Book Reviews

Tell the Client's Story
Mitigation in Criminal and Death Penalty Cases

Edward Monahan and James Clark, Editors
American Bar Association (2017)
Reviewed by Ernie Lewis

Gregg v. Georgia was one of several cases that came down from the Supreme Court on July 2, 1976, reinstituting the death penalty in the United States. Kentucky responded by passing a death penalty bill almost identical to the Georgia statute approved in *Gregg.* Kentucky's death penalty was back in business.

Ed Monahan was a recently minted lawyer in Kentucky's new Office of the Public Defender. He formed the Death Penalty Task Force to flesh out the new statute and to offer assistance to the private attorneys called upon to defend under the new law. Ed was the editor of the first iteration of a death penalty manual, planned the first public defender training held at Shakertown (led by Millard Farmer), and organized the task force into teams to give advice to lawyers throughout the state. Ed became the Director of Training for the Department of Public Advocacy, and led the effort to train Kentucky public defenders in how to handle capital cases. By the late 1980s, he had joined with James Clark, who later obtained a Ph.D. in social work, on training, consulting, and handling capital cases. In no small way is Ed responsible for the fact that only one person has been executed involuntarily in Kentucky since *Gregg.*

Those of you who were defense lawyers at the time remember those days. Mitigation was a new concept, mostly defined and constrained by the statute. When a case ended, lessons learned were passed on. There was no such thing as a mitigation specialist. Team defense, while taught by Millard Farmer, was a virtual unknown. No standards existed. There was not a bar experienced in capital cases. No public defender division was dedicated to handling capital cases. And there were a lot of death penalty verdicts.

A rich oral history, developed by the late 1980s, became *the American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (1989). Fourteen years later, the guidelines were updated. Later the *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases* (2008) was published. Together these three documents became the gold standard for capital teams, capturing the lessons of the oral history and providing guidance for attorneys, mitigation specialists, investigators, leaders, and courts.

Ed Monahan, the former Kentucky Public Advocate, and Dr. James Clark, presently the Dean of the Florida State University College of Social Work, have combined to give a gift of immense importance to the capital community in the form of *Tell the Client's Story.* This book captures the development of capital defense and is true to all three fundamental documents, but it goes much, much further. Theirs is an up-to-date compilation of current and best practices. This book is essential for new and experienced capital defense lawyers alike as well as mitigation specialists, investigators, and anyone else who might be called upon to serve on a team defending someone's life.

Ed and Jim have gathered together a brilliant group of authors, many of whom have lived the history of the modern death penalty. These are skilled and experienced practitioners. All are worthy of a section in this review. I will choose just a couple of chapters to highlight. John Blume and Russell Stetler lead off the book with a chapter titled "Mitigation Matters" that sets the tone for the entire book. Ed and Lorinda Youngcourt describe best practices in capital voir dire. Marla Sandys, Elizabeth Vartkessian, Heather Pruss, and Sara Walsh provide some of the oral history developed from the Capital Jury Project in a chapter titled "Setting the Stage and Listening to What Jurors Have to Tell Us About Mitigation." In "Creating and Leading the Mitigation Team," Jim and Ed provide fresh insights on capital teams that can be found in few places in the capital literature. Robert Walker, an experienced consultant in capital case reviews, offers rich insights in his chapter titled "Developing Case Theories: Processes and Methods." Chapter 12, "Telling the Client's Story: Developing a Consistent Theme for Life Imprisonment without Possibility of Parole," written by

About the Reviewer

Ernie Lewis is the Executive Director of the National Association for Public Defense.

The opinions expressed in reviews are those of the reviewers and do not necessarily reflect the opinion of NACDL.

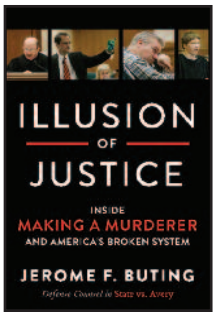
Steve Bright, is like hearing Steve give one of his iconic closings. These are just some of the rich insights contained in this remarkable book.

A couple of other thoughts are worth mentioning. Leaders of organizations in death penalty states know what a problem capital punishment is, consuming resources, creating conflicts, and burning out employees. No leader in such an organization should fail to learn the lessons contained in this book. Mitigation specialists are in many ways the heroes in the telling of the decline of capital punishment in the United States. While the *Supplemental Guidelines* are their bible, this book should become their friend. ■

Illusion of Justice

Inside *Making a Murderer* and America's Broken System

By Jerome F. Buting
Harper (2017)
Reviewed by Raymond Dall'Osto



Illusion of Justice is not simply a companion piece to the popular Netflix series on the continuing legal odyssey of Steven Avery and his nephew Brendan Dassey. It is a gripping firsthand account of what really unfolds when a criminal defense lawyer is brought into a high profile homicide case, and more so, what happens when the system and the science are like loaded dice against one's client. The roller coaster series of events in Avery's life — first conviction, then exoneration; then a new charge and the commencement of a forced march towards conviction, no matter what — is dealt with expertly by the author.

