CHAPTER 2

CASE MANAGEMENT

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[2.1.] Practical Aspects of Presiding over a Capital Case

Presiding over a capital case presents the trial judge with unique challenges and opportunities. No case is more difficult, yet none offers more opportunity for the judge to exercise the skills of the trade or carry out the sworn obligations of a judge's oath. The capital case, perhaps more than any other case, magnifies the significance of decisions made by the judge during the trial. Probably more than most judges realize, the judicial decisions that they make every day matter greatly to the litigants and others. In a capital case, those decisions really matter.

[2.2.] The Context of a Capital Trial

In preparation for a capital trial, the trial judge first must understand and appreciate the context in which the trial will take place. Trial courts can assume:

- ✓ Everyone will be nervous. Because so much is at stake, each of the lawyers will be on edge, worried about making mistakes. With four lawyers, two on each side, at least one may be trying a capital case for the first time. Everyone expects the judge not only to know the rules but also to set the tone for the proceedings. The judge must remain calm and keep everyone else on track.
- ✓ Appeals and motions are inevitable. If there is a conviction, there will be an appeal. If the sentence is death, there will be interminable appeals. The trial judge's every word is subject to review. As such, the judge should be extremely conscious of the importance of making a record. Trial judges should keep bench conferences to a minimum; if used, the trial judge should reconstruct them on the record with the assent of counsel to each reconstruction.
- ✓ The trial will be long and tiring. One of the challenges for the trial judge is to keep the trial on schedule and progressing at a steady pace without sacrificing the quality of work produced by the lawyers, parties and jurors. During a lengthy trial, the judge should anticipate scheduling problems, family concerns and various conflicts that will arise. While it is important to be prompt and maintain a consistent schedule, the judge

should also recognize the importance of being sensitive to the personal needs of the jurors, the parties and their attorneys. The judge may have to choose between canceling a day or half day of court or losing a juror due to such a conflict. It may also become necessary to recess early or take extended breaks occasionally, simply to avoid undue fatigue. Judges should recognize that stress will take its toll on everyone during the course of a long, hard trial.

- ✓ Due process must be woven into the very fabric of the trial. The judge must ensure procedural due process, that is, the right to notice and a fair hearing. Further, due process involves another aspect called procedural justice. Unlike distributive justice, which is concerned with the outcome of a case, procedural justice refers to a process in which the litigants perceive that they had a chance to tell their stories and that people listened to them. Studies on this issue have led to a conclusion that "[c]itizens who view legal authority as legitimate are generally more likely to comply with the law."[185] Under this theory, a case will be easier to manage if a defendant perceives that he or she is getting a fair trial.
- ✓ As noted above, the lawyers, parties and witnesses are looking to the judge to set the tone of the trial. Part of the judge's job is to put everyone at ease to an appropriate degree. The task is difficult, to be sure, but does not need to be an overwhelming one. It is important to the state and to the defendant that the judgments in these cases are made by fair minded and conscientious people. Once the jurors are selected, the parties have accepted them and expressed confidence that the jurors are fair minded and conscientious. The judge's words and actions in the presence of the jury need to reflect that the jurors meet that standard.

[2.3.] Setting the Tone

One of the best ways to set the tone for a capital trial is for the judge to set parameters for the lawyers in advance of the trial. Lawyers know that each judge has particular nuances and certain "hot buttons." They want to know the judge's expectations and generally welcome any information that makes the trial more predictable. Judges can save themselves (and the lawyers) much anguish by

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[185] TOM R. TYLER, WHY PEOPLE OBEY THE LAW 62 (Yale U. Press 1990); *see* Jonathan D. Casper, Tom Tyler and Bonnie Fisher, *Procedural Justice in Felony Cases*, 22 LAW & SOC'Y REV. 483 (1988).

communicating in advance any special rules that they expect to be followed or any pet peeves that lawyers should avoid.

For example, the judge's "toolbox" for a capital case might include handouts for the lawyers on any stage of the trial that the judge anticipates is likely to present problems, such as jury selection or closing arguments. Even if the lawyers disagree with the judge's rulings, it would be a foolish lawyer indeed that would continue to violate policies that the judge has furnished in writing before the trial.

[2.4.] The Judge's Capital Trial Toolbox

As the judge prepares for a capital case, it is useful to create management checklists for recurring issues likely to arise during the trial. A capital case likely will involve some unique yet some fairly predictable issues. For example, it is far more likely that a capital trial will pose particular problems during jury selection, especially with the death qualification of jurors and potential *Batson* challenges, as well as potential abuses during closing arguments. The judge's preparation for a capital case should include creation and compilation of checklists, notes, and form orders for dealing with these and other areas. By taking time to create these checklists, judges will force themselves to become familiar with the principles necessary to rule on many of the contentious issues that will arise during the capital trial. Anticipating likely problems will enable the judge to minimize the potential for error and articulate early in the process to the lawyers what the judge's expectations are for their conduct. A word of caution, however, with respect to the use of checklists and form orders: Judges should not fall into any set pattern in ruling on objections or motions during the trial or pre-trial proceedings. Rather, judges should make decisions on a case-by-case basis.[186] A sample capital cases checklist is contained at Appendix 2-1.

You should include the following items in a capital case toolbox for effective trial management:

- ✓ Individual state's capital case benchbook;
- ✓ Attorneys' guidelines for jury selection questions;
- ✓ Form of questions for death qualification of jurors;
- ✓ Procedure for determining *Batson* issues;
- ✓ Attorneys' notice of intent to exercise peremptory challenge, opportunity for *Batson* objection;
- ✓ Sample *Batson* order;
- ✓ Juror responsibilities handout, contact information;
- ✓ Preliminary jury instructions;
- ✓ Sample order on motion to suppress;

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[186] *See* Witherspoon v. State, 391 U.S. 510 (1968) (sentence of death could not be carried out where jury that recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to death penalty or expressed conscientious or religious scruples against its infliction; no defendant can constitutionally be put to death at hands of tribunal so selected).

