I was seventeen years old when Florida executed Ted Bundy—a nationally reviled serial rapist and murderer of 16 women—not far from my home in Mobile, Alabama. My life in those days was filled with pep rallies, proms, and college applications. Although I fancied myself “mature” and deep thinking for my age, this was the first time I had ever really thought about the death penalty. I recall standing in my bathroom, curling iron in hand, getting ready for high school and listening to the universally obnoxious morning disc jockeys. They were covering the Bundy electrocution, and for those in my community, it was cause for carnival-like celebration. There were “tail-gate” parties in the prison parking lot. My hometown radio station played clips of people shouting gleefully for “Bundy Barbeque.” My reaction was immediate and visceral. I felt disgusted and ashamed by their celebration. Didn’t they realize a human being was about to die? That said—and despite my first pangs of moral aversion to this barbaric display—I’m sure that I finished curling my hair, and carried on with my day. Little did I know how that morning, and the feelings it aroused in me, would later come to affect my life.

Some months later, I received a scholarship application from one of the colleges to which I was applying. Eschewing the more typical (and boring) essay questions such as “tell us about yourself” or “describe what you did last summer,” this institution asked me to define “the evolving standards of decency that mark the progress of a maturing society.” I was impressed. At first I did not know from where these words had come. I speculated they were from some famous piece of literature or political philosophy. Perhaps they had come from Jefferson, Locke, or the Magna Carta. I wanted to learn more about who had written them before I embarked on the daunting task of trying to define them for myself. I spent a day at my local public library playing the part of a word sleuth. I checked many places, tried lots of theories, until I finally found it: the words came from a 1958 Supreme Court opinion entitled Trop v. Dulles.\footnote{356 U.S. 86 (1958).}

As a high school student, I had never read an opinion before, much less an opinion from the United States Supreme Court. I didn’t know what I was looking for, but I wanted to know more about this provocative phrase. I learned that Trop was a case interpreting the Eighth Amendment’s “cruel and unusual” clause in the
context of review of the Nationality Act of 1940, which provided that a citizen "shall lose his nationality" by "deserting the military or naval forces of the United States in time of war."

In finding unconstitutional this practice of "denationalization" or "total destruction of the individual's status in organized society," Chief Justice Warren went out of his way to mention, in dicta, the death penalty. He wrote:

At the outset, let us put to one side the death penalty as an index of the constitutional limit on punishment. Whatever the arguments may be against capital punishment—both on moral grounds and in terms of accomplishing the purposes of punishment—and they are forceful—the death penalty has been employed throughout history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty."

When I read those words, I thought immediately of Ted Bundy (and "Bundy Barbeque"). That month, I wrote my scholarship essay on the death penalty as a disgraceful, anachronistic practice. I had missed Warren's point about the importance of societal mores and public acceptability as a barometer for Eighth Amendment jurisprudence, but I had begun a life-long stance as a death penalty "abolitionist."

In college and law school, I was a voracious consumer of literature and research on the death penalty. I bought every book I could find on the topic. I was fascinated by all of the arguments for and against. I was intrigued and frustrated by the common misconceptions that seemed to underlie support for the death penalty in this country: the belief that it is a deterrent (it is not); that it is cheaper than life in prison (it is not). So, what started out as a visceral response to a bad morning radio show became a deeply-seeded intellectual curiosity (and later a professional calling). I truly believed that if the rest of the public learned the things about the death penalty that I had learned, it would be abolished. What I didn't understand was what had happened to those "evolving standards of decency" I had read about as a seventeen-year old. Had we made no "progress" since 1958?

