

## Capital Case Checklist

### I. Arraignment

- A. Arrange special security considerations.
- B. Review indictment and verify statutes. Never arraign without counsel being appointed and present.
- C. Advise defendant of rights, including right to counsel and advise that a death penalty specification has been included in the indictment.
- D. Appoint two qualified counsel, if necessary.
  - 1. One lead counsel and one second chair counsel based on the approved counsel list.
  - 2. Immediately after arraignment, verify that the appointed counsel remain currently capital qualified as either lead counsel and second chair counsel.
  - 3. Appoint two counsel; one lead counsel and one second chair counsel.
- E. Read the indictment to the defendant even if a waiver is made by counsel and give defendant a copy of the indictment on the record.
- F. Consider time waiver issues.
- G. Consider issue of bail, if appropriate.
- H. Determine citizenship and notify defendant. Do entry to order notification by all counsel and court to consulate if defendant is a foreign national.

### II. Post Arraignment Case Management

- A. Complete Appointment of Counsel forms and forward same to the Supreme Court.
  - 1. File a copy with case file.
  - 2. Attach current certificates of appointed counsel or if appointed counsel cannot find same, attach an appropriate affidavit from appointed counsel indicating that they are currently capital qualified and file copies with the case file.
  - 3. Verify with the Supreme Court that appointed counsel have current capital qualifications. Be certain that lead counsel carries lead counsel certification for trial purposes.
  - 4. Reduce to judgment entry the fact that counsel are currently capital qualified and that the Court has checked with the appropriate registration agency verifying the capital qualifications and indicate one counsel as lead counsel and one counsel as second chair counsel.

- B. Consider order regarding media access to courtroom and proceedings.
- C. Consider protective and decorum order on counsel, parties and witnesses.
- D. Consider appropriate court security issues for pretrial conferences and pretrial motions.
- E. Prepare a standard scheduling order: approximately six months is usually needed from the time of arraignment until the date of trial for preparation and for mitigation experts to complete case preparation.
- F. Order clerk to notify Supreme Court regarding capital filing.

### **III. Case Management – Selecting the jury venire**

- A. Prepare judgment entry requiring jury commissioner to pull specific number of jurors for the potential capital venire (250-500 depending on the case). Order should require the jury commissioner to mail the jury summons approximately six to eight weeks prior to trial date.
- B. Prepare standard initial short form questionnaire for mailing to the jurors with the summons.
- C. Order counsel to submit long form questionnaire. File final form and samples in case file. This should be ready to go well in advance of the jury summons.
- D. Discuss with jury commission process of following up on summons that have not been returned and require jury commission to maintain notes on each potential juror as to the follow-up steps complete in attempting to locate each juror not responding.
- E. See that the final detailed questionnaire is approved by judgment entry of the Court and ordered mailed approximately four to five weeks prior to the day of trial.
- F. Schedule first round of jury excuses approximately three weeks prior to trial.
- G. Provide the lawyers with short form and long form jury questionnaires as they are returned to the jury commission. Jury commission maintains originals; copies to counsel.
- H. Schedule second round of potential jury excuses for one week after the first round. See that jurors are notified to appear for second round of jury excuses.
- I. Hold first round jury excuse on the record with the defendant, and all counsel and jury commissioner present on the record.
- J. Hold second round of jury excuses on the record with defendant present and counsel participating along with jury commissioner. Court to journalize each excuses juror on the record. Court to journalize each excused and not excused juror on the record.