- ✓ Sample order on media coverage;
- ✓ Checklist for entering any orders restricting public comment;
- ✓ Checklist for ordering physical restraints on defendant;
- ✓ Checklist for removing disruptive defendant from courtroom;
- ✓ Sample order for removal of disruptive defendant;
- ✓ Sample order for placing restraints on defendant;
- ✓ Handout for attorneys: guidelines for closing arguments;
- ✓ State's rules of practice or criminal procedure;
- ✓ Selections from the state's rules of professional responsibility.

Many of these are contained in the appendices of this book, but judges should not underestimate the importance of creating their own forms. By doing so, they will gain a much better appreciation for particular nuances involved in each stage of the capital trial. They can also factor their particular management styles into the creation of their forms.

[2.5.] Dealing with Disruptive Defendants

In *Deck v. Missouri*,[187] the U.S. Supreme Court held that due process forbids the use of visible shackles during a capital murder trial, unless the use is justified by an "essential state interest." Justice Breyer noted that the law has long forbidden the *routine use* of visible shackles during a capital trial, permitting shackling only in the presence of a particular reason to do so.[188] The U.S. Supreme Court found that the basic rule embodies notions of fundamental fairness embodied in the Due Process Clause, forming a part of the Fifth and Fourteenth Amendment due process guarantees.[189] "The appearance of the offender during the penalty phase in shackles, however, almost inevitably implies to a jury, as a matter of common sense, that court authorities consider the offender a danger to the community . . . ."[190]

Nevertheless, the right to remain free of physical restraints that are visible to the jury may be "overcome in a particular instance by essential state interests such as physical security, escape prevention, or courtroom decorum."[191] The majority stated:

> We do not underestimate the need to restrain dangerous defendants to prevent courtroom attacks, or the need to give trial courts latitude in making individualized security determinations. We are mindful of the tragedy that can result if judges are not

[187] 544 U.S. 622 (2005).
[188] *Id.* at 626 (emphasis added).
[189] *Id.* at 627.
[190] *Id.* at 633.
[191] *Id.* at 628 (citations omitted).

> able to protect themselves and their courtrooms. But given their prejudicial effect, due process does not permit the use of visible restraints if the trial court has not taken account of the circumstances of the particular case.[192]

In any event, no person shall be tried using restraints "except as a last resort."[193]

Unfortunately, the U.S. Supreme Court does not provide a thorough definition of the elements that are sufficient to justify the use of restraints. Rather, it provides that the trial court's determination "must be case specific"[194] and be supported by findings.[195]

[2.6.] Requisites for Use of Physical Restraints

Multiple courts have examined the underlying reasons that justified the use of restraints in capital cases. In *State v. Thomas*, the trial adequately explained the reasons for shackling the defendant: (1) he threatened to become violent and tip over the counsel table; (2) he refused to come to the courtroom from the holding cell; and (3) he threatened his attorneys and one bailiff with physical injury.[196] Outside of the presence of the jury, the trial court expressed, on the record, its concerns that the defendant would endanger court personnel, possibly the jury, and that "a situation could arise that just couldn't be stopped in an amount of time [to prevent someone from getting] hurt, and probably the defendant."[197] Similarly, in *Russell v. State*, the Mississippi Supreme Court upheld the trial court's use of shackles because the defendant on trial for the capital murder of a prison guard already fatally stabbed an inmate, had a past conviction for armed robbery, and attempted to escape from a medical center ending in a shootout.[198]

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[192] *Id.* at 632.
[193] *Id.* at 628 (quoting Illinois v. Allen, 397 U.S. 337, 343-344(1970)).
[194] *Id.* at 633.
[195] *Id.* at 634. *See* Sireci v. Moore, 825 So.2d 882 (Fla. 2002) (The Florida Supreme Court held that a capital sentencing court's shackling order did not violate the defendant's constitutional rights because: (1) nothing in the record indicated that the jury ever saw the defendant in restraints; (2) the trial court made every effort to keep the defendant's restraints from being viewed by the jury, and (3) the defendant's alleged attempt to have his brother-in-law killed so that he could not testify for the state gave the trial court ample justification for restraining the defendant.).
[196] 514 S.E.2d 486 (N.C. 1999).
[197] *Id.* at 496.
[198] 849 So.2d 95 (Miss. 2003). *See, e.g.*, Nicklasson v. State, 105 S.W.3d 482 (Mo. 2003) (imposition of physical restraints on capital murder defendant was not abuse of trial court's discretion where defendant was charged in connection with multi-state crime spree involving two murders to which defendant already admitted indiscriminate firing of shots in a shopping mall and twice attacked security personnel while in state custody); State v. Zeitvogel, 655 S.W.2d 678 (Mo. Ct. App. 1983) (no abuse of discretion occurred in capital homicide prosecution against two prison inmates when judge ordered restraint by handcuffs of defendant and his 11 inmate witnesses, where trial court considered the

Conversely, in *Gammage v. State*, the Texas Court of Appeals found that the trial court committed prejudicial error when it required the defendant to wear handcuffs throughout trial.[199] During a pre-trial hearing, the sheriff testified that he preferred to have both co-defendants under physical restraints throughout the trial because they "were more dangerous than any other prisoners he has ever had."[200] However, the sheriff based his opinion of dangerousness on the facts giving rise to the case being tried, admitting that he knew nothing about the criminal history of either but concluded that each had a bad temper from their complaints about food.[201] The sheriff also alleged that the defendants were in the same cell where someone had dug a hole for escape, but he couldn't prove that the defendants were the perpetrators of the offense.[202] Further, the sheriff stated that informants told him the defendants planned to escape; however, the judge made no effort to seek direct testimony from the informants.[203] Despite the fact that the trial court allowed the defendant to dress in civilian clothing, the Texas Court of Appeals held that it was "an abuse of discretion for the court to employ restraints without specifically finding a manifest need, when less drastic security measures would have adequately and reasonably addressed the problem."[204] The