In law school, I studied the case of Penry v. Lynaugh, which shed some light on this question. Johnny Paul Penry, I learned, was a mentally retarded man on Death Row in Texas. His case was heard by the United States Supreme Court in 1989 and

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2. Id. at 88 n.1.
3. Id. at 101.
4. Id. at 99.
6. Id. at 311. Johnny Paul Penry was convicted in Texas state court of murder and sentenced to death at State v. Penry (Trinity County 1980) [hereinafter Penry I]. His conviction was confirmed at Penry v. State, 691 S.W.2d 656 (Tex. Crim. App. 1985) [hereinafter Penry II], cert. denied, 474 U.S. 1073 (1986) [hereinafter Penry III]. Penry instituted a habeas corpus proceeding which was denied by the district court. Penry v. Lynaugh, No. L-86-89-CA (E.D. Tex. 1986) [hereinafter Penry IV]. The appellate court affirmed the district court's decision at Penry v. Lynaugh, 832 F.2d 915 (5th Cir. 1987) [hereinafter Penry V]. The U.S. Supreme Court, however, vacated Penry's sentence because the jury had not been adequately instructed with respect to mitigating evidence. Penry v. Lynaugh, 492 U.S. 302 (1989) [hereinafter Penry VI]. Texas retried Penry, and Penry was again convicted of capital murder and sentenced to death. State v. Penry, No. 15,977 (Walker County, July 17, 1990) [hereinafter Penry VII].
his lawyers argued that killing someone with the I.Q. of a seven-year old is "cruel and unusual" and inconsistent with "the evolving standards of decency that mark the progress of a maturing society." In an opinion written just a few months after Ted Bundy's execution, the Supreme Court held that there was not—at least not yet—a "national consensus" against the execution of the mentally retarded. What had seemed such a lofty and noble exercise to me when I wrote my college essay on Warren's opinion in _Trop_ was reduced in the Penry opinion to a simple, mathematical survey: more states permitted the execution of the mentally retarded than opposed it (assuming you didn't count abolitionist states—which I always thought was unfair). I was forced to take off the rose-colored glasses of my youth and begin to see the death penalty for what it was: a deeply engrained national practice that was not going anywhere any time soon. I remember feeling disappointed by the Penry opinion, but I never envisioned how that case, or that man, would come to affect my life in profound ways.

In seeking a job following law school, my single most important criterion in selecting a firm was its commitment to _pro bono_ in general, and to death penalty work in particular. Yes, I wanted a place with an exciting litigation practice, and fun, smart, unique lawyers who would make the long hours bearable, but most of all I needed a place that I could feel comfortable, a place that shared my view of the importance of this type of work. Paul Weiss was the perfect home for me.

As soon as I began at the firm, I requested death penalty work. At that time, the firm had at least four or five active death penalty cases, and you cannot imagine how surprised I was to learn I would be working on the Penry case—the same case that had caused me such disappointment in law school. You see, the disappointing portion of the Penry opinion I had read, finding it constitutionally permissible to


7. _Id._ at 333-34.
8. _Id._ at 335.
9. _Id._ at 334-35.
execute the mentally retarded, had always eclipsed the fact that the opinion was a success on the more limited question posed by Penry's attorneys: whether Penry's jury, through its instruction, was afforded an opportunity to "give effect" to Penry's mitigating evidence of mental retardation. Thus, Johnny Paul Penry was still alive in Texas, and was now a client of Paul, Weiss. Indeed, in 1990, following the Supreme Court's reversal, he was once again tried by a jury in Texas and once again given the death penalty, this time with Paul, Weiss handling his case and his appeal. As a junior associate working on the case, I remember many long nights pouring over the trial transcript searching for legal error. I remember minor legal skirmishes in the state courts of Texas as the case slowly wound its way through the complicated legal maze of habeas corpus litigation.

And, for several years, Johnny Paul Penry was just a person I wrote about in legal briefs. An abstract legal principle, if nothing else. Because of his mental retardation, he was certainly never able to assist meaningfully in his defense (we'll table, for the moment, how the courts could ever judge such a person to have met the minimum standards of competency), so we did not frequently consult with him, as we did with other clients, about his case. Our loyal and dogged local counsel, John Wright, kept in touch with Johnny and tried, in his patient way, to explain all of the byzantine legal maneuverings to him. But, basically, Johnny was more a cause to me than a human being.

