELLO., *supra* note 2, at 142- 45.

and two others with the same first name); *Funchess* already had *Grigsby habeas* filed: got it from FSC: awful; Margot called: Bar Board Governor voted to reconsider jury rec and reaffirmed their support with only 2 dissents; Steve Zack and Frank Upchurch were behind it; Chan Muller and Mike Nachwalter were great. 10:30 a.m.: Long talk with Susan Cary about *David Funchess,* whom she likes.

Friday, March 21:
Radelet: Jones executed in Alabama; he raised *Grigsby* issue: I called SPDC to confirm that: jurors actually excluded; Ruthann: University of Florida wants interview; I called FSU and Joyce Davis said FSU wants an interview, too; *Talle Democrat: Stano* clemency yesterday (CCR can't do case since he killed *Spaziano*'s victim); Malone: *Ocala Star* calling for end of CCR; met for an hour with Senator Dunn and group on legislative repeal of jury override; very helpful; he says he'll push override hard: very pleased at Bar support; called Eleventh Cir.: *Paul Magill* (killing kids issue) panel is PTF, FMJ and Clark. Drove Talle to WPB all night.

Saturday, March 22:
WPB: Rested at home; put stereo together and then took it apart and back to the store.

Sunday, March 23:
WPB: Hung out at home.

Monday, March 24:
My 29th birthday. Put the new stereo together. *Ta.m.pa Trib* reporter called: US Sup Ct to rule on *Adams* cert. on Tuesday, one way or the other; Mark thinks this means *Grigsby* is coming soon from the Supreme Court; drove WPB to Talle; arrived at 3:30 a.m.

Tuesday, March 25:
Worked on *Paul Magill* oral argument in Eleventh Circuit: killing kids, IAC, *Lockett/Cooper*; no decision by U.S. Supreme Court in *Grigsby;* Radelet asked me to do article for *Death Studies* on stress, etc.; Chris Vasil: *Adams* stay extended to Monday; Reiser: "I can't keep doing this."

Wednesday, March 26:
Worked on *Paul Magill* Eleventh Circuit oral argument all day; talked to Dick Burr about my coming to state-federal judicial conference; Craig taking Larry's job; Mark: we could prevent Larry from being confirmed: I want Mark

with me in Atlanta to help on *Magill* oral argument; SH says no need; I finally convince him to go.

Thursday, March 27:
"Continuous death Warrant" bill introduced in Senate: passed unanimously by Sen. Corrections Comm.: Jimmy is worried; Mark and I fly to Atlanta for *Magill* oral argument in Eleventh circuit; Steve Bright meets us, and later he moot courts me on *Magill:* worthless, patronizing, condescending cynical, jerky questions; I stay up until 3:30 a.m. writing the argument.

Friday, March 28:
Atlanta: Woke at 5:30 a.m. and finished preparing for *Magill* oral argument: went over it with Mark; argument: went like a dream: very interested in killing kids issue and *Lockett* issue; FMJ did not seem to think that re-sentencing is enough: must be a per se bar to executing kids; I tried to steer them toward a narrow holding that would stand up later, but the court was only interested in merits. Post mortem: Even Preacher Steve Bright thinks we have a shot. Flew Atlanta to Talle.

Saturday, March 29:
SH and Malone were fighting over his control of St. Pete office ("my people . . . "); I Cleaned my office; Interviewed Richard McCleese, from Chicago.

Sunday, March 30:
SH: Malone is quitting ("I have to draw the line somewhere"); Mark says he's coming up Tuesday for big meeting; Mark Evans and Sidney Kilgore arrive tonight; called Malone: he told Mark he quit: the problem, "working behind the scenes"; worked on *Dan Thomas habeas* for FSC.

Monday, March 31:
Worked on *Dan Thomas' Grigsby habeas* for FSC; Chris Vasil called from U.S. Supreme Court: all 3 *Adams* cert. petitions denied; *Grigsby* did not come out today; called the lawyer in *Jones:* the juror was never asked the right *Grigsby* question during voir dire, so the fact the U.S. Supreme Court let him die, even while *Grigsby* remains pending before them, doesn't necessarily mean we'll lose *Grigsby* — or that we won't continue to get *Grigsby* stays out of the Supreme Court (in *Dan Thomas* successor, for instance before *Grigsby* gets decided).

Tuesday, April 1, 1986:
April Fools Day: Called Joan Rossin about getting extension of time in for filing *Nollie Lee Martin:* she's leaving Attorney General's office, in part to

avoid doing the *Martin* successor: no problem with more time (which should put us into U.S. Supreme Court summer cert. pool[623]); Karen Gotlieb called: *Ronnie Straight* cert. denied in U.S. Supreme Court; called Chris Vasil: Justice Blackmun dissented from denial of cert. in straight, along with Brennan and Marshall; good talk on phone with Ronnie Straight: he was calm, but expects warrant; *Dan Thomas habeas*: got it out; All afternoon (4 hrs): getting written test for drivers license; need that to get car insurance, which expired because I wasn't paying attention.

Wednesday, April 2:
Nollie Lee Martin motion for more time went out; Senator Dunn called: Ray Marky thinks *Cabana* requires specific jury findings on intent to kill; I said I didn't read the case that way, but I wished Marky were right; Dunn really seems interested in going to a system of jury sentencing, like Georgia. Afternoon: 5 hours getting road test in Quincy, Florida.

Thursday, April 3:
Ill with cold or flu; long and hostile meeting with St. Pete CCR office people; I lie on couch coughing while Sid Kilgore and Mark Evans talked about how hard they work and about the limits of their commitment to this fight; Mark Olive said little, which probably means St. Pete office is finished; John Briggs called: He'll look for *Grigsby* jurors in *Straight*; called Radelet about *Magill* statistics the court was interested in; MO to SH: St. Pete office shutting down.

Friday, April 4:
Magill Eleventh Circuit granted my motion to supplement record with FSC oral argument tapes; got in *Jones* papers; supplemented FSC record in Dan Thomas; atmosphere: St. Pete people keeping to selves and talking quietly; Sid apologized to Mark Olive for being jerk in meeting, but too late for that.

Saturday, April 5:
Mark Evans running about the office having psychotic episodes about *Ed Thomas*: fighting with MO and being very rude (and loud) to him; Sid White: FSC oral argument in (*Dan*) *Thomas* for Mon morning, on *Grigsby* issue.

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623. The "summer cert. pool" refers to the pile up of cert. petitions that remain pending during the Supreme Court's summer vacation. Cert. petitions filed after the end of the Court's term (in late June or early July) remain pending until the court opens its new term on the first Monday of October. Petitions filed in July won't be decided until the first Monday in October. Getting a Florida capital cert. petition into the "summer cert pool" meant that cert. would not be denied— and therefore, typically, a death warrant would not be signed— until first Monday of October. Since the early 1980's, the Supreme Court has denied hundreds of capital cert petitions— products of the summer cert pool— on each first Monday of October.

Sunday, April 6:
Ruthann and Larkin arrive in Talle.

Monday, April 7:
I did *Dan Thomas* oral argument in FSC (Ruthann and Larkin there in courtroom): Justice Boyd angry: I had only filed an original *habeas* on *Grigsby* issue (no. 3.850 in trial court); he was demanding to know where our 3.850 was ("Is this your new strategy?"): he told me to assume they ruled against me by noon; Justice Overton sympathetic, a little. Good breakfast with Ruthann and Larkin at Monroe St. restaurant. 10:45 a.m.: FSC denied Dan Thomas; called Chris Vasil: No *Grigsby* decision out of U.S. Supreme Court today or until 21st, at earliest: *Davidson James* stay expected to continue until then; watched Larkin while Ruthann interviewed at FSU; wrote *Dan Thomas* cert. on *Grigsby* while Larkin slept; good evening with Ruthann and Larkin: her interview went well.

Tuesday, April 8:
Drove around Talle with Ruthann and Larkin in morning, then they left for WPB; worked on *Ed Thomas* FSC *habeas* on *Grigsby;* took break to go to Black Caucus meeting with Jimmy Lohman; Rep. Hargrett wants me to testify on his *Grigsby* bill; Burke not at all interested in sponsoring a bill on killing kids; worked on *Ed Thomas* all night; read *Funchess* voir dire.

Wednesday, April 9:
Proofed (*Ed*) *Thomas'* FSC habeas; worked on *Funchess'* FSC *habeas* on *Grigsby*; Charles Fulwood from Amnesty International is here: he not sure override is "do- able" this year: he is as unenthusiastic as he has been in the past; Faith Blake: Override bill assigned to Judiciary Crime and Appropriations Committees: continuing warrants bill is only in Corrections Comm, and it's passed there already.

Thursday, April 10:
Finished draft of *Funchess* FSC *habeas* on *Grigsby*; Theda James: Filed op cert. this morning in *Dan Thomas;* Chris Vasil in U.S. Supreme Court: "Don't see why there wouldn't be action tomorrow in *Dan Thomas*"; Malone and I worked on Dan *Thomas* 3.850; worked all night on production and bullshitting; *Funchess* amended *habeas* on *Grigsby,* filed in FSC at 2:00 a.m. Slept on MO's couch for rest of night.

Friday, April 11:
Slept on MO's couch until noon; Malone taking *Dan Thomas* 3.850 papers to Bartow; Theda called: Asking for Monday morning oral argument for *Dan*

Thomas in Bartow. 1:40 p.m.: Trial court clerk called: *Dan Thomas* oral argument is Monday at 10:00 a.m. 2:00 p.m.: MO went to do *Ed Thomas* oral argument in FSC. 2: 10 p.m.: Called Frank Lorsen at U.S. Supreme Court: brought him up to date (Chris Vasil not there, which worries me): he has "absolutely no idea" if the Court will rule today on *Dan Thomas.* 2:00 p.m.: MO back in office; *Ed Thomas* argument went great; expects unanimous stay from FSC: court very troubled by jury override issue. 3:40 p.m.: Sid White called: don't expect FSC ruling today in *Ed Thomas*; Jeff: Wilmer, Cutler is seriously considering taking *Bundy* on in postconviction. 5:04 p.m.: Frank Larsen: *Dan Thomas* cert. denied, 7- 2, with standard dissent by Justices Brennan and Marshall; shit: the end of our *Grigsby* moratorium on executions.

Saturday, April 12:
Got up at noon: talked to Ron Hoffman about his DPR cases; Started reading *Funchess* trial transcript and looking for issues (including *Grigsby*: what the hell, we haven't lost *Grigsby* yet in U.S. Supreme Court); I wish I had my old Vietnam books here; if David is executed, he'll be the first Vietnam Vet to be executed, and he has PTSD; talked to MO and SH about getting Vietnam Vets organizations involved in this case.

Sunday, April 13:
Read *Funchess* transcript and edited *Dan Thomas* Eleventh Cir cert.; talked to SH and MO about grisly details: whether Larry, or one of us, would witness the execution, etc. 10:00 a.m.: Reiser returned from FSP: Dan Thomas was on the verge of hysteria: Ed Thomas cried. Worked on til 3:00 a.m.; slept on couch until 7:00 a.m.; Reiser left for Bartow: meeting Malone there then to Federal District Court in Tampa, if necessary; MO called from Miami: he and I had an argument about giving FSC copies of 3.850 of Ed Thomas. 9:20 a.m.: MO called: Fed Dist Ct closing at 10:00 a.m. for a funeral: he will give papers to FSC. 9:30 a.m.: Called Sid White: Florida Supreme Court on bench, no ruling yet in *Ed Thomas:* wants 3.850. 11:00 a.m.: MO called: juror signing affidavit; then will file 3.850. Noon: at deli with Jimmy, Steve Walter tracked me down and says Frank Lorsen of U.S. Supreme Court is on rampage, saying we're misleading the court; just a confusion in lodging our anticipatory papers; cleared it up.

Monday, April 14:
12:30 p.m.: Malone called: Ruling on *Dan Thomas* 3.850 will come by 1:00 p.m.. 1:15 p.m.: Reiser called: lost *Dan Thomas* 3.850: discussed FSC stay papers, which I wrote. 1:50 p.m.: FSC granted stay in Ed *Thomas.* 2:50 p.m.: Sid White called: No oral argument in *Dan Thomas* in FSC; just waiting; wrote letter to *Paul Magill's* mother; our whole CCR group waited and fretted

in reception area. 4:30 p..m: Tanya called: lost 5- 2 in FSC; Larry left for FSP at 5:00. 5:40 p.m.: Malone called from Tampa: Dist Ct hearing at 7:30 p.m.; SH: Doug Duncan will witness it: she is making arrangements for final visit, etc. 6:30- 7:00 p.m.: Went home to shower. 7:30 p.m.: US is bombing Lybia, listening to news; SH singing Quadaffi's praises. 8:35 p.m.: MO called; *Dan Thomas* hearing over in Fed Dist Ct: we still have a shot at stay based on *Grigsby*: Reiser's oral argument went well; called Frank Lorsen and brought him up to date. 9:45 p.m.: MO called: no ruling yet: any minute. 10:04 p.m.: MO called: we lost everything, including CPC. 10:50 p.m.: MO called: bring Kiatro tapes to FSP cow pasture. 11:25 p.m.: MO called: should we push for 24 hour stay, or does that just prolong it? 11:45 p.m.: MO called: lost 2- 1 in Eleventh Circuit: 5 hour stay pending cert., until noon tomorrow; State may try to dissolve it; talked hard strategy choices. 12:15 a.m.: State not appealing stay; U.S. Supreme Court seems not to be working tonight; long talk with Tim Schrader; can't sleep. Can't go home.

Tuesday, April 15:
Slept on couch from 6:30 a.m.- 8:30 a.m. 9:15 a.m.: SH: Execution reset for 12:01 p.m.: no Eleventh Circuit opinion. 9:30 a.m.: Reiser: MO asking for rehearing *en banc* in Eleventh Circuit: still no opinions yet from panel; relayed info to Ed Turner in U.S. Supreme Court. 10:55 a.m.: Dan Thomas freaking out: his children were torn from him. 11:00 a.m.: Eleventh Circuit opinions out; FMJ dissented on 4 issues. 11:15 a.m.: Dan's sister called: kids dragged from Dan; SH is caving in. 11:55 a.m.: Ed Turner called: everything denied 7- 2, Brennan and Marshall wrote standard dissent: 12:11 a.m.: It's done: He's dead; SH and Gail broke down, called St. Pete; Reiser crushed; Ed Thomas' mom called, thinking he had been executed; radio reported it over limbo and steak dinner with red wine; Susan Carey called: "Dan fought to the end and bit [prison warden Richard] Dugger"; slept for an hour on couch, then worked on *Funchess.*

Wednesday, April 16:
Fell asleep in office last night; *Talle Democrat:* Thomas went to his death "kicking and screaming and cussing": also said there was an execution of a volunteer in Texas, Jeffrey Barney; got in *Thompson* opinion in Eleventh Circuit: bad for *Paul Magill's Lockett* issue; Ruthann: University of Florida wants to interview more people: fuck that; long mass meeting on *Funchess;* Jeffrey Barney executed in Texas.

Thursday, April 17:
FSC unanimously denied *Grigsby* stay in *David Funchess;* SH: Senator Jack Gordon will kill continuing warrants bill; *Funchess* meeting: I suggested only

doing PTSD clemency, since its not really a legal issue; MO "opened it for discussion," ho ho ho; SH: Fins said Dick Burr took job with LDF; Florida House of Rep passes warrant bill unanimously; reporter tells Larry that Governor will veto it.

Friday, April 18:
Warrants in *Ronnie Straight* and *Tommey Zeigler;* talked to Ronnie, and he seemed okay: we talked mostly about *Grigsby* issue; Reiser going nuts: no notice of appeal filed in *Zeigler,* to Eleventh Circuit; he thought Bill Duane, volunteer lawyer, had done it, and Bill thought we had filed it[624]. Jimmy: Press conference on *Funchess* with Vietnam vets went very well; MO at FSP, supervising psych evaluation; lost *Omar Blanco* 3.850 in trial court; good talk with Mrs. Straight (*Ronnie's* mom); worked on *Funchess* Fed Dist Ct and Eleventh Circuit papers all day; long meeting on clemency; I was not there.

Saturday, April 19:
Worked on Eleventh Circuit *Funchess* papers; Ronnie Straight called: good talk: he's pinning hopes on *Grigsby,* and he seems feisty; *Talle Democrat:* Good piece on *Funchess* and PTSD; AG Jim Smith declares he's running for Governor; mass production of *Funchess* appendices; edited Eleventh Circuit stay papers until 4:00 a.m. and slept on floor.

Sunday, April 20:
Got up at 11:00 a.m.; MO and Reiser had big blow up; St. Pete: Gail and Terry frantically calling MO to say that St. Pete CCR office has fallen apart; nothing written yet in *Bush.* 6:00 p.m.: MO leaves for trial court in Jacksonville; I went to *Funchess* vigil at Vietnam Vets Memorial: Sandy D'Alemante there and tells me that Ruthann has been offered FSU job; told her; happy; slept on couch.

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624. This was a major disaster – the single worst mistake CCR made in its early years. Filing a timely notice of appeal is a jurisdictional prerequisite to taking an appeal to the Federal Circuit Court of Appeals. Failing to file the one- sentence boilerplate notice within the required 30 days deprives the Appellate Court of jurisdiction: The Appellate Court is jurisdictionally banned from entertaining the appeal. A lawyer's failure to file a timely notice of appeal constitutes *per se* ineffective assistance of counsel. In the *Zeigler* case, our failure to file the timely notice of appeal – of the Federal District Court's denial of *Zeigler's first* (not successive) *habeas corpus* petition meant that he was jurisdictionally barred from appealing. The death warrant thus created the possibility that Tommey Zeigler would become the first Florida death row inmate to be executed on a first warrant, as well as the first to be executed without ever having had an appeal from the denial of his first federal *habeas corpus* petition.