#### IV. Case Management – Pretrial Issues

- A. Consider and make appropriate orders regarding experts for the defense including an order regarding private investigators. Standard for appointing experts: Has defense counsel provided a prima facie showing that the funds or experts requested are needed to pay for services necessary to a competent defense. *See Ake v. Oklahoma*, 470 U.S. 68 (1985).
- B. Appoint appropriate mitigation experts. Get commitments on the record regarding mitigation expert being ready for trial date.
- C. Consider issue of time waiver.
- D. Discuss on the record potential jury view and items to be shown to the jury and any statement that will be read to the jury prior to the view.
- E. Arrange for appropriate street clothing for defendant whenever jurors may be present.
- F. See that defendant is present any time matters are put on the record.
- G. When in doubt, put matters on the record as opposed to being completed in chambers.
- H. The general rule is that purely procedural matters may be conducted in chambers but any discussion of substantive matters should take place on the record. Even purely procedural matters should often be placed on the record after they have been discussed in chambers. Take a very narrow view of the term “procedural”. The best practice is to put all matters on the record with the defendant present along with counsel. It is a good idea after every pretrial to memorialize the pretrial by going on the record and permitting counsel to make any statements they wish concerning the pretrial matters and for the defendant to be present during any discussion on the record.
- I. Discuss issues of competency and sanity, if necessary.
- J. Discuss issues of suppression and set appropriate hearings. Set discovery deadlines. Bill of particulars, Discovery Responses, both sides.
- K. Discuss timetable for filing standard motions and other related motions by reviewing the Court’s full scheduling order.
- L. Consider change of venue issues, if relevant.
- M. Consider joinder issues, if relevant.
- N. Consider difficult or disruptive defendant issues, if any.
- O. Discuss any stipulations – put on record with defendant present. Discuss what discovery will be filed on the docket prior to trial or what will be simply exchanged between counsel to prevent the case being over publicized by the press. Remember, all of this must be eventually filed and placed on the record for appellate purposes. Order court copies and place on the

record what has been exchanged. You want no disputes at trial or on appeal as to what was exchanged. The best policy is straight filed discovery like any other case.

- P. Discuss affirmative defenses or alibi.
- Q. Use a pretrial motion log for maintaining motions and rulings so that all motions have been decided prior to trial.
- R. Specific catch-all items pretrial.
  - 1. Discuss length of trial and review scheduling order. Require all motions by each side to be sequentially numbered. Defense using numbers and state using letters. Court's entries can then correspond.
  - 2. Review jury selection process.
  - 3. Check technical information.
    - a) Witness names
    - b) Defendant's full name
    - c) Charges technically correct
    - d) Exhibits and procedures for marking same
    - e) Unique evidence issues
  - 4. Review *Voir Dire*. Does counsel wish the Court to advise jury of defendant's right not to testify – put on the record?
  - 5. Review courtroom protocol and security.
  - 6. Review progress on motions.
  - 7. Any special needs for trial.
  - 8. Discuss trial issues
    - a) Timing of opening
    - b) Jury view arrangements
    - c) Separation of witnesses
    - d) Handling victim and defendant's families at trial.
  - 9. If trial counsel does not seem competent to handle a capital case, confront the issue at once.

**V. Case Management – Standard Pretrial Motions and Orders:** Maintain motion log and entry log so that every pretrial motion has a judgment entry prior to the date of trial.

- A. Most motions should be handled on the Court record after appropriate written briefs in support and in opposition to the motion have been filed. The Court should entertain oral argument on most motions unless they are purely procedural.
- B. Prior to the date of trial, check to be certain that all motions have been handled and any motions remaining should be handled prior to the commencement of trial by holding a special hearing.

**VI. Day of Trial**

- A. If defendant waives jury for three-judge panel trial, secure written jury waiver.
- B. If defendant wishes to enter a three-judge panel plea of guilty, obtain written jury waiver.
- C. If defendant enters a plea of guilty, be certain to cover the statutory notification, if the defendant does not hold U.S. citizenship.
- D. Arrange for extra court security. Jury room, bathrooms, snack bars, etc. constantly checked for newspapers, etc.
- E. See that defendant has been dressed appropriately in street attire and take special precaution to avoid potential jurors from seeing defendant in shackles.
- F. Make necessary arrangements for media access.
- G. Give counsel an opportunity to put any remaining issues on the record prior to seating the jury.
- H. Review with counsel and inquire specifically as to whether any motions have remained undecided by the court.
- I. Jury commission to provide jury orientation and to separate capital jury venire from other potential jurors.
- J. Be certain that all arrangements have been made for jury view. Discuss and rule on exactly what will be explained to the jury prior to the view. Any instructions to the jury should be reduced to writing and made a part of the court record.
- K. Advise lawyers that there is no display of exhibits until admitted.

**VII. Group *Voir Dire***

- A. Defendant present at all times dressed in appropriate street attire.
- B. Advise counsel prior to group *voir dire* that counsel shall not mention the issue of the death penalty or sequestering during this part of the jury seating process. Indicate that the

court will advise the jury at the end of the initial group jury seating process regarding the death penalty and sequestering.