That all changed as his execution date approached. Another associate in our office had begun speaking with Johnny by telephone, and I remember the day she brought to my office two crayon drawings Johnny had done for us. It was around the time of Halloween, and Johnny had drawn a picture with a large orange pumpkin on it. It seemed so pathetic to me. This man was forty-four years old, not more than two months away from his scheduled execution, and he was drawing us, his lawyers, bright orange pumpkin faces. This simply did not comport with my notions of "decency" or "progress." For the first time, I became scared that we might not just lose this legal battle—this fight over what was, in my mind, right versus wrong—we might lose our client.

I was not the only one afraid. Probably one of the most heartening things about this work is that you are absolutely never alone. The support you receive working on a death penalty case is unparalleled. This community of lawyers has among the best hearts and minds you will ever meet, and it does not matter what time of day or night—weekend or holiday—there is always someone there to lend a helping hand, provide a needed case citation, or toss around a new legal theory. And all of those folks, too countless to mention here, came to our aid in Johnny's case. Through their tireless efforts, numerous groups formed to advocate for Johnny both in and out of court. The media shed spotlights on the injustices of Johnny's case, international groups lent their support, and nationally regarded medical groups wrote amicus curiae briefs on Johnny's behalf. As Johnny's execution date came closer and closer, this machine seemed to be behind him, willing him to live.

Everyone had always told me that the days and hours leading up to an execution were frenzied and frenetic—full of publicity campaigns, clemency determinations,

10. Id. at 340.
11. Penry VII, No. 15,977; Penry VIII, 903 S.W.2d at 715.
and last minute legal appeals. And it was certainly true that the period leading up to Johnny’s execution date was a crazy time. But what scared me more than that was when the work stopped. That is, when there was nothing left to do but wait. Within a few days of his execution date, we had already heard that the Texas Board of Pardons and Paroles had denied clemency. Our cert petition to the Supreme Court was fully briefed. My colleagues on the case were down in Texas to be with Johnny in his final hours, to watch him say his final goodbyes to his family. My job seemed absurdly easy in comparison: I just had to sit by the phone in New York and wait to hear from the Supreme Court clerk’s office.

Like any watched pot, the phone in my office refused to ring. I sat there all day, just waiting for the call. As it was getting dark outside, I began to get more and more nervous. I called the clerk’s office again just to make sure they had my number. The woman I spoke with assured me that they did. I sat and stared at the pile of documents on my desk. I seemed incapable of making even the most basic privilege and responsiveness determinations on my other cases. All I could think about was the deafening silence of my phone not ringing. Finally, a good friend came by and told me I had to walk upstairs to get some dinner. I resisted at first, but then relented, and sure enough, I was not more than twenty feet from my office when the phone rang: it was the Supreme Court clerk’s office. The Motion for Stay of Execution had been Granted! Johnny Paul Penry would not die tonight. The Court would decide at their next bench conference whether to grant certiorari in the case. I had chills running up and down my spine for what felt like hours. My trembling fingers could barely dial the numbers on the phone to reach my colleagues in Texas; when I did, the other associate on the case dropped the phone in a mixture of shock, excitement, and general emotional overload. Ironically, Johnny was the one person who, because of his mental impairments, just didn’t really seem to get it. Johnny’s priest, who was with Johnny when the news came, said Johnny seemed to have no real grasp of the gravity of the situation: he just wanted to know whether he could still have the special cheeseburger they had prepared for his last meal.

The weeks following the stay of execution were filled with what we call in our profession “cautious optimism.” Surely the Supreme Court would not grant Johnny a stay of execution and then turn around only a few weeks later and refuse to hear his case. But I had already learned that in death penalty cases the usual rules rarely apply, so I did not actually breathe a sigh of relief until we got the call from the clerk’s office telling us that cert had been granted on all of our questions. Finally, we felt like lawyers again. We were back in the game, and there was work to be done, briefs to be written. We had written these same arguments countless times before for Johnny, but all of those briefs seemed like dress rehearsals for this opus. This brief was before a “real” court, a court that affirmatively expressed interest in hearing Johnny’s case. They had heard Johnny’s case before, and now they had agreed to hear it again. We hoped we were up to the challenge of demonstrating Johnny’s meritorious claims.

