

The People v. Juanita Thomas: A Battered Woman's Journey to Freedom

by Andrea D. Lyon,¹
Emily Hughes,² and
Juanita Thomas³

Introduction

This article is about Juanita Thomas's struggle within the criminal justice system, how it failed her, and how, eighteen years later, a clinical law professor, her students, and Ms. Thomas herself worked together to get her home. It is a story of collaboration, of perseverance (especially Juanita's), and of the importance of finding out the truth for *yourself*.

Because there would have been no freedom for Ms. Thomas without all of these elements

¹ Andrea D. Lyon is an Associate Clinical Professor of Law and Director of the Institute for Justice in Capital Cases at DePaul University College of Law. Professor Lyon Graduated from Rutgers University in 1973, and from the Antioch School of Law in 1976. She joined the Cook County Public Defenders' Office that year, where she worked in the felony trial division, post-conviction/habeas corpus unit, preliminary hearing/first municipal (misdemeanor) unit, and the appeals division. Her last position there was as Chief of the Homicide Task Force, a 22-lawyer unit representing persons accused of homicides. She has tried over 125 homicide cases, both while in the Public Defender's office and since. She has defended over thirty potential capital cases at the trial level and has taken eighteen through penalty phase; she has won all eighteen. In 1990 she founded the Illinois Capital Resource Center and served as its director until joining the University of Michigan Law School faculty as an Assistant Clinical Professor in 1995. A winner of the prestigious National Legal Aid and Defender Association's Reginald Heber Smith Award for best advocate for the poor in the country, she is a nationally recognized expert in the field of death penalty defense and a frequent continuing legal education teacher throughout the country. In 1998, she was awarded the "Justice for All" award at the National Conference on Wrongful Convictions and the Death Penalty.

² Emily Hughes is an Assistant Public Defender in Iowa City, Iowa. A 1997 graduate of the University of Michigan Law School, she clerked for United States District Judge Michael J. Melloy, then she was an Albert Sacks fellow for The Criminal Justice Institute at Harvard Law School before joining the state public defender's office in Iowa.

³ Juanita Thomas worked in the maintenance department of Michigan State University before her arrest. Since her release she has married and stays at home caring for her infant grandson.

— without the help and support of people who care about justice — it seemed that this article should be written collaboratively as well. The part of the article written by me (Andrea Lyon) will be written in plain print. My former student’s writing will look like this: Emily Hughes. Ms. Thomas’s writing will look like this: Juanita Thomas.

Part I will discuss what a legal clinic is and does. Part II will describe how we became involved in Juanita Thomas’s case. Part III outlines the basic strategy involved in designing, investigating, and writing a state post-conviction petition, while Part IV provides background and information about the events leading up to the night Juanita Thomas was charged with first-degree murder. In Parts V and VI, we describe how we worked collaboratively as a team, how we reviewed what happened at trial, and what the case revealed to us as we investigated it. Parts VII and VIII explain how we put the case together and the strategy that evolved, while Part IX describes the final results. It is our hope that this article and the story of Ms. Thomas’s struggle will help us all understand more about our system of justice, what it means to work as a team, and what we can accomplish, together.

I. The Role of Clinics in Legal Education

Learning by doing is a well-known concept, but debate abounds regarding the value of knowledge gained through practice and what kind of practice creates the most learned students. The study of law is an area where this debate continues in full force. Though the nature of the argument is primarily focused on how clinical programs should be structured and taught, some legal educators fail to understand the value and place of practical clinical education.

Good lawyers must have a thorough understanding of the legal theories shaping the laws they work to interpret. There is more than one way to teach that theory. Clinical programs offer students the opportunity to incorporate theory and practice. In addition, beyond allowing

students to learn by simply working on cases, clinics offer students the unique experience of both practicing law and evaluating the details of that work with their professors and instructors.

Clinics give law students the opportunity to have clients, meet with those clients, and create their own theories of the case in a way that is unique from the experience students have as summer associates and clerks. Supervising attorneys for summer associates and clerks simply cannot spend the same amount of time as clinical professors devote to develop law students' skills and understanding of the law. In a clinical setting a law student can discuss with classmates and instructors every detail of a case, and truly analyze, with the help of others, each tactical decision or act she makes on behalf of her client.

If students do not take a clinic in law school, they are thrust into their jobs as new lawyers with lots of ideas and with whatever skills they managed to hone through summer work. New lawyers who participated in clinical programs in law school have the benefit of additional training, which often makes them better able to jump into the role of both counselor and advocate.

Clinics give law students skills training they do not receive in their other courses in law school. Recently, the MacCrate Report outlined ten skills fundamental to lawyering, and four values central to practicing law.⁴ Those skills and values are:

SKILLS	VALUES
1. Problem solving	1. Providing competent representation
2. Legal analysis and reasoning	2. Promoting justice, fairness, and morality

⁴ See Task Force on Law Schools and the Profession: Narrowing the Gap, Amer. Bar Ass'n Sec. of Legal Educ. and Admissions to the Bar, Legal Education and Professional Development--An Educational Continuum 234-35, 238 (1992) (known as the "MacCrate Report" after Robert MacCrate, committee chair)

3. Legal research
 4. Factual Investigation
 5. Communication
 6. Counseling
 7. Negotiation
 8. Litigation and alternative dispute resolution
 9. Organization and management of legal work
 10. Recognizing and resolving legal work⁶
3. Striving to improve the profession
 4. Professional self-development⁵

The only one of these skills that is taught in most law classes is the second one on the list: legal analysis and reasoning. If a law student takes a course in professional responsibility then she may learn of most of the values listed in the MacCrate Report. The one value, however, that cannot be learned in the classroom alone is that of promoting justice, fairness, and morality, a value which is at the heart of many law students' decisions to become lawyers.

Students learn such skills and values from the numerous clinical law programs that are now a standard curriculum at most law schools. Students in clinics learn how to interact with clients, witnesses, opposing counsel, and judges; they learn that the actual clients are more important than they seem in casebooks. Clinical students also learn that the small paragraph or the rare page of "facts" at the beginning of a judicial opinion is the heart of a case. And they learn that the facts do not arrive magically in those paragraphs, but have been developed by

⁵ See id. at 140-41.

⁶ See id. at 138-40.

investigation, strategy, and advocacy.

Most of the cases taken on by clinical programs are on behalf of indigent clients. For many young lawyers their work with indigents clients in law school clinics will be their only exposure to cases involving clients with low incomes and cases where poverty underscores the legal issues. The cases handled in clinics often concern intersecting issues of poverty, race, and gender, even when those issues are not the basis of the litigation.

In clinical law programs students learn first hand about promoting justice, not in theory or in a lively discussion with colleagues, but in a courtroom or as part of a brief for someone real. Clinical students do not have “theoretical” clients, but people whom the students have often met, and more importantly, people who depend on them. When law students work in clinics they often have to explain to their clients how race, gender, and class are affecting their case, even though the case is about something seemingly remote from such issues, such as consumer fraud. Such discussion not only furthers the students’ understanding of the ways non-legal issues and facts impact a case, but it teaches them to be effective and dynamic counselors, as well as to strive for justice, fairness, and morality.

Among those who understand the necessity of law school clinics, there is much disagreement about how to structure these clinical programs. Such debate includes questions about how many students should work on a given case, case selection, and what areas of practice are best for learning. Certainly, the decision on how many students are assigned to work on a case will depend on the type of case involved.

The more difficult question regarding the structure of law school clinics is what kinds of cases the clinic should accept, such as whether students working in a general clinic designed to

address a variety of needs should accept a certain criminal or a civil case.⁷ In contrast to general clinics, many law school clinics are specialized to certain practice areas, giving students the ability to choose between civil litigation clinics, child advocacy clinics, criminal law clinics, and the like. Because law school clinics are usually specialized into specific practice areas, the question of “what kind of case to take” really means deciding whether a criminal clinic should take shoplifting cases or death penalty appeals, or both; or whether civil litigation clinics should accept landlord-tenant cases, or a complex consumer fraud litigation with third-party plaintiffs and defendants. These questions, in turn, become questions about the scope and size of the cases.