The first chapter explodes in real time as criminal defense counsel are trying to get their bearings and a handle on a brutal homicide case being purposely sensationalized by the prosecution and law enforcement in the media. This book is not derived from third-person accounts, but is told "from the trenches" as it really happened (and still is happening) by Jerome "Jerry" Buting, one of Avery's defense attorneys.

The author intertwines the often hard to believe, true story about what happened in Avery's case with his own story. Buting informs the reader how he became a criminal defense lawyer, how he came to represent Avery, and why he continues, like Clarence Darrow, to be an "attorney for the damned." Jerry started out as a public defender, which, for many of us, was our proving ground. His reminiscences on that time, his development into a seasoned defense attorney, and his description of what it feels like to fight, lose, and hurt make for a most compelling story. Disclaimer: I worked with Jerry when we were young public defenders. I saw him in action firsthand, and saw how he honed his trial skills and developed his approach to complex science issues.

The book's discussion of the validity and reliability of DNA and other forensic evidence — not only in the Avery case but also in other postconviction litigation such as the Ralph Armstrong case — provides a primer on DNA evidence and defending against such. For that alone, the book is worth the price.

Jerry also walks the reader through his investigation in the Avery case, pretrial and post-trial, which makes for very suspenseful reading. Spoiler alert: watch for his exploration of blood sample preservative EDTA, the source of samples and potential tampering and/or contamination. This may yet turn out to be the key to the jailhouse door for Steven Avery.

If you deal with DNA and other forensic evidence in your practice, you will know what I mean after you read *Illusion of Justice*. Buting's lessons and proposals at the conclusion of *Illusion of Justice* are all the more relevant given Attorney General Sessions' announcement in April 2017 that he would not renew the National Commission on Forensic Science and his decision to suspend review of past FBI testimony on several questionable forensic science techniques. "Accurate forensic science analysis be damned!" appears to be the Trump Justice Department's new motto. As Buting's book points out, particularly in the concluding chapters, this means that justice be damned too. In light of this, the task for criminal defense lawyers will certainly become considerably more difficult, and challenging junk science even more important. We must *resist* this perversion of science, law, and justice.

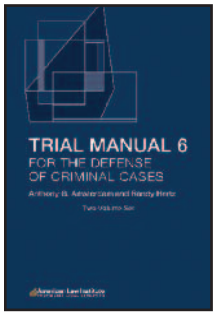
Jerry's career, his fight to free the innocent, and his efforts to protect the constitutional rights of his clients would be worthwhile reading on their own. But this is not a self-laudatory book or a collection of "war stories." It is an important exposition of what really happened in some of the trial and appeal cases in which Jerry Buting and others in the defense bar were involved. Advocates who have been practicing criminal defense for many years will appreciate Jerry Buting's concluding "forest and the trees" overview. For lawyers at an earlier stage in their careers, *Illusion of Justice* will not only open their eyes and educate them, but it will also inspire them to join the battle. ■

About the Reviewer

Raymond Dall'Osto is a partner at Gimbel, Reilly, Guerin and Brown LLP in Milwaukee, Wisconsin.

Trial Manual 6 for the Defense of Criminal Cases

By Anthony G. Amsterdam and Randy Hertz
American Law Institute CLE (2017)
Reviewed by Abbe Smith and David Rudovsky



We are both former public defenders who cut our teeth on earlier versions of this essential criminal defense treatise. For us and for new generations of criminal defense lawyers, there is a newly revised, two-volume *Trial Manual 6 for the Defense of Criminal Cases* by Anthony Amsterdam and his NYU colleague Randy Hertz. Tony Amsterdam has been an incredibly creative criminal defense lawyer and teacher for close to six decades and his teaching and counseling have guided many of us through the treacherous landscape of criminal defense. Randy Hertz has made his mark in exceptional clinical teaching and advocacy and as co-author of a highly touted treatise on federal habeas corpus practice (with James Liebman) and juvenile defense practice (with Amsterdam and Martin Guggenheim). Their skills and innovative thinking have produced a *Manual* that should be on every criminal lawyer's book shelf, serving as the first reference book for inexperienced lawyers and as an essential resource for the experienced practitioner.

The *Manual* is a thoughtfully conceived, well-organized, easy-to-read guidebook on the process of handling a criminal case, from arrest to appeal. Threading the needle of serving the novice and the experienced lawyer is always a challenge in the writing of professional manuals, as is finding the right balance in addressing federal and state rules of

procedure and practice in a justice system that involves thousands of police departments, prosecutor offices, courts, and jails and prisons. The *Manual* does this well in providing the basic guidance, insights into complex and sophisticated issues, and references to sources with more comprehensive discussions of particular issues.