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following factors: (1) history of violent crimes and escape by defendant and his witnesses; (2) consideration of safety of all persons within courtroom; (3) consideration of possibility of escape; and (4) trial court's responsibility to ensure order and safety in the courtroom); People v. Hawkins, 897 P.2d 574 (Cal. 1995), *cert. denied*, 517 U.S. 1193 (1996) (trial court did not abuse its discretion in ordering a capital murder defendant to be confined in a security chair, which restrained defendant around his waist in a manner not directly visible to the jury; the court found that the defendant had been involved in three fistfights while in jail and had an extensive history of criminal violence, though his status as a capital murder defendant did not, in itself, warrant restraint); Harlow v. State, 105 P.3d 1049 (Wyo. 2005) *cert. denied*, 546 U.S. 835 (Wyo. 2005) (capital murder defendant's right to a fair trial was not violated when he and two of his witnesses were restrained during trial; the record indicated that on several occasions, the trial court addressed questions of courtroom security and the physical restraint of the defendant and that it took appropriate ameliorative action, and the jury had knowledge that the defendant and his two witnesses were prison inmates at the time of the trial); and, People v. Cunningham, 25 P.3d 519 (Cal. 2001), *cert. denied*, 534 U.S. 1141 (2002) (trial court did not abuse its discretion in ordering that the capital murder defendant be shackled during the trial, even though the defendant did not act in a violent manner during his courtroom appearances; the trial court found the following: (1) there was evidence that the defendant had obtained the key to his handcuffs; (2) the courtroom assigned for the trial was not equipped with a lock; (3) the trial court conducted its own investigation prior to ordering the shackling to determine how best to ensure that the jury did not see shackles; (4) and the court specifically instructed the jury not to discuss or consider the shackles and not to consider them as connotation of guilt).

[199] 630 S.W.2d 309 (Tex. App. 1982).
[200] *Id.* at 311.
[201] *Id.*
[202] *Id.* at 311-12.
[203] *Id.* at 312.
[204] *Id.* at 317.

Texas Court of Appeals found unpersuasive the fact that the co-defendant was acquitted of the murder despite wearing handcuffs as well.[205]

Likewise, in two Washington cases, the Washington Supreme Court found that the restraint of the defendant was improper. In *State v. Clark*, the trial court ordered the defendant to appear in shackles on the first day of *voir dire*, during the reading of the verdict and throughout sentencing, but not during the trial phase after *voir dire*.[206] The defendant argued that the restraint violated his rights to a fair trial and sentencing, and amounted to "impermissible judicial comment on the evidence."[207] While the trial court found that the jury venire could not see the shackles, the Washington Supreme Court held that the jury could infer shackling from the defendant's "stilted and restrained movement."[208] There was no evidence in the record that the defendant "posed a threat of violence, escape, or disruption."[209] Indeed, the Washington Supreme Court found from the record that the defendant was well-mannered during pre-trial

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[205] *Id.* at 315. Likewise, in State v. Gomez, 123 P.3d 1131 (Ariz. 2005), the court held that the trial court's shackling of a capital murder defendant during the aggravation and penalty phases of the trial was not justified. It held that the defendant's conviction for a capital crime could not by itself justify shackling. *Id.* at 1141. The court found that the record contained no evidence of security concerns; therefore, it vacated the death sentence and remanded the case for new sentencing proceedings. *Id.* at 1141-42.

[206] 24 P.3d 1006, 1026 (Wash. 2001), *cert. denied*, 534 U.S. 1000 (2001).

[207] *Id*.

[208] *Id.* at 1027. *See, e.g.,* People v. Urdiales, 871 N.E.2d 669 (Ill. 2007), *cert. denied*, 128 S.Ct. 494 (2007) (shackling upheld where the defendant was recently convicted of two murders, there were security problems with the courtroom, the shackling of defendant's left arm resulted after defendant had a violent outburst in courtroom and had to be physically subdued and handcuffed, the shackling was not visible to the jury and did not impair defendant's ability to communicate with his counsel, and defense counsel conceded that the trial court acted appropriately in shackling the defendant); Gray v. Commonwealth, 356 S.E.2d 157 (Va. 1987), *cert. denied*, 484 U.S. 873 (1987) (use of leg irons upheld because of serious nature of charges, to maintain security, and defendant had extensive and violent criminal history; the trial court ensured that the jury remained unaware of the shackles by having them removed outside the jury's view when the defendant took the witness stand to testify); People v. Arias, 913 P.2d 980 (Cal. 1996), *cert. denied*, 520 U.S. 1251 (1997) (waist chain and handcuffs upheld where the defendant's outburst during his capital murder trial revealed them, the trial court admonished the jury on two occasions to disregard everything they saw and heard and to decide the case solely on the basis of evidence; the California Supreme Court found that it was not error for the trial court to fail to allow individual *voir dire* of jurors on the issue); State v. Holmes, 565 S.E.2d 154 (N.C. 2002), *cert. denied*, 537 U.S. 1010 (2002) (shackling upheld where the defendant had a history of disruptive and assaultive behavior while at the detention center, including attempting to start a fire in his cell block, the attempt occurred 12 days before trial in which it took six people to forcefully restrain the defendant, the shackles were not visible to the jury, and the trial court clearly indicated that its initial ruling would be reconsidered daily, thereby giving defense counsel the opportunity to bring to the court's attention any impairment to defendant as result of being shackled).

[209] *Clark*, 24 P.3d at 1028.

proceedings.[210] The Washington Supreme Court held that the shackling was constitutional error, but it was harmless because (1) he was not shackled throughout the two-and-a-half-week trial and (2) the jury had already arrived at its verdict of guilt or innocence prior to the second time they saw the defendant shackled.[211] The Washington Supreme Court did not address whether the shackling constituted impermissible judicial comment on the evidence.[212]

In *State v. Finch*, the defendant was shackled during the entire trial and during the special sentencing hearing.[213] The trial court was trying the defendant for allegedly murdering his ex-wife's friend and for murdering a police officer during his arrest. The trial court ordered the defendant shackled because he was a large man and he had originally planned to kill his estranged wife who testified against him.[214] The Washington Supreme Court found that restraining a defendant during trial infringes upon his right to a fair trial, primarily violating the presumption of innocence.[215] Further, shackling restricts the defendant's ability to assist counsel during trial, it interferes with the defendant's right to testify on his or her behalf, and it "offends the dignity of the judicial process."[216] Finally, restraining a defendant also infers dangerousness and prejudices the jury against the accused, especially in a trial alleging a violent crime.[217]