Monday, April 21:
7:15 a.m.: MO called: trial court hearing set for 8:00 a.m.; *Talle Democrat*: Front page story on Vietnam Vet's vigil; I worked on Eleventh Circuit paper logistics. 11:30 a.m.: Called FSC: trial court denied everything; by noon, papers still not in U.S. Supreme Court; MO called: wants to add *Grigsby* to cert.: I dictate to Jeff, who takes it to Chris Vasil, who physically adds it to the copies of the cert. petition; Dictated Eleventh Circuit papers to SPDC; Rumor that cabinet members Firestone and Turington are urging clemency. 3:00 p.m.: Florida Supreme Court denied *Funchess* 6- 1. 3:30: *Bush* 3.850 and stay denied in trial court; Reiser called about cert. issues; Worked on Straight all day. 5:00 p.m.: Ruthann called: Our house in WPB was robbed while Ruthann at work: They took the 1882 Silver Dollar my mom gave me for my 21st birthday, my Civil Air Patrol medals, Boy Scout medals and merit badges, my Phi Beta Kappa stuff; FSU offer also there in mail: $29,000: she'll accept. 6:30 p.m.: Art told Jeff Thompson that the Governor was denying clemency; he, Larry leave for FSP. 6:40 p.m.: MO called: *Funchess* hearing over; he stressed need for CPC. 7:30 p.m.: MO called: Fed Dist Ct says nothing until 8:30 or 9:00. 8:00- 8:50 p.m.: went to vigil; Tom Horken, Sarah Bleakly, Joyce Davis there; very moving. 10:30 p.m.: Fed Dist Ct denied everything, including CPC. 11:40 p.m.: Went to vigil, but rained out; came back and MO read the Fed Dist Ct opinion and it's a killer; *Funchess* is dead now. 12:00 a.m.: MO called to chat. 12:40 a.m.: Chris Vasil called and asked "did Eleventh Circuit tell you what they did?", when I said no, he said "I'd better let them tell you"; I called and Eleventh Circuit, phone line was busy (talking to MO?). 12:55 a.m.: Got through: stay until noon tomorrow; someone asked for *en banc* poll; called Chris and filed U.S. Supreme Court cert. and stay request. 1:00 a.m.: MO called: need to file more paper in U.S. Supreme Court. 1:50 a.m.: Angela Bickers read Eleventh Cir opinions to me from her house. 2:15 a.m.: MO called to talk strategy; tense and inconclusive, he was implying I'm a wimp for not playing hardball.

Tuesday, April 22:
7:30 a.m.: Went to vigil at Vietnam War memorial. 7:40 a.m.: called MO: should we file anything else in *Funchess*? He put me off and called back at 8:40 a.m.; he wants to dictate something to Jeff in DC: I set that up and fell asleep. 10:10 a.m.: Chris Vasil called: U.S. Supreme Court has extended stay from noon until 5:00 p.m.. 10:50 a.m.: MO called: FSP re-set execution for 5:01 p.m.: we waited: went to vigil; SH: CNN wants interview; I went home to shower at 7:15 a.m.: MO called: trial court hearing set for 8:00 a.m.; *Talle Democrat*: Front page story on Vietnam Vet's vigil; I worked on Eleventh Circuit paper logistics. 11:30 a.m.: Called FSC: trial court denied everything: by noon, papers still not in U.S. Supreme Court; MO called: wants to add

Grigsby to cert.: I dictate to Jeff, who takes it to Chris Vasil, who physically adds it to the copies of the cert. petition; dictated Eleventh Circuit papers to SPDC; Rumor that cabinet members Firestone and Turington are urging clemency. 3:00 p.m.: Florida Supreme Court denied *Funchess* 6- 1. 3:30 p.m.: *Bush* 3.850 and stay denied in trial court; Reiser called about cert. issues. 3:25 p.m.: Returned to office, as news came in of U.S. Supreme Court denial, 7- 2, with standard dissent by Brennan and Marshall: tears. 4:30 p.m.: went to vigil; at 5:01 p.m., I laid flowers on monument; came back at 5:10 p.m. and heard at 5:11p.m. that he was dead; tears; steak dinner and wine; SH cried all the time. 10:30 p.m.: back in office: Jeff Thompson there; talked about the killing itself, which he witnessed: "David was free, from the first burst of electricity." David Funchess executed in Florida.

Wednesday, April 23:
Slept on couch; woke at 10:30 a.m., and saw note to call Linda Weeks of Florida Bar; she wanted me to do letter for Margot's signature, on jury override; worked on that all day; MO: heard that Dick Burr's *Ford* oral argument in the U.S. Supreme Court went badly yesterday.

Thursday, April 24:
Drove Talle to WPB.

Friday, April 25:
Home with Larkin. Frantic call from Radelet about CNN show; nothing came of it.

Saturday, April 26:
Ruthann sent FSU acceptance letter; we drove to Port St. Luce to look for summer place for her and Larkin; dinner with Maria Soto.

Sunday, April 27:
Ruthann drove to Orlando; I went home with Larkin.

Monday, April 28:
Home with Larkin. Dick Burr: *Ford* sounds bad; talked about the future direction of CCR. Night: Drove WPB to Talle.

Tuesday, April 29:
Called Linda Weeks: Raford Taylor gutted my letter on override: now its one page of innocuous pablum; Jimmy Lohman does not think its so bad; we all had strategy meeting: decided I'd testify in Florida Legislature House Judiciary Crime Committee; SH: won *Skipper* in U.S. Supreme Court, which

may help *Martin;* Linda Brown of Bar called: offered me vice chair of IRRC: I accepted; frantic and disorganized plans for tomorrow's override testimony; Jimmy obviously has done no advance planning; wrote *Grigsby* Florida Supreme Court *habeas* for Straight; lLong talk with Ronnie Straight: He understands his chances and issues and he mostly talked about his mother's worrying about him.

Wednesday, April 30:
Came in at 6:30 a.m. and talked override strategy with Radelet and Jimmy; went by Rep. Burke's office: vote very close and he not think it will pass; confusion over V. Felder, who Jimmy had gotten to be there to present Bar position; Raford Taylor said that's his job (Sabotage?); Committee Hearings: total disaster: Burke made an introduction I couldn't even follow; Jimmy said we didn't have the votes; Burke did not want testimony: Taylor said "Bar endorses it"; Radelet said some things from the audience got stomped by McEwen and he lost his cool; Buddy Jacobs spoke for the prosecutors; lost 7-5. Won *Batson and Turner* in US Sup Ct; *Tommey Randolph:* Life sentence on re-sentencing. Night: ACLU reception; long meeting on *Zeigler* strategy; edited *Straight habeas* on *Grigsby.*

Thursday, May 1, 1986:
Talked to new law clerks on how to read a trial transcript; long meeting with Art Norman, MO, etc. on *Ted Bundy*: Polly did not know about this: MO is not returning her calls; *Straight:* Florida Supreme Court *habeas* went out; Dinner with MO, Lissa and Ginnie; MO thinks legislative efforts are a waste of time.

Friday, May 2:
Read *Straight* transcript. MO and Polly had argument earlier, but sounds okay now.

Saturday, May 3:
Read *Straight* transcript. Ronnie Straight and I had good talk: "I trust you and have faith in you"; Good talk with Ruthann about the possibility of witnessing an execution: she asked me not to; read *Straight* record until 4:30 a.m.; can't sleep.

Sunday, May 4:
Read *Straight* transcript; MO working on *Zeigler*; Richard McClees and wife in Talle, checking it out; we all watched *Bundy* (part one) of a made for TV movie: it was awful; long talk with MO about *Bundy,* his view of Polly's ineptitude, the firm's apparent lack of support for her, etc.

Monday, May 5:
Slept on couch; called Chris Vasil at 10:00 a.m.: lost *Grigsby* 6- 3, Rehnquist writing; cert. denied in *Bundy;* nothing on *Sipeal* ("The event that they're waiting for hasn't happened yet; *Darden and Hitchcock* are "definite possibilities"). Polly and Jeff called: Very nervous about getting a *Bundy* Warrant; MO called from Col. Barton's office at FSP: told him about *Grigsby;* he'll tell Ronnie Straight; Press calls; got in *Grigsby* opinion by zap mail; Carol Boone (*Ted Bundy's* wife called: Problems with Polly: wants CCR involved: I tried to sell her on the Wilmer, Cutler firm: told her about *Booker,* etc.; warrants bill passed Senate Corrections Comm; Art Norman pissed: MO back from FSP in evening; Ronnie Straight very depressed about the *Grigsby* decision, crying: cheered him up some; TV cameras there trying to film *Bundy;* We all watched second part of the *Bundy* movie: SH called in and said the Governor is saying a new *Bundy* Warrant will come soon: called Jeff and told him.

Tuesday, May 6:
7:00 a.m.: Left for FSP; picked Doug Chumbly up at Gainesville Airport and we talked about his upcoming oral argument in *Porter*: it was painful; met with Ronnie Straight: good spirits, talked about whether his mom should come now or at the end: he heard about *Grigsby* on the radio and is very appreciative of our work; Magill: awkward, nothing much to say: he's very bright, logical and well read, into ancient Greek history: the word on the row is that *Bundy* will get a warrant by Friday; Chumbly got mad because Terry and I were taking so long with our prison visits: huffy phone call.

Wednesday, May 7:
Warrants: *Tommey Groover* and *James Card*; Groover called: he sounds okay; talked to Ronnie Straight again about his *Grigsby habeas* in FSC; read *Straight* transcript; Craig Barnard here for PD meetings and for Ad Hoc on Responsible Representation Committee meeting tomorrow: MO "rabid" about Dick's suggestion, in memo, that CCR's continued existence is an issue: He sees the only issue as CCR continuing as is (if you're not dedicated enough, take a hike) or as a typical, bureaucratic, 9 to 5 state agency; MO and Craig had sharp words on de-funding of CCR; MO acting like I've betrayed him. Dinner with Craig, SH, etc.

Thursday, May 8:
Stella, Joe Spaziano's woman friend called: she had a dream we heard from FSC; I called at 10:00 a.m., but no opinion in *Spaziano* yet; Ad Hoc Committee meeting from 10:00 a.m.- 4:00 p.m.: Very good; decided to do audit (Jeff's idea) and create a Board of Directors to be a flack; MO did not

say much and seems like he'll just ignore all of this; *Porter:* Chumly can't do moot in Georgia, didn't send anything to George Kendall or Steve Bright; one-half hour conference call: it was useless; hung out with Jeff; MO, Reiser and Ginnie did *Zeigler* all night.

Friday, May 9:
Took Jeff to airport at 7:00 a.m.; read *Straight* record;[625] did investigation; MO, Ginny and I left office at 3:00 p.m. for glass of wine, that wound up becoming 4 bottles; slept in office; we all decided to go to Europe for the weekend.

Saturday, May 10:
Letters to clients; called George Kendall: *Porter* oral argument went well: looks like a remand: Chumbly knew record and issues; found possible *Songer* issue in *Straight* record. Ruthann arrived at 10:00 a.m.

Sunday, May 11:
Ruthann, Larkin and I looked at houses: not much luck; they left at 6:00 p.m.; worked on *Straight* at home.

Monday, May 12:
MO in Jacksonville: talking to *Straight* witnesses; Tom Seligson of *Parade* magazine wants to talk about interview: said that Jay Pinkerton, 17 years old at time of crime, is set to die in Texas on Thursday; worked on *Straight* investigation; Talked with Groover and mom: pep talk; SH: Larry had very good meeting with Eleventh Circuit Chief Judge Godbold: he seems to respect our office, but says our papers are too emotional, using *Funchess* as an example.

Tuesday, May 13:
Edited former Florida Governor Leroy Collins letter to *St. Pete Times*; talked with MO about *Hitchcock/Songer* issue in *Straight;* prepared for teaching MO's seminar at FSU: did it on jury override: fun; Ronnie Straight's mom called: He very upset at us for not having filed anything yet: I called him and cooled him out; drafted section for stay memo on *Hitchcock/Songer* issue.

Wednesday, May 14:
Worked on *Hitchcock/Songer* issue in *Straight*; long talk with MO on strategy; Calls from Florida State Court and Federal District Court: When will you file

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625. I discuss Ronnie Straight's case in MELLO, DEAD WRONG *supra* note 2, at 206-18.

something in *Straight*? Zeigler: giving TV interviews, playing us off against trial lawyers and first *habeas* counsel; talked to MO and Craig and decided to file original Florida Supreme Court *habeas* on *Hitchcock/Songer* issue; mad rush to get it filed; in at 9:30 p.m.; Called Sid White: May get OA tomorrow morning. Norm Sherman: J. Black is burning the midnight oil on *Zeigler*, may have decision tomorrow. Midnight: Met on *Zeigler* successor issue; none, except *Hitchcock/Songer;* started cert. petition in *Straight;* slept on couch at 3:00 a.m.

Thursday, May 15:
Woke at 7:00 a.m.: talked to MO about who should do *Straight* oral argument and decided he'd do it. 8:30 a.m.: Sid White said not to come at 9:00 a.m., Florida Supreme Court will call if they want oral argument; *Magill:* Larry said Godbold indicated they'd reach merits of killing kids issue; *Talle Democrat: Pinkerton* executed in Texas, 17 at time of crime. Lost *Maxwell* in FSC: Terry very upset. 10:20 a.m.: Florida Supreme Court denied *Straight:* Florida Supreme Court called him: this was expected, he's okay; Norm Sherman: No Fed Dist Ct decision in *Zeigler* today; Pro Bono Bar awards and reception at Governor's mansion; Florida Supreme Court Justice Barkett came up to me and was effusive with praise for CCR: "Keep it up, even when it seems that nobody cares"; long talk with SH and Jimmy about which of us should witness the *Straight* execution: decided that Larry would meet Ronnie and see if they hit it off; worked on 3.850; slept on couch.

Friday, May 16:
Woke up at 10:00 a.m.: Federal Distroct Court denied *Zeigler*. 10:30 a.m.: *Straight* 3.850 almost in final: cert. being proofed; Dist Ct on their own; Joe Nursey told SH we're killing *Zeigler*. 1:00 p.m.: MO leaves for Jacksonville to file *Straight* 3.850. 1:50 p.m.: Dist Ct denied CPC in *Zeigler*; Reiser gave me the order; took nap. 3:00 p.m.: called Angela Bickers: no Eleventh Circuit panel yet; MO called at 4:00 p.m.: oral argument is now. 4:00 p.m.: Good talk with Straight: he read 3.850 and liked it: said not to feel guilty if we lose; the group sat around waiting and drinking. 6:10 p.m.: *Straight* 3.850 denied; talked about strategy for Florida Supreme Court brief; I wrote it; called Ronnie Straight and told him: he seems okay. 10:00 p.m.: Norm Sherman called: Fed Dist Ct denied stuff filed by *Zeigler* trial lawyer.

Saturday, May 17:
Woke up at 1:00 p.m.: I argued hotly with Florida Supreme Court; fought with FSC guard about getting *Straight* transcript; Faith got it from J. Adkins; looked for house to rent; finished *Straight* Florida Supreme Court brief;

worked on Dist Ct papers for *Straight*: finished at 2:30 a.m.; MO going to Jacksonville tomorrow.

Sunday, May 18:
MO, Reiser and Ginnie in Jacksonville; I finished *Straight* federal papers. 10:30 a.m.: Debbie at FSC called: *Straight and Zeigler* oral argument at 11:00 a.m. tomorrow; called Ronnie Straight: *he* likes Larry, said crime was a "bitch frenzy." 2:00 p.m.: MO called: Trial court still reading *Straight* papers; hearing postponed. 4:00 p.m.: MO called: Argument went very well: confident of stay; talked to Craig and Dick about possible relief in *Straight; Gardner* type remand; Took nap; awakened at 6:30 p.m. with news of Florida Supreme Court stay in *Zeigler*: State appealing. Midnight: Wrote *Straight* oral argument for tomorrow in Florida Supreme Court; slept on couch; Reiser back from Jacksonville: he'll do *Zeigler* argument.

Monday, May 19:
4:30 a.m.: Ronnie Straight called to wish me luck; my *Straight* oral argument: slaughter: everyone hostile, even Barkett; I got buried in poison; Ginnie and Lissa marveled that they could be so savage; Reiser, who also caught lots of flack, said I held up well; J. Erlich asked questions about *Spaziano* record indicating he thinks the *Gardner* hearing was wide open, which meant we lose under *Hitchcock/Songer*. 11:40 a.m.: Florida Supreme Court denied *Straight*: unanimous: no opinion yet; told Chris Vasil in U.S. Supreme Court to file our lodged stay papers; called Ronnie Straight: He wants me to call his mom, very depressed; called her, and she burst into tears, "oh no." 11:45 a.m.: Eleventh Circuit stayed *Zeigler*, so now he has 2 stays in effect. 2:40 p.m.: MO called: Florida Supreme court opinion in *Straight* out; oral argument in Dist Ct at 5:00 p.m.; called Chris Vasil: State moving to dissolve Eleventh Cir *Zeigler* stay, but he thinks the stay will stick: we may have *Straight* order by 5:00 pm. 4:30 p.m.: Frantic letter to Eleventh Cir, at MO's request. 5:40 p.m.: MO called: hearing delayed; Tanya told Norm that FSC would decide *Zeigler*, and 10 minutes later, Florida Supreme Court dissolved the stay. 7:10 p.m.: Chris called: *Straight* stay denied 6- 3, Blackmun would deny without prejudice to re-file from Eleventh Circuit so we may have 3 votes for stay; called Ronnie Straight: doing okay. 7:40 p.m.: Fed Dist Ct denied *Straight*, no CPC; I called his mom, who cried and cried and thanked us; MO called: Ronnie Straight is okay, he's being "white lighted"; MO's oral argument in District Court was "the best I've ever done." 8:05 p.m.: Panel is PTF, RSV and Clark. 8:30 p.m.: No decision tonight on *Zeigler*; MO: wants motion for oral argument; I did it on the phone with Angela Bickers, then the order came in: Eleventh Circuit stay until noon, no CPC, unanimous; called Ronnie Straight: Ronnie talked again about my witnessing his execution: He wants me there, but knows

how it would annihilate me ("it would fuck you up man, just fuck you up—and other guys need you, you can't be fucked up for them"): He's bonded with Larry, and says he'll be okay; he did have one last request of me: would I attend his funeral to be there for his mom? I said I would. 11:00 p.m.: called Straight: interrupted by MO, who wanted to file rehearing; very heated argument about playing court's ga.mes; stayed up to 3:00 a.m., depressed.