- C. Proceed with group *voir dire* as in a standard criminal case with the exception of not discussing the potential penalty and sequestering.
  - 1. Jurors to be provided with oath as prospective jurors.
  - 2. Court to conduct initial *voir dire*.
  - 3. Jurors to be questioned in general regarding the accuracy of their questionnaires and that they are now under oath.
  - 4. Permit prosecutor to inquire.
  - 5. Permit defense to inquire.
  - 6. Have jurors reaffirm accuracy of information in the short form and long form juror questionnaires.
  - 7. Advise jurors they will not be photographed.
- D. At conclusion of general *voir dire*, advise jury of the potential for the death penalty and of possibility of being sequestered.
- E. Take challenges for cause.
- F. Pass out individual *voir dire* schedules.
- G. Explain individual *voir dire* schedules.
- H. Provide detailed admonitions to jury prior to any adjournment.

### **VIII. Individual Voir Dire**

- A. Defendant present during individual *voir dire* and dressed appropriately for trial.
- B. Bring approximately eight jurors to courtroom; provide oath and opening remarks. Excuse the jurors then bring jurors back for individual questioning. Also, advise jurors again of their admonitions and that their admonitions continue throughout the course of the case.
- C. Ask individual jurors if information on short form and long form questionnaire is accurate. Inquire as to any prior felony convictions. Consider whether felons may remain.
- D. Proceed with pretrial publicity questions.
- E. Proceed with death penalty qualification questions.
- F. Permit counsel to inquire regarding pretrial publicity and death penalty qualifications.

- G. Permit counsel to inquire on any other specific area from the jury questionnaires.
- H. Advise juror of return date.
- I. Provide juror with admonitions.
- J. Once sufficient jurors have been capital qualified, then return to group jury process.
  - 1. Defendant to be present and dressed appropriate for trial.
  - 2. Provide jurors with oath.
  - 3. Provide admonitions.
  - 4. Proceed with final questioning by court and counsel.
  - 5. Re-open challenges for cause.
  - 6. Peremptory challenges. If challenges based on sex or race, be aware of *Batson* issues and handle same on the court record.

**IX. Trial Phase**

- A. Review with jury the potential for two phases.
- B. Will you permit jurors to take notes and if so, be certain to provide special instructions. Jurors must not take notes from the courtroom during the trial except during deliberations and then only to the deliberation room. Notes should not go to the motel or anywhere else.
- C. Review the policy of reviewing witness statements in camera with counsel, if necessary.
- D. Conduct all proceedings, including sidebar conferences, on the record.
- E. Provide counsel with a copy of proposed jury instructions at the earliest opportunity. This permits an orderly process of refining the instructions as the trial progresses.
  - 1. Allow requests and objections on the record.
  - 2. Key pitfalls to watch out for:
    - a) Using “gist of the offense” purpose instruction is not appropriate in aggravated murder context. Redo your standard purpose instruction, as it is not appropriate.
    - b) “Foreseeability” causation instruction is generally inappropriate in aggravated murder context.
    - c) Give intoxication instruction, if requested and appropriate.
    - d) Give lesser-included instruction, if appropriate.

- F. In the event that you need to substitute a juror, it is best to have at least some individual inquiry of that juror with the defendant and counsel present.

## **X. Deliberations**

- A. Arrange for sequestering.
  - 1. Provide jurors with single rooms.
  - 2. See that security has been properly informed and provided appropriate checklists.
  - 3. Prepare sequestering questionnaires for jurors to complete.
  - 4. Prepare appropriate sequestering order.
  - 5. Be certain that security check of all rooms has been completed including disconnecting televisions and radios, including clock radios, newspapers removed, etc.
  - 6. Provide jurors with list of items that they may and may not bring while sequestered. Provide juror sequestering information packet.
  - 7. Question jurors on the record to be certain that no one has brought any items not permitted such as small televisions, small radios, cell phones, newspapers, etc.
  - 8. Provide special oath by the clerk of courts to all officers who will accompany the jury during sequestering.
- B. Arrange for alternate jurors during deliberations. Advise jurors that they may not discuss the case unless all jurors are present in the jury room.
- C. Note time jury begins deliberations, breaks, recess for the day, verdict time, etc.
- D. Place any jury questions on the record, including discussions regarding the rulings. Be certain that the defendant and counsel are present during any discussions regarding questions and when any question is sent back to the jury, be certain that it is reduced to writing and made a part of the record along with the question itself.