The *Manual* proceeds chronologically. Volume One opens with a general sketch of criminal procedure and then moves to arrest (and/or clients "wanted" by the police), bail and arraignment, interviewing, case planning, investigation, preliminary hearing, diversion, guilty pleas, discovery, motions, and suppression hearings. Volume One also includes a helpful bail questionnaire and interview checklist. Volume Two deals with the immediate run-up to trial and the trial and post-trial process, including trial motions, trial preparation, retaining experts, election or waiver of jury trial, voir dire, opening statements, evidentiary issues at trial, handling prosecution witnesses, presenting the defense case, motions for acquittal, jury instructions, closing argument, sentencing, and post-sentencing motions and proceedings (probation and parole). The focus throughout is on the issues and factors a lawyer should consider in making key decisions.

Reflecting the heightened significance and complexity of plea negotiations, the *Manual* provides essential and up-to-date advice — both legal and strategic — on preparing for and conducting plea negotiations, counseling the client about plea versus trial, and preparing the client for entering a plea in court. As the U.S. Supreme Court has acknowledged, "criminal justice today is for the most part a system of pleas, not a system of trials." *Lafler v. Cooper*, 566 U.S. 156, 170 (2012).

The *Trial Manual* recognizes that the plea decision is the client's to make, but the authors forthrightly note that "counsel may — and, indeed, must — give the client the benefit of counsel's professional advice on this crucial decision, and often the only way for counsel to protect the client from disaster is by using a considerable amount of persuasion to convince the client that a plea which the client instinctively disfavors is, in fact, in his or her best interest." *Trial Manual*, at 266. Indeed, both of us have come close to crossing the uncertain line between persuasion and coercion in representing clients. The *Manual* also does an excellent job of parsing what goes into a cost-benefit analysis of plea versus trial, including the myriad collateral consequences of a conviction. *See id.* at 266-87.

A chapter devoted to representing clients who are mentally ill or intellectually disabled — a frequent issue in criminal defense, but one that few defense lawyers fully understand — does an excellent job of laying out the strategic judgments relating to mental health that must be made at every juncture of the proceedings, the advisability of consulting with an expert to assist with these judgments, how to deal with court-ordered mental health examinations, and the legal and strategic considerations in deciding whether to raise a claim of incompetency and in pursuing an insanity defense.

The chapters on preparing for and conducting trial are all excellent. We found some shortcomings in the material on voir dire, which is a bit conventional. To be sure, many jurisdictions severely limit voir dire, but there are examples of more progressive practices, including the "Colorado Method" of jury selection for effectively setting up a cause challenge. *See, e.g.*, Ann M. Roan, *Reclaiming Voir Dire*, THE CHAMPION, July 2013, at 22; Matthew Rubinstein, *Overview of the Colorado Method of Capital Voir Dire*, THE CHAMPION, November 2010, at 18.

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There are also thoughtful strategies for addressing a judge's improper rehabilitation of a biased juror during voir dire. *See, e.g.*, Patrick T. Barone & Michael B. Skinner, *Breaking the Spell of the Magic Question During Voir Dire*, The Champion, March 2015, at 22.

Importantly, the *Manual* maintains a client-centered approach throughout, while also acknowledging how complicated the lawyer-client relationship can be in criminal cases. As the authors write:

> [E]ven the most experienced, committed defense attorneys will admit to sometimes feeling baffled and frustrated by difficulties in dealing with particular clients. These include, for example, the client who seems hell-bent on doing something that is tactically dangerous; the client who is antagonistic to counsel for no apparent reason (or at least not one that is evident to counsel); and perhaps even a client whom counsel personally dislikes. In such situations, it is useful for attorneys to remind themselves that criminal defendants usually are under extreme stress, not only because of the criminal charges that hang over their heads but also because of a variety of difficult life circumstances that comprise the background for the charge. … Defense attorneys should approach this work with a humble recognition of the limits of their ability to understand the circumstances of their clients' lives and relationships, and should reconcile themselves to the sometimes painful reality that faithful adherence to the ethos of defense work requires providing the best possible defense even (and perhaps especially) to the most difficult clients.
>
> *Manual*, at 4-5.

This newest version of the *Manual* more than lives up to its original purpose: to serve as a reliable resource for criminal defense lawyers at the trial level. It covers the legal, factual, and tactical aspects of criminal defense work in an easy-to-access format for practitioners who need information and ideas fast. The latest forensic science and technology are included, as is a critique of this science and technology. New bodies of information generated by the internet, new methods of record-keeping, and new modes of presenting evidence at trial are also covered. Numerous U.S. Supreme Court and other court decisions regulating criminal procedure are analyzed from a defense perspective.

For both of us, and for thousands of other criminal defense lawyers, the *Manual* has provided a broad-based training in the essentials of criminal defense work, advice on a wide range of issues that inevitably require consideration in one case or another, and the starting point for legal research and motion and brief drafting. The new *Trial Manual 6 for the Defense of Criminal Cases* updates and improves upon this indispensable approach. We could not recommend it more highly. ■

About the Reviewers

Abbe Smith is a Professor of Law; Director, Criminal Defense & Prisoner Advocacy Clinic; and Co-Director, E. Barrett Prettyman Fellowship Program at Georgetown University Law Center.

David Rudovsky is a Partner at Kairys, Rudovsky, Messing, Feinberg & Lin, and is a Senior Fellow at University of Pennsylvania Law School.

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