Tuesday, May 20:
6:30 a.m.: Jimmy woke me up to sign rehearing MO had dictated; I not want to file it and found it insulting, so I signed Larry's name; Jimmy is flying it to Atlanta, to file in the Eleventh Circuit: would get there at 10:00 a.m. or so; Nap in morning; SH woke me up: *Zeigler* referred to full court. 10:15 a.m.: Chris Vasil: Nothing from U.S. Supreme Court on *Straight* until near noon. 11:00 a.m.: *Straight* stay extended until 5:00 p.m. by U.S. Supreme Court; I called his mom: "torture." 2:40 p.m.: U.S. Supreme Court upheld *Zeigler* stay; I slept. 4:30 p.m.: SH woke me: no word yet on *Straight*. 4:53 p.m.: called U.S. Supreme Court: Frank Lorsen said no word yet. 5:01 p.m.: Chris called: stay denied 5-4: did not reach cert. petition and he said there's nothing else we can file to get them to reach it: he read the separate orders to me; too late for me to call Ronnie, he's already strapped into chair;[626] MO called: I summarized the orders; Dinner with the group; asleep at 10:00 p.m.

Wednesday, May 21:
Woke at 10:00 a.m.; Former Governor Collins called: he is getting flack about *St. Pete Times* column; Terry: MO cried all the way home; Ronnie Straight's mom called to thank us: his funeral is Friday.

Thursday, May 22:
Lost *Joe Spaziano* in Florida Supreme Court; called co-counsel; called Joe: Joe was very quiet; called Stella and Clubhouse. Jerry Stano called MO: warrant signed: Larry spoke to him; we must decide conflict issue now; *Bundy* is other warrant;[627] another Bob Graham warrant theme: serial killers, this time? Ruthann and Larkin arrive in Talle.

Friday, May 23:
Larry Spaulding asked me what the *Stano* conflict was: I showed him the *Spaziano I* clemency memo I'd written in 1984, suggesting *Stano* might have done *Joe Spaziano's* crime, attaching *Stano*'s PSI, described theory, and how

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626. Ronnie Straights execution hit me especially hard, as described in MELLO, DEAD WRONG, *supra* note 2, at 206-17.

627. I discuss the *Bundy* case in MELLO, DEAD WRONG, *supra* note 2, at 102.

conflict- free counsel would urge *Stano* to deal. Drove Talle to Gainesville for Ronnie Straight's funeral: mass was already in progress; after service, his mom clung to me at the grave: said good- bye to him at grave. Drove to WPB.

Saturday, May 24:
WPB: Packed house for move to Talle.

Sunday, May 25:
WPB: Packed house.

2. Jackson's Flank Attack

Monday, May 26:
Drove WPB to Talle. MO: "You better fight hard if you want us to conflict out of *Stano*"; worked on *Spaziano* rehearing; long meeting with Polly and MO on *Bundy* issues and strategy; MO pretty cold and condescending; she seems lost at sea, with no help from firm and it's not clear she wants to help anyway.

Tuesday, May 27:
I have a cold; feel awful. SH: Reiser quit, effective July 31; Lunch with Greg Thomas and Sarah Bleakly: She told him about Wilmer, Cutler offer: he wants me to apply at H&K, his firm, to do First Amendment; Faith: Sunny Goldenfarb quit: Continuing Warrants bill now tied to corrections package; Tanya at Florida Supreme Court called me on *Stano* and *Bundy*; I told her my conflict and that she needs to talk to Larry or MO.

Wednesday, May 28:
Talked to MO and SH about sending *Zeigler* to LDF or Paul Weiss: seemed to me that we have a conflict, due to IAC claim based on our failure to file notice of appeal; MO: Malone says he and MO need to be in same office; so is Malone coming to Talle? MO vague; Mark Evans: Nothing written in *Card*: hopes to file by Mon, but probably not until Tuesday; long talk to Debbie Fins about *Zeigler*; she called around: Steve Winter finally agreed to do it; MO told me about staff meeting today: St. Pete is dead: he wants to bring Malone here, but Larry, Faith and SH are strongly against it.

Thursday, May 29:
Lunch with Rhoda Kibler: good talk about working within the system and being a lawyer, boring from within, "using the master's tools to dismantle the master's house"; her father is Chesterfield Smith: said Bill Sadowski may be

next FSC Justice; taught MO's seminar: HAC; Carol Boone, Ted Bundy's wife called: they like Polly and love the Lake City cert.

Friday, May 30:
Continuing Warrants bill bouncing between House and Senate; told Art Weidinger the status of *Spaziano*; drafted memo sections for *Groover*.

Saturday, May 31:
Drafted issues for *Groover* until 3:00 a.m.; SH: Fight with Mark Evans about her investigation in *Card*: he wanted focus to be on guilt phase stuff, rather than on anthropological life history stuff; Ruthann and Larkin leave WPB for Talle.

Sunday, June 1, 1986:
Movers arrived from WPB at 10:00 a.m.: spent all day on that; came into office at 10:30 p.m.; Just lost *Groover* 3.850 in trial court in Jacksonville; CCR; crew coming back from Jacksonville; Florida Supreme Court will let us know about *Groover* oral argument tomorrow.

Monday, June 2:
Got in at 8:30 a.m.: no word on *Groover* oral argument; Larry: St. Pete shuts down July 31: he'll tell them after these warrants are over; all will be offered jobs in Talle; Steve Winter: Seth Waxman at Miller, Cassidy, Larocca and Lewin (where I worked the summer of 1982) in DC is very interested in co-counseling *Zeigler:* if so, then Steve is definitely in. 9:30 a.m.: no Florida Supreme Court action tonight; Tanya at Florida Supreme Court told Angela at Eleventh Circuit who told Norm at District Court, who told us; Tanya refused to tell me herself.

Tuesday, June 3:
In office at 9:30 a.m.: No word yet on *Groover*; Norm in Dist Ct says not to file yet; Florida Supreme Court still hasn't ruled; MO thinks Dist. J. Black will issue a stay without argument; SH: Ed Stafman may take *Spaziano*, if we have conflict; MO says we can pay him from CCR conflict money. 2:15 p.m.: *Card* lost in trial court. 3:00 p.m.: Tanya called: Florida Supreme Court stay and remand for evidentiary hearing in *Groover*. 3:40 p.m.: Florida Supreme Court stayed *Card* and put it on expedited briefing schedule; Steve Winter: he's in *Zeigler*, but needs backup; Seth can't do it now.

Wednesday, June 4:
Dick Burr: Steve Winter is in for appellate work in *Zeigler*: over next few months, we'll try to find volunteer firm to take it over; drafted deterrence

issue in *Nollie Lee Martin* cert; bugged MO about deciding *Stano/Spaziano* conflict issue; he's very laissez faire, no rush yet.

Thursday, June 5:
Home all morning; Steve Walters: MO (in St. Pete, telling Malone he's being shut down) can't teach his seminar tonight: he wants me to do it; Reiser and I will split it; worked on *Martin* cert.

Friday, June 6:
I asked Larry if a decision had been made on *Stano/Spaziano* conflict: he said he talked to MO, who said we were representing *Stano*; I gave Larry the clemency memo, which MO hadn't mentioned: I said that I had strong ethical problems with working on *Stano* and couldn't work on it myself and that Joe would have real problems if I did; SH: Ed Stafman will take *Spaziano*, if we pay him; Larry says conflict money only goes for costs, if we get any conflict money at all this session of the legislature.

Saturday, June 7:
Faith Blake: Legislature only funded us at same level as last year, not even annualizing the budget; no way to last the year on this; no conflict money at all.

Sunday, June 8:
Worked on *Martin* cert; MO back from St. Pete, but home ill; Malone called several times for him today.

Monday, June 9:
Worked on *Martin* cert. Lunch with MO and Ed Stafman: Ed seems interested in the *Spaziano* case, but the problem is money; MO thinks CCR may be able to swing $5,000 (did not tell Board that); everything very tentative.

Tuesday, June 10:
Finally got MO to talk about conflict issue in *Stano/Spaziano*: he wants to just reveal it to *Stano* and *Spaziano*; Lissa will research it; Afternoon and evening with Tom Seligson of *Parade* Magazine: good conversation about killing kids; he really has been doing his homework; had lots of info on other states; we started at Posey's (for oysters and corona beer), then went to other bars and restaurants.

Wednesday, June 11:
Edited *Martin* cert.; Reiser had helpful comments and additions; MO wants me to do *Stano/Spaziano* conflict letter to Bar; Larry called MO from St. Pete:

4 hr meeting on shutting the office down; Malone was not there, Sid and Mark Evans all over him: Larry backed off and agreed to reconsider.

Thursday, June 12:
Home in morning. Larry: Letting St. Pete see budget; Malone not coming to Talle under any circumstances; Talked to MO about *Stano/Spaziano* conflict: Larry will deal with Bar to get advisory opinion: I'll draft letter; MO: St. Pete gone; Malone called for MO and I answered phone: It's all a SH and Sunny plot: Larry came there and saw it's a lie, so now he's reconsidering: may be time for him to move on anyway, since politics are so intense.

Friday, June 13:
MO in Tennessee; Larry talked to Bar on his own about *Stano/Spaziano* conflict: gave them hypotheticals about the conflict: they said we're right in getting out of *Spaziano* (but we're still very much in *Spaziano*; Stafman not on board yet); SH: Richard MaCleese said no to job with CCR; went over resumes of applicants; got letter from *Joe Spaziano*: "You won't let them kill me, will you?"; Interview with Tom Mittelstadt, Rhoda's friend (ex law prof; just out of fed prison).

Saturday, June 14:
SH: Don Middlebrooks, volunteer in *Stone*, wants to drop the case: asked me to look it over and talk to him; MO back in Talle: Talking about his leaving CCR ("That would make things smoother"): he's convinced I'm leaving, since I won't give him a "straight" answer; MO is upset that Larry is taking charge and that I'm "talking to him" [*ie.* Larry] (about conflict?).

Sunday, June 15:
Ruthann and Larkin leave for Jensen Beach; work on *Death Studies* article: very eerie writing about how I felt when Ronnie Straight was killed; Malone called for Craig and got me: "Craig has lots to say about your (my) loyalty; maybe I'll (he'll) go into corporate law, at least there they'll be loyal"; Conflict over Larry's memo on killing St. Pete and firing summer clerks that went out while MO gone; Talked to MO about appellate division (we were both very drunk); he is very enthusiastic about it.

Monday, June 16:
9:15 a.m.: Tanya called on *Stano* status; I gave her to Larry, telling her I can't talk to her because of my own conflict: she asked Larry for memo on status: I do not want to do that until we know more about whether we have a *Stano/Spaziano* conflict and how to cure it; talked to law students about their cases; Long talk with Craig: he says he didn't trash me to Malone: he's trying

hard to hire Malone, and Craig himself is considering coming to Talle "eventually"; he thinks we don't have a conflict in *Gardner* aspect of *Spaziano*, but it's close question. MO came in at 11:30: St. Pete in uproar over Larry memo; *Stano*: Trial court entered order that we file 3.850 by Thurs: MO very cavalier about saying fuck it; Long meeting with Larry and MO on conflict: I am getting out of *Spaziano* because of remand IAC conflict: sending letter to *Stano* judge and Bar, I am getting out of *Stano*, too; I wrote Bar letter. Drunken talk with MO: Should "we" bring Malone up? I told him that my possibly leaving should have an influence on that choice: MO: SH is on way out.

Tuesday, June 17:
Talked to Larry about *Stano/Spaziano* conflict: he sees no reason for me to get off of *Spaziano*; Mad dash to FSP to meet with *Joe Spaziano*: confusion about whether *Joe* was scheduled for visit: Joe is still very frightened and feels abandoned: he seemed to understand my remand- IAC conflict: he suggested the Outlaws could pay Stafman; on the ride home, MO said CCR need pay nothing.

Wednesday, June 18:
Flew Talle to Orlando with Larry; ran into Steve Goldstein at Orlando airport; I decided to stay the night in Larry's room. Went to Bar Leaders meeting: total waste of time. News: U.S. Supreme Court Chief Justice Warren Burger resigned: Rehnquist nominated for Chief and Scalia (DC Circuit) for Associate: Scalia is Catholic and anti-abortion, so maybe anti-death penalty as well; called Craig: *Middleton* won in Federal District Court (Judge Alsee Hastings); MO: sent Bar letter on *Stano/Spaziano* conflict; Dinner with Larry, Goldstein and law students (one into CCR).

Thursday, June 19:
Morning TV news: Rock executed in Texas; Good talk with Larry at breakfast about appellate division—he said "do it": he'd been relying on SH and MO advice on administrative things, and they turned out very good at that; talked about Craig, what a pity he didn't go for CCR; Larry: "I never would have taken the job, if Craig wanted it"; I suggested early retirement. Flew Orlando to Talle: looked over *Card, Ada.m.s, Routley* papers; MO: wants me to think about sending Malone to WPB on CCR salary, to suck him and Craig in and shift power from Talle to WPB; I related my talk to Larry: MO asked what my "agenda" is, since I spend so much time with Larry; MO says SH is being buried by her critics (Malone; Terry): only he supports her; Renata Ward called: Dr. Lewis studying killing kids is good for *Paul Magill*.

Friday, June 20:
Warrants in *Raymond Stone* (represented by Susan Carey and Don Middelbrooks) and *Robert Parker* (Bob Link; CCR conflict); Dick Burr called on Judicial Conference strategy tomorrow: I told him Larry did not want me to go: we worried about Larry; *Stano*: Trial court extended time limit until Sunday; Dave Davis came over: he represents *Livingston*: a death row kid; Craig: Susan is getting out of *Stone*, she's on vacation next week: it is unclear what the story is with Don Middlebrooks, other than that he and Susan can't get along; called Don: he's in, if CCR will be "lead counsel."

Saturday, June 21:
MO asked me to go to Miami to work with Middelbrooks on *Stone*; Larry called: Judicial Conference went well: Florida Supreme Court Justice Boyd, McDonald and Overton were hostile about delays, but federal judges great; Boyd said he doesn't read our papers, and Larry said he hoped the federal judges were listening; Faith: SH says Mark Evans is writing letter to all legislators, saying SH is engaged in unauthorized practice of law and killing CCR; Read *Stone* 3.850 papers: this case is outrageous, worst poverty I've ever seen—he grew up in dump; Long talk with Susan about dealing with Middelbrooks.

Sunday, June 22:
MO had conference call with *Stano* judge: the press was there: the State attorney was trashing CCR and MO; Bob Link called on *Parker*: he wanted to talk about override, but I brought up conflict and told him about *Booker* and *Shriner*: I suggested a hearing to waive conflict and told him IAC is the claim most likely to get a stay: he worried a hack lawyer would be appointed if he conflicts out and wants to go only on *Brady* claims: I told him we lost that claim in *Groover*, it sounds like there is a credible IAC claim, since Link promised him a life sentence; Jeff: filing *Agan/Waterhouse* stay in *Ted Bundy*, prior to 3.850; MO blasted Wilme, Cutlerr: "Your friends are killing Ted": he did not think they've read the record: they were "lucky" in *Booker*; awful dinner with MO, SH and the rest: MO bubbling with praise for her: looks like new alliance; last week, he was saying she's finished.

Monday, June 23:
Long talk with Tom Equals about *Gorham.*: Whether to go into Federal District Court if he loses in Florida Supreme Court and fight default (and avoid fact findings in state court) or file 3.850; He seems on top of it: wants CCR as co- counsel: I said I'd talk to MO; Good talk with Don Middelbrooks: he is excited that I'm coming there: I gave him some research projects for between now and when I arrive. 11:00 a.m.: Dick Burr called: *Willie Jasper*

Darden decided by U.S. Supreme Court: we lost, affirmed and remanded: ran to tell SH, who was on phone with a reporter, who said we lost 7- 2; I called Chris Vasil, who read syllabus: It was 5- 4, flat loss, remand is routine; ACLU zap mailed the opinion: it was nasty - - Justice Powell was pissed. MO came in the afternoon: Abruptly said he did not want to hear my summary of the opinions. 3:40 p.m.: Got in *Ted Bundy* papers; Polly called: she had a good meeting with *Bundy* yesterday. 4:10 p.m.: Reporter called: *Bundy* filed: stay pending filing of 3.850; MO: *Bundy* papers are okay, except for errors in fact and law. Joe Spaziano's mom, Rose, called: he's upset about conflict: good talk with her; Craig called: Malone accepted WPB job.

Tuesday, June 24:
Two hour talk with Don about *Stone* issues and needed research; *Talle Democrat*: cert. denied in *Jimmy Lee Smith*; Talked to Dick Burr about getting *Stone* psych evaluation; Dick Burr: Bowden executed in Georgia. 5:00 p.m.: Polly called for statistics for *Bundy*; SH: In Bowden's case, Georgia Pardon Board entered a ninety day stay and sent in shrink without telling anyone, who said he was not retarded, then set the execution for this morning; Read 500 pages of *Stone* transcript; Reiser's draft of *Darden* rehearing.

Wednesday, June 25:
Arranged for Dr. Krop to do *Stone* psych evaluation on Friday; edited *Adams* brief; Christopher: MO got angry letter from volunteer lawyer, bailing out of the case. *Stano*: Our motion for continuance denied: we are precluded from filing 3.850. 2:30 p.m.: Got in *Stano* order, trashing CCR; *Spaziano*: Stella and Rocky called: concerned about letters from Joe: they can raise money to pay Stafman; Dinner with Shearman and Sterling people: discussed psych evaluations on killing kids; got back at 8:00 and Jeff had called: *Bundy* trial court denied stay pending 3.850, but good appeal issues since judge pre-judged merits. All night: worked on *Adams*; drafted part of *Stano*'s Florida Supreme Court papers; fell asleep at 4:00 a.m..