Our primary claim boiled down to the fact that in retrying Penry in 1990, the Texas trial court had repeated the same error that the Supreme Court found

unconstitutional in *Penry VI.* that the jury instructions did not permit the jury to give effect to Penry’s mitigating evidence of mental retardation. Eventually, the Texas legislature dealt with this problem by amending the death penalty statute to require juries to decide whether mitigating circumstances (such as mental retardation) outweighed aggravating circumstances and thus required a life, rather than a death, sentence. However, in their haste to re-try Penry after *Penry VI,* the State of Texas did not wait for the Texas legislature to modify the death penalty statute to deal with the problem articulated in *Penry VI.* Instead, the trial court judge attempted to fix the problem on his own. He simply told the jury, in a convoluted instruction, that if they felt that Johnny should not die, they should just answer one of the special questions “no”—even if they thought the factually correct answer was “yes.” Only a handful of cases in Texas involved the use of this special “nullification instruction”—as the Texas state courts came to call it. *Penry* was one of them. Oddly enough, Johnny did not get the benefit of the statutory amendment that his case had generated. It was just one of many cruel ironies in Johnny’s case.

The day the Supreme Court heard oral argument was bright, crisp, and beautiful—one of those perfect Washington D.C. spring days. The cherry blossoms were in full bloom. An hour or so before the argument, the lawyers were invited into one of the special drawing rooms at the Court and were given a brief tutorial by the staff about the protocols for oral argument in the high court. The mystical red and green podium lights were explained to us, and we were given a seating chart with the Justices’ names on them. I remember feeling as if someone should pinch me; it all seemed like a dream. Not long thereafter, we were ushered into the courtroom and seated at counsel table. As the partner on the case stood up to begin the argument, I remember turning around and seeing behind me several rows of our supportive death penalty colleagues filling the defense bar. Once again, I felt we had this amazing community of lawyers at our back.

The argument went well. Just the day before, we had received word that the Supreme Court had granted certiorari in another case challenging the Court’s holding in *Penry VI* that it was not *per se* unconstitutional to execute the mentally retarded. That was certainly a jolt in the arm, and we spent some time the night

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13. *Editor’s Note:* In standard judicial parlance, when the same case is decided by the Supreme Court more than once, each decision is consecutively titled, for example, *Penry I,* *Penry II,* and so on. Because of the nature of this edition and the use of a special procedural history footnote, we abandoned this common practice in favor of numerically titling each decision of the case in chronological order.

14. The Texas statute in effect at Penry’s first—and second—trial asked jurors to answer three questions: i) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with reasonable expectation that the death of the deceased or another would result; ii) whether there is a reasonable probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and iii) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased. Tex. Code Crim. Proc. Ann. art. 37.071 (Vernon 2004). However, as the Supreme Court had explained in *Penry VI,* evidence of mental retardation and severe child abuse are “beyond the scope of [the first special issue]” (concerning the defendant’s deliberateness); are relevant to the second special issue (concerning future dangerousness) only as an aggravating factor; and they simply have no bearing on the third special issue (victim’s provocation). *Penry VI,* 492 U.S. at 322-25.

before the argument scrambling to decide how we might answer questions concerning that cert grant.

In the end, our argument was limited to the facts and legal arguments in our case, and Bob Smith, the partner on the case, did an outstanding job. It was great to see him responding with his typical incisive wit and intellect to the bench’s questions; it looked like he did this every day. What really stuck me more than the legal discussion, however, were a few asides made by one of the Justices. As Bob was describing how convoluted and absurd the jury’s “nullification” instruction was, Justice Scalia interrupted him, saying: “They seem pretty clear to me. Even if the defendant is mentally deficient, we assume the jury is not.” It seemed like a rather cheap shot. Then, our adversary, counsel for the State of Texas, bemoaned the fact that he had little time left after the Court’s questions to get to his main point, noting that his “time was near.” Scalia once again retorted: “We’re not going to execute you. Your time is far off.” As published accounts later verified, few in the audience laughed. There was something in those comments that made me wonder whether capital cases had become so commonplace before the Court that they had lost their fundamental human gravitas.