Many legal educators and clinic professors believe the best cases for students to learn from are small ones, with a limited scope that can be easily handled by one or two students. One rationale behind this opinion is that small cases with a limited scope give students the chance to handle every aspect of the case, from the intake interview, to hearings and negotiations with opposing counsel. Cases that are small in scope enable students to learn how each tactical decision and choice works in relation to the overall strategy they have designed for the case. Small cases also give a student or a pair of students the opportunity to feel responsible for a case and to a client. Unfortunately, the reality is that even small, self-contained cases usually cannot be handled in the artificial time restraints of a semester or academic year. This means that even small cases must often be transferred to another law student or pair of law students in the next

⁷ Some clinicians argue that criminal cases offer the best learning experiences. See Barnhizer, *The Clinical Method of Legal Instruction: Its Theory and Implementation*, 30 *J. LEGAL EDUC.* 67, 101-03 (1979). Others contend that clinical education does not have to be focused on litigation-oriented skills. *See, e.g.*, Meltsner & Schrag, *Report from a CLEPR Colony*, 76 *COLUM. L. REV.* 581, 587 (1976).

term.⁸ Law students who are assigned the case will find that they are working on a case where previous students have already developed the strategy and theory of the case.

This reality is, in part, similar to the situation of law students who are working on large complex litigation or an intensive criminal appeal as part of their clinic caseload. It is similar because when law students work together on more complex cases, they generally handle a small portion of the case that has been developed by other attorneys. Working on large cases also has unique learning opportunities for law students. Students will experience how to do a portion of a case or a specific set of tasks, and how those tasks fit into the larger plan for the case. Because many large cases involve several law students, law professors, and attorneys from outside agencies or firms, one of the most significant skills a law student can learn from working on such cases is how to work as part of a legal team. Additionally, large cases taken by law school clinics often involve interesting and important legal issues, which “better enable students to learn that lawyers can have a major impact on society. They may also enable students to observe the legal system in its most complex form, and learn how tenaciously litigation is fought when a lot is at stake.”⁹ In addition, a law school clinic may be able to take on a lawsuit in which there are unlikely to be financial rewards, but where the legal issue is of great import -- such as challenging the way in which child care benefits are being provided (or not provided) to the working poor.

While it is beyond the scope of this article to fully debate the merits of the small case and the large case, many law school clinics are structured such that the value of a student seeing a

⁸ See Naomi R. Cahn and Norman G. Schneider, *The Next Best Thing: Transferred Clients In a Legal Clinic*, 36 *Cath. U. L. Rev.* 367 (1987) (discussion on the issues involved in transferring cases in a clinical law program).

⁹ Philip G. Schrag, *Constructing a Clinic*, 3 *Clinical L. Rev.* 175,191-192 (1996)

case from beginning to end is unduly placed ahead of the value of learning how to work as a member of a legal team. Such prioritization ignores the individual plans students may have for their future legal profession and is, in fact, unnecessary. Students in law school clinics should ideally have the opportunity to work on both small and large cases. Helping students learn the law and learn to be effective lawyers can best be achieved in a clinical setting where the cases “selected for law students maximize the educational value of their clinical experience . . . indeed, cases should be chosen that demonstrate the positive role which the legal profession can play in society in order to instill in law students a responsible professional attitude at a time when they are particularly receptive to learning about the profession.”¹⁰ Law students learn this and a great deal of other skills and methods for creative problem solving by working on both small and large cases, and the nature of what they learn from these two types of cases can be very different. As such, it makes little sense for a clinical program to adhere to a methodology which limits students to working on either large or small cases based on the supposed increased educational value of working on one type of case as opposed to another. Legal educators can certainly agree that what is paramount to teaching law students to be good lawyers is doing just that: teaching them to be lawyers. Programs that maximize the opportunities for students to learn are certainly preferable to programs that limit these opportunities.

II. The Clinic Gets Involved

So how did we get involved in Juanita Thomas’s case? It began with a letter. A well written, fact laden, emotionally charged letter. The kind of letter that can only be written in the direst of circumstances. But it wasn’t from my soon-to-be client; it was from the man who had

¹⁰ Frank S. Bloch, *The Andragogical Basis of Clinical Legal Education*, 35 *Vand. L. Rev.* 321, 350-351(1982)

been her lawyer for nearly four years, also on a *pro bono*¹¹ basis, who had never gotten past reading the transcripts. He had agreed to take on this complex and aged case without the resources to do it properly. As a sole practitioner, it was impossible for him to devote the kind of time and attention a case like Juanita's needed and deserved. So he wrote to the clinic for help. He wanted out.

The letter made me want to know more, and of course, once I knew more I was hooked. Juanita Thomas, an African-American woman who had been consistently abused and stalked by an aggressive boyfriend, had been found kneeling in the grass outside her apartment, dressed only in her underwear, sobbing incoherently about how she "didn't mean to, but had to." How had it happened that this woman, so clearly battered, was convicted of first-degree murder? How could it possibly be right that she should spend the rest of her life in prison?¹² Wasn't the sixteen years she had already served enough?

III. What it Takes to Undo an Old Injustice

Once I decided to take on the case I assigned four advanced clinic students to work collaboratively as a legal team: Matthew Colon,¹³ Emily Hughes, Jennifer Lanoff,¹⁴ and Andrew

¹¹ Without any fee. Of course the clinic represented Ms. Thomas without any fee, but we were not in the position of a sole practitioner in doing so -- we didn't need to bring in and give service to paying clients to keep going.

¹² Under Michigan law, a person convicted of first-degree murder is sentenced to mandatory life without parole. There is no other sentence available, no matter what the circumstances might be. M.C.L.A. 750.316(1). See People v. Lobaito (1984) 351 N.W.2d 233, 133 Mich.App. 547 holding that the mandatory sentence of life imprisonment upon conviction of first-degree murder did not constitute cruel and unusual punishment.

¹³ Matthew Colon is a Staff Attorney for Trout Unlimited's Western Water Project in Bozeman, Montana.

¹⁴ Jennifer Lanoff is an Assistant Public Defender with the Public Defender Service in Washington, D.C.

Wise.¹⁵ In choosing this team I chose students who had worked together before on cases, who had competed together as a part of the Michigan Trial team, and who were (and remain) dedicated to the public interest.¹⁶

It was important that we work together to develop a new line of attack on the case. One thing I had learned from my years as director of the Illinois Capital Resource center¹⁷ was that in order to try to undo an injustice, you had to be willing to do two things. First, the strategy that the first lawyers tried didn't work. It had already lost at least twice, both at the trial level and on appeal. Clearly a new lawsuit with new facts and a fresh perspective was needed. Second, I learned to assume everything the prosecution said was true and to assume that *not one thing* they said was true at the same time. It is with this mind set that we all sat down to figure out how to reinvestigate Juanita's case, and to find the truth.

Andrea organized weekly meetings in her office at 10:00 a.m. every Tuesday. We first met to brainstorm ideas about the case and to divide responsibilities. Then, as the weeks progressed, the meetings shifted to strategy sessions where we discussed what we'd accomplished and what roadblocks we'd come against. For example, as we began to talk with jurors, we talked about how the

¹⁵ Andrew Wise is an Assistant Public Defender with the Public Defender Service in Washington, D.C.

¹⁶ Jennifer Lanoff graduated a year before the other three students, so she helped with the initial investigation, and the other students continued working on the case the following year.

¹⁷ I was the founder and director of the Illinois Capital Resource Center (ICRC) for five and a half years. ICRC was established by the Illinois Supreme Court to respond to the need for post-conviction and habeas corpus counsel for Illinois prisoners who had been sentenced to death, but whose legal procedures had not yet been exhausted. That agency lost its federal funding and was renamed the Capital Litigation Division of the State Appellate Defender's Office in 1995 and still exists today. This agency was and is responsible for the exoneration of many of Illinois' death row inmates which has been the object of much media coverage.

interviews went and developed new ways to frame certain questions with the next set of jurors.

Ms. Thomas was also part of these meetings, even though she couldn't attend in person. Andrea established a regular time and day for the meetings so they could become a routine part of Ms. Thomas's week, just as they were a routine part of our own. Ms. Thomas knew that at 10:00 a.m. every Tuesday we would be meeting in Andrea's office, and that she could always reach us or talk to us then. She would call Andrea's office collect, and we would put her on speaker phone so she could hear everything and share her own ideas. Often she said nothing the entire meeting, but I always knew she was listening and keeping careful, patient track of our progress.