Although the trial court may have been justified in shackling the defendant during his ex-wife's testimony, the Washington Supreme Court held that restraints were not justified throughout the trial.[218] The Washington Supreme Court found no indication from the record that the defendant "posed a threat to anyone else in the courtroom," that he posed an escape risk, or that he disrupted the courtroom proceedings.[219] The state argued that the trial court's decision was justified because the defendant was on trial for murder, he had prior convictions for "violent" offenses, he was a large man, and he attempted suicide while he was in prison.[220] The Washington Supreme Court found that being on trial for murder cannot be used to justify restraint because all capital defendants would then be subject to restraint.[221] It found that the defendant's prior convictions were more than 25 years old and that he never committed violence or attempted escape while incarcerated.[222] The Washington Supreme Court also found that the size of the defendant does not constitute a "manifest need" for restraints.[223] Even though the defendant attempted suicide while in custody, the suicide attempt was eight

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[210] *Id*.
[211] *Id.* at 1028-29.
[212] *Id.* at 1026.
[213] 975 P.2d 967, 1002 (Wash. 1999), *cert. denied*, 528 U.S. 922 (1999).
[214] *Id*.
[215] *Id.* at 998.
[216] *Id.* at 998-99.
[217] *Id.* at 999.
[218] *Id.* at 1002.
[219] *Id*.
[220] *Id*.
[221] *Id*.
[222] *Id*.
[223] *Id*.

months prior to trial; the defendant was placed on antidepressant medication; and, there were no other cases allowing for the use of restraints on that basis.[224]

Nevertheless, in *People v. Morgan*,[225] the Fulton County Court found that a "heightened standard of due process" in a capital case pre-trial proceeding did not compel the sheriff's office to alter its standard procedure of restraining the defendant and allowing only prison garb during pre-trial proceedings. The defense unsuccessfully argued that due to media coverage, *potential* jurors may witness the defendant in restraints and prison garb which will "taint" the trial.[226] The Fulton County Court held that because all papers filed in the case containing potentially sensational material were sealed, the portrayal of defendant in the media had not "even approached the sensational" nature of it.[227] As such, the defense could address any "taint" during *voir dire*.[228]

In addition to preventing violence,[229] the trial court may also need to restrain the defendant to prevent possible escape[230] and to avoid trial disruption.

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[224] *Id*.
[225] 178 Misc. 2d 621 (N.Y. County Ct. 1998).
[226] *Id.* at 627.
[227] *Id*.
[228] *Id*.
[229] *See, e.g.,* U.S. v. Edelin, 175 F. Supp. 2d 1 (D. D.C. 2001) (use of stun belts as a security measure in a capital trial was appropriate in view of the seriousness of the crimes charged and the severity of the potential sentences, the numerous allegations of threats of violence made by the defendants against witnesses, previous guilty pleas or convictions of a substantial number of the defendants to prior gun charges and/or violent crimes, belligerent and threatening comments made to the Deputy U.S. Marshals by most of the defendants, allegations of gang activity, and the likelihood that associates or rivals of the alleged gang might be present at the trial); State v. Cassano, 772 N.E.2d 81 (Ohio 2002), *cert. denied*, 537 U.S. 1235 (2003) (shackling of the defendant during trial was upheld where the defendant's prison record reflected multiple threats to other inmates and a significant amount of fighting, the court ordered counsel tables skirted to conceal defendant's shackles from the jury, the defendant's hands were left free throughout trial, and the jurors were aware that defendant was a prison inmate and convicted murderer); State v. Wilson, 556 S.E.2d 272 (N.C. 2001) (capital defendant's shackling was upheld where he had been involved in at least two fights while in jail and had "beat [another inmate] up real bad," combined with the seriousness of the charges); Snyder v. State, 893 So.2d 488 (Ala. Crim. App. 2003) (stun belt's use was upheld where defendants allegedly told another inmate that he was going to take the gun from an officer in courtroom if the trial didn't go well); State v. Cassano, 772 N.E.2d 81 (Ohio 2002) (shackling upheld where defendant's prison record reflected multiple threats to other inmates and significant amount of fighting); People v. Ramirez, 139 P.3d 64 (Cal. 2006) (physical restraints upheld where defendant invited police to kill him when arrested, used his blood to draw pentagram and write "666" on jail floor, and said "Hail Satan" and displayed pentagram and "666" on his palm at arraignment); State v. Henry, 944 P.2d 57 (Ariz. 1997), *cert. denied*, 523 U.S. 1028 (1998) (shackles, handcuffs, and shock belt at resentencing hearing upheld where defendant was previously convicted of several violent felonies including involuntary manslaughter and armed robbery); Bigby v. Cockrell, 340 F.3d 259 (5th Cir. 2003) (shackling and handcuffing upheld after the defendant attacked the judge by pointing a gun at the judge's head).

In *Stockton v. Commonwealth*,[231] the Virginia Supreme Court examined, in part, whether the trial court's use of shackles during a re-sentencing hearing before a jury denied the defendant a fair trial.[232] During the re-sentencing hearing, the defendant was shackled at the ankles.[233] He swore at the judge and refused to return to court unless he was unshackled.[234] On the next day, he returned to the courtroom unshackled.[235] The Virginia Supreme Court found that he was not prejudiced by the shackling on the first day because: (1) The defendant was already convicted of the capital offense; (2) he had an enhanced motive to attempt an escape and to injure anyone who stood in his way; (3) he had a previous record of escape, and (4) he cursed the judge.[236]

In *People v Stankewitz,* the California Supreme Court held that the trial court did not err in ordering leg restraints to be placed on the defendant during *voir dire* and trial.[237] The trial court ensured that the leg restraints were never in view of jurors, and it conducted an evidentiary hearing 14 days after *voir dire* began where the court found that during the defendant's first trial, he tried to escape from the courthouse holding cell, he struck his attorney, and he threatened the trial judge.[238] The trial court also found that there were recent reports the defendant expressed plans to escape.[239] After *voir dire* concluded, the trial court conducted a second hearing in which the chief bailiff testified that he believed the defendant posed a continuing security risk, citing defendant's prior violence and escape attempts, defendant's statements that he would shoot officers if he

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[230] *See, e.g.,* Minor v. State, 780 So.2d 707 (Ala. Crim. App. 1999), *rev'd on other grounds*, 780 So.2d 796 (Ala. 2000) (shackling capital murder defendant before sentencing was not an abuse of discretion given the risk of escape due to the defendant's history of escape and the fact that the defendant faced either death or life imprisonment without parole).