## **XI. Trial Phase Verdict**

- A. Verdict form must state specification separately and that it was proved beyond a reasonable doubt.
- B. Some judges prefer, prior to taking the verdict, to poll jurors on the issue of their sequestering and lack of compromise.
- C. Read verdicts.
- D. Poll jury as to verdicts.
- E. Advise jury as to next phase and provide dates for reporting.

- F. Maintain alternate jurors for second phase.
- G. Provide jurors with complete admonitions and emphasize the necessity of following the admonitions.
- H. Arrange for jurors to be excused and to be accompanied to their automobiles, etc.
- I. Advise defendant after jury is excused of:
  - 1. The right to pre-sentence investigation
  - 2. The right to a mental examination.
  - 3. The right to make a statement not under oath, and that he will not be cross-examined on that statement.
  - 4. The right to present evidence, call witnesses, etc., during the sentencing phase.
  - 5. The right to appeal the conviction.
- J. Advise counsel regarding sentencing phase jury instructions.
- K. Advise defendant of the procedures that will be followed by the Court.

## **XII. Sentencing Phase**

- A. Rule on any pending motions. Rule on what evidence will be excluded during sentencing phase. Be cautious not to simply admit all trial phase evidence in the sentencing phase, if not appropriate. Also, be cautious in permitting the jury to decide what evidence is appropriate on the aggravating circumstance and on mitigation.
- B. Poll each juror about following the court's admonitions during their recess.
- C. Opening remarks to the jury by the court including some opening instructions.
- D. Opening statements, prosecutor proceeding first.
- E. Prosecutor to proceed with evidence limited to the aggravating circumstance.
- F. Defendant to proceed with any mitigation evidence or experts.
- G. Final arguments prosecutor proceeds first and last.
- H. Provide final instructions as to the jury for sentencing phase. Do not let the jury speculate as to what evidence may or may not be admissible during the sentencing phase.  
Instruction pitfalls:
  - 1. Failing to merge aggravated circumstances when appropriate.
  - 2. Failing to explain weighing process when more than one "victim."

3. Giving improper reasonable doubt instruction. At this phase it's not "the truth of the charge."
  4. Use proper definition of mitigation.
  5. Use proper nature and circumstances instruction
  6. Avoid *Brooks* error.
  7. Be certain you have the most current updates on any statutory penalties.
- I. Provide special clerk of courts' oath to officers in charge of sequestered jury. Best to provide oath to everyone who will be involved in sequestering security.
  - J. Make arrangements and sequester jury.
  - K. Obtain copies of sequestering orders, etc. and file same, checklists, etc.
  - L. If jury indicates it is deadlocked:
    1. Try to determine, based on time deliberating and question, whether they are deadlocked.
    2. If deadlocked, consider an appropriate additional charge avoiding any language that talks about "you may be the only jury." There is some dispute on whether any instruction to break the deadlock is proper.
    3. If jury is irreconcilably deadlocked, take the case away from the jury and impose one of the life sentence options after weighing process.

### **XIII. Sentencing**

- A. Read jury verdict and poll jury. Excuse jurors and provide appropriate security for jury to leave the courthouse.
- B. Advise defendant of ramifications of the jury verdict.
- C. Advise defendant of right to appeal.
- D. It is suggested that a small recess be undertaken prior to pronouncing sentence so that the court may consider all of the factors necessary for sentencing. If life is recommended, court must impose. If death recommended, court may override.
- E. Ask prosecutor, defense counsel and defendant if they wish to say anything before sentence is pronounced.
- F. Read sentence in open court to defendant.
- G. Set execution date, if necessary.

#### **XIV. Case Conclusion – Final Steps**

- A. See that jury questionnaires are collected from counsel and provided to the jury commissioner.
- B. See that the jury commissioner retains questionnaires for potential future needs on the case.
- C. Make jury questionnaires part of the court record.
- D. Appoint two approved appellate counsel.
- E. Make sure the court reporter secures or records custodian secures all exhibits and miscellaneous papers such as jury questions and court responses, court exhibits such as witness statements, juror questionnaires if filed, etc.
- F. Make sure everything that is to be a part of the record is complete and filed.