Although courts repeatedly admonish counsel that post-conviction proceedings (called 6500 petitions in Michigan¹⁸) are not designed for a total re-litigation of the issues at trial, we had to, essentially, prepare as though that was what we were doing.¹⁹ We needed not only to be thoroughly familiar with the entire trial record (the transcript and the common law record), but to do a great deal of independent factual investigation outside the record as well. In a disturbingly large number of cases, the facts which were presented at trial have turned out later to be incomplete or false.²⁰ These false or incomplete facts may be the result of such factors as a prosecutor who concealed information, witnesses who disappeared at the time of trial or testified

¹⁸ Michigan Court Rule 6.500.

¹⁹ Much of this section of the article is adapted from my Illinois Post-Conviction Defense Manual which I wrote the second edition of in September 1993 of. The first edition I co-authored with Centra Walker in July of 1990.

²⁰ See, e.g., Strickler v. Greene, 527 U.S. 263 (1999), McMillan v. Monroe County, Alabama, 520 U.S. 781 (1997), Kyles V. Whitley 514 U.S. 419 (1995).

falsely at trial, or a defense attorney who did not conduct an adequate investigation into guilt or sentencing issues.

A state post-conviction petition is not a continuation of the trial and appellate process. It is a search for matters outside of the record that support a constitutional claim (often, ineffective assistance of counsel or violations of Brady v. Maryland²¹) and must be supported by affidavits sufficient to give a factual basis for ruling in your client's favor. Since there is no right to an evidentiary hearing on such a petition, only the right to *request* one, the petition may be dismissed without a hearing. Therefore, it must be factually complete enough to warrant relief either on direct appeal or in federal court on its pleadings and supporting documents.

Under the doctrine of exhaustion of state remedies, federal law requires that the state courts have an opportunity to review the facts and legal theories in support of each claim before the federal courts may look at them.²² The exhaustion rule requires that you complete any appeals process available to you in the state court.²³ Both the prisoner and the state are entitled to file a petition for writ of certiorari in the Supreme Court of the United States after the state supreme court grants or denies a state post-conviction petition (provided, of course, that the ruling implicates federal constitutional rights).

Since there was no guarantee that we would win Juanita's case in any state court, we had to think about the possibility of going to federal court should we lose. However, since the case was filed after the passage of the Anti-Terrorism and Effective Death Penalty Act of 1996,²⁴ our

²¹ In Brady v. Maryland, 373 U.S. 83 (1963) the United States Supreme Court held that the prosecution must turn over exculpatory evidence to the defense.

²² Ex Parte Royal, 117 U.S. 241 (1886); Vasquez v. Hillery, 106 S.Ct. 617 (1986); Picard v. Connor, 404 U.S. 270 (1971).

²³ 28 U.S.C. Sec. 2254

²⁴ 28 U.S.C. Sec 2254 (d)

chances of seeing federal court and surviving a technical procedural challenge would be small.²⁵

Even though that was true, we certainly needed to pay attention to exhaustion and other procedural rules should we lose and be forced to try to get into federal court.²⁶

We divided the record and began planning how to reinvestigate the facts of the case. What do I mean by that? I mean we investigate: 1) the facts of Juanita's life -- at least insofar as they impacted her case; 2) the facts of her defense attorney's pre-trial investigation and conduct of the trial; 3) the facts, both in and out of court, that surrounded her trial and appeal; 4) the facts of the actual homicide; and 5) the facts of the official investigation into the homicide.

An investigation into the facts — both in and out of the courtroom — that surrounded the trial and appeal will reveal the atmosphere in which the case was tried, as well as important specific actions or omissions that do not necessarily appear in the trial or appeal record. For

²⁵ See , e.g., Keeney v. Tamayo-Reyes, 504 U.S. ____, 118 L.Ed.2d 318,(1992) which used the fact that the although defendant had presented all of the federal claims to state courts, he hadn't presented each fact to them to support his claim, so he was procedurally barred -- forbidden -- from even having his claim heard on the merits.

²⁶ A petition for writ of habeas corpus must be filed with the federal district court that has jurisdiction over the case. The petition parallels the state post-conviction motion, although it usually includes federal constitutional issues raised on the initial direct appeal which did not have to be raised again in state post-conviction, and/or issues arising from the denial of rights in the state post-conviction process itself.

The federal district court's decision is reviewable by the United States Court of Appeals for the circuit once a "certificate of probable cause to appeal" is issued by the district court or the court of appeals. Briefs are filed in the federal court of appeals, and oral argument is regularly granted. The case is heard by a panel of three judges. In a higher proportion than other criminal cases, capital cases may be reheard by the full court (en banc) after a panel decision, although it is still a relatively infrequent occurrence. A loss before a panel of the circuit may therefore require a request for rehearing en banc (called a "suggestion for rehearing en banc"). If the en banc request is granted, new briefs may be filed.

Both the prisoner and the state are entitled to file a petition for writ of certiorari in the Supreme Court of the United States after a decision by the federal appeals court. That means that both sides can ask to be heard, but the odds are against it since very few requests to be heard are granted by the United States Supreme Court.

example, some unrecorded facts surrounding the trial may include the shackling of the defendant or appearance of the defendant in prison garb, excessive security in the courtroom, actions by the victim's family that would have prejudiced the jury, the absence of the defendant at crucial stages of the proceedings against him, a prevailing community sentiment of hostility or racism that was not revealed during the voir dire, or non-record evidence considered by the appeals court. In this case, we discovered that Juanita Thomas's case was tried three months after the same prosecutor lost the infamous "burning bed" case and swore he would not tolerate "open season on men."²⁷

More important, though, was the investigation into the homicide itself. How could this have happened — a first-degree murder *conviction* for a battered woman who was found, clad only in her underwear and the decedent's blood, kneeling down and moaning incoherently in a stranger's yard about how "he wouldn't let her go"? This was no first-degree murder,²⁸ and we needed to find out why it had turned out the way it had.

Generally speaking, an investigation into the facts of a homicide is designed to determine: a) whether your client was the person who killed the victim (not a question in this case); and b) if so, whether she did so with the requisite mental state to make the homicide a first-degree murder. Our efforts concentrated on the second question. Was she acting in self-defense such that she should have been acquitted? Was the homicide provoked and thus deserving of a reduction from

²⁷ NBC's television docudrama *The Burning Bed*, was based on the book by Faith McNulty, and portrayed the story of Francine Hughes, a battered wife who set fire to her husband as he lay sleeping. The story was also the subject of a cover story in a popular magazine. Diliberto, *A Violent Death, A Haunted Life*, PEOPLE, Oct. 8, 1984, at 100. Hughes was from Lansing, and unsuccessfully prosecuted by the same trial prosecutor who prosecuted Juanita Thomas. Unlike Juanita, Hughes was white.

²⁸ Defined in Michigan Compiles Laws Annotated (MCLA) 750.316, first-degree murder requires proof of premeditation.

first-degree to second-degree murder?²⁹ Should it have been reduced to manslaughter?³⁰

We also needed to mount an investigation into the facts of the official investigation of the homicide to reveal whether the investigators properly gathered sufficient evidence to convict Juanita Thomas of first-degree murder. We needed to evaluate: a) whether the physical evidence presented was properly analyzed by the experts; b) whether the prosecution in any way improperly influenced witnesses who testified against our client; c) whether any searches or arrests were conducted in violation of constitutional rights; or d) whether the prosecutor failed to reveal any information to which the defense was entitled. An investigation into the facts of the official investigation is difficult, but often surprisingly fruitful, as it turned out to be in Ms. Thomas's case.

An investigation at the post-conviction stage is, in some ways, not so different from an investigation before trial, with one crucial difference: we were not writing on a clean slate. For example, it took Matt Colon a half-dozen trips to Lansing and a lot of talking to — and schmoozing with — clerks, police officers, court officers, and prosecutors before he could find and retrieve the *court file* in the case. It was lost, apparently for years, but Matt found it. It was in the wrong building and not stored in any predictable way, but he found it. Finding the court file was very important because although we had copies of the trial transcript, we had no way of knowing what motions had been filed and ruled on. As it turned out, there was a very important

²⁹ MCLA 750.317 does not require proof of premeditation, just knowledge and intent to kill.