[231] 402 S.E.2d 196 (Va. 1991), *cert. denied*, 502 U.S. 902 (1991), *denial of habeas corpus aff'd*, 41 F.3d 920 (4th Cir. 1994), *cert. denied*, 515 U.S. 1187 (1995).

[232] The history of the case is cumbersome. The Virginia Supreme Court affirmed defendant's murder-for-hire conviction and death sentence. 314 S.E.2d 371 (Va. 1984). The defendant petitioned for writ of *habeas corpus*, and the U.S. District Court for the Western District of Virginia granted the writ in part, and appeal was taken. The Fourth Circuit Court of Appeals affirmed. 852 F.2d 740 (1988). At re-sentencing, the circuit court again imposed the death sentence, and an automatic sentence review followed. This case is the result.

[233] 402 S.E.2d at 197-198.

[234] *Id.* at 198.

[235] *Id*.

[236] *Id.* at 198-200. *See also* People v. Medina, 799 P.2d 1282 (Cal. 1990) (in capital murder prosecution, the trial court did not abuse its discretion in ordering the defendant shackled for the remainder of a trial after the defendant cried out and turned over the counsel table; the defendant had a prior history of violence including a long list of disturbances and assaults while in custody, and the record demonstrated a manifest need to shackle the defendant following the violent behavior).

[237] 793 P.2d 23, 38 (Cal. 1990).

[238] *Id*.

[239] *Id.* at 39.

had a gun, and several recent incidents involving threats and assaults by the defendant against other inmates in state prison.[240]

Because of its potentially prejudicial impact on the jury, the California Supreme Court held that trial courts should only allow shackling as a last resort, based on "a showing of manifest need for such restraints."[241] Where used, they "should be as unobtrusive as possible, although as effective as necessary under the circumstances."[242] However, the defendant must object to their use or the claim will be deemed waived on appeal.[243] Also, the court's "shackling decision 'cannot be successfully challenged on review except on a showing of a manifest abuse of discretion.'"[244]

In addition to potential violence and trial disruption, a state trial court held that the potential for escape and violence are sufficient reasons to order the use of physical restraints. In *State v. Atkins*, the state trial court permitted the use of leg irons on the defendant during the sentencing hearing because the defendant attempted escape from his jail cell and had a propensity towards violence, as evidenced by his guilty plea to the brutal beating of his infant son as well as expert testimony at his prior competency hearing that suggested a violent disposition.[245] The North Carolina Supreme Court held that a trial court may order a defendant or witness subjected to physical restraint in the courtroom when the judge finds the restraint to be reasonably necessary to maintain order, prevent the defendant's escape, or provide for the safety of persons.[246] In doing so, the court must, under the North Carolina statute: (1) state on the record, out of the presence of the jury, and in the presence of the person to be restrained and his or her counsel, if any, the reasons for the action; (2) give the restrained person an opportunity to object; and, (3) unless the defendant or defense counsel objects, instruct the jurors that the restraint is not to be considered in weighing evidence or determining the issue of guilt.[247] If the restrained person controverts the stated reasons for restraint, the judge must conduct a hearing and make findings of fact.[248]

In this case, the trial court conducted a hearing pursuant to the statute to allow argument by all parties concerning the need for restraint.[249] The hearing was held outside the presence of the jury.[250] The trial court ensured that a cloth was draped over defendant's counsel table to completely conceal the leg restraints

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[240] *Id*.
[241] *Id.* at 38 (citations omitted).
[242] *Id.* (citations omitted).
[243] *Id.* (citations omitted).
[244] *Id.* (citations omitted).
[245] 505 S.E.2d 97, 115-16 (N.C. 1998), *cert. denied*, Atkins v. North Carolina, 526 U.S. 1147 (1999).
[246] *Id.* at 115 (quoting N.C. GEN. STAT. 15A-1031 (1997)).
[247] *Id*.
[248] *Id*.
[249] *Id.* at 115-116.
[250] *Id.* at 116.

from view by the jurors, thus limiting any potential prejudice to defendant.[251] The defendant always entered the courtroom before the jurors and left the courtroom after the jurors so they could not view his leg irons.[252] The North Carolina Supreme Court found that the trial court "took every conceivable precaution to evaluate the need for restraints and to minimize any potential prejudice to defendant."[253]

[2.7.] Types of Restraints

Many types of restraints are used in restraining capital defendants. Shackles,[254] handcuffs,[255] stun belts and other electronic devices,[256] leg irons,[257] leg braces,[258] "security chair,"[259] and combinations thereof can be concealed from

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[251] *Id. See also* People v. Buss, 718 N.E.2d 1 (Ill. 1999), *cert. denied*, 529 U.S. 1089 (2000) (shackles during trial were upheld where defendant did not object to shackles so long as the jury did not see them, the tables in the courtroom were skirted, and the shackling did not hinder the defendant's ability to consult with counsel).

[252] *Atkins*, 505 S.E.2d at 116.

[253] *Id. See also* U.S. v. Fields, 483 F.3d 313 (5th Cir. 2007) *cert. denied*, 128 S.Ct. 1065 (2008) (The Fifth Circuit Court of Appeals held that the district court did not abuse its discretion in requiring a defendant charged with capital murder and escape to wear a stun belt at trial, even though the defendant had not previously misbehaved in court; the U.S. Marshals Service testified that the defendant (1) had a violent criminal history, (2) had been "aggressive, volatile, and lewd" while in custody, and (3) had a "history of escape and escape attempts," and the court appropriately took steps to minimize any risk of prejudice to the defendant, including allowing him to conceal the stun belt under his street clothes and having both sides remain seated before the jury so that the jury would not see the self-represented defendant's physical restraints.).

[254] *See*, *e.g.,* Deck v. Missouri, 544 U.S. 622 (2005); State v. Clark, 24 P.3d 1006 (Wash. 2001); Stockton v. Commonwealth, 402 S.E.2d 196 (Va. 1991); State v. Cassano, 772 N.E.2d 81 (Ohio 2002); Szuchon v. Lehman, 273 F.3d 299 (3d Cir. 2001); and People v. Cunningham, 25 P.3d 519 (Cal. 2001).