Thursday, June 26:
Polly Nelson and Jim Coleman arrived at 8:30 a.m.: putting the final touches on *Bundy* papers; MO ignoring them and working on *Stano*; *Paul Magill*: it has been thirteen weeks since the oral argument, not that I'm counting. Craig called at 10:00: won *Alvin Ford* (killing the insane) in U.S. Supreme Court: Justice Thurgood Marshall wrote; Dick called later: won on both Eighth and Fourteenth Amendment claims. Lunch with Ed Stafman: $5,000 fee and $5,000 expenses: he asked me to think about going into partnership with him. 3:40 p.m.: oral argument in Florida Supreme Court on stays for *Bundy* and *Stano*: Jim and MO did great (classic MO line: "*Stano* isn't a serial killer; he's

a serial confession): Florida Supreme Court jerky and a little hostile, but not extreme: looks good for *Stano* and bad for *Bundy*. 4:40 p.m.: Won *Stano*: we can file 3.850. 5:20 p.m.: Lost *Bundy*: no stay, must file a 3.850.[628]

Friday, June 27:
Reiser: U.S. Supreme Court procedural default cases yesterday killed *Adams;* Patsy Morris called: *Flemming* got Eleventh Circuit stay: PTF dissented: State taking it up; *Stano* trial court order: when you file 3.850, have your witnesses there ready for an evidentiary hearing; Flew Talle to Miami; met Don at firm and settled in: he seems good, but nothing has happened except some confessions research; worked until 3:00 a.m. at firm.

Saturday, June 28:
In Miami working on *Stone*: In law firm office at 8:30 a.m.; Read 800 pages of *Stone* transcript; took notes. 10:15 a.m.: called Polly (also in Miami): they plan to file *Bundy* 3.850 at 1:00 p.m.; She and Jim were up all night on it; Talked with Don on and off all day; he is drafting IAC claim: nervous about when he will file.

Sunday, June 29:
Going over *Stone* files and talking to Don; Called my office in Talle: nothing written in *Stano*; Called Polly: *Bundy* 3.850 filed yesterday; Wrote *Stone* until 3:00 a.m.: *Hitchcock* and race claims.

Monday, June 30:
In Miami on *Stone*; Morning news: *Bundy* argument set for 8:00 a.m.; in office at 8:30 a.m. working on *Stone* confessions issues; Called Norm Sherman: next Federal District Judge in rotation is Susan Black, then its Melton, so we want to wait until *Parker* files, so that he's got Black and we get Merton. 11:30 a.m.: Reiser called: *Stano* Eleventh Circuit panel is Roney, Hill and Kravich: Angela Bickers is upset, saying "You all like taking risks"; Nothing written yet in *Stano*: MO is home sleeping: Lissa and Ginnie do not know issues; Reiser is very upset; *Darden*: cert. denied (on successor). 1:30 p.m.: Jim called: Lost in trial court in *Bundy*: real zoo in Judge Cowart's court: Cowart did the State's work for it (Jim said "It's unfortunate the court was more prepared than the State is"). 5:30 p.m.: Reiser called: *Bundy* lost in Florida Supreme Court;[629] he is panicking that nothing seems to be happening in *Stano*. 5:40 p.m.: Jeff called: J. Zlock (new) is *Bundy* Federal

628. *See* Bundy v. State, 490 So. 2d 1257, (Fla. 1986).
629. *See* Bundy v. State, 490 So. 2d 1257, 1258 (Fla. 1986).

District Judge: Eleventh Cir panel is RSV, Godbold and an unknown: Jeff took a job with Biden Judiciary; Dinner with Don and wife; back working on *Stone* at 10:00 p.m.; did confession claims until 3:00 a.m. SH: Malone and Mark Evans trashed her to Larry: "The lowest point in 8 years."

Tuesday, July 1, 1986:
In Miami on *Stone*: Talked to *Stone* trial lawyer: he'll do *Hitchcock* affidavit. 9:50 a.m.: *Stano* 3.850 done and on way to court; MO exhausted; drafted *Stone*; edited; talked to Don. Noon: Called Talle: *Stano* 3.850 filed (unverified): witnesses on the way, judge testy with Ginnie (who was there all morning). 2:30 p.m.: Mark Evans called: *Stano* is in trouble: wants to raise conflict issue. 5:30 p.m.: Called Talle: *Bundy* lost in Federal District Court, MO in non-evidentiary hearing in *Stano*; Reiser thinks 24 hr. stay likely, since Florida Supreme Court left for the day. 6:15 p.m.: Called Jeff at home: no word on CPC: CCR not know anything (as of 6:30). 6:35 p.m.: Called *Bundy* local counsel: 24 hr stay from Federal District Court: CPC granted. 6:45 p.m.: On phone with office when word comes in: *Stano* 3.850 denied but stay granted until 10:00 a.m. tomorrow. 7:30 p.m.: SH called: *Stano* trial court gave hearing, but only to call trial lawyer: MO said that's no hearing; District Court is Judge Sharp; Faith: MO started crying after hearing about the meeting of Larry, Mark Evans and Malone: all lies about SH; Left office at 4:30 a.m.

Wednesday, July 2:
In Miami on *Stone*: Woke at 8:30 a.m.: morning news: *Stano* got Florida Supreme Court 24 hour stay; Called office: *Stano* oral argument at 2:00 p.m.: District Court judge now is Patricia Fawcett (new). Noon: Jim called: he just filed *Bundy* Eleventh Circuit papers: Fed District Court is totally incompetent: it did not understand *habeas*, exhaustion or default; Angela Bickers says no one knows what's going on, the Federal District Court's order[630] is so bizarre; Lee Currie called: cert. denied in *Butch Sireci*: a shock: called MO about someone there calling Butch; talked to Dick Burr about mental health 3.850 in *Sireci*. 3:00 p.m.: Called office: Francie Small says oral argument in *Stone* went very well; Florida Supreme Court disgusted with CCR, but seemed to agree that there was a colorable hearing issue. 3:20 p.m.: Faith called: Florida Supreme Court stay in *Stano*. 4:40 p.m.: Tim called: *Bundy* stay in Eleventh Circuit;[631] Got together with Jim, Polly, and the rest of the *Bundy* gang for

630. *See* Bundy v. Wainwright, 651 F. Supp. 38 (S.D. Fla. 1986).

631. *See* Bundy v. Wainwright, 794 F. 2d 1485 (11th Cir. 1986); *see also* MELLO, DEAD WRONG, *supra* note 2, at 103.

dinner: delightful: Jim happy as a kid; back at firm at 11:00 p.m.; edited *Stone habeas* rest of night.

Thursday, July 3:
In Miami on *Stone*. Morning: Talked to Don about *Stone* stuff; called MO: He is thinking about making a move for Larry's job; went to airport, rented car and drove to Jensen Beach.

Friday, July 4:
Jensen Beach. Larkin ill with stomach flu. Read Ruthann's story —"Interviews"—one of the best stories I've ever read: it left me breathless: every paragraph and image was perfectly crafted.

Saturday, July 5:
Jensen Beach. Worked on *Death Studies*[632] article with Ruthann; she made it much better, but I'm still not sure it says anything.

Sunday, July 6:
Jensen Beach. Night: Drove to Miami; left car at airport at 1:00 a.m.; cab to firm, and looked over *habeas* and memo.

Monday, July 7:
In office at 8:00 a.m.; Don in Miami on a case for the firm; Long talk with Dr. Krop: his report will be sent tomorrow; talked to SH about investigation generally and Mark Evans' claim that she put *Card* at risk by overruling his investigation priorities: he is now saying that in 2 weeks there will be "big changes"; Called Art Weidinger: Filing a new mental health 3.850 that should hold off warrant in *Sireci*; Norm Sherman called: *Parker* 3.850 denied in trial court: Florida Supreme Court argument Tuesday; Catherine (Don's secretary)says: He sees this as final *Stone* draft; no way; Don called: Brought him up to date: he does not seem upset. Madness: *Stone* Editing *habeas* and memo; MO: Cert. granted in *Jim Hitchcock's* case (finally the *Cooper/Lockett/Songer/Sireci/Hitchcock* issue is before the U.S. Supreme Court, but how can we win it, atmospherically – without the court also admitting that so many people executed before now also had a winning issue?); Cert. also granted in *McCleskey*: finally the Baldus race discrimination study is before the U.S. Supreme Court (the last big ticket, death row clearing case); we talked *Stone* strategy; Don called at 5:30 p.m.: Upset that it's not finalized; I just kept plodding through the editing:

632. Michael Mello, *Another Attorney for Life*, FACING THE DEATH PENALTY (1989).

Catherine glaring at me; MO: SH talked to Bob Link: he does not plan to file *Darden* until Mon: I do not want to wait that long on *Stone*, but if we don't then we get Susan Black as our judge: Worked until 4:00 a.m. on appendices, mostly on prison conditions.

Tuesday, July 8:
In Miami working on *Stone* Warrant: In at 9:00 a.m.; talked to SH: She is advising Link to file *Parker* late, telling him about the mechanics of *habeas*; Gail is finding good stuff on the institutions where *Stone* grew up; Periodic talks with MO: Probably no more state court litigation; Unpleasant talk with Don about calling trial lawyer at IAC hearings: I told him about *Stanley, Adams*, etc.: he also does not like prison conditions stuff; Norm Sherman: *Parker* lost in Florida Supreme Court: pissed he's not filing in Federal District Court until Mon; Edited *Stone habeas* memo; did *Stone* Eleventh Circuit papers. SH: MO and Larry decided to fire Mark Evans tomorrow; MO called: U.S. Supreme Court stayed *Messer* (Ga) on *McCleskey*, after Eleventh Circuit denied: Another moratorium (like *Grigsby*)? Or just on Ga cases, since Baldus study was Georgia?

Wednesday, July 9:
In Miami working on *Stone:* Talked to MO: Definitely going straight into Federal District Court on *Stano*: told that to Norm; General *Stone* bickering and sniping with Don all day: he does not think I've improved the petition, very offended that I re- structured his IAC claim; I edited and proofed all day. Faith: Mark Evans says he'll file bar grievance if SH not fired. Midnight - 3:00 a.m.: Put *Stone* appendices in order.

Thursday, July 10:
In Miami: Warrant on *Stone*: First thing in the morning Don asked whether CCR was paying to produce the *Stone* appendices; another argument about the prison conditions stuff: he wants to footnote the new material on institutionalization; decided to forego prison conditions appendix. Don cooled out in the afternoon; production going well; decided to file *Stone* tomorrow. 4:30 p.m.: Norm called: Federal District Judge Black is in awful mood (not only because of us): Told him how hard logistically it would be to do a hearing this weekend: Norm will pass that on to her; Proofed, finalized, and got *Stone* Federal District Court papers to courier; Eleventh Circuit papers ready.

Friday, July 11:
In Miami, working on *Stone* Warrant: Don pretty uninterested in getting ready for a hearing: tried to get him up to Federal District Court and filed at 10:15

a.m.; Fought with Don about how to posture *Stone* in Federal District Court: Need for hearing means stay: he does not really want hearing, he wants CCR to pay for witnesses: I told him to talk to MO. 12:30 p.m.: Called Norm: no word yet: no plans to work this weekend are being made: he thinks she'll rule today against us; While on phone, Norm got order: She wants exhaustion memos by Monday; Don's secretary does not want to work this weekend—he wants CCR to send someone. 3:00 p.m.: Called Norm: Nothing will happen this weekend: no evidentiary hearing unless we get ample notice: we need not be there on Mon: she may rule on merits; Decided to do exhaustion memo at Talle. Flew Miami to Talle, headed straight into office and worked on *Stone* exhaustion memo until 3:00 a.m.

Saturday, July 12:
Slept on couch; up at 9:00 a.m. and did *Stone* exhaustion memo all day; Don called at 4:00 p.m.: suggested I come back to Miami: I said no way, using logistics as excuse; Got State's response in *Stone* at 5:00 p.m.: Not bad; Norm: *Parker* filed this morning: Judge Black's clerks are furiously working on the *Stone* exhaustion issue; Don called again and we talked for an hour: he seems lost; Wrote procedural default memo in *Stone*; edited exhaustion memo.

Sunday, July 13:
Edited *Stone* memos; talked to Don on and off all day: he's reading lots of exhaustion cases; Susan Cary: Saw Raymond Stone yesterday: his spirits high; Talked to MO about what to do if Judge Black dismisses *Stone* as unexhausted: decided to go to Eleventh Circuit: the problem is that *Caldwell* claim isn't really exhausted; I decided to delete that claim: called AG and he agreed; we'll file that tomorrow. 4:45 p.m.: Everything out in *Stone*, to Jacksonville and Atlanta. 12:15 a.m.: SH called (from Jax; working on *Groover* investigation): all the *Stone* stuff picked up.

Monday, July 14:
8:10 a.m.: Norm called: *Stone* stuff filed: SH filed everything; SH: Norm says it will be a late night: he is not confident about stay in *Stone* or *Parker*. 11:30 a.m.: On phone with Joanne in Federal District Court when orders come in: stay in *Stone*, non-evidentiary hearing set for July 22. Afternoon: *Parker* stayed by Judge Melton. Slept all afternoon and night at home.

Tuesday, July 15:
In at 11:00 a.m.; Worked on supplemental exhaustion memo in *Stone*; MO getting ready for *Groover* evidentiary hearing; Faith showed me Mark Evans' letter to Larry, saying he's coming to Talle and filing Bar grievance: she said

that MO met with Judge McDonald: it generally went well, but fallout from *Stano* may mean that CCR must be prepared to put on evidentiary hearings as soon as any 3.850 is filed; Faith in tears about what that does to CCR budget.

Wednesday, July 16:
Edited *Stone* supplemental memo; Talked to Reiser about *Darden* rehearing; Most people in *Groover* hearing, in Jax; Dick Burr: Art says that Jim Smith told the Governor that *McCleskey* and *Hitchcock* mean moratorium: he's thinking about holding off on signing warrants; Smith asking for special legislative session to come up with a new statutory process for determining execution competency, in light of *Ford*.

Thursday, July 17:
Cleaned office; went over *Death Studies* article;[633] Neil Skene: Harry Johnston, as Governor, might give advance notice about which warrants are coming; he did not realize CCR budget was cut (Neil asked him this at recent press meeting); No one here to type edits on *Stone* memo: everyone in Jax for *Groover* hearing.

Friday, July 18:
Final edits on *Stone* memo; Lissa called from Jax: *Groover* hearing is going well, but "the CCR family" is a little tense: SH on a rampage; Eloise back from Jax: SH is terrorizing everyone, especially the law students: she was drunk in front of our witnesses; Called Don: *Stone* memo is okay: agreed he'll take lead next Thursday. 11:00 a.m.: MO called: *Groover* hearing going well: talked about risks of not calling the trial lawyer as a witness in *Groover*.

Saturday, July 19:
Good talk with Ruthann about the future: we're leaning towards Wilmer, Cutler.

Sunday, July 20:
Chores; rested. *Groover* crew returned: MO and SH think the hearing went well, though the outcome is pretty pre-ordained; MO seems depressed; MO and Ginnie sniping like lovers. . . ; Read USLW: *Thomas, Brooks* and others vacated by U.S. Supreme Court and remanded for reconsideration . . . .

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633. Michael Mello, *Another Attorney for Life*, *supra* note 633.

Monday, July 21:
Odds and ends; client letters; Faith talked to Gloria Nelson in WPB: Malone is trying to bring his St. Pete administrative staff with him, to help Gloria run the office; Faith is very depressed about budget; MO: Evidentiary hearings set in August in *Preston* and *Johnson*. Midnight: Long bull session with MO, SH, etc., on CCR running out of money; MO seems to have offered Billy Noles a job.

Tuesday, July 22:
Letter from Nollie Lee Martin: "I don't know why I'm terrified of the electric chair. . . ."; Got in draft of new *Sireci* 3.850; Good lunch with Charlene Carnes: She'll lobby for override repeal, if I can find some money: she will also help find the statistics the Eleventh Circuit wanted in *Magill*.

Wednesday, July 23:
Tom Equals called: wants us to co- counsel *Gorham* and divide up the issues: I told him we can't do that: went over risks of going directly to Federal District Court, bypassing 3.850; Talked to MO about new *Sireci* 3.850: he said it's okay; Faith: Mark Evans resigned: fight seems over.

Thursday, July 24:
In at 7:30 a.m.; Rental car would not work, so we took my car to Jacksonville for *Stone* oral argument; got a speeding ticket and got to hearing 15 minutes early; Don was there: decided he'd do all the talking in Jacksonville for oral argument; he did okay, but not inspired and did not stress need for evidence hearing; Judge Black effusive with praise for him, carefully ignoring CCR; Lunch with Norm: *Stone* was stayed because we dropped the *Caldwell* claim; Judge Clack said "clever, aren't they": that seemed to "throw her for a loop": before that, he was sure she was going to deny us.

Friday, July 25:
Sireci 3.850 sent to be filed. Morning: found out that yesterday SH and MO divided up cases among lawyers: I asked SH for my cases, and she put me off all morning. Afternoon: Mass meeting, run by SH, on case division (I'm now responsible for 35 cases); MO said we're "roughly" moving toward an appellate division (nothing in the division evidencing that); SH went through each case, insulting Ginnie periodically; I was enraged by the whole thing. *Blanco*: one of my new cases: AG agreed to continuance and talked to Larry about ACLU hiring Charlene to lobby override: positive.

Saturday, July 26:
Drove from Talle to Jensen Beach. Perfect day with Ruthann and Larkin; read "Atlantis" story: beautiful piece of work.

Sunday, July 27:
Jensen Beach. Morning: walked with Larkin on beach; Ruthann came down to beach in late morning; we went to pool in afternoon; Larkin becoming good swimmer: he dives off side of the pool. I don't want this to end. Good talk about DC: I'll go for 2 years, then we'll go to England for a year, then back to Florida to teach.

Monday, July 28 - Saturday, August 2, 1986:
Jensen Beach.

Sunday, August 3:
The happiest, most perfect day of my life.

Monday, August 4:
Packed up cars and drove to Orlando where we shopped at outlet mall, then drove to Talle; On the way, it really hit home how much I was dreading returning to CCR, to a CCR with SH in control.