³⁰ MCLA 750.321 allows a reduction of the offense to manslaughter when there is serious provocation. Interestingly, Michigan does not recognize “imperfect self-defense” as a reason to reduce murder from either first to second degree or to manslaughter. However, in sentencing, the Michigan guideline do take into account “victimization by the decedent.” Offense Variable 3 (B). These guidelines were not in place, however, when Juanita Thomas was tried.

court order in the file ordering the prosecution to turn over the criminal history of the deceased.³¹

This was important because, as we later discovered, the decedent had an extensive criminal history that had been hidden from the defense, and that had almost been hidden from us.

Thus, while we were trying to discover what the true facts were, there was a trial record we needed to read and know intimately, as well as an analysis by a state appellate court of some of the issues raised during the trial. The state courts had already arrived at their understanding of what the facts were, and in what ways the facts failed to support Juanita's defense.

Equally important, during the course of our factual investigation we would be examining physical evidence that had already been analyzed in a certain way, and interviewing people who may have already been interviewed by trial counsel or the prosecution -- many of whom had testified at the trial. Finally, it would be important to keep in mind that by the time of our investigation, a jury had found Juanita Thomas guilty, that she had been sentenced to life without parole, and that this had happened nearly two decades ago. Most, if not all, of the people we went

³¹ On December 12, 1979, the defense filed a Motion to Produce. Following a hearing on that motion which convened on January 2, 1980, the Court ordered that the State produce a number of documents and other pieces of evidence, including but not limited to, the "Rap Sheet of the Lansing Police Department regarding Willie Hammond . . . and [m]edical reports, including lap reports, . . . in the possession of the Prosecuting Attorney." In addition, the Court ordered that "the people shall provide a list of names of witnesses interviewed but not endorsed on the information who might provide exculpatory information concerning the case to the defendant." The word "exculpatory" was hand-written onto the typed order by the judge and bore his initials. (This order was attached to our Motion for Relief from Judgement as Attachment E).

Despite this order, the State failed to produce Hammond's record, and Ms. Thomas's trial counsel was forced to repeat his request for discovery of the record during the course of the trial. (Vol. VIII, 432). Following this repeated request, the prosecutor again failed to provide any information regarding arrests or convictions of Hammond after 1975. (The trial transcript consisted of eleven volumes. Volume I covered jury selection conducted on May 29, 1980. Volumes II-XII covered the trial proceedings from June 2, 1980 through June 23, 1980. So when we refer to parts of the trial transcript it will be as follows: Vol. #, page # of that volume. This part of the record is in Vol. VIII, page 433.)

to interview would know that. Therefore, even though we were starting a fresh investigation from our own perspective, in the minds of the people we wanted to question, we would be re-raising issues they might prefer not to think about again.

IV. Juanita Thomas's Story

July 28, 1979, my live-in lover and I had been to a party. I worked at MSU³² for several years. That Friday, I picked up my check and did not work. My boyfriend and I had been living together for several years. I met him when I was 20 and he 15. He looked much older than 15. We dated for a long time and he moved in with me. He never abuse me until he moved in.

He changed once he moved in. He started to listen to my phone calls, didn't want me to have no friends or family to come to see us. I loved him deeply and was thinking he felt the same of me. When we go places I wasn't allowed to talk to men or dance with anyone except him. His mother wasn't happy with our relationship at first, because I was older and he refuse to go to school most of the time. Things were OK for a while.

As he got older he begin to change in bad ways. He was fighting his sisters, mother and others in his family. I was thinking he would not do it to me. When you love someone that's how one thinks, also feels. First time we got into it we went to a bar. He wasn't old enough to get in so I sent him home in a taxi. When I did get home he was hid outside under the staircase with a 2 X 4 piece of wood. He told me he felt I would bring someone home.

And we would have to answer to him. I said knowing you are home why would I

³² Michigan State University in Lansing, Michigan.

do such a thing. Next time he pull my phone out of the wall. I was talking on it. At no time did I ever fight back. See before he moved in with me he had killed his mother's lover with a butcher knife and he never got time for it. His family must have said the man jumped him first.

He got meaner as time passed. He'd always say he would not do it again and I was fool enough to believe his lies.

For days he would not do it but he would always go back on what he said he would not do. In 1964 I had a baby girl by him. At the time I didn't know he had one a few doors from where we lived so he cheated again and again. He would tell me it meant nothing to him. The baby did not stop his ways at all. His family loved the baby. He started to call me names. Talk bad of me. One don't know mental abuse is worse than a fight. It stays with you.

He started to drink more and more and wasn't working. I only wish today I had got away and stayed away.

I would throw him out and take him back, over and over again. He use the same line, It won't happen again.

Believe me it would always happen again. I moved from East Lansing to South Lansing. One day I went to see the DA to try to get him put in a nut house. It had got really worse. The DA OK for me to get a pistol for protection of him.

Once he came at me with a knife and I shot at him. The police was called by him and my gun was taken and never gave back to me.

That time he wanted me to say I was his landlord so he could get extra money from the state which I refused to do. Next time he cut up all the things I had in my

house. He left nothing. I was at work. I call the police. They say they never saw him do it. Nothing was done. I had to replace everything. He followed me to the Lansing mall asking for money. I refused to give him any. He throw a brick in my car window, broke the big glass.

I had to pay the insurance first hundred before it got fixed. No one seemed to help me or care what was going on with me. I went to work many times with black eyes. I had kids when I met him. He would tell me he was going to fuck my kids. They were afraid of him. He did beat and rob my son once when I was at work. I never felt one of us would have to kill the other. The police would give him a ride away from my house when I would call them or tell me and the kids to leave until he cool off, which would be days. I would go to work with the same clothes on. I would stay at my mother's house a few doors from me. He would come there at times for me.

My mother had a gun in the house and he known of it, so he would not kick her door in as he did kick my door in many times. I sometimes left work, go to a bar just to chill out. Someone would tell him. He would pull my wires from under my car hood. The police once more would say they did not see it. So the Thurs. before the nite in question he had left. On Friday late nite I went to Tommie's Bar on North Wash. Ave. I was with another woman. Right away I saw him and a woman sitting close in a booth. We had some things quick like I said I wanted to leave so we started to go. Just outside of the door he call my name, and said if I go with you will you forget what you just saw. I always did forgive him. So he left with me.

The lady I was with went walking. He wanted whiskey and some dope (weed) I went to the dope place and got some (weed) also the store for whiskey. Next we

stopped at his mother's house. He picked up a drunk man from there, a friend of his. Next we went to North Town. His aunt was having a party there. We danced. He said once he would hit me with a pop bottle if I dance with someone other than him again.

He was well known around town so most men would not ask me to dance. We left the party early a.m. hrs. He had told me to drink, also smoke weed, which I never had or would do before no matter where we went.

I wanted to go home. He said we would drop off his friend and go to a house on West Kalamazoo St. where people sit and drink all night. After that we went home. The kids was at my mother's house a few doors away. Once inside we ate, drank some more, smoked weed and decided to have regular sex. I think he was hooked on my oral sex.

He knew rule was I never would do oral sex on him when he been gone for a day or days. I always kept the butcher knife hid someplace where he could not find it, knowing he used one on his mother's lover in the past.

He went to the bathroom. I started to talk on the phone to his mother. We would talk to her anytime nite or day. He would have to do it or have me call her, it was a thing he would do. He came back in sit near me on the bed.

So I told his mom I would talk to her later and hung up the phone. He wanted oral sex which I said I would not do. He said you will do it. He hit me and was bringing his cock up near my mouth. I was laying on my back. He reached on the dresser which was near the bed. There was a letter opener on it. He got it and I reached under the bed, got the butcher knife out and just started to hit him again and again. All I wanted to do was get out of the house, not kill him. I got to the bedroom door. Somehow he was

still holding me I remember hitting him again. I ran down the stairs and out of the door. It was storming bad. I was thinking he was still after me. I ran someplace, knocked on some door then I fell only had on panties and bra. I was later told some man in court I never remember seeing before say he call the police and covered me with his coat. I could not remember who I was. I been told one of the police knew who I were. I remember in the hospital then in a cold dirty jail cell, all along feeling insane. I don't know too much next. A friend of mind from legal aid said he came to see me the minute he heard on the radio what happen to me. He did some legal work in the past for me. I went before some judge days later, got out on bond. My friend from MSU paid it for me.