[255] *See, e.g*., Gammage v. State, 630 S.W.2d 309 (Tex. App. 1982); People v. Arias, 913 P.2d 980 (Cal. 1996); State v. Henry, 944 P.2d 57 (Ariz. 1997); and State v. Zeitvogel, 655 S.W.2d 678 (Mo. Ct. App. 1983).

[256] *See, e.g*., Snyder v. State, 893 So.2d 488 (Ala. Crim. App. 2003); U.S. v. Edelin, 175 F.Supp.2d 1 (D. D.C. 2001); U.S. v. Fields, 483 F.3d 313 (5th Cir. 2007); and State v. Adams, 817 N.E.2d 29 (Ohio 2004) (The Ohio Supreme Court found that the trial court did not abuse its discretion in ordering the use of a stun belt to prevent escape and violence even when the defendant suffered from epilepsy because of the court's findings that no medical evidence indicated that he was at risk if the device was activated.). But *see* State v. Johnson, 858 N.E.2d 1144 (Ohio 2006) (stun belt not justified).

[257] *See, e.g*., State v. Atkins, 505 S.E.2d 97 (N.C. 1998); Collins v State, 297 S.E.2d 503 (Ga. App. 1982); and People v. Combs, 101 P.3d 1007 (Cal. 2004) (leg restraints).

[258] *See, e.g.,* State v. Wilson, 556 S.E.2d 272 (N.C. 2001); and State v. Davolt, 84 P.3d 456 (Ariz. 2004).

[259] *See* People v. Hawkins, 897 P.2d 574 (Cal. 1995) (The California Supreme Court upheld a capital murder defendant's confinement in a security chair, which restrained the defendant around his waist in a manner not directly visible to the jury, since the defendant had been involved in three fistfights while in jail and had an extensive history

jurors so they are less likely to adversely affect the trial process. Obviously, if visible signs of restraints (such as gagging or visible shackles) are necessary, the trial court should give curative instructions to the jury.[260]

[2.8.] Use of Restraints for Transferring Defendants and during Videotaped Interviews

To safely transfer or transport a capital murder defendant from a secure facility to the trial court, law enforcement and prison and jail officials use restraints. However, problems may arise when jurors inadvertently witness the defendant in restraints. In *State v. Hankins*, the Missouri Supreme Court held that the inadvertent viewing of a capital murder defendant in handcuffs and chains on two occasions did not justify a mistrial.[261] In the first incident, the sheriff was transporting the defendant from one courthouse to another prior to trial.[262] As he ascended the steps to the courthouse, the defendant asserted that there were "jurors standing on the steps all the way around when I came through."[263] The appellate court noted that the jury had not yet been selected.[264] The sheriff then escorted the defendant into the courtroom where there were other people, but the defendant was unsure whether they were (potential) jurors or not.[265] The sheriff

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of criminal violence; however, his status as capital-murder defendant did not, in itself, warrant restraint.).

[260] Newman v. State, 106 S.W.3d 438 (Ark. 2003) (The Arkansas Supreme Court upheld the trial court's order to gag a capital murder defendant where, during the prosecutor's closing argument, the defendant became disruptive and interrupted the argument several times, ultimately causing the trial court to dismiss the jury to resolve the matter. When the trial court questioned the defendant about his ability to sit quietly and allow the prosecutor to make his argument, the defendant replied that he would "stand on the Fifth Amendment."); and Baker v. State, 906 So.2d 210 (Ala. Crim. App. 2001) (The Alabama Court of Criminal Appeals found no judicial bias where the trial court's threats to gag a capital defendant, in response to his statements of "fuck that" after the court instructed him to sit down and be quiet, and after the defendant repeatedly made disparaging remarks during recesses toward the court and the prosecutor). *But see* England v. State, 940 So.2d 389 (Fla. 2006) (The Florida Supreme Court found that the trial court did not commit fundamental error by ordering the defendant to be gagged during closing arguments in the penalty phase of a capital murder trial, despite the fact that the trial court failed to give a cautionary instruction to the jury; while the supreme court would have preferred that the trial court give a cautionary instruction, the supreme court found the following actions persuasive: (1) the trial court warned the defendant on seven occasions that he was going to be gagged if he continued to disrupt the proceedings, but the defendant was not dissuaded by the warnings; (2) the trial court ordered that the defendant's hand be free so he could write notes to defense counsel; (3) the trial court limited the time of the gagging; and (4) it was unreasonable to assume that threat of contempt would have dissuaded the defendant.).

[261] 642 S.W.2d 606, 610 (Mo. 1982).

[262] *Id*.

[263] *Id*.

[264] *Id*.

[265] *Id*.

immediately removed the restraints.[266] On the second occasion during lunch on the first day of trial, the sheriff transported the defendant, who was wearing handcuffs, to the sheriff's office located near the entrance to the courthouse.[267] Four or five jurors saw the defendant.[268] The Missouri Supreme Court differentiated this case from one where the defendant was handcuffed during trial.[269] It found that "officers charged with the custody of an accused may take reasonable precautions to maintain that custody."[270] It found that it is a desirable and necessary practice to handcuff prisoners, and "the jury is aware of this."[271] The Missouri Supreme Court found "nothing to indicate that the officers charged with the custody of [the defendant] exceeded their right to take the reasonable necessary precautions for the maintenance of order and the retention of custody during the progress of the trial."[272]

Despite this case, trial judges should take precautions to ensure that jurors are not able to view the defendant in restraints. If there is an error and a juror inadvertently witnesses the defendant in restraints, the trial court should provide a curative instruction.