In the weeks and months following the oral argument, we all worked as hard as we could to think about something else, to work on other cases, and to forget that this decision was out there being debated and drafted among the Justices. For me, that work took me to other parts of the world. I was working very late into the night in Singapore, when I got the news from my colleagues back in New York: we had won, by a vote of 6-3! The Supreme Court once again reversed Johnny’s death sentence and remanded it to the Texas state court for a new sentencing hearing. A few hours later, my room service breakfast arrived with a copy of the morning paper—the International Herald Tribune, complete with an article about my client’s legal victory in the Supreme Court. I was glowing.

The euphoria generated by that victory lasted for a deliciously long time. I do not think any of us had ever felt so proud of any legal accomplishment. Indeed, it lasted so long that we were all shocked a bit into reality when we began to have contact with the prosecutors on the case to schedule a pre-trial conference. It was like water on a camp fire. What did they mean, a pre-trial conference? We had won! Especially with the Supreme Court still slated to consider the per se constitutionality of executing the mentally retarded in Atkins v. Virginia, we could not fathom how Penry could be tried—for a third time—so soon.

Yet, despite all of our motions to every court who would listen (and several that refused), there was nothing we could do to keep Johnny from being retried prior to the Supreme Court’s ruling in Atkins. It seemed an absurd waste of all sorts of judicial resources to try Penry for the death penalty at a time when the nation’s

(2001). However, following the cert grant, the North Carolina legislature passed a bill outlawing the death penalty for the mentally retarded, which mooted the case. The Court later accepted certiorari on the same question in the case of Atkins v. Virginia, 536 U.S. 304 (2002).

17. Id.
highest court was deciding whether such a trial was constitutional, but it quickly became clear that there was nothing we could do to stop this "machinery of death." However, on one of our early trips to Livingston, Texas, I began to get a sense of why.

On Valentine's Day 2002, Judge Elizabeth Coker invited us back to her private chambers to discuss various pretrial issues. She disclosed to us (off the record) how she had gone to school with the victim, Pamela Carpenter, and how she remembered the day that news of Pam's murder had arrived at the school. As if the Judge's salient childhood memory was not enough, there was also a sign hanging on the wall just to the left of her desk. It looked like one of those deliberately tacky "gone fishin'" signs painted on a piece of wood, with a metal wire across the top. Except this sign read:

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Judge's Office
Open: When I'm Here
Closed: When I'm Not
Hangins' on Tuesday!
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All along, we tried in earnest to persuade the prosecution that a plea bargain was the appropriate way to resolve this case, once and for all, after 23 years of legal battles. We certainly made efforts toward that end before Penry's third trial was to begin. But we quickly discovered that when all the other side is willing to accept is your client's death, there is not much room for bargaining. I wondered why the prosecution would want to put the victim's family through the ordeal of yet another trial and a decade more of lengthy appeals; in many ways, the trial was more a torture for them than for anyone else. But, sadly, I have come to believe that the prosecution (and I suspect the victim's family as well) views the acceptance of any result less than Johnny's death as a mark of disloyalty and dishonor to the memory of the victim. This fact really hit me just before one of Johnny's execution dates. The victim's family took out an ad in the local Texas newspaper. It still chills me when I think of it: it has a beautiful picture of the victim, along with her name and her dates of birth and death. It then read: "We love you. We miss you. We will never forget you. May the execution of Johnny Paul Penry happen on [the then-scheduled date]." That ad taught me more about why we have the death penalty in this country than all of the countless law review articles and books I had ever read on the topic.