Tuesday, August 5:
Morning and afternoon: cleaned house with Ruthann. Afternoon: Went to office: saw my new, small office (everything re- arranged while I gone); SH: warrants in *Darden* and *Rose* (SH says volunteer lawyer is trying to dump it); oral argument on continuance of *Preston* hearing is Thursday; talked about whether I should go to Airlie: SH and MO decided I'd go and come back if *Preston* doesn't get a continuance; SH says my purpose in going to Airlie is to hype CCR (??!!!).

Wednesday, August 6:
Flew Talle to DC with CCR crew: six hour layover in DC; I met Jeff for lunch at Senate Judiciary Committee: talked about bringing *Magill* to firm and having Cutler argue it if cert. was granted: that would be great for solidifying death work at firm. Night: bus from DC to Airlie House.

Thursday, August 7:
Airlie House, Warrenton, Virginia: Seminars; SH sent me a note during seminar: MO got continuance of evidentiary hearing in *Preston* until October; Moot courted Steve Winter for *Zeigler*. Night at lodge: good talk with Dick Burr about CCR: Malone took job at WPB and is doing *Rose*.

Friday, August 8:
Airlie House: Slept until 9:30 a.m.; skipped most seminars; moot courted David Bruck for *Hall*; Argument with SH about volunteering execution and human dignity: short argument: she stomped off in a huff.

Saturday, August 9:
Bus from Airlie House to DC; Cab to mom's: cousin Pat there, girding herself for divorce.

Sunday, August 10:
Alexandria, Virginia: Parents.

Monday, August 11:
Alexandria, Virginia: Parents; Bob Gore called, saying Sunny Goldenfarb needed to talk to me; I called her: it was MO she'd called for, but we had good talk about her oral argument tomorrow in *Dennis Smith*: put her in touch with George Kendall; MO: "Everyone at Airlie said you seemed surly and unhappy . . ." (SH, Ginnie, Jimmie).

Tuesday, August 12:
Alexandria, Virginia: Parents. Morning: Got together with Dave Grady. Lunch and afternoon: good talks with Wilmer, Cutler and Pickering folks about London office, First Amendment (Tim Dyk, John Payton); ran into summer clerk who just finished clerking for Eleventh Circuit Judge Frank M. Johnson and who was his clerk on *Paul Magill*: said I did good oral argument, but Eleventh Circuit was "political": said Clark was "writing dissent - or concurrence": he was surprised the opinions were not out yet: generally indicated *Magill* would lose. Good dinner with Jim and Polly: he is getting rid of all pro bono but death cases: no problem with my bringing *Magill* to firm.

Wednesday, August 13:
Alexandria, Virginia: Parents. Sunny called: *Smith* oral argument went well; Called Craig: Malone there and working on *Rose*: not trying to stop it, but there may be a conflict; *Armstrong* won before District Judge Castagnia.

Thursday, August 14:
Alexandria, Virginia: Parents. Tried to change return flight to come back on Saturday; Faith says CCR can't pay to change it, so I'll stay until Sunday and take Monday off: fight with Faith. Afternoon News: Senate Judiciary Committee voted to send Rehnquist and Scalia to full Senate: Biden votes against Rehnquist. Dinner with Jeff and family.

Friday, August 15:
Alexandria, Virginia: Parents. Checked in at office: MO "not there," according to Jimmy, who seems to be screening MO's calls; *Darden* has stay in effect from last round in U.S. Supreme Court.; focus is on that, rather than *McCleskey*: no work done on *McCleskey*: claim yet.

Saturday, August 16:
Alexandria, Virginia: Parents. Dinner with Jeff and family.

Sunday, August 17:
Flew DC to Talle. Called office: MO surprised the office is paying for my return flight from my "vacation," since I didn't return right after Airlie; no word from Florida Supreme Court on *Blanco* extension of time.

Monday, August 18:
Relaxed with Ruthann and Larkin; Dreading going into work tomorrow.

Tuesday, August 19:
In office at 8:30 a.m.: SH and MO polite, but chilly; MO brought me up to date on *Darden*: Governor decided to recognize stay: Governor expected to do something today; press release says stay until U.S. Supreme Court acts. Got copy of *Spaziano* Florida Supreme Court mandate, which means rehearing was denied: confirmed this by calling Florida Supreme Court; U.S. Supreme Court cert. due in about 3 weeks. Talked to Ed Stafman: Still interested in doing *Spaziano* 3.850; SH: Won *Jent* and *Miller*[634] in Eleventh Cir., sent back for hearing; Charlene Carnes: Can do *Magill* statistics, but need money: MO said $200 is okay: passed this on to her; MO: Ed Stafman says I'm unhappy and leaving: I "should be more discrete"; David Bruck: *Hall* was awful: sounds like Eleventh Circuit is thinking about rejecting deliberate bypass test of *Thomas Zant*[635].

Wednesday, August 20:
Worked on *Death Studies* article: Started reading *Mann* federal papers; SH: MO says I'm to work with *Jent* and *Miller* volunteer; Talked with Larry and Faith about *Spaziano*: $5,000 is okay: get Ed appointed and do contract with him; later talked to MO about it, and he was enthusiastic when Larry was there: later he accused me of going over his head: said to go to Larry directly next time. Warrants: *Allen Lee ("Tiny") Davis* and *Kenny Hardwick*; George

634. For an excellent description of *Jent* and *Miller see* VON DREHLE, *supra* note 54.
635. This was my Thomas v Zant, 697 F. 2d 977 (11th Cir. 1983).

Kendall: *Smith* oral arguement went very well: *Zeigler* was hard to read but sounds like remand: *Hall* went very badly: J. Edmondson wants to override *Thomas v. Zant*; called Chris Vasil: *Wall* killed in Texas; didn't raise *McCleskey*.

Thursday, August 21:
Overheard SH: Billy Noles starts on Sept 1; worked on *Death Studies* article; Wrote *Spaziano* motion asking for more time; Florida Supreme Court: Stay denied in *Rose* (still a WPB case); Craig says Malone is working on 3.850, nothing filed; Called Dick Burr: He'll talk to IRRC about *Ford* rules and Bar role now; Lunch with Rhoda Kibler: She may work for Holland & Knight: wants me to chair IRRC next year, if I don't go to D.C.; worked on agenda; SH: Karen Gotlieb in on Sunday for Florida Supreme Court argument: I may meet her.

Friday, August 22:
Craig: Larry Smith executed in Texas on first warrant; MO: Talked to me about *Darden* successor: he seems preoccupied with Texas situation; Lunch with Gail Anderson: She upset about tense atmosphere in office; SH tore Terry Farly apart two weeks ago while MO sat there silent; MO was hiding behind SH; Don Middelbrooks called to chat: he may be teaching at FSU; Called Chan Muller: He's hot on override and will talk to Bar President: wants it to be a Bar priority; Neil Skene will talk to IRRC.

Saturday, August 23:
Home with Ruthann and Larkin. Worked on *Death Studies* essay.

Sunday, August 24:
Home with Ruthann and Larkin; Came in office to pick up work; MO left when I got there; Karen Gotlieb there. Is MO upset that I didn't meet her? Who cares? Came home to work, but went back to office; Worked until 4:00 a.m. on *Mann* and *Spaziano*; MO called at 2:30 a.m., sweet as can be: said we must talk soon.

Monday, August 25:
Worked on *Mann* brief; Larry saw articles on volunteer executions on my desk (for *Death Studies* article) and asked for copies of them; Called Art: Brought him up to date on *Spaziano*, *Sireci* and *Kennedy*; Stella Madden called about status of Joe's case: Told her Ed Stafman wants me to work with him as partner.

Tuesday, August 26:
Wrote letters; read *Mann* record; *Talle Democrat*: *Chester Wicker* executed in Texas; Lunch with Faith: She isn't sure MO isn't trying to force me (and Lissa) out: he wants only a cadre of gophers and sycophants; Faith spent weekend with SH, so now SH is perfect; MO is cause of all problems, etc.

Wednesday, August 27:
Lewis Carres argued *Rose* in Florida Supreme Court; SH says it went very well; Called Dan Mayers from Ruthann's office and accepted job offer at Wilmer, Cutler, and Pickering; called Jeff; Ruthann and I suddenly very depressed; I cried in office and on way to pick up Larkin at school; things are so good between us now. Night: Agonized with Ruthann: was it an awful mistake? Should I stay and try to teach at FSU? MO called at home: Wants to talk: He said "I love you," but it's too late for that.

Thursday, August 28:
Very depressed: impossible to concentrate; Norm Sherman called to talk about case assignments in *Davis*: Federal District Judge Moore or Black; Read more on *Mann*; Talked to volunteers in *Harich* and *Ruffin*;; MO: Can't talk today: must do *Darden*; Lunch and dinner with Ruthann: What to do?

Friday, August 29:
Read *Mann* record: issue selection; No order on *Darden*: stay remains in effect; Everyone in office is leaving me alone and I'm doing the same: pretty depressed.

Saturday, August 30:
Chores during the day; mall with Ruthann and Larkin; Came into office at 4:00 p.m.; drafted issues in *Mann*; office atmosphere chilly; MO sort of friendly until Jimmy Lohman came in; I'm depressed and tense.

Sunday, August 31:
In office at 2:00 p.m. Wrote Mississippi conviction issue in *Mann*; hard to concentrate. Worked until 1:00 a.m.

Monday, September 1, 1986:
Mann brief all day.

Tuesday, September 2:
Mann brief all day. 10:30 a.m.: No word from U.S. Supreme Court on *Darden* rehearing; Radelet called: My *Death Studies* article is "solid gold"; Got two long letters, detailing his attempts to get headphones so he can block out the

noise of death row: He also mentioned cert. petition: "It doesn't seem to have much weight"; Primary Election: Nightmare: polling machines broken: confusion; As of 2:00 a.m., Phil Podovano had lost: Pajeic was slightly ahead of Jim Smith in race for Governor: Johnston out: Dunn leading Butterworth.

Wednesday, September 3:
Long talk with Mark Evans about *Mann* issues: he agrees IAC issue "sucks"; Saw my mail had been opened: Steve Walter said it's a new SH policy: she said go to Mark, who said my mail wouldn't be opened; Eloise showed me letter from Polly Nelson to Larry: Give us help on *Bundy* expenses, or you'll get the case back; Sent copy of *Mann* draft brief to Mark Evans.

Thursday, September 4:
Drove to Tampa with Larry: good talk: told him I may have to go to DC; IRRC committee: Endorsed jury override: Ray Ferraro said to expect a fight on Board of Governors; Dick gave good talk on *Ford* rules; Flew from Tampa to Talle.

Friday, September 5:
Jimmy L. talked to Ron Tabak: *Adams* Eleventh Circuit oral argument went very well: Ct only interested in *Caldwell* issue on merits: okay on procedural default; Called Mark Evans: brief looks good; MO, unsolicited, said the *Mann* brief is good; Edited *Mann* brief all day: did record excerpts.

Saturday, September 6:
In at noon: SH putting in record cites: very helpful; Discovered that all my footnotes in *Mann* brief had been put into text: Eloise said SH told her to do that (without telling me); SH said that's the policy: "If you don't like it, then type it yourself or hire a personal secretary"; called MO, who agreed the "policy" doesn't apply to non- warrant cases: said he'd "be right in to discuss it"; he came in 3 hours later, as I was leaving: he gone when I returned; Edited *Mann* and proofed until 6:00 a.m.

Sunday, September 7:
In at 10:00 a.m.: editing and proofing *Mann* brief all day; MO: SH wrong about the footnote policy: "We have to have a drink together": asked when I'm leaving CCR; Mark Evans called: Upset about HAC issue: calmed him down. 8:30 p.m.: Eloise gone all day; Barbara does not know how to cut out extra space: brief is 103 pages. 9:30 p.m.: Eloise finally called: be in office in approximately 45 minutes; actually came at 12:00 a.m. 1:30 a.m.: Good talk with Eloise and Barbara: both leaving CCR; Proofed all night. Brief bound at 7:40 a.m.; took brief to plane.

Monday, September 8:
Mopped up *Mann* stuff; SH and MO on the road; I asked SH about meeting on Tuesday with her, MO and Larry: she said Thursday, but "I don't go to set ups." MO: He won't go to meeting unless I tell him what it's about first: he then abruptly got off the phone, called back and said I was playing games. Went home to sleep at 11:00 p.m.

Tuesday, September 9:
Message from Sunny Goldenfarb: Eleventh Circuit affirmed *Smith*; Called her: five page opinion: they just decided prejudice prong of procedural default; Lunch with Ruthann: went over *Death Studies* essay edits; Back from lunch: MO, SH and LS all here: I asked SH if she wanted to come to the meeting, and she said she'd rather not; MO blasted me for being childish, but came to the meeting anyway; I just told them I had decided to leave: no hard feelings; MO appears to be betrayed by my not talking to him first.

Wednesday, September 10:
Read *Buford habeas* (sent for filing): Did not raise lingering doubt about guilt issues; Called the lawyer, but he seems not to understand the issues, and wants me to write it; no way—I don't have time—sent him the stuff; *Butch Sireci* called: Death Warrant: he's panicked; Called Dick Burr: WPB may come in on a mental health 3.850 in *Sireci*; MO: "I'm sick about your duplicitness and undermining the office"; I wrote request for extension of time in *Omar Blanco*; Drafted *Spaziano* cert. petition; Left office at 3:00 p.m. to wait for the washing machine repair person to arrive at home; told MO to call if he still wanted to get together. Took a drive with Ruthann and Larkin; MO never called.

Thursday, September 11:
Morning: Wrote resignation letter and Ruthann typed it; Eloise: "I heard a rumor you're leaving. . . ." Called Jon Horn on *Harrich*: Told him that Steve Bright was worthless as a moot courter (that to Preacher Steve's self-righteous arrogance, the Eleventh Circuit judges are Nazis) and that he shouldn't waste his time, he doesn't really understand the dynamics of the Eleventh Circuit; Jon called after the *Harich* oral argument: Eleventh Circuit Judge Frank Johnson was awful: *Darden* was all he wanted to talk about: if the panel does send the case back for an evidentiary hearing, Judge Fay will dissent on IAC; Jon did not think *Adams* oral argument went so well, although Judge Johnson seems to think that *Caldwell* issue lives; Dick Burr: He and Craig will do all the work on the *Sireci* successor 3.850 on the right to a competent mental health expert at trial; Norm Sherman, clerk for the Federal District Court in Jacksonville called: We lost *Stone*; I called Don

Middelbrooks: He's written notice of appeal and application for permission to appeal (also mentioned he's applied for one of the vacancies on the Florida Supreme Court); Gave my resignation, to Larry Spaulding and everyone, office to office; MO was great and supportive; Called Craig Barnard to tell him I had decided to leave CCR and Florida full time death work: Craig nonplused and Buddha-like as ever.

Friday, September 12:
Talked with Larry Spaulding about CCR article.[636] Rumor: United States Supreme Court stayed three Louisiana executions last night; Florida Supreme Court granted a one week extension for me to file initial brief in *Blanco*; worked on *Sireci* and *Blanco*.

Saturday, September 13:
In at 10:00 a.m. Drafted *Sireci* federal *habeas* issues; Lunch with Lissa Gardner; Started reading *Blanco* record, until 10:00 p.m.

Sunday, September 14:
In the office at 10 a.m.—reading *Blanco* record all day, until midnight.

Monday, September 15:
Blanco record. Norm Sherman called: getting nervous about *Davis*; my Federal District Court judge in *Sireci* will probably be Judge Patricia Fawcett; Long talk with Dick Burr about adding *Caldwell* claim to 3.850 in *Sireci*: waiver is risk in diluting our way around procedural default on the other issues; Later, Norm called: looks like Kendall Sharp is our district judge in *Sireci*. Oh, boy.

Tuesday, September 16:
Blanco brief. George Kendall called to chat and see if LDF would help in an appeal case: we talked about *Blanco*; I negotiated all day with Vivian Berger (professor at Columbia University Law School) and Florida Supreme Court: looks like she's in as counsel for *Blanco*, and will replace me and CCR as *Blanco*'s counsel in the Florida Supreme Court if I can get Florida Supreme Court to give two extra weeks to file initial brief.

Wednesday, September 17:
Called Sid White: No word yet on extra two weeks to give Vivian Berger time to substitute for me and CCR in *Blanco*; back and forth all day with Vivian

636. Michael Mello, *Facing Death Alone*, *supra* note 118.

and the Florida Supreme Court and Sid and Tanya; Worked on *Spaziano* cert. petition; Called Joe Derosher (public defender): He will try to get *Sireci* 3.850 motion back before Judge Baker; Went over *Sireci* memo; wrote Amendment to *Sireci* 3.850: Joe Derosher called: our judge in *Sireci* is a guy named Formet; Chris Vasil at U.S. Supreme Court called on status: I mentioned that *Darden* rehearing was denied the day before the death warrant expired—they could have executed him: stay in *Rault* (a *McCleskey* statistically based race discrimination claim): *Rook* pending; Called Jeff Robinson: nose-count on Rehnquist vote: confirmation as Chief Justice of the U.S. Supreme Court coming soon.

Thursday, September 18:
Called Sid White: Florida Supreme Court denied my *Blanco* motion for two extra weeks; this means that Vivian Berger is out of the case, I'll have to do the brief, but Vivian may be able to stay on to help; Worked on *Sireci* federal *habeas* papers; Larry Spaulding agreed to play hardball with the Florida Supreme Court, but then Viv Berger decided she didn't want to push it with the justices; so now I throw together a brief on the cultural dimensions of the Mariel Boatlift.

Friday, September 19:
Rook executed in North Carolina. *Talle Democrat*: U.S. Supreme Court denied *Rook* stay by 5- 4 vote; called Vivian Berger: court ruled after 11:00 p.m.; Worked on *Sireci* federal *habeas* and *Blanco* Florida Supreme Court brief; Big push last night to get *Hardwick* Florida Supreme Court *habeas* done, and it almost is done; Called Judge Formet re. *Sireci*: told him that I had just now gotten back into the case, and he seemed very generous in setting an oral argument and briefing schedule, subject to change; Butch Sireci called me: Good chat; he sounds okay.