Some cases, however, present factual scenarios where showing the defendant in restraints is necessary. In *Barber v. State*, the state introduced into evidence a videotape taken at the scene of the crime, not the police station.[273] In the video, the defendant is wearing handcuffs, though the videotape is blurry in places, and the handcuffs are visible only part of the time.[274] The Alabama Court of Criminal Appeals held that the handcuffing did not "tend to negate the

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[266] *Id*.
[267] *Id*.
[268] *Id*.
[269] *Id.* (citations omitted).
[270] *Id.* (citations omitted).
[271] *Id.* (citations omitted).
[272] *Id.* (citations omitted). *See* Burgess v. State, 827 So.2d 134 (Ala. Crim. App. 1998), *cert. denied*, 537 U.S. 976 (2002) (The Alabama Court of Criminal Appeals held that the security measures used during a capital murder defendant's trial did not deny his right to a fair trial where the sheriff's deputies were present in the courtroom, and the deputies used handcuffs to bring the defendant into the courtroom, but they removed them before the jury came into the courtroom.); *see also,* Grant v. State, 58 P.3d 783 (Okla. Crim. App. 2002) (Even though prospective jurors saw the capital murder defendant being transported by prison guards where he was locked arm-in-arm with them, the Oklahoma Court of Criminal Appeals found that the method used to transport him to and from the courtroom did not undermine the presumption of innocence and did not violate a statute prohibiting individuals from being tried before a jury while in chains or shackles; the prospective jurors knew that the defendant was in prison on unrelated charges when the murder occurred.).
[273] 952 So.2d 393, 446 (Ala. Crim. App. 2005), *cert. denied*, 127 S.Ct. 1875 (2007). This case also involved an inadvertent viewing of restraints by the jurors during the transportation of the defendant. *Id.* at 445. The Alabama Court of Criminal Appeals found that the trial court immediately asked the jurors whether anything happened that would prejudice their ability to hear the case. *Id.* None responded. As such, the Alabama Court of Criminal Appeals found that the defendant's rights were not violated. *Id.*
[274] *Id.* at 446.

presumption of innocence or portray the defendant as a dangerous or bad person" because: (1) defense counsel did not object to the handcuffs in the video during trial; (2) defense counsel did not request a cautionary instruction; (3) "jurors would likely infer that handcuffing was simply standard procedure"; (4) the jurors watched the defendant on television rather than in person which "further reduces the potential for prejudice"; (5) the defendant appeared in trial without handcuffs for several days; and (6) the defendant appeared in handcuffs for a relatively brief period.[275]

Conversely, in *Lucas v. State*, the Texas Court of Criminal Appeals found that showing a crime-scene-videotaped confession of the capital defendant in handcuffs was error.[276] While the appellate court agreed that it was "both necessary and practical to handcuff [the defendant] while on the side of a busy roadway," especially since he admitted to heinous and violent past activity, it was error because of the "visual impact of the improper picture of a restrained defendant upon the mind of the jury."[277] Nevertheless, the appellate court found the error to be harmless for a number of reasons.[278] First, the defendant confessed to the actual killing over a month before the videotape was made.[279] Second, the Texas Court of Criminal Appeals could not find any harm in allowing the jury to view the defendant with handcuffs where "the contact occurs simultaneously with the accused's voluntary, detailed descriptive confession of guilt at the scene of the crime."[280] Third, over the strenuous objections of defense counsel at the scene, the defendant "unequivocally made known his intention to disregard those warnings and to further implicate himself in the matter through the medium of videotape."[281] Fourth, the videotape shows a "minimally restrained individual" who was freely confessing to murder.[282] Fifth, the defendant appeared without handcuffs during the trial.[283] Sixth, there was overwhelming evidence presented during the penalty phase of the trial.[284]

[2.9.] Trial Judge's Curative Instructions

In those cases where the jury witnesses the use of restraints, the trial court may correct the problem by giving a curative instruction. In *People v. Arias*, the defendant's outburst during his trial revealed his waist chain and his handcuffs which had been concealed.[285] The court admonished the jury "that you are to consider this case only on the evidence that comes from the witness stand

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[275] *Id*.
[276] 791 S.W.2d 35, 56 (Tex. Crim. App. 1989).
[277] *Id*.
[278] *Id*.
[279] *Id*.
[280] *Id*.
[281] *Id*.
[282] *Id*.
[283] *Id*.
[284] *Id*.
[285] 913 P.2d 980, 1014 (Cal. 1996), *cert. denied*, 520 U.S. 1251 (1997).

here and make your decision based on that evidence, and not what you observed in the courtroom, the acts or antics of the defendant. You're to ignore these actions in making your decision and base it solely on the evidence that comes from the witness stand."[286]

Likewise, in *Szuchon v. Lehman*, the federal trial court visibly shackled the capital murder defendant after he "grabbed and kicked a state trooper who was leaving the witness stand."[287] The jury witnessed this event and witnessed court security subdue the defendant in front of the jury box.[288] The trial court ordered the defendant shackled to his chair and to the counsel table; however, the court allowed the defendant's left hand to remain unshackled, so he could take notes and assist his counsel.[289] The trial court also did not gag the defendant.[290] The trial court record plainly evidenced that the court considered a number of options besides shackling such as barring the defendant from the courtroom, issuing a contempt citation, and concealing the shackles.[291] In rejecting the latter course of action, the trial court stated:

> It's my opinion that a couple of jurors were so frightened last night that it would be more productive for them to know that he is in some fashion shackled to his chair, and it is my belief that the possibilities of the prejudicial effect of knowing that he is unable to leave his chair are far less than the productive, if you will, effect of them knowing that they can pay attention to the evidence without having to worry about the Defendant.[292]

Trial defense counsel did not object to the visible shackling, nor did he object to the "cautionary instructions regarding the shackling."[293] The Third Circuit Court of Appeals found that the trial court appropriately instructed the jury to remain solely focused on the evidence.[294] In appealing the use of shackles, defense counsel noted that two jurors "could not set aside the fact that [the defendant] was shackled, and that another juror "was utterly terrified of [the defendant] and believed that he would kill her and her family."[295] As such, defense counsel argued that the shackling must have had a "substantial and injurious effect or influence on determining the jury's verdict."[296] The Third Circuit Court of Appeals found no violation of due process stating that the jurors' "declarations seem to verify the court's assessment that certain jurors were truly

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[286] *Id*.
[287] 273 F.3d 299, 314 (3d Cir. 2001).
[288] *Id*.
[289] *Id*.
[290] *Id*.
[291] *Id*.
[292] *Id.* at 314-15.
[293] *Id.* at 315.
[294] *Id*.
[295] *Id*.
[296] *Id.* (citing brief of cross-appellant).