I was in a daze for weeks. I could not believe my lover was dead. I went and looked at him in the casket. Still it was hard to believe. I never meant to kill him. I went back to work a month later. People was nice to me, did not ask questions which I was glad they did not do.

The police reports and testimony in the trial revealed anything but a premeditated first-degree murder. Witness after witness testified to seeing this woman, clad only in her underwear, covered with blood and running through the neighborhood, dropping to her knees in a stranger's yard and moaning about how he wouldn't stop. Testimony adduced from both prosecution and defense witnesses during the course of the trial established that Juanita Thomas and the decedent, Willie Hammond, had conducted a romantic relationship over a period of years prior to July of 1979.³³ The relationship had been marked by numerous and repeated instances of violence by Hammond against Ms. Thomas. For example, in the year preceding his death, Hammond had

³³ Vol. VII, 390; Vol. Vol. VIII, 580.

doused Ms. Thomas with alcohol and punched her repeatedly in the head.³⁴ Earlier that same year, Hammond had kicked Ms. Thomas outside of the Western Union office in Lansing because he wanted money from her.³⁵ In 1976, Hammond wrapped a bicycle chain around Ms. Thomas's neck and began to choke her in front of her co-workers at Michigan State University.³⁶

Late in the evening of July 28, 1979, members of the Lansing Police Department were called to Ms. Thomas's house, where they found the decedent, Willie Hammond. Officers also found Ms. Thomas in the grassy area in front of the house, dressed only in her underpants and bra, speaking incoherently.³⁷ According to her neighbors, Ms. Thomas had repeatedly stated that she "didn't mean to do it, but had to."³⁸ Throughout her interrogation that night, Ms. Thomas maintained that she acted in self-defense when she stabbed Hammond with a knife. Ms. Thomas consistently told the police that just before the stabbing, Hammond had forcibly pinned her beneath him as he reached for a weapon on the nearby dresser.

At trial, officers testified that Ms. Thomas made a number of statements directly following their arrival on the scene, including the following:

He made me do it; he came after me, I killed him, I know I killed him . . .
I had to do it, he wouldn't give me my clothes, he came after me. I had to stab him,
he is dead. I know he's dead, ya know, I had to do it.³⁹

Ms. Thomas repeated these self-defense statements in a taped interrogation by the police at the station house five hours later.⁴⁰

³⁴ Vol. VIII, 599.

³⁵ Vol. VIII, 588-89.

³⁶ Vol. VIII, 592-595.

³⁷ Vol. II, 313, 327, 360, 399, 429.

³⁸ Vol. II, 278.

³⁹ Vol. IV, 622-623.

⁴⁰ Vol. VI, 115.

The police found Hammond's body lying naked in the doorway to the bedroom. The condition of the room indicated that Ms. Thomas and the decedent had struggled extensively. Much of the furniture was up-ended, and clothes and other items were strewn about the room.⁴¹ The police discovered large amounts of blood on the bed, as well as in the immediate area around Hammond's body.⁴² Moreover, the first investigating officer noticed blood on a window screen which was located directly behind the bed where the stabbing occurred.⁴³ In fact, the police later claimed that their initial entry into the house was prompted by the sight, from the sidewalk below, of blood on the second-floor screen.⁴⁴ The testimony about the screen, and the truth of what the police did with that evidence, became a central part of our case to overturn Juanita Thomas's conviction: the blood-stained screen was highly corroborative of her statement to the police.

The prosecution's theory at trial was that Ms. Thomas had killed Mr. Hammond while he slept. Hammond's sisters, Kimberly Swinton and Phyllis Walker, both testified that Ms. Thomas and Hammond argued on the day of the offense, and that Ms. Thomas threatened to kill Hammond.⁴⁵ Martha Ann Walker and Mary Louise Walker, also sisters of Hammond, and Linda Faye Thompson, a family friend, testified that Ms. Thomas was in possession of a Michigan State University Bookstore bag that contained a knife later identified as the knife with which Hammond had been stabbed.⁴⁶

In its cross-examination of the prosecution witnesses, the defense attempted to elicit

⁴¹ Vol. V, 824.

⁴² Id.

⁴³ Vol. III, 389; Vol. V, 755-56.

⁴⁴ Vol. II, 141, 152.

⁴⁵ Vol. VI, 138, 185-90.

⁴⁶ Vol. VII, 298-300, 324-26, 358-59.

testimony regarding the violent character and prior acts of Hammond.⁴⁷ However, the Court precluded this line of questioning, holding that the defense had failed to establish foundation for such questions and that because defense counsel could not define when specific incidents had occurred, the questions were irrelevant.⁴⁸ These matters also took on great significance after our investigation revealed just how little defense counsel had done to investigate Ms. Thomas's case, and just how much the police and the prosecution had hidden from the defense.

VI. Working as a Team

A. Getting To Know Each Other

When I first met attorney Lyon some strange way I felt OK. One thing she did not make promises. She would say I will give my best to your case. And I felt she would. I had been lied to, made promises, they were never kept. But I prayed about this. And I felt it would be OK. I feel we have a good relationship and she have been and always will tell me the truth and I trust her.

We still keep close touch. And she never refused my calls in or out of prison. And I used to call her a lot when I was in prison. It made me feel better.

I met Juanita Thomas at the aptly named prison in which she lived, Coldwater. You get there by driving west from Ann Arbor on I-94 to I-69, and then south for awhile. And I do mean awhile. It's in the middle of no where. Cut off, desolate, and distinctly unfriendly. Normally I can get a guard to chat with me as I go through the process of being shaken down and searched before I being admitted for an attorney visit. But not there.

As I waited to meet Juanita Thomas, I realized that I knew very little about her. I knew

⁴⁷ Vol. VI, 27, 32, 206; Vol. VII, 404, 424.

⁴⁸ Vol. VI, 27, 33, 206; Vol. VII, 404-407.

she was African-American, over fifty years old, and that was about it. When we were introduced, I was surprised. She was about five-foot-six or seven, a little portly, medium complected and incredibly soft-spoken; in fact, I had to strain to hear her. She almost seemed afraid of me. I am six-foot tall without my shoes (and I admit a penchant for a modest heel), over 200 pounds, of a different race than she (I am white), with long hair and a loud voice. Sometimes I just forget I look that way, or that I might appear frightening.

So I ended up spending a fair amount of time with Juanita chatting about this and that, trying to put her at her ease. I wanted her to understand that I was serious about her case, serious about undoing this injustice, and that I needed her help. It would take time, I knew, for her to feel comfortable with me and to trust me. After all, the system had betrayed her at every turn. She had not received a fair trial, adequate representation, an honest prosecution, or the help she had been promised by others during the sixteen years she'd been at Coldwater prison. I told her that I would work hard, that my students and I would leave no stone unturned, and that we would do our very best. I know better than to promise results. Leaving aside the ethical constraints against doing so, it is just morally wrong to set up a client's expectations, to hurt them. If there is one thing I have learned from representing people in trouble it is that you must have the trust and aid of your client to accomplish *anything*. When I first met Ms. Thomas we sat at a table in the visiting room, sandwiched between vending machines and a window looking into the "yard." She was soft-spoken, measuring each word with the same reflectiveness that she measured us. A protective patience. I could not imagine serving a month in jail, let alone sixteen years of my life. I could not imagine having people promise to work on my case and then

disappearing, or pouring my hopes into yet another set of people who could disappear yet again.

But she said none of this. She was polite, quiet, and thankful. Andrea had written a letter of introduction to pave the way for our first visit, and we had spoken with Ms. Thomas during our weekly team-meetings from Andrea's office. From Juanita's tone of voice when she talked about Andrea I could tell that Andrea had already begun to gain her trust, but Ms. Thomas spoke so softly I had to strain to hear her voice.

Andy did criminal defense work for several years before coming to Michigan law school, so he slid easily into conversation with Ms. Thomas, reassuring her -- without ever saying it in so many words -- that we would work hard although we were only law students. We told her what we had done on her case and what we planned to do. At that point, we had read the file and had brainstormed the case as a team, so we were as up-to-speed as we could be, ready to investigate.