Saturday, September 20:
In at 8a.m. Atmosphere at CCR tense; Edited *Blanco* initial Florida Supreme Court brief; *Davis* Florida Supreme Court *habeas* filed.

Sunday, September 21:
In at noon. Edited *Blanco* brief; *Hardwick* Florida Supreme Court *habeas* was filed at midnight last night; Office frantically working on *Hardwick* 3.850s; Left at 6:30 p.m.

Monday, September 22:
Final edits on *Blanco* Florida Supreme Court brief. 10:00 a.m.: Florida Supreme Court denied *habeas* in *Davis* and *Hardwick*; Jimmy Lohman: 3.850

in *Hardwick* not written (MO doing that now); MO talked with *Davis's* trial court judge at 2:00 p.m.: "This is the worst yet"; Judge Formet's office called re. *Sireci*: oral arguement (non evidentiary) Friday at 3:00 p.m.; Frenetic madness all day in office. 4:00 p.m.: decided I couldn't go to DC for Wilmer, Cutler and Pickering orientation. 4:50 p.m.: called Chris Vasil in U.S. Supreme Court about *McCleskey* certs: Chris is not happy. 5:00 p.m.: Sid White called: his justices are going home.... 5:08 p.m.: *Davis* 3.850 denied; I told Sid: he said the Florida Supreme Court justices had gone, and won't be back in until 6 a.m. tomorrow.

Tuesday, September 23:
In at 9:30 a.m. SH news: Florida Supreme Court denied *Davis* and *Hardwick*: we also lost *Davis* before Federal District Judge Black in Jacksonville (she found abuse-of-the-writ?). 10:00 a.m.: Jimmy Lohman: Florida Supreme Court will have opinion in original *habeas* in an hour; Planning logistics with Chris Vasil in U.S. Supreme Court: he said the executions had been rescheduled for 7:00 p.m. tomorrow; SH: MO wants me to write the stays pending cert. from the 3.850 denials in *Davis* and *Hardwick*; Got in Judge Black's order in *Davis*: nasty: trashes CCR by name. 1:20 p.m.: called Chris Vasil on status and Chris said "Between you and me, you have made the court very angry with your last- minute filings: they won't let your clients die, but things must change"; Lunch with Ruthann. 3:00 p.m.: SH: MO is now deciding whether to give the U.S. Supreme Court copies of our stay papers in Federal District Court. 4:10 p.m.: Called Chris: we will hear by 5:00 p.m. SH: MO says U.S. Supreme Court stay will come soon. 5:10 p.m.: Called Chris, who said: "Give me until 5:30; don't go home." 6:00 p.m.: MO called: Chris says we'll hear in 15 minutes. 6:20 p.m.: Chris called: Stays in both cases: Justice Powell wrote a lengthy concurrence, trashing CCR: Chris read me the last paragraph of Powell's opinion: "I expect counsel to explain this": sounds like a threat of sanctions for Bar disciplinary action. Evening: Faith Blake called at home: David Milford had been hit by a bus in Miami, right after the evidentiary hearing; SH: *Hardwick* papers lost by airline: trial judge is leaving in half an hour; Called Norm Sherman in Federal District Court in Jacksonville: told me I'm on his shit list for cutting this one too close. 7:30 p.m.: MO in argument in *Hardwick*; Malone called to talk about filing a mixed federal *habeas* petition. 9:00 p.m.: Lost *Hardwick*; called Sid White at home; SH: Eleventh Circuit is going home. 9:30- 10:30 p.m.: up front at desk at CCR, laughing at gross typos in my pleading. 10:35 p.m.: called Chris: our papers had arrived in U.S. Supreme Courtt. 10:40 p.m.: MO called: Filing *Davis* federal *habeas*.

Wednesday, September 24:
Warrants: *Willie Jasper Darden* and *Johnny Copeland*; Long talk with Dick Burr about *Sireci* strategy: will file Florida Supreme Court *habeas* on *McCleskey* race discrimination study: try to be ready for a Friday evidentiary hearing; Wrote Florida Supreme Court *McCleskey habeas* in *Sireci*; also drafted opposition to dissolve trial court stay (Is this getting a little too cocky?); Skimming Eleventh Circuit slip opinions not yet published; Bar lobbying case lost in the Eleventh Circuit: end of Bar's endorsement of legislative appeal of the jury override?

Thursday, September 25:
Edited *Sireci* Florida Supreme Court *habeas*; Florida Supreme Court denied *Stewart* on the *McCleskey habeas*: This means I need to rewrite the *Sireci* petition; Met with Rocky, Stella, Ed and Larry Spaulding re: How much money Ed Stafman would need to take over *Spaziano* from CCR after I left; Read *Sireci* all afternoon. Night: realized that no one had done the *Sireci* form motions; Lissa Gardner typed them all; left at 3:00 a.m.

Friday, September 26:
Flew Tallahassee to Orlando in morning: met Jimmy Lohman and Dick Burr at airport; went over *Sireci* oral argument with Dick; Worked out of Joe Derosher's public defender office; Malone showed up, and he and Burr did status conference on *Jerry White*; I called to CCR to check in and learned that we had won *Caldwell* issue. Oral argument on our stay application in *Sireci* started late (at 4:30): Judge Formet was active, sounded interested and sympathetic; took a recess; came back and read his order: need evidentiary hearing, so need stay; the issue that sold him was the second-generation *Ake v. Oklahoma* argument that, once the state gives you a shrink at trial, that shrink cannot perform so incompetently as to be rendering shrink malpractice; Margene Roper (prosecutor on *Sireci*) was very pissed and will appeal to the Florida Supreme Court to dissolve Judge Formet's stay; Dick and I worked on the judge's order; Couldn't find a typist at PD's office: very hostile person agreed, but it took 2 hours; we all hung around the court house and the PD's office waiting; I called *Butch Sireci* to tell him what was happening; called CCR in Tallahassee to check in; Dinner with Dick Burr.

Saturday, September 27:
Sireci: Up at 8:00 a.m.. Talked with Dick about *Sireci* oral argument; At airport, called Outlaws clubhouse: They sent a car to pick me up; Met with Wild Man, Rocky and other Outlaws at clubhouse: Good talk (and great breakfast): they seem satisfied with Ed Stafman, and with *Joe Spaziano's* situation generally; Flew from Orlando to Tallahassee in afternoon.

Sunday, September 28:
In at 9:30 a.m. Air conditioning off: CCR offices putrid; Worked on *Sireci* oral argument in Florida Supreme Court on State's appeal of stay.

Monday, September 29:
Up at 5:30 a.m.: went over *Sireci* oral argument with Ruthann; The *Sireci* Florida Supreme Court oral argument itself was very strange: I was arguing the race discrimination study, which is an issue that the justices usually hate, but today they seemed very interested in the merits of the issue: the court seemed very friendly, almost palsy wit me: Justice McDonald joked about my new beard and "going up to the northeast": even Justice Boyd joined in the general conversation about my future; Oddest of all, they upheld the execution: It was entirely a merits ruling. 11:15 a.m., Tanya Carroll called from the Florida Supreme Court: *Sireci* stay affirmed; Called Butch Sireci, Dick Burr, the various courts along the line.

Tuesday, September 30:
Cleaned office; Eloise typing *Spaziano* cert.: In the mail; Justice Black denied permission to appeal in *Stone*; MO being especially friendly: said he wants me to go with him to the *Hitchcock* oral argument in DC. Night: Listened to primary election returns. 9:30 p.m.: 93% of the precincts in, and Jim Smith is ahead by 10%. 10:00 p.m.: Computer has glitched. 10:30 p.m.: only 37% of precincts in, and Smith is ahead by only 2%. Went to bed.

Wednesday, October 1, 1986:
NPR in the morning: first they said Pacdjic won; then they said Jim Smith won; then Pacdjic; the *Tallahassee Democrat* gave it to Pacdjic; Also, Butterworth won the attorney general's race, but Ed Dunn not yet conceding; Got in *Sireci* Florida Supreme Court order: stay affirmance was 4- 3 (Adkins voted with us; Ehrlich and McDonald didn't). Night: Eloise wanted to have a drink with me: pleasant chat at the Hilton Bar; then ran into Justice Barkett at the bar and we had a nice talk about the future of death penalty litigation, the stresses of her job and mine; she was very complimentary about how CCR was doing, under the impossible circumstances, and I think she especially liked my *Calyx* t-shirt.

Thursday, October 2:
Closed door meetings of CCR senior staff all morning; While they met, I did final edits on *Spaziano* cert.

Friday, October 3:
Spaziano cert. petition being typed (heavy competition from other work, including Billy Nolas' New York cases); Talked to MO about *Ed Kennedy* (he wants me to read the record before we file) and *Robert Preston* (he'll worry about the evidentiary hearing; at the moment I shouldn't worry about it). Noon: Called Chris Vasil in U.S. Supreme Court: No word on *Stewart*: maybe later today; Mike Radelet called: general editor on the *Death Studies* collections has a problem with the political nature of the papers, especially mine: if they insist on editing a lot, he'll pull the whole issue and publish it as a book; Fine with me: entirely his call. 5:30 p.m.: Chris Vasil called: *Stewart* denied 5-4: Stevens dissented; Stevens seems to be telling us to "just go to federal *habeas* court before coming up here."

Saturday, October 4:
Spent day with Ruthann and Larkin. Eloise called: *Spaziano* cert. petition is in the mail.

Sunday, October 5:
Home.

Monday, October 6:
Mike Millemann in office (the Maryland Millemann, not the California Appellate Project Mike Millman): talked about Ernie Fitzpatrick re-sentencing. 10:05 a.m.: Called Chris Vasil at U.S. Supreme Court: cert. denied in *Wardell Reilly*; *Nollie Lee Martin*, *Levis Aldridge*, and *Ed Kennedy*: were all scheduled to be reconferenced on Friday; stay and permission to appeal denied by federal district court in *Stewart*. 11:30 a.m.: Called Angela Bickers in Eleventh Circuit clerk's office: no Eleventh Circuit papers yet, and she's very pissed at me ("I guess you didn't read the opinion in *Davis* about late filings"). 4:20 p.m.: Craig Barnard called: *Stewart* stayed by Eleventh Circuit; Chris Vasil then called: Scalia did not vote on the cert. decision: all the cases were conferenced at least once.

Tuesday, October 7:
Called Art Weidinger (Governor Graham clemency aide): *McCleskey*-based race discrimination claim moratorium is a possibility: He asked for information on stays in successor *habeas* cases; I called Chris Vasil: he'll talk to Art to confirm my list; Gave list to Art: no more than four warrants between now and the end of the year; Home for dinner; Back in office by 9 p.m.; Warrants in *Wardell Reilly* and *George Lemon*.

Wednesday, October 8:
Warrants are set for November 5, the day after the general election; Jimmy Lohman: *Willie Jasper Darden* is innocent: new witnesses supporting his alibi have been located; Read procedural default cases for *Spaziano* and *Larry Eugene Mann* reply briefs; Radelet called: "Who saved Wardell Reilly? He's my best friend."

Thursday, October 9:
Called Dick Burr: Craig moot courted *Hitchcock* at LDF in New York; Lost *Card* in FSC; Chan Muller: Eleventh Circuit didn't hint at jury override repeal: endorsement by Florida bar.

Friday, October 10:
Larry Spaulding took me into his office to talk about restructuring CCR to create an appellate division; Worked on *Mann* reply briefs.

Saturday, October 11:
In office for a few hours, working on *Mann* reply briefs.

Sunday, October 12:
Worked at home on *Mann*.

Monday, October 13:
Reply briefs; Got some chilly comments about my not being in the office over the weekend. Fuck 'em.

Tuesday, October 14:
SH: *Willie Jasper Darden* 3.850 filed; U.S. Supreme Court cert. denied in *Nollie Lee Martin*, *Bundy*[637] and *Ed Kennedy*; *Levis Aldridge* held over for reconference; Someone told me that everyone except me at CCR resigned on Saturday; Called Lee Martin's sister, Mary: She very upset about cert. denial, of course; Called Lee, who was devastated; asked me to call his brother, which I did.

Wednesday, October 15:
Tallahassee Democrat: Governor reviewing *Bundy* files and will decide within a week whether to sign a new death warrant; Called Polly Nelson: warrant is coming, she thinks: she said that there were major problems within the Wilmer, Cutler and Pickering law firm about devoting full time work to

637. *See* MELLO, DEAD WRONG, *supra* note 2, at 103.

the *Bundy* case; MO: *Darden* 3.850 denied, but good abuse-of-the-writ fact-findings; MO: Dick Burr said *Hitchcock* U.S. Supreme Court oral argument went wonderfully: Justices Scalia and White seemed especially interested in the limitation on mitigating circumstances issue; the *McCleskey* oral argument went predictably horribly; Called Art Weidinger re: *Nollie Lee Martin*; Marshall Dian: *Hitchcock* oral argument was magnificent: they're interested in the *Alvin Ford* jury instruction issue—the issue that had been dead in Florida since Alvin Ford lost in the Eleventh Circuit in February 1983—the standard jury instruction issue, the same standard jury instruction the juries got in every Florida execution to date: Craig was arguing our complex *Cooper/lockett/*AC second- generation *Lockett* argument, when Scalia cut him off, and said: "But doesn't this jury instruction violate *Lockett*? Why are you arguing this complexified stuff, when the jury instruction violated *Lockett?*" (Because you've rejected that argument for years, letting our clients die); If we win *Hitchcock* on this basis . . . .; I took this up in *Ronnie Straight* (on a first *habeas* with a Florida Supreme Court merits ruling—better procedural posture than *Hitchcock* or *Ford*) only a couple of weeks before cert. was granted in *Hitchcock* and my *Straight* cert. was identical to *Hitchcock's*: Arbitrary and capricious: Struck by lightning.

Thursday, October 16:
Talked with Craig Barnard and Dick Burr about oral argument in *Martin*; Called Art Weidinger: new psych reports: the mental and emotional stress of a new death warrant would push him over the edge, I said; Florida Supreme Court decided *Stano*: implying no hearing because we filed so late; Florida Supreme Court oral arguments: MO did great. 1:00 p.m.: Florida Supreme Court granted stay in *Copeland*, but not *Darden*; Lissa Gardner: Met with Lee Martin and he's terrified; Rocky called from the Outlaws clubhouse: things are all set with *Joe Spaziano* and Ed Stafman; he'll be paid $2,000 now, and the rest in three weeks.

Friday, October 17:
Called Craig: Federal District Court denied *Copeland*; Dr. Dorothy Lewis has good news on *Lee Martin's* brain damage; Called Art Weidinger with new info re: Lee's organic brain damage; Worked on reply brief; Tense waiting on *Darden* in Eleventh Circuit. 3:20 p.m.: MO says we'll hear in *Darden* in half an hour; I had to go pick up Larkin: went home with him. 6:00 p.m.: Jimmy Lohman called: 3- 0 stay in *Darden* out of the Eleventh Circuit—Judge Peter Fay, joined, too; State appealing the stay.

Saturday, October 18:
Home.

Sunday, October 19:
Home.

Monday, October 20:
Waiting for U.S. Supreme Court on *Darden*; Reply briefs; Sent *Martin* stuff to Art Weidinger: he sounded chilly and unresponsive over the phone; SH: U.S. Supreme Court cert. denied in *Aldridge*. 3:00 p.m.: Chris Vasil called: U.S. Supreme Court affirmed the Eleventh Circuit stay in *Darden*; That's over, for now.

Tuesday, October 21:
LS: Governor Graham went on tirade against the Eleventh Circuit and the stay in *Willie Jasper Darden*; Ed Stafman called: Good meeting with Joe Spaziano: wants me to send all of Joe's files to him. Lunch. After lunch: Warrants in *Nollie Lee Martin* and Ted Bundy;. Talked to MO about staying on at CCR to do *Martin*—at least another month; Called Lee: he was panicked, but seemed to have found some inner calm: God knows from where.

Wednesday, October 22:
Worked on *Martin* U.S. Supreme Court rehearing, based on the pendency of *Hitchcock*, but gave it up after a while: for some reason, the jury instructions at *Nollie Lee Martin's* trial predicted *Lockett*, and didn't seem to limit the sentencing jury's consideration of nonstatutory mitigating circumstances; Talked with MO, Dick, Craig and Malone about Martin; I'll probably stay at CCR until *Martin* is over; Dick will do the mental health issue claim from West Palm Beach; I'll do the rest from here.

3. The Chancellor Mansion

Thursday, October 23:
George Kendall called from Georgia: At *Bundy* oral argument (from last warrant), Eleventh Circuit all but ruled from the bench that *Bundy* is being sent back to the federal district court: Judge Robert S. Vance trashed the assistant attorney general for "trifling with the court."

Friday, October 24:
Tallahassee Democrat front page: "Eleventh Circuit Blasts State's Handling of Bundy Case," with generous quotes from Judge Vance; West Palm Beach got *Martin* transcript: Steve Malone starting to read it; Ken Coleman called from Wilmer, Cutler and Pickering: he's on cloud nine; I called Judge Vance: he's pleased I'm leaving death work to work at Wilmer, Cutler and Pickering: wrote reply Brief in *Larry Eugene Mann*.

Saturday, October 25:
Mann reply brief all day; Talked with MO and Billy Nolas about procedural default issues; Radelet called: pulled *Death Studies* issue: Will try to publish as a separate book; Read Chan Muller's Florida Supreme Court brief in *Hansbro* (jury override case argued Monday): strong case.

Sunday, October 26:
Barbara typing *Mann* reply brief; edited all day; MO read *Mann* brief draft and said he liked it okay; Billy Nolis read it and had many inane comments; Arguments with SH, Billy, etc. over *George Lemon*; Worked on *Mann* until 4:00 a.m.

Monday, October 27:
Mostly tried to stay awake. Odds and ends; cleaned up office, etc.

Tuesday, October 28:
Called Craig Barnard: working on *Levis Aldridge, Kenny Foster* Eleventh Circuit brief; Malone read *Martin* transcript, and is afraid *Aldridge* might squeeze Martin;. Jim Coleman and Marion Lindbergh: *Booker* oral argument went well; Long talk with Coleman about *Bundy* strategy.