If only I could find a way to convince this family that accepting a punishment other than death for Johnny would not mean they loved their daughter any less; if only I could make them see that Johnny's death would not heal, and could not heal their undeniable pain, and that another decade of legal battles was only going to pick at the scab of their never-healing wounds. My heart goes out to that family. They are good people, and neither they, nor their daughter, deserved what happened to

20. Callins v. Collins, 510 U.S. 1141, 1145 (1994) (Blackmun, J., respecting denial of certiorari). It also seemed like Texas hadn't learned much from Penry XVI, because once again, the courts were hastily moving forward to try Penry without first clarifying, through legislative enactment or Supreme Court guidance, what the appropriate prevailing standards would be.
them. But I still had a client to defend, and I still fundamentally believe that what is broken inside of them will not be fixed by killing a mentally retarded man.

Defending a man who has been tried and convicted twice before, and whose two previous trips to the Supreme Court has made him a national celebrity of sorts, presents some unique problems for jury selection. That was complicated by the fact that weeks before we had tried and lost a competency trial in the same town with substantial news coverage. For Penny’s punishment trial, we sent jury notices to over 1,000 potential jurors. We were forced to exclude many of the potential jurors for hardship and patent conflicts of interest, leaving us approximately 100 jurors to question in individualized voir dire. The vast majority knew all about Johnny and his prior convictions. The only thing they didn’t know was why he was back here again. The few that did know the answer to that question told us they deeply resented the fact that Johnny was not dead already.

Voir dire is the best sociology course one can take. I had walked into that courtroom confident that, having been raised in the South, I would be prepared for, and understand, these people and their views. But the truth is, we are a nation of communities, and this group of people bore little resemblance to the community in which I had been raised. Some of the attitudes and prejudices were the same, and I felt them, but one critical difference was just the raw anger and spirit of violence I felt radiating from these jurors as they shared with us their lives and their attitudes. Maybe it is the fact that Texas is somehow steeped in the violence of the “West”—guns, large trucks, and the open range—I don’t know. All I know is that when we looked for some sign of mercy or understanding in these potential jurors, all we saw was anger. They told our local counsel that they didn’t like him, or the tie he was wearing. More than one told us that they were open to the death penalty as a punishment for vehicular manslaughter. Our veteran jury consultant shared her time-worn conclusion: “angry people kill.” And that is exactly what we expected many of these people wanted to do to our client.

Voir dire is also a daunting psychological exercise. As each new potential juror walks in the room, you are searching for some sign in their words, their background, or their body language that they will not kill your client. You watch them watch Johnny and you watch them look with authority to the prosecution. As you question them repeatedly about their views—many of which you find utterly inimical to your own—you have to find a way to swallow your own sense of right and wrong and engage them where they are. You are not going to change these folks’ views of the death penalty and social justice in an hour.

It took over six long weeks to complete this process. At the end, we felt good about what we had done, but we still knew the deck was stacked against us. Even with the use of our peremptory strikes, we were left with a jury that included a state trooper and a female corrections officer who transported inmates from Death Row. We were also mindful of the chilling fact that when we asked potential jurors from the same community to raise their hand if they thought competency trials and mental health defenses were just a “sham” put on by the defense, virtually every hand in the courtroom flew up. So, we knew this was going to be an uphill battle, or, as our seasoned local counsel once reminded me: “we’re all swimming in the same stream, but we’re swimming upstream, and they’re swimming down it.”
One of the advantages of litigating a capital case from a large law firm is the arsenal of resources the firm can bring to the problem. In this post-O.J. Simpson world, no one is naive enough to believe that resources do not impact the quality of defense. And, once again, Paul, Weiss was incredibly supportive. We hired a "dream team" of psychological and other mental health experts because, despite the overwhelming evidence, the State was disputing Johnny's mental retardation.

Johnny was diagnosed mentally retarded in the first grade, and had gone to the Mexia state school for the mentally retarded. (Bob, the partner on the case, used to love to say, "Who tries to cheat their way into the state school for the retarded?") When Johnny got in trouble as a juvenile, the case against him was dismissed because the prosecution admitted he was mentally retarded. His prison records from 23 years on Death Row were replete with references to his mental retardation (until the issue began to take prominence in the courts, and then, mysteriously, the diagnoses became more vague). In the ten times he had been given I.Q. tests from ages seven to forty-six, every time his results fell in the mentally retarded range. As our experts testified, one would literally have to be a genius with a background in the creation and standardization of I.Q. tests to get results in the same range every single time over such a long period with so many different test forms and versions.