Although we talked about our investigative plan and discussed ideas with Ms. Thomas about avenues to explore, the real purpose of the first visit was to get to know each other, so we tried not to focus solely on the case. We talked about Juanita's family, about who kept in touch with her and when she had last heard from them. We talked about her work in maintenance at MSU before any of this had happened and how she'd done in prison. With the exception of one incident shortly after

she'd first arrived, she'd received no other "tickets" in the sixteen years she'd been incarcerated, and she was understandably proud of her immaculate track record.

We made lists of people who could be useful sometime down the road. The person for whom she worked at Michigan State who'd posted her bond pending trial; the people who helped with her case at various points during the appellate process; her family; and the guards at the prison who could testify to her good behavior, although we promised not talk with them without her permission because she was worried they would get in trouble if they spoke on her behalf, and it was important to limit their exposure until it became essential.

Then we asked her to tell us anything she remembered about the trial. Whether she remembered anything in particular about the jurors - if anyone was especially hostile or kind to her; if anyone seem visibly upset during the trial; what she remembered about the witnesses and the evidence; and what she remembered about her attorney.

Before we finished our first visit and left to drive back to Ann Arbor, one of the last memories she told us was about a car ride she had taken with her attorney shortly before trial. Her attorney had taken her for a medical evaluation and had somehow convinced the sheriff to let the attorney drive Ms. Thomas in his own car, rather than having the sheriff take her in the backseat of a police cruiser. On the way back to prison from the doctor's

office, Ms. Thomas told us how the attorney had pulled off the highway to the side of the road so they could both step out of the car, stand in the sunshine for a moment, and watch a group of horses graze in an adjoining field. Besides her trial and a few emergency hospital visits, it was the last time Ms. Thomas had ever stepped outside of prison.

The meeting with the students had me a little shaky. They were nice. And I felt you [Andrea] would not have sent them if you did not trust and think I would like them. I only can really remember Matt and Emily real good. After talking to them later I felt they cared about my case. For me now I still some time think of that hell hole but I won't do anything to get in trouble.

VI. The Case Unravels

A. What Happened at Trial

We have already discussed the evidence that was adduced at trial. But it is what didn't happen at trial because of the intersection of a poor defense, an unfair prosecution, and the bias against a battered woman (let alone a woman of color), that undid Juanita Thomas.

The state gave me an attorney I had to contact him first. At first he seem to know what to do. Once in court I could see he really did not know or could not hear too well.

I did not have money to do better. The women from the battered shelter was to aid me. I started to feel they only wanted to be in the news. Once I went to prison they soon forgot about me real quick. I don't think no one in the system cared what happen to me being (abused). It was black on black and we wasn't married. Also back then there wasn't much help for a battered woman as it is today.

I was abused by the beating I got from my lover. And mentally abused. The way he treated me.

I did not get a fair trial. It was in Mason. I had an all white jury. That's not a jury of my peers. I never had a chance.

At trial he some time tell the judge they had not paid him the money that was due him to do my case. He would act OK toward me. I really don't feel he knew what to do. So I got life without parole. My appeal was turned down.

B. Our Investigation

We began by dividing up tasks. Matt Colon had the responsibility of tracking down all court documents and using the Freedom of Information Act to locate police records, lab reports and the like. Andy Wise and Emily began looking for and interviewing jurors, as well as attempting to locate the physical evidence so we could actually see it. I contacted Susan Fair who had been involved through the battered women's clemency project and was a survivor herself. It was my understanding that she had some evidence to tell us about -- she and another woman (at that time a law student, but now an attorney named Linda Henderson) had gotten into the evidence locker some years previously.

Meeting Susan Fair was interesting and difficult. While she was (and is) an ardent supporter of domestic violence issues, she is also a chain-smoking bleached-blond intolerant zealot. When she came to meet with me, she gave me her notes and her ideas about how the case should be litigated. From her demeanor, you would have thought it was *her* case, not Juanita's. I am sure it felt that way to her, and given the many broken promises made to Ms. Thomas by other attorneys, I could understand Ms. Fair's suspicions. Nonetheless, I found her attitude towards me troubling. In the few months I had worked on the case, I had already done more than

anyone else had done in the sixteen years Juanita had been incarcerated. I knew what I was doing, and her hostility made it difficult to listen to her. Most of her notes on how to proceed with the case were not of much use, but what was of paramount importance was this: when Ms. Fair went to see the evidence, she discovered that the screen that had been above Juanita's bed had been ordered to be destroyed, by the lead detective, on the very day of jury selection. Ms. Fair had contemporaneous notes of seeing that order and therefore was able to sign an affidavit. By the time we went to look at the evidence ourselves, all paperwork relating to the screen had been lost, so this information was critically important.

Meanwhile, Emily was investigating the jury members. In the prosecutor's closing argument, the prosecutor had invited the jury to do their own investigation, which is legally improper. Ms. Thomas's ability to reach for the knife while Hammond pinned her to the bed was critical to the self-defense theory. At the time of closing argument, the prosecution had adduced no testimony regarding the position of Ms. Thomas in relation to the knife, nor had he adduced any evidence establishing the width of the bed, the distance from the bed to the ground, or the length of Ms. Thomas's arm. While the prosecution had introduced photographs of one corner of the bed, none of the pictures included a measurement ruler, which made it impossible to determine (and thereby improper to argue) exact heights, widths, and lengths.

Despite the lack of evidence regarding Ms. Thomas's ability to reach an object beneath the bed, the prosecuting attorney argued to the jury that Ms. Thomas's self-defense claim was physically impossible and then instructed the jurors to conduct their own investigation. The prosecutor specifically told the jury in closing argument:

Does the physical evidence support it? No. First of all, if she is laying flat on her back, try it, try it in there if you have an opportunity, just a bed, if you're on your back, flat on the back, and you're not on the edge, you can't reach under the bed to grab a knife; you

can't do it, it's impossible.⁴⁹

While a jury can use their common sense and everyday experience to deliberate, they are not allowed to conduct their own investigation of the facts,⁵⁰ nor is it proper to invite them to do so.⁵¹

I wanted to find out if they had done their own investigation, and if so, what the results had been. I was also curious about the jury's impressions of the whole trial. With these questions in mind, I sent Emily and the other students out to investigate the case.

Our juror interviews were half systematic process and half luck. The system came from trying to determine who the jurors were and where they lived, while the luck came in actually finding any jurors sixteen years after the trial had taken place.

We bought a local Lansing street map and highlighted where we thought each of the jurors lived, then we tried to catch people at home by stopping by their house and knocking on the door. Since it is easier to say "no" to someone over the phone than face-to-face, we chose not to call first. Also, we did not want to conduct interviews over the phone because we hoped face-

⁴⁹ Vol. XI, 1246.

⁵⁰ People v Simon, 189 Mich App 565, 567-68; 473 NW2d 785 (1991), see also People v Kamischke, 3 Mich App 236, 241-42; 142 NW2d 21 (1966) (The impartial jury guaranteed by the Constitution is a jury with an impartial frame of mind at the beginning of the trial and one that bases its verdict only on legal and competent evidence produced during the trial connecting the defendant with the commission of the crime charged).

⁵¹ Even when (as in this case) defense counsel fails to object to the invitation to use specialized knowledge to evaluate the evidence, it is a cardinal rule that a prosecutor may not argue facts not in evidence to the jury. People v Ellison, 133 Mich App 815, 820; 350 NW2d 812 (1984); People v Dane, 59 Mich 550, 552; 26 NW 781 (1886). Because of the manifest injustice that occurs when a factfinder considers extraneous evidence, the Michigan Supreme Court has held that the *possibility* that the factfinder considered such evidence constitutes reversible error. People v Ramsey, 385 Mich 221, 224-25; 181 NW2d 553 (1971).

to-face interviews would be more thoughtful and in-depth than phone interviews.⁵²

So we drove by people's homes during times of the day when our interviews would be least intrusive and when people might have time to talk: Saturday late morning and afternoon, Sunday afternoon, and some weekday evenings, but never after dark because people are more reluctant to open their homes to total strangers who arrive in the dark.