frightened and that shackling would help them to focus on the evidence rather than on [the defendant]."[297]

However, in *Lovell v. State*, the trial court explained to the jury during the sentencing hearing that wrist and ankle shackling was the normal procedure for anyone already convicted of charges of murder and facing a serious sentence.[298] The Maryland Supreme Court held that this instruction does not cure "the error by causing the balance to tip sufficiently away from prejudice and in favor of the state interest in courtroom security to sustain the decision to shackle."[299] The Maryland Supreme Court found that the "instruction reflects the notion that all convicted murderers who face the possibility of a jury-imposed capital sentence are appropriately shackled."[300] It found that an "individualized evaluation" is required.[301] The individualized evaluation should consider whether there is a state interest that justifies the prejudice to the offender.[302] Otherwise, trial courts could simply shackle and instruct in all capital sentencing hearings without the need for hearings.[303]

[2.10.] Removal of Disruptive Defendants

The U.S. Supreme Court in *Allen v. Illinois* stated that "it is essential to the proper administration of criminal justice that dignity, order, and decorum be the hallmarks of all court proceedings in our country."[304] The trial court should not and cannot tolerate "flagrant disregard" of elementary standards of proper conduct.[305] Accordingly, if a "disruptive, contumacious, stubbornly defiant" defendant confronts the court, appellate courts must give them "sufficient discretion to meet the circumstances of each case."[306]

In *Allen*, the defendant represented himself; however, the court appointed counsel to protect the record as much as possible.[307] During *voir dire* and again during the prosecution's case in chief, the trial court had to remove the defendant

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[297] *Id. See* also State v. McKnight, 837 N.E.2d 315 (Ohio 2005), *cert. denied*, 126 S.Ct. 2940 (2006) (While jurors were leaving the courtroom after seeking additional instructions before retiring from deliberations for the evening, the jury inadvertently viewed the defendant in handcuffs; the Ohio Supreme Court held that the viewing was brief and inadvertent, and the trial court addressed any prejudice by its curative instructions.).
[298] 702 A.2d 261, 274 (Md. 1997).
[299] *Id*.
[300] *Id*.
[301] *Id*.
[302] *Id*.
[303] *Id*.
[304] 397 U.S. 337, 343 (1970).
[305] *Id*.
[306] *Id*.
[307] *Id.* at 339.

from the proceedings because of his disruptions.[308] Nevertheless, defense counsel remained to represent the defendant.[309]

The Seventh Circuit Court of Appeals felt that the defendant's Sixth Amendment right to be present at his own trial was "absolute."[310] It held that no matter how unruly or disruptive the defendant's conduct might be, the trial court could never hold that he lost that right so long as he continued to insist upon it as Allen clearly did.[311] Therefore, the Seventh Circuit Court of Appeals concluded that a trial judge could never expel a defendant from his own trial.[312] The court concluded that the trial judge's ultimate remedy when faced with an obstreperous defendant like Allen who is determined to make his trial impossible is to bind and gag him.[313]

The U.S. Supreme Court disagreed, stating:

> Although mindful that courts must indulge every reasonable presumption against the loss of constitutional rights, . . . we explicitly hold today that a defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom. Once lost, the right to be present can, of course, be reclaimed as soon as the defendant is willing to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings.[314]

The U.S. Supreme Court found at least "three constitutionally permissible ways for a trial judge to handle an obstreperous defendant like Allen: (1) bind and gag him, thereby keeping him present; (2) cite him for contempt; (3) take him out of the courtroom until he promises to conduct himself properly."[315]

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[308] *Id.* at 339-40.
[309] *Id.* at 340.
[310] *Id.* at 342.
[311] *Id*.
[312] *Id*.
[313] *Id*.
[314] *Id.* at 343 (citations omitted).
[315] *Id.* at 343-44. *See* Newman v. State, 106 S.W.3d 438, 452-53 (Ark. 2003) (The Arkansas Supreme Court held under *Allen* that the trial court's actions were constitutionally permissible in gagging the defendant during the prosecutor's closing arguments because the defendant continued to interrupt the prosecutor's closing argument even after the trial court reprimanded him).

[2.11.] Practice Pointers for Dealing with Disruptive Defendants

A trial court should use caution when ordering the restraining of a capital defendant during trial. The trial court should review its own statutory authority to assess whether there is a scheme for using restraints. If not, the following may be used as a checklist for doing so[316]:

- ✓ A trial judge may order physical restraints upon a defendant or witness when the judge finds the restraint to be reasonably necessary to:
  - maintain order or prevent disruption;
  - prevent the defendant's escape; or
  - provide for the safety of persons.
- ✓ Before ordering the restraint of a defendant or witness, the judge should:
  - Hold a hearing outside the presence of the jury and in the presence of the affected person and counsel;
  - Provide an opportunity to object;
  - Ensure that the hearing is on the record; and
  - Make findings of fact.
- ✓ The judge should consider the following factors in assessing whether a restraint is necessary:
  - The seriousness of the charge(s) against the defendant;
  - The defendant's temperament, character, age, physical attributes, past record;
  - Past escapes or attempted escapes or evidence of a present plan to escape;
  - Threats to harm others or create a disturbance;
  - Self-destructive tendencies;
  - The risk of mob violence or attempted revenge by others;
  - The possibility of rescue by other offenders still at large;
  - The size and mood of the audience;
  - The nature and physical security of the courtroom; and
  - The adequacy and availability of other remedies.

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[316] *See* State v. Tolley, 226 S.E.2d 353 (N.C. 1976) (citing N.C. GEN. STAT. 15A-1031 (1997)).

✓ The judge should instruct the jurors that the restraint is not to be considered in weighing the evidence or determining guilt unless there is an objection to the instruction.

[2.12.] Conclusion

As this chapter demonstrates, presiding over a capital case presents case management issues that are unique. Decisions made by the judge hold a magnified significance that doesn’t usually occur in any other type of case. Further, it is the only type of case that requires direct appeal after the case has concluded and that will inevitably cycle through many appeals and reviews. Hopefully, this chapter will help in assisting you in those trial management issues.