However, that did not stop the prosecution from arguing Johnny was not mentally retarded. They claimed Johnny was faking his mental retardation (presumably from age six), that his poor vision and lack of formal education were the reason for his low I.Q. scores, and that mental retardation was just a "label" that followed him throughout his life, but was not accurate. The prosecution was too afraid to give Johnny their own I.Q. test, but that did not stop their mental health professionals from opining that he was not mentally retarded—based on their review of records and a limited interview of Johnny (a practice that is universally decried in the professional literature as a basis for a mental retardation diagnosis).

In addition to the mental health "dream team" we assembled to debunk these absurd allegations, we also had a "dream team" of mitigation fact witnesses thanks to the tireless efforts of one of our associates, a paralegal, an investigator, and our amazing mitigation specialist, who traveled to every tiny town in Texas (including one aptly named "Cut-n-Shoot") to locate people who had known Johnny as a child. It was amazing what we found. We found Johnny's first grade teacher (now 90 years old) who recalled the fact that Johnny was so slow she had to put him at a desk beside her and give him dolls to play with while the rest of the class learned. We put on one of Johnny's teachers from the Mexia school for the retarded, who testified that even at a school for the retarded, Johnny was slower than his peers. We had children from the neighborhood (now adults) who testified how Johnny, at age 17, would try to play kickball and hide-n-seek with kids ten years younger than him.

These same individuals, as well as numerous members of Johnny's family, also told stories about the horrific child abuse they saw Johnny suffer at the hands of his mother. They described how Johnny's mother (who had, for a time, been institutionalized in a psychiatric hospital) hit Johnny in the mouth when he was still a baby in a high chair. At age one, she broke his arm, and when he was a toddler, she put him in scalding hot water that left with him severe scars. According to these eyewitnesses from both inside the family and around the neighborhood, Johnny's
mother hit him with everything she could get her hands on, from belt buckles and extension cords, to mops and a tree limb. She put cigarettes out on his flesh and chased him around the house with a butcher knife, threatening to cut off his penis when he wet the bed. And in an act so vile it still makes me gag every time I hear it, she “potty-trained” Johnny by forcing him to drink his own urine from the toilet bowl and eat his own feces from his underpants when he had an accident. But, in the end, none of these facts about Johnny’s mental retardation or his severe child abuse meant much if we could not convince twelve people that the facts were sufficient to save his life.

As we had predicted, the Supreme Court decided Atkins right in the middle of our trial, throwing the entire proceedings into temporary chaos. When the Supreme Court decided in Atkins that the mentally retarded could no longer be executed, the Judge called a temporary halt to the proceedings and dismissed the jurors from the courtroom. Because Johnny had long been the poster child for mental retardation and the death penalty, a swarm of media descended on the courthouse, as the parties fought to find copies of the opinion to review. Ultimately, the judge ruled that despite the obvious significance of the opinion and our motion for a mistrial, the case was going forward. (We were later told that when the jurors asked courtroom personnel what all the buzz was about, the Judge told the jurors that the Supreme Court had issued a ruling but that “it had nothing to do with this case.”)

So, when it came down to July 3, 2002, the day of closing statements, I was not sure what to feel. The case had been through so many ups and downs. I tried to recapture the feeling of lucky pride we had felt when we got the stay of execution from, and ultimately won in, the Supreme Court. But this was a totally different venue with totally different decision-makers. All that our incredible success had bought us was the right to be back in front of these people. In many ways, the victory was now beginning to feel hollow. I agonized over the possibility that after everything we had been through, and despite all of our successes in the Supreme Court, Johnny Paul Penry was now going to be the only mentally retarded defendant whose life Atkins did not save.