The not-so-subtle catch about the whole process was that it was difficult to find people at home. A good part of juror interviews involved making the hour drive from Ann Arbor to Lansing, then driving the "loop" of homes on our map, only to find nobody there. We would get something to eat or try to do other work in the area, but there is only so much to do when state buildings are closed. More often than not, we drove to Lansing, tried to find jurors, waited awhile and tried again, then drove home. I soon learned that investigation takes patience and perseverance.

When interviewing jurors, I modified the strategy Andrea had taught me to use when interviewing witnesses for pending criminal cases. Most importantly, I learned never to investigate alone in

⁵² Like voir dire, interviewing is a skill which does not come easily. It requires creating the space in which a real conversation can occur, listening without judging, asking without pushing. See for example, Amsterdam, Tony "Interviewing the Client: the Initial Interview" American Law Institute 1984. See also Bennett, Cathy E., Hirschhorn, Robert B., and Epstein, Heather "How to Conduct a meaningful and Effective Voir Dire in a Criminal Case". National Criminal Defense College Handbook, Mercer Law School, Macon Georgia (1995).

order to ensure that somebody else hears what the juror says, so that person can then "prove it up" if the juror later changes his testimony.

Also, bringing someone along is helpful should a juror later claim that I deceived him by not explaining who I represented or exactly who I was. It is critical to have a second person verify that I was neither deceitful in my introduction nor that I intimidated the juror into speaking to me. In addition, to try to alleviate any potential confusion, I always hand the juror my business card and announce who I am and who I represent as soon as the door opens.

Bringing a second person with me also helps to document as precisely as possible what was said during the interview. I do not take notes during the actual interview so that the juror will feel less intimidated and will speak more freely, and so I am able to listen better and ask good follow-up questions. (It is difficult to write, listen, and carry on a conversation at the same time). Afterwards, my prover and I drive a few blocks from the house, out of eyesight of the juror, before pulling off the road and writing down everything we can remember – separately, without talking to each other first. Only when we are both finished writing do we debrief about the interview. Without fail, a second person will always remember something that I did not remember, and sometimes the two of us will remember something differently.

This is basically the same way Andrea taught me to interview witnesses during a regular criminal investigation, but she also taught me that one aspect is very different. In a juror interview, she taught me to say as little as possible in order to create a space for the juror to speak and tell me what the juror thinks is important. This not only means that I ask very open-ended questions, but it means that I do not fill in silences that arise in the conversation. As unbearable as it can be to sit across from a complete stranger in her living room and let an awkward silence linger in the air, I learned to wait. Waiting until the juror breaks the silence encourages the juror to think more carefully about whether there is anything else she can possibly remember about the trial or their deliberations. Rather than a glossed conversation of the "highlights" of the trial, silence encourages the juror to remember any detail, no matter how big or how small, so that the juror has *something* to say to erase the silence. Sometimes it is the memory of those seemingly innocuous details, like the fact that two of the jurors car-pooled together to the courthouse every day, or that two of the jurors were related by marriage, which suggest ideas for further investigation that may lead to reversible appellate issues.

Another strategy is to ask open-ended questions that invite jurors to discuss their impressions of other jurors. While jurors are often reluctant to discuss their own thought processes, they may be more likely to discuss what other jurors

thought or said or the way other jurors acted during deliberations. This can provide insight about questions to ask other jurors during future interviews.

With this strategy in mind, in addition to the specific questions we had developed about whether jurors had done their own reach-under-the-bed investigation, we combed the Lansing neighborhoods tracking down jurors. In the end, every juror we found agreed to talk with us, but nobody admitted having tried the reach-under-the-bed investigation, although we strongly suspected from their reactions to the question that some of them had -- or one of them had and told the other the "results" of the experiment. What came through most pervasively from the interviews was the injustice of the final result. Sixteen years later, jurors still remembered the bloody photos and the way that Ms. Thomas had been described sobbing and kneeling in the grass in her underwear, covered in blood. They hadn't realized that Juanita would have to be sentenced to life without parole. Some jurors seemed sorry to find out that in all likelihood Juanita would die in prison.

In addition to juror interviews, one of our top priorities was finding the physical evidence that had been introduced at trial. The box of Juanita Thomas's trial evidence was in storage beneath the courthouse, in a room tucked inside the parking garage. Matt and I followed the guard down the backsteps, through the parking garage and into a storage room filled with

cardboard boxes. Juanita's box was about four feet by four feet in size, with the word "Thomas" scrawled in black magic marker across the outside. The guard pulled it down from the top shelf and set it before us on the cement floor. It wasn't sealed, so there was no need to open it for us.

When I looked inside the box all I saw were grocery bags and plastic baggies, so my first thought was that the evidence was gone. Then, as I opened the crumpled grocery bag on top of the box and began to look inside it, the guard jumped and asked whether we had remembered to bring our plastic gloves. We hadn't even thought of it. He shrugged and said we could do what we wanted, but that he couldn't promise everything would be sealed properly.

Just as the guard was talking about bloody evidence and how they didn't think to seal bio-hazardous material "back then," Matt pulled a brown-stained sheet from the bottom of the box. It wasn't labeled and it wasn't in a bag, but it was clearly the bloody sheet from the bed. Also floating around the bottom of the box was the underwear Ms. Thomas had been wearing and the knife she had used. I pulled out my notebook and began recording everything we found in the box, amazed at the haphazard condition in which it was stored.

The guard stood over us while we examined the evidence, so we didn't talk about anything we pulled out. We simply looked at it, recorded it, and moved to the next item. During the drive

home we reviewed our list and realized that just as Susan Fair had told us, there was no screen stored anywhere in evidence, and there was no index card to indicate what had happened to it.

VII. Putting Together our Case

One of the great challenges and joys of clinical teaching is working out the theory of the case with students. Figuring out which issues to raise, how to raise them, and how to avoid procedural default⁵³ were challenges. A key part of developing our theory was trying to figure out what to do with the information we had. Although we suspected an evidentiary hearing would reveal actual misconduct by the jury members, we had no proof we could put in the record to support that claim, so we decided to raise the issue of the prosecutorial misconduct committed in inviting the jury to do their own investigation. Obviously, we would also raise the issues of destruction and hiding of evidence and of her attorney's incompetence, but would that be enough?

Developing our theory didn't happen overnight. It evolved over weeks of meetings and weeks of driving back and forth to Lansing, talking with each other and brainstorming different ideas in the car. Even though the theory evolved over a period of time, one particular meeting stands out as the pivotal moment when our investigation and theory came together.

⁵³ Procedural default is a concept which keeps courts from looking at the merits of a claim on collateral review if the claim was not raised and preserved in the trial court. See McClesky v. Zant, 113 L.Ed. 2d 517 (1991); Keeney v. Tamayo-Reyes, 118 L.Ed.2d 318 (1992); Brecht v. Abramson 123 L.Ed.2d 353 (1993); James S. Liebman, Federal Habeas Corpus Practice and Procedure (1991 update).

It took weeks to find the photos that had been admitted into evidence at trial, so when we finally located them and had copies made, we were all anxious to see them. When I walked into the meeting that week, Matt had just passed the stack of photos to Andy, and Andy looked through them one by one, passing each photo to me after he'd seen it. Andrea had already looked through them and was clearly excited to talk with us about something.

The photos were bloody and fairly graphic, although now that I'm a public defender, I realize that in the scheme of things, they could have been worse. The photos I remember most vividly showed the decedent's naked body, stretched across the floor. They showed close-ups of his wounds, the bloody bed and sheets, and a stream of blood trailing down the steps and the wall leading down the steps.

After we'd all seen the photos, Andrea asked us if anything seemed odd about what was or wasn't in the photos. Nothing seemed particularly strange to any of us, so she then explained how an evidence technician is taught to take photos of a crime scene. She told us the photographer takes photos in a circle, starting with one particular point – like the bloody bed – and moving methodically in a panoramic sweep until the entire scene, inch by inch, has been captured. If the technician properly followed such a method, she explained, the photos should have captured every inch of the room.