Wednesday, October 29:
Worked on *Ford*/competency to be executed issue in *Martin*; Reread cases and briefs; Called Dick Burr: he had a good meeting with Lee Martin yesterday; Lee says he's not at all like Ford, but Dick thinks his controls are slipping more each day without a stay of the warrant; Terrible moral dilemma: should we instruct the prison to stop medicating Lee's mental illness? That would cause his mental health to deteriorate even more, which improves his execution competency claim, and thus his chances of getting a stay; but that would come at a fearful price: Taking Lee off his meds would descend him into hell—lashed by demons, trying to keep Satan under the hell of his boot; So, do we send Lee into mental hell to try to keep his physical body alive for a bit longer? Or do we decrease his chances of a stay by having the prison pump him full of anti-psychotic drugs—so he'll be terrified, with a clear head, of sitting in the electric chair he fears so much? And it's our choice, not his: He's not mentally competent to decide whether or not to refuse medical/psychiatric treatment: Even with medication, he's very crazy, although probably not too crazy (or not crazy in the right way) to be executed under *Ford* test of execution competency. Don Middlebrooks called: needs me to do stuff on request for permission to appeal, etc. in *Stone*; Dave Davis called: questions about executing juvenile issue that he has in a direct appeals

brief: I stressed the need to raise the killing kids issue as a *federal* constitutional error.

Thursday, October 30:
Faith Blake came into my office for a long chat about *Martin, Lemon* and *Reilly*: Told me that a reporter called Larry Spaulding about Florida Supreme Court meeting on CCR "delays" in filings, but tabled any actio;. Talked with Dick Burr about Bar action on mental incompetence to be executed rules: Ray Markey is leading the charge that it should be the legislature, not the Bar or the court, to come up with substantive standards and procedures for deciding execution competency.

Friday, October 31:
Worked on *Martin* mental competence to be executed issue: cases and law review articles; Rhoda Kibler: she and Sandy D'Alamberte wanted me to come to the ABA, Individual Rights and Responsibilities Committee meeting tomorrow in Miami; Talked with Chan Muller about execution competency rules and Bar response: a real mess. Night: Lissa called at home, from Tampa: very upset after meeting with George Lemon; he has such a childlike approach and appearance in his craziness: mentioned raising a *Ford*/execution competency issue; Called MO: he's undecided whether to raise execution competency as an issue in *Lemon*: I'm afraid if he does, it will torpedo *Martin* raising the claim: I also worry that any last- minute filing would hurt the claim and derail any Bar actions effectiveness.

Saturday, November 1, 1986:
Morning (home). Billy Nolas called: thinking about raising *Ford*/execution competency issue in *George Lemon's* case; asked for my letter to Governor Graham in *Dennis Adams*: talked about issue generally (he didn't have a clue): I tried to get him to understand the dangers of raising it in a last- minute pleading; Called Craig Barnard: MO hasn't talked to him about execution competency issue in *Lemon*: Craig thinks Florida Supreme Court stay likely in *Lemon*; Florida Supreme Court Justice Atkins has filed a lawsuit in federal court to stay on the Florida Supreme Court after the mandatory retirement age: Atkins arguing age discrimination. Night: In office: Billy still struggling with execution competency issue: I tried to stress the need to get input from Craig Barnard at West Palm Beach: nothing written yet; *Lemon* Florida Supreme Court oral argument reset for Monday; Called Craig and Dick: now not too worried about it; can't resolve *Lemon* issue based on *Nollie Lee Martin* concerns; Burr met with Lee Martin on Friday, and it went well: Lee will stop trying to pretend that he's sane: concern that he may try to hurt himself this weekend; Burr and I talked about the ethics of appearing not to

"be making him crazy," as opposed to simply removing impediments to make his craziness apparent and identifiable as such by a neutral observer; Craig feels we need to be very attentive to these ethical issues, and not cross the line.

Sunday, November 2:
Tallahassee Democrat: Martinez slightly ahead of Steve Padjik: is trashing Padjic big time for being "soft" on capital punishment. Relaxed with Ruthann and Larkin: went to park.

Monday, November 3:
As I arrived at CCR, Lissa and others were leaving with 3.850 to file in Orlando in *George Lemon*. Morning: Called Craig: no word from Burr; Steve Malone found another issue—right to be present during all trial court proceedings—not litigated earlier in *Martin*; MO filed Florida Supreme Court *habeas* in *Wardell Reilly*; 3.850 in *Reilly* still being written. Back from lunch: Billy Nolis stuck at airport: can't get to 3.850 court to file *Lemon*. Mail call: got in State's brief in *Omar Blanco*; Got a copy of *Lemon* 3.850 from the Xerox room: *Alvin Ford*/mental competency to be executed issue raised in three superficial pages: psychologist Joyce Carbonell's competency report is dated Friday, when we didn't know what she would conclude. 2:15 p.m.: Florida Supreme Court stayed *Wardell Reilly*, 4- 3: Justice Joe Boyd still thinks Wardell is innocent, which he might well be; Dick Burr called: Nollie Lee Martin tried suicide last night: cut his wrists; the problem with the *Ford*/execution competency issue is whether Lee is the right *kind* of crazy—in any event, his mental condition seems to be deteriorating rapidly. 7:30p.m.: *Lemon* 3.850 papers lost in transit: hearing at 8:00 a.m. tomorrow; Florida Supreme Court *habeas* on *Lemon*—not raising *Ford*/execution competency issue—denied unanimously.

Tuesday, November 4:
Ruthann and I voted in morning: gulped and voted for Graham, against retention of Justices McDonald and Overton; In office at 9:30 a.m.: trial court just denied *Lemon* 3.850 without evidentiary hearing; *Tallahassee Democrat*: Padjic expected to lose; Butterworth's ex- wife and son killed themselves last night; Called Dick Burr: Martin still pretty together mentally, all things considered: delusions increasing, in ways "helpful" for us in *Ford* issue: I suggest Lee might refuse the psychotrophic drugs that are holding his mental world together: what the hell should Dick and I do about *that*? Without the drugs, Lee is in a genuine hell of mental illness, but that world of demons might be the only thing that might keep him alive (if that's the right word for it) under *Ford*; Kibler: Jack Harkness called for status of *Ford* issue: Criminal

Law Committee won't submit to board at November 13 meeting in Naples: Criminal Law Committee can't meet until November 21: if we can get something to the board by November 13, they'll probably act on it: she told them about *Martin*: she thinks the board of governors might come in and ask for a stay of execution, to give the board time to come up with new, and constitutional, rules for dealing with death row claims of incompetency for execution; Must get Individual Rights and Responsibilities Committee vote back before the 13th; Called Dick Burr and then set up conference call: the consensus was to go through with the 13th and to try to get our own rule through the committee; during the conference call, MO came in to say that Florida Supreme Court had stayed *George Lemon*; Called Rhoda: status update; Long talk with Dick Burr about ethics: some speculation that Dick induced, or at least did not attempt to prevent, Lee Martin's recent suicide attempt. Election night: left office at 4:00 p.m. to pick up Larkin. 8:30 p.m.: Martinez up by 10%; Lissa Gardner came over at 9:00 p.m.: listened to election returns with us. 9:30 p.m.: Martinez ahead by 8%: Democrats doing well in U.S. Senate races: Bob Graham won his Senate seat– at least he can do less damage to our clients in DC than here in Tallahassee in the governor's office; Martinez stayed ahead by at least 6% all night. 10:00 p.m.: Three networks gave it to Martinez; Robert Butterworth is attorney general. 10:40 p.m.: 63% of precincts reporting gave Martinez an 8% lead.

Wednesday, November 5:
Called Phil Patavano: he lost his race for trial judge; Got Dorothy Lewis's letter on *Martin*: gives us abuse-of-the-writ problems; Called Rhoda: not in office; called back at 4:00 p.m.: she has not yet talked with Bar people; Dick Burr working on *Kenny Foster* all day; I worked on *Ford*/competency issue for *habeas*.

Thursday, November 6:
Talked with Craig Barnard: Dick Burr wants to file next Friday in *Martin*: Steve Malone finding sentencing issues not raised by me in first *habeas*: Craig says "Governor" Martinez can't replace Larry Spaulding as head of CCR; Worked on *Ford* issues in *Martin*; MO will work on *Martin* 3.850; Rhoda called: If we can get something out by tomorrow morning, IRRC committee can vote by Monday, and we can present it to the full Board of Governors on Thursday, but she thinks that we'll have problems getting our *Ford* rules through; Rhoda can't be there on Thursday: some talk about the Bar asking the Florida Supreme Court (administrative request) for a stay in *Martin* until new execution competency rules are issued; Burr called: met with the trial prosecutor in *Nollie Lee Martin's* case: he'll go with Dick to the Board of Governors meeting. Warrants: *Gerald Stano* and *Walter Steinhorst*.

Afternoon: Rhoda called: Bar backed out of asking for stay in *Martin*: Bar leadership did not realize it was a particular case; *Atkins* lost in Federal District Court.

Friday, November 7:
Talked with SH about organizing support for our *Ford* rule proposal in Florida Board of Governors; Mindy Byers (Florida Bar) called: Board of Governors meeting has been moved to Saturday: they won't vote until they get the Criminal Rules Committee's proposal: still worth working on it, but not a big deal now; Called Burr and Rhoda: trying to pin it down—Rhoda now seems very engaged; Conference call on *Nollie Lee Martin* issues: awful: a million bullshit issues that will delay filing at least until Wednesday; I dictated *Ford habeas* petition in *Martin*; Saw Charlene Cares at lunch: In the Florida senate, the conservatives have taken over, and unseated "liberal" president and put in neanderthals; SH: Martinez can fire Larry Spaulding at will: I wonder whether CCR will now end, not with a bang but a whimper.

Saturday, November 8:
Called Burr: Bill White thinks we should back off of the Board of Governors: will then try to influence the Criminal Rules Committee proposal; Can Rhoda call the chair of the Criminal Rules Committee about backing off? Can Rhoda call Mindy Byers at the Bar about calling off the IRRC's presentation? Drafted reply to the State's op cert. in *Spaziano*; Conference call: punched up *Martin* issues.

Sunday, November 9:
Home: picked up leaves, went to fair; Dick Burr called to talk about execution competency issue in *Nollie Lee Martin*: I expressed my fears that we might be seen as deliberately delaying filing: Burr said he's afraid Lee will kill himself if we wait until the end of the warrant period to file.

Monday, November 10:
Got in Burr's *Martin* competency for execution draft; put everything together and gave it to MO to give to typists (who aren't happy about having been here all weekend working on Billy Nolis's Georgia brief); Called clerks' offices and AG about Wednesday filing in *Martin*: Chris Vasil told me about Texas execution scheduled for tonight: Williams, on a *first habeas* corpus petition. Conference call on *Martin* logistics; Polly Nelson called from DC re. *Bundy*: hearing set for Thursday; Worked on *Martin* IAC appeal issues; Home for dinner: Back at 8:30 p.m.; worked until 3a.m.; MO not here; only Lissa and I. Started to box up my office.

Tuesday, November 11:
Tallahassee Democrat: U.S. Supreme Court took cert. in hypnotism case, *Rock v. Arkansas*; Don Middelbrooks is one of the finalists for the Florida Supreme Court open slot; Called Jim Coleman re. hypnosis issue in *Bundy*: ecstasy over cert. grant in *Rock*; MO in the office in the morning, but not writing issues; talked to Burr about logistics of getting West Palm Beach's draft of the *Martin* issue here; Called Lee Martin: He sounds awful, sluggish, depressed, hopeless; Strategized with Craig and Dick on and off all day; went through drafts; West Palm Beach's issues coming in by plane tonight. 11:30p.m.: good talk with Rhoda about *Ford* rules and Bar: agreed to put it on for Saturday; went over the execution competency sections of the *Martin* petition. Midnight: West Palm Beach issues arrive: incorporated them into the *Martin* pleading: worked all night; typists came in at midnight to incorporate West Palm Beach issues into the stay application.

Wednesday, November 12:
Talked to everyone about waiving Florida Supreme court oral argument in *Martin*; *Tallahassee Democrat*: Jim Smith to Become "Gov" Martinez Chief of Staff, sort of. Final proof of *Martin* issues; Called Joy Shearer, AG on *Martin*: she wants oral argument. Afternoon: final edits being made, appendices produced; Tom Seligson called to say hi and chat about *Magill* killing kids issue; Hectic: getting Florida Supreme Court papers in; wrote U.S. Supreme Court stay papers; Got in Joy's answer brief in *Martin* at 4:30 p.m.; Eloise: state attorney asked for financial files on some of CCR's cases; Home for dinner: Back at 9:00 p.m.; wrote *Martin* oral argument until 2:30 a.m.; At about 12:30, Burr called: talked about *Martin* oral argument: he and Rhoda talked today about Board of Governors meetings: they won't present our version of the proposed rules: tried to sway the Rules Committee: our rule might pass in some committee.

Thursday, November 13:
Hot news flash: Won *Aubrey Dennis Adams* in Eleventh Circuit; Ruthann mooted me for *Martin* oral argument in morning; This is how the argument went: I walked into the clerks' office, to sign in to do the argument, about 10 minutes before walking up to the podium, with my main issue being the absence of any execution competency rules and regulations used to decide *Nollie Lee Martin's* execution competency issue: Sid White handed me the court's brand new, hot off the press, *Ford* rules on execution competency: the Court had adopted Jim Smith's proposal: I barely had time to read the new rules before the oral argument began: the justices didn't want to hear any procedural challenges to the new rules: they were very hostile, and I'm afraid I sort of returned the favor: Justice McDonald interrupted me lots of times:

this looks really lousy for Lee. After the argument, I called *Lee Martin* on Deathwatch and tried to be upbeat; Conference call: Dick thinks we should trigger the statute, even though the statute is clearly unconstitutional under the *Ford* decision: if we lose, do not take it up to the U.S. Supreme Court. 10:30 p.m.: Florida Supreme Court denied *Martin* stay; Art Weidinger, Governor Graham's clemency aide, called: file letter and the Governor "will grant a stay"; I asked Art if he was sure : Art said, yes: No fire drills; so I wrote the letter; MO read it over; I called Art again: confirmed that a letter means a stay, and that the Governor had "decided" on a stay: he confirmed, and said the stay would probably come tomorrow. 4:00 p.m.: got the Florida Supreme Court's opinion in *Martin*: 6- 1, Justice Barkett dissenting. 4:50 p.m.: Tanya Carroll called from Florida Supreme Court: *Bundy* stay denied in state trial court; Chris Vasil called from U.S. Supreme Court: *Bundy* lost in Eleventh Circuit; Finalized U.S. Supreme Court supplemental brief in *Spaziano*; Edited *Spaziano* reply brief in spare time.

Friday, November 14:
Tallahassee Democrat: Larry Spaulding quoted as saying he was handed the new rule on execution competency 5 minutes before the Florida Supreme Court oral argument in *Martin*—I asked him to *please* not talk to reporters any more; Waited all morning. Larry Spaulding had talked with our auditor. 1:10 p.m.: *Miami Herald* reporter: Art Weidinger says it will be at least 2:00 p.m. before we hear on the governor's decision regarding a stay in *Martin*. 3:40 p.m.: walked Ruthann to law school: I was gone less than 10 minutes, and during that time, the governor issued the stay in Martin;. Called Art: no psychiatric examination by the State's shrinks of *Martin* at least until Tuesday or Wednesday of next week: Governor not going to rush a psychiatric exam.: a week to get their reports, so we have time to respond to their reports; Called Lee: "You're kidding"; Called Chris Vasil: He asked if I was withdrawing then U.S. Supreme Court stay request in *Martin*: I said I didn't think I wanted to, since the governor's order granting the stay wasn't clear that it extends past Wednesday, the time Lee's death warrant expires: I don't trust the governor, and I want to keep it in, but I wasn't pushing the Court to act on it. Chan Muller called: the Criminal Rules Committee is making a presentation at the Board of Governors tomorrow: being presented by some law school professor; called Dick Burr: he can't be there; Talked to MO about leaving CCR on Tuesday.

Saturday, November 15:
Polly Nelson called about *Bundy* a couple of times: 3.850 filed on Friday, but word processing glitch meant that the last two lines were deleted from each page: refiling today; *Bundy* oral argument in trial court set for Monday

morning; Slept for most of the day. Rhoda: Burr did a great job at the Board of Governors meeting.

Sunday, November 16:
Relaxed. Wrote transfer memo on all of my cases at CCR, status, etc.

Monday, November 17:
Joan Fowler Rossin, one of my old opponents in *Martin*, called: Congratulations on *Martin* stay. 10:30 a.m.: *Bundy* confusion:[638] federal *habeas* filed in Jacksonville, not Orlando; Florida Supreme Court reset *Bundy* oral argument for 11:00 a.m., but no one knows if the 3.850 has been denied yet; Told Larry Spaulding I'm leaving CCR Tuesday or Wednesday; Sandra Hinson called for *Martin* update: she's an old friend of his: she knew that *Bundy* had been assigned to Federal District Judge J. Kendall Sharp, my old pal from *James Dupree Henry* in 1984; Dick Burr called to talk about *Martin*: federal *habeas* was another way to prevent the psychiatric commission ordered by the governor from going in: decided trying to keep them out is too risky. 12:30 p.m.: Jim Coleman and Polly Nelson arrived for oral argument; Called Art Weidinger: Governor considering not convening the psychiatric commission on *Martin* until the next governor: he recommends that the Governor not sign warrants until the end of judicial review, state and federal: Governor "not strident" on it. *Bundy* madness: Eleventh Circuit snafu: 1651 inadvertently filed, so the court denied it: need to get it up there, along with CPC and other stuff: I wrote it up. 3:00 p.m.: Florida Supreme Court denied *Bundy*; Jim Coleman back from oral arguments 10 minutes later; Jim Coleman called Federal District Court: no oral argument; Doug Chumley called: won *Raleigh Porter* in Eleventh Circuit: sending it back for evidentiary hearing. 4:30 p.m.: Eleventh Circuit panel does not want *habeas* petition in *Bundy* to be sent to them: good sign since they wouldn't kill him without at least pretending to look at the *habeas* petition; Waiting with Jim and Polly. 7:40 p.m.: Chris Vasil: unanimous U.S. Supreme Court stay in *Martin*: seems as though they didn't trust the Florida governor any more than I did, and afraid he would pull another *Dennis Adams* on them; Called Dick Burr and Art Weidinger: The statutory psychiatric examination is now a moot point in *Martin*; No longer need Governor Graham's stay: We've got one out of the U.S. Supreme Court, and it's solid and it's unanimous. 8:30 p.m.: Federal District Court called: order in *Bundy* by 9:15 p.m.; SH: Lost *Freddy Lee Hall* in the Eleventh Circuit: deliberate bypass, abuse-of-the-writ, etc.; MO and I had conversation about Polly and Jim and the law firm: we both think they're

638. *See* MELLO, DEAD WRONG; *supra* note 2, at 103.

fucking up *Bundy*. 11:00 p.m.: everything denied in Federal District Court in *Bundy*: 19- page opinion: Margaret Vandiver called from Orlando: denied CPC to appeal: she read the order over the phone; Called Chris Vasil: he knew it was a denial for two hours: he's playing a Coweco baseball game to kill the time; should be hearing from the Eleventh Circuit soon. 12:00 a.m.: Called Chris: Eleventh Circuit telex snafu is causing the delay. 12:30 a.m.: Warren Godfrey, clerk of the Eleventh Circuit, called: indefinite stay in *Bundy*. Good night.