The day of the closing statements was a media circus. When we walked into the courtroom, you could not find a seat anywhere, and there were cameras flashing like crazy. The Judge had permitted ABC News’ Nightline to set up a special camera in the courtroom with a media feed to all the local news stations. This room, which had been “home” to us for several months, had suddenly become foreign. I could not help but wonder how all of this media attention would impact the jurors. In addition, I was beginning to wonder whether I was going to be able to get through the closing statement myself. I guess the strain of the last four weeks had accumulated, and my body was beginning to suffer the physical repercussions of the hard days and long nights of the trial. I was sure my entire closing was going to be lost in a fit of coughing. I will never forget how just before I stood up to deliver my closing, one of the reporters sitting in the row behind me heard my cough and passed me a few cough drops. I am sure it was just a kind gesture, but somehow I felt that she, too, was on Johnny’s side. Luckily, as I stood up and walked across the courtroom toward the jury box to deliver my closing, all the minutiae—the
media and the coughing fits—melted away. All I saw were the twelve sets of eyes in front of me, and I spoke to them for an hour about why I thought Johnny had never had a fair shot in life, and how although he deserved to live in prison for the rest of his life, he did not deserve to die for what he had done. After the closings were over, I felt that we had said our peace (as they would say in Texas), and now all that was left to do was wait.

At first, the waiting seemed long indeed. Conroe, Texas is a small town, so there were only a very limited number of restaurants within walking distance of the courthouse for all of us to grab some lunch while the jury deliberated. Ironically, the defense and the prosecution ended up at the same restaurant and, although at separate ends of the room, we waited together. We had barely ordered when we received word from the clerk that the jury had returned with a question. We all tromped back over to the courthouse, where we learned that the jury wanted to know how much the prosecution’s expert had been paid. Although no more scientific than reading tea leaves, we thought this was a good sign for Johnny. But the jury also wanted to view a videotape of Johnny speaking on television, a video clip that the prosecution had used to try to demonstrate that Johnny was faking a speech impediment.22 So, together, these two requests told us that the jury was conflicted about what to do with Johnny’s life. The rest of the afternoon crept on, and time seemed to stand still. With every minute, we became more hopeful for Johnny’s life, but we also knew that as it got later into the evening on the eve of the July Fourth holiday, we were not going to keep these jurors around much longer.

Sure enough, at around 6:00 p.m., the jury came back with the verdict. We all piled into the courtroom again and the jury filed in, one by one, some of the women holding hands, others with tears in their eyes. The state-trooper foreman announced the verdict: Johnny Paul Penry should be executed by lethal injection. The victim’s family cheered and applauded. The Judge immediately turned and told Johnny to stand up for his sentencing. He looked confused and afraid. I could not bear to see him standing there alone like that, so, not knowing what else to do, I stood up next to him. I felt as if I was receiving the death sentence along with him. I have never felt lower as a human being. We had lost the most important case a lawyer can be asked to try—the case I had prepared for in my mind since I was seventeen. I knew then I would always torture myself with questions about how that could happen, and what I could have done differently. But, at the same time, despite the devastating blow of that loss, I can honestly say I have never felt prouder as an advocate than I did just standing there next to Johnny that day. I know it meant a lot to him, and it has come to mean even more to me.

As I write this, over fifteen months have passed since that difficult day, and we are still fighting. We have only recently received the court reporter’s record, which took well over a year to complete, and spans 89 volumes and several thousand pages. It has been a strange year, as we have all tried to return to work on our “normal” cases and wait for what we hope and expect will be the eventual appellate vindication of Johnny’s rights and the sparing of his life. The trial court has tried

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22. Of course, as we pointed out at trial—and as anyone with a speech impediment will tell you—the impediment often becomes more exaggerated when the speaker is nervous. So the prosecution’s claim that Johnny was faking his speech impediment was utterly specious.
to get our local counsel off the case and replace him with someone who consulted with the prosecution during the trial. The lead prosecutor was killed in an automobile accident after leaving a dinner party attended by the Judge and several of the jurors from the case. We were told it was not the first time the group had socialized together.

We do not yet know who will represent Johnny on appeal, but, rest assured, the battle still goes on. We are still swimming in the same stream, but they are going down, and we are headed up.