Tuesday, November 18:
Home all day with Larkin; Called Chris re: *Martin*: the State was taking the Eleventh Circuit stay in *Bundy* up to the U.S. Supreme Court to try to get it dissolved; MO and I plan to get together for drinks at 5:00 p.m.; Ruthann got ill: I must go pick up Larkin, so no drink with MO; Said good- bye; LS in interview so very quick good-bye; spent most of the time saying good-bye to the support people.

Wednesday, November 19:
Governor Graham trashes Eleventh Circuit as "procrastinating" on *Bundy*. 9:40 a.m.: No word from U.S. Supreme Court on *Bundy*. 12:10 p.m.: Jim called: U.S. Supreme Court upheld *Bundy* stay unanimously; Eloise finished transfer memo: gave report to MO and Larry Spaulding.

Thursday, November 20:
Chance of new U.S. Senator Graham getting on the finance committee: judiciary is a real possibility, since Graham is yelling about drugs and death penalty; hearings on death penalty using Graham's Florida experience as an example—he would be "firm" on death cases.

Friday, November 21:
Home.

Saturday, November 22:
Cleaned house with Ruthann; bought vacuum cleaner; raked leaves. Ruthann worked on procedural default article at FSU law school.

Sunday, November 23:
Crafts fair (market days); cheesecake in back yard; Kickball in backyard; ball stuck in tree.

Monday, November 24:
Asked SH to serve Burr with all *Martin* pleadings; SH said *Stano* evidentiary hearing set for tomorrow, but no 3.850 motion yet; Burr called: hearing went very well: made substantial headway: Dr. Herrera was very good: Dr. Kirkland (brother to Ed Kirkland, Joe Spaziano's trial lawyer) very hostile: next phase of hearing in April; Worked on procedural default article at FSU and ran into Sandy D'alamberte: he wants to do something—a law review article or a case—on the right to counsel in capital postconviction proceedings: we'll talk tomorrow; David Milford called to ask if I'll do *Larry Eugene Mann* oral argument in January: no way: I'm history.

Tuesday, November 25:
Procedural default article at FSU law school; *Tallahassee Democrat*: *Tommy Ziegler* won in Eleventh Circuit: ineffective assistance of counsel (probably CCR and I): Eleventh Circuit told District Court to consider sanctions against lawyers (*i.e.*, CCR and me); Larry Spaulding says if nothing filed by Wednesday, nothing will be filed until Monday, on other cases, because of holidays; Met with Sandy D'Alamberte: He wants to co-author an article on counsel and suggested the possibility of me teaching criminal law next semester at FSU: we'll talk again Monday; Went by CCR: *Stano* won't be filed tomorrow; the Eleventh Circuit's opinion in *Ziegler* was nasty; Talked with Ruthann: agreed I'd do article with Sandy, maybe push departure date to DC up to mid-January; Ran into Charlene Cares: big meeting today on legislative priorities: Larry Spaulding and Jimmy Lohman want everyone to spend all energies on CCR funding, and none on jury override or anything else: Charlene thinks there will be public hearings (on CCR?); *National Public Radio*: *Stano* may not be filed until next Monday.

Wednesday, November 26:
Worked on procedural default article all day; Gave my resume to Sandy's secretary; Ran into Terry Pride: Florida Supreme Court stayed *Walter Steinhorst*: *Stano* won't be filed until Monday; *Tallahassee Democrat*: Iran Arms For Hostage Crisis in DC: Forcing NSC Chief and Aide to Resign: Ron Reagan caught in contradictions: another Watergate?

Thursday, November 27:
Thanksgiving! Ruthann made big dinner; relaxed all day; *National Public Radio*: Reagan's NSC aide destroyed papers on Iran crisis: Governor Tony Ania of New Mexico commuted all five death row inmates' sentences: he was a lame duck governor.

Friday, November 28:
Ruthann and I both worked on procedural default article until 2:00 a.m. Played with Larkin.

Saturday, November 29:
Ruthann and I worked on procedural default article all day; Called Patsy Morris in Georgia for newspaper cites in Alday family killing case; Worked on article until Monday.

Sunday, November 30:
Hung out, shopped, worked on article; CCR called: *Stano* hearing at 8:30 a.m. tomorrow.

Monday, December 1, 1986:
9:00 a.m.: NPR: *Stano* lost in trial court; *Tallahassee Democrat*: Bob Dole calling for special session of Congress on arms for hostages stuff; Called Chris Vasil in U.S. Supreme Court: cert. denied in Spaziano; Two hour meeting with Sandy D'Alamberte on counsel article: we went over his outline and divided issues.

Tuesday, December 2:
NPR: *Stano* got a state trial court stay; Went to bookstore; Worked on counsel article all afternoon, and until 10 p.m., worked on detailed outline.

Wednesday, December 3:
Finished outline and typed it on computer; Got an Eleventh Circuit opinion in *Ziegler*: Eleventh Circuit directed Federal District Judge Black to consider sanctions on lawyers; SH called to invite me to CCR staff meeting tomorrow: Decided not to go; Lissa Gardner came over for dinner: talked about new CCR case assignment lists: Larry Spaulding now has a caseload: *Martin, Magill, Spaziano* and *Stone* unassigned: CCR must do 3.850s by the end of 1986: only two so far have had a little work done on them already.

Thursday, December 4:
NPR: Evans executed in Texas: U.S. Supreme Court rejected execution competency claim; Worked on counsel article during day; researched law review articles on state constitutions and the death penalty. Evening: I watched Larkin, while Ruthann at meetings; NPR: special prosecutor on Iran Contra thing.

Friday, December 5:
Met with Sandy D'Alamberte re: counsel article; Read law reviews all afternoon.

Saturday, December 6:
Hung out. Did footnotes on procedural default article.

Sunday, December 7:
Relaxed at home.

Monday, December 8:
NPR: first day of open hearings on Iran Contra: George Schultz testifies; Ran with Ruthann in morning; Worked on counsel article and default article in my new FSU law school office.

Tuesday, December 9:
Worked on counsel article all day; Called Wilmer, Cutler and Pickering: I'm in PIR group of practice: they do stuff like asbestos defense work, products liability, etc.: sounds grim, in part because I wouldn't be able to work with Jim Coleman.

Wednesday, December 10:
Counsel article all day at FSU; Gathering materials to document the crisis in capital postconviction counsel; Patsy Morris in Georgia will send me stuff on Georgia's lack of postconviction counsel; Tom McCown will send me stuff on *Tim Palms* case.

Thursday, December 11:
Met with Sandy: he called ABA and James Rineman re: info on postconviction counsel crisis. Night: typed some footnotes for default article.

Friday, December 12:
Counsel article; law reviews: Naomi Likton called from New York: discussed pros and cons of filing a new 3.850 in her death case.

Saturday, December 13:
Ruthann and Larkin left for Jacksonville to visit Ruthann's parents. I cleaned house.

Sunday, December 14:
Cleaned house. Ruthann and Larkin returned in evening from Jacksonville.

Monday, December 15:
Larkin home from school: has cold; SH called: got letter from *Raymond Stone* (Don Middelbrooks' client), asking who I am; I called Don Middelbrooks, and he's already written to *Stone*: Confusion over CCR's relationship with Middelbrooks and the *Stone* case now that I'm gone: I tell Middelbrooks I cannot be co-counsel once I start working at Wilmer, Cutler and Pickering. Called Angela Bickers in Eleventh Circuit clerks' office to make it official: I should send a letter re: my status (or nonstatus) as *Stone*'s co-counsel; *Talle Democrat*: Profits from Iran Contra scam went to Republican candidates in last election.

Tuesday, December 16:
Larkin ill: home with him. Wrote letter to Eleventh Circuit on *Stone*.

Wednesday, December 17:
Larkin still sick; Went to FSU to make appointment with Sandy for tomorrow: talked briefly with him: he seems very fired up about capital postconviction counsel article.

Thursday, December 18:
Ill; Met with Sandy: not too productive, mainly because my head kept waiting to explode.

Friday, December 19:
Talle Democrat (yesterday's): Texas inmate, Richard Arndale, set to die this morning: handwritten cert. petition denied, 7-2 (Brennan and Marshall only); Does he have lawyer? Called George Kendall on counsel project: he said we won a Virginia case yesterday: thinks our project is worthwhile and will send stuff; Lissa called: won *Cooper* in Eleventh Circuit: wants me to write her a reference letter.

Saturday, December 20:
Ill; Did Christmas shopping with Ruthann and Larkin.

Sunday, December 21:
Ill; Home; Solstice gifts.

Monday, December 22:
Ill; home; did shopping.

Tuesday, December 23:
Ill; home; shopping. Called Eloise: State auditors in for two days on Don Smith charges about CCR misappropriating funds, etc: "scared shitless": LS told everyone to act normal around the auditors: the open meeting turned into a closed session between Don, BALSA people, Faith, Larry and MO, which someone taped: sounds like Ginnie Shubert's gone for good.

Wednesday, December 24:
Ill; shopping.

Thursday, December 25:
Gifts in morning; Drove to Jax.

Friday, December 26:
Jacksonville - Ruthann's parents.

Saturday, December 27:
Jax to Talle.

Sunday, December 28:
Hung out.

Monday, December 29:
Light day of shopping, odds and ends; *Talle Democrat*: Martinez press aide says warrants will be signed as soon as the Governor is "procedurally able" to do so: no "structural changes": clemency will be rare; Larry Spaulding quoted that executions will increase after *McCleskey* is decided.

Tuesday, December 30:
Went into FSU in afternoon; Jesse said Sandy annotating the outline.

Wednesday, December 31:
Hung out. Ruthann worked on default article.

V. CONCLUSION: I AM CHANGED BY WAR"

But here we bury men
I will never see again
And I am changed by the war.
By this war I am changed, Jessie,
For the worse I fear.
There's whiskey rations plenty
With talk rough to hear.
I have seen
How quick death comes,
Or the slowness of decay.
For a cause under God
This seems all the Devil's way.[1]

So it ends, without ending. By the end of 1985 the Florida deathwars had evolved into a series of bloody fist fights in individual cases. One chance for a grand victory—the *Grigsby* issue—had ended in failure in the U.S. Supreme Court. But two other epic struggles; both with the potential of removing large numbers of people from death row—*Hitchcock* and *McCleskey*— were still pending in the Supreme Court at the end of my Florida journals. One might say that the deathwars were slouching towards Gettysburg.

I left Florida for private practice in DC in January 1987, and then I left DC for teaching in Vermont in May, 1988. I continued to represent death row prisoners until 1996, when the "Crazy Joe" Spaziano case[2] drove me from the madhouse of capital punishment as a legal system. But that is for future journals.

Reading back over these journals I'm struck by how . . . *young* I was then. A song keeps going through my mind, Billy Joel's haunting *Goodnight Saigon*:

We met as soul mates
On Paris Island;
We left as inmates
From an asylum.
And we were sharp,

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1. BRUCE BERNSIDE, *My Dearest Jesse, on* Unsung Stories of the Civil War (Tortoise Humor Recordings 1999).

2. See MELLO, DEAD WRONG, *supra* note 2, at 270-72.

As sharp as knives,
And we were so gung ho
To lay down our lives.
    We came in spastic,
Like tameless horses;
We left in plastic
As numbered corpses
And we learned fast
To travel light
Our arms were heavy
But our bellies were tight.
    We had no home front,
We had no soft soap;
They sent us *Playboy*
They gave us Bob Hope.
We dug in deep
And shot on sight
And prayed to Jesus Christ
With all of our might.
    We had no cameras
To shoot the landscape;
We passed the hash pipe
And played our *Doors* tapes.
And it was dark
So dark at night . . .
And we held on to each other,
Like brother to brother,
We promised our mothers we'd write
    And we would all go down together;
We said we'd all go down together;
Yes, we would all go down together.
    Remember Charlie,
Remember Baker;
They left their childhood
On every acre.
And who was wrong,
And who was right;
It didn't matter
In the thick of the fight.
    We held the day
In the palm of our hand;
They ruled the night,
And the night
Seemed to last as long
As six weeks on Paris Island.

We held the coastline,
They held the highlands.
And they were sharp,
As sharp as knives:
They heard the hum of the motors,
They counted the rotors,
And waited for us to arrive.
And we would all go down together;
We said we'd all go down together;
Yes, we would all go down together.[3]

Abolition of capital punishment is an idea. Abolition of slavery was an idea. My hope is that the journals presented here will contribute to our national understanding of the real death penalty. As Stephen Vincent Benet wrote of slavery's abolition:

John Brown's raid has gone forward, the definite thing is done,
Not as we see it done when we read the books,
A clear light burning suddenly in the sky,
But dimly, obscurely, a flame half- strangled by smoke,
A thing come to pass from a victory not a victory,
A dubious doctrine dubiously received.
The papers praise, but the recruiting is slow,
The bonds sell badly, the grind of the war goes on—
There is no sudden casting off of a chain,
Only a slow thought working its way through the ground,
A slow root growing, touching a hundred soils,
A thousand minds—no blossom or flower yet.
It takes a long time to bring a thought into act
And when it blossoms at last, the gardeners wonder—
There have been so many to labor this patch of ground,
Garrison, Beecher, a dozen New England names,
Courageous, insulting Sumner, narrow and strong,
With his tongue of silver and venom and his wrecked body, ...
Wendell Phillips, Antinous of Harvard—
But now that the thought has arisen, they are not sure
It was their thought after all—it is good enough—
The best one could expect from a man like Lincoln,
But this and that are wrong, are unshrewdly planned,
We could have ordered it better, we knew the ground,
It should have been done before, in a different way,
And our praise is grudging.

---

3. BILLY JOEL, *Goodnight Saigon*, *on* THE NYLON CURTAIN (Columbia 1982).

Pity the gardeners,
Pity Boston, pity the pure in heart,
Pity the men whom time goes past in the night,
Without their knowledge.
They worked through the heat of the day.
Let us even pity
Wendell Phillips, Antinous of Harvard,
For he was a model man and such men deserve
A definite pity at times.
He too did his best.
Secure in his own impenetrable self- knowledge,
He seldom agreed with Lincoln or thought him wise;
He sometimes thought that a stunning defeat would give
A needed lesson to the soul of the nation,
And, before, would have broken the Union as blithely as Yancey
For his own side of abolition, speaking about it
In many public meetings where he was heckled
But usually silenced the hecklers sooner or later
With his mellifluous, masculine, well-trained accents.
War could hardly come too soon for a man like that
And when it came, he was busy. He did his part,
Being strong and active, blessed with a ready mind,
And the cause being one to which he professed devotion,
He spoke. He spoke well, with conviction, and frequently.
So much for the banner-bearers of abolition,
The men who carried the lonely flag for years
And could bear defeat with the strength of the pure in heart
But could not understand the face of success.
The other dissenters are simpler to understand.
They are ready to fight for the Union but not for blacks,
They don't give a damn for niggers and say so now
With a grievous cry.
And yet the slow root- thought works
Gradually through men's minds.
The Lancashire spinners,
Thrown out of work because no cotton can come
To feed their mills through the choking Union blockade,
Yet hold starvation meetings and praise the Union.
The tide has begun to turn in some English minds,
The watchers overseas feel their hands grow numb,
Slidell and Mason and Huse still burrow and argue,
But a cold breath blows through the rooms with the chandeliers.
A door is beginning to close.

Few men perceive
The turn of the tide, the closing of the door.
Lincoln does not perceive it. He sees alone
The grind of the war, the lagging of the recruits,
Election after election going against him,
And Lee back safe in Virginia after Antietam,
While McClellan sticks for five weeks and will not move.
He loses patience at last and removes McClellan.
Burnside succeeds him—
And the grimly bewildered
Army of the Potomac has a new rider,
Affable, portly, whiskered and self- distrusting,
Who did not wish the command and tried to decline it,
Took it at last and almost wept when he did.
A worried man who passes like a sad ghost
Across November, looking for confidence,
And beats his army at last against stone walls
At Fredericksburg in the expected defeat
With frightful slaughter.
The news of the thing comes back.
There are tears in his eyes. He never wanted command.
"Those men over there," he groans, "Those men over there"
—They are piled like cordwood in front of the stone wall—
He wants to lead a last desperate charge himself,
But he is restrained.
The sullen army draws back.
Licking its wounds. The night falls. The newspapers rave.
There are sixty- three hundred dead in that doomed attack
That never should have been made.
His shoulders are bowed.
He tries a vain march in the mud and resigns at last
The weapon he could not wield.
Joe Hooker succeeds him.
The winter clamps down, cold winter of doubt and grief.[4]

I didn't leave Florida; I never have; I never will, and I never want to. The time recorded in these journals was the fundamental experience of my life. I knew it at the time. I know it now. Everything since is prose.

4. *See* Benet, *supra* note 31, at 229.