We looked at the photos again, trying to visualize the scene

in order to decide what was missing. Then we realized what was unmistakably absent: there were no photos of the window beside the bed. And there were no photos to the left of the bed -- where the letter opener that Juanita had said Hammond was reaching for would have been. We remembered the testimony we'd read in the record, where the police claimed that one of the reasons they had entered the house was because they could see blood on the window screen of a second-floor window.⁵⁴ And we remembered that the first investigating officer testified he had noticed blood on a window screen which was located directly behind the bed.⁵⁵

We then compared this to the information Susan Fair told us about viewing the evidence shortly after the trial and discovering that the screen that had been above Juanita's bed had been ordered to be destroyed, by the lead detective, the same day that the jury selection began. Clearly something was askew.

Next, we reviewed the prosecution's theory of the case. The State argued that Ms. Thomas had stabbed Willie Hammond in his sleep, while he layed on his back in bed and she leaned over him. If Hammond had really been stabbed in this position, it seemed inconsistent that blood splattered upwards with such force as to bloody a window screen located beside the bed. At the least, the screen should have been tested to see if the blood splatter was

⁵⁴ Vol. II, 141, 152.

⁵⁵ Vol. III, 389; Vol. V. 755-56.

consistent with the prosecution's theory of the case and a photo should have been taken of the screen. The fact that both were missing raised the question of foul play.

Juanita Thomas had said she reached for the knife because Hammond was reaching for the letter opener on the dresser. The fact that these two pieces of evidence which would have been photographed in the ordinary course of police practice were missing was highly significant. If they had *contradicted* Juanita's statement, they would have been there, they would have been used. It is precisely because they did the opposite -- they showed she was telling the truth -- that these two places weren't photographed. They managed to get a photo of a plate with food residue on it and a hot sauce bottle at the foot of the bed, but could not manage to photograph the area where the weapon Juanita was afraid of was, not the bloody screen? We couldn't prove these photos were taken out of the evidence folder -- the negatives were in strips and could have been easily cut -- but the absence of these particular photos spoke volumes.

We then returned to our theory of the case and put the missing evidence together with a consistent factual account of how Hammond had been killed: Ms. Thomas was laying on her back and had just refused to have oral sex with a very drunk and drugged Hammond. Hammond became enraged and reached for a weapon on the dresser beside the bed. As he did this, Ms. Thomas reached under the bed and grabbed a knife she had hidden there. She stabbed upwards at Hammond, flailing to free herself from his grasp. He kept pinning her down and she kept trying to get free, and with each cut, blood splattered from Hammond's upright body onto the bed, sheets -- and screen -- beside the bed. The fight eventually moved from the bed

to the floor, and when Ms. Thomas finally did free herself, she ran screaming down the stairs and into the grass outside.

The reason the screen had been destroyed the same day jury selection was scheduled to begin was because it was the one piece of physical evidence that revealed that Hammond was not, in fact, sleeping when Ms. Thomas first stabbed him. Had the screen or the photo of the screen, the letter opener on the dresser or the photo of it (which the technician undoubtedly took, but which was also "lost") been properly preserved, the trial attorney would have had physical evidence to show that Ms. Thomas was telling the truth.

This revelation came about half-way through our investigation of the case, and as we continued investigating, talking to jurors, and re-reading the record, we developed the theory with as much specific evidence and citations to the record as possible. When it came time to write the brief and supporting petition, we boiled it down into three main concepts: prosecutorial misconduct in inviting the jury to conduct their own investigation to see whether it was physically possible for Ms. Thomas to reach under the bed while laying on her back and reach for a knife; destruction of exculpatory evidence that would have proven that Juanita's account was in fact true; and ineffective assistance of both trial and appellate counsel for not realizing that the defense had been sabotaged.

A. What the Prosecution and the Police Hid From The Jury

The prosecution not only failed to produce, but then later **destroyed**, exculpatory physical evidence which directly contradicted the prosecution's theory and supported Ms. Thomas's claims

of self-defense. First, they specifically failed to disclose the existence of the bloody screen located directly behind the bed on which the struggle occurred. There can be no question that the screen fell under the legal definition of exculpatory evidence: the location of the screen in relation to the bed and the fact that there was blood on it contradicted the prosecution's theory that the decedent was underneath Ms. Thomas.⁵⁶ The bloody screen was never produced to the defense, and was destroyed at the order of the lead detective on the day that jury selection commenced in the case.⁵⁷ The prosecution then exacerbated their malfeasance by arguing to the jury that the lack of physical evidence supporting Ms. Thomas's self-defense claims "proved" that she was lying about the events of July 28, 1979.⁵⁸ The suppression and destruction of this piece of evidence denied Ms. Thomas the protections guaranteed by the due process clause. The United States Supreme Court has held that the due process rights of an accused are violated where the government, acting in bad faith, fails to preserve potentially exculpatory evidence.⁵⁹

Second, we discovered that the prosecution failed to disclose a litany of prior violent acts committed by the decedent despite numerous requests and a **direct Court order**. By using the

⁵⁶ See Brady v. Maryland, 373 US at 87.

⁵⁷ Attachments C and D to the Motion for Relief From Judgment.

⁵⁸ Vol. XI, 1241, 1252, 1255. The prosecutor repeatedly scoffed at Ms. Thomas's claims of self-defense, and flatly stated that the jury should conclude that Ms. Thomas was lying because the physical evidence did not support her claim:

“I suggest to you that if you believe the Defendant -- then you have not looked at the physical evidence in this case because the physical evidence in this case, I suggest to you, proves beyond a reasonable doubt that her story is not improbable, it's impossible.” (Vol. XI, 1241.) “Her story is not consistent with the physical evidence in this case. There is no blood on the top of the bed...” (Vol. XI, 1252.) “She claims self-defense, according to Mr. Kingsley [defense counsel], according to her, and it's not supported by the physical evidence. And her claim, I suggest to you, is not improbable, it's impossible.” (Vol. XI, 1255.)

⁵⁹ Arizona v Youngblood, 488 US 51, 109 SCt 333 (1988).

Freedom of Information Act (FOIA) we were able to discover that Hammond had not only an extensive record, but an extensive violent record -- with 13 prior criminal offenses. Finding them took some doing. The intrepid Matt Colon must have traveled to state police headquarters in Lansing four or five times to speak with the records officer in person. Finally, the officer admitted that it was a lot of work to look up those old records -- they were all in the basement somewhere and many had been misfiled. Matt offered to help; he went into the basement and found Hammond's records, all of which were filed two or three numbers away from where they should have been. Whether this misfiling was an accident or not, no one can say, but he found them. Two arrests had no accompanying data, but the rest were for violence, and many for sexual violence. The prosecutor had failed to produce Hammond's "rap sheet" to the defense, and if this court order had been obeyed, defense counsel would have known that Hammond had been arrested on numerous occasions between 1976 and 1980 for child molestation, rape, assault with a gun, and assault with a deadly weapon in connection with a drive-by shooting.⁶⁰

Timely and proper production of such evidence would have allowed Ms. Thomas to investigate, prepare, and define any one of three defense theories that were supported by the suppressed evidence: self-defense against the threat of imminent death, self-defense against the threat of imminent great bodily harm, and defense against the forcible felony of rape. And there is a distinct advantage to this last defense because a person has the right to resist a forcible felony with deadly force, and she does not have to be "reasonable" about it.⁶¹

⁶⁰ Attachment F to the Motion for Relief from Judgement.

⁶¹ Ms. Thomas's testimony established that Hammond was trying to force her to engage in oral sodomy against her will, which qualifies as a "sexual penetration." MCL 750.520a(1); MSA 28.788(1)(1). A trial judge's refusal to give an instruction that a defendant may use deadly force to repel an imminent forcible penetration is reversible error. People v Barker, 437 Mich 161; 468 NW2d 492 (1991).

Knowledge of this evidence would have also altered the cross-examination of a number of the prosecution's witnesses with regards to bias and veracity -- particularly Hammond's mother who testified during cross-examination that her son had not been violent in the past five years.⁶² The criminal record of Hammond, coupled with the bloody screen at the head of the bed which Detective Weigman ordered destroyed on the day that jury selection began, would have provided exactly the type of proof necessary to have allowed the jury to accept Ms. Thomas's testimony and police statements.

The prejudice that Ms. Thomas suffered as a result of the prosecution's actions was then compounded by the prosecutorial misconduct committed in closing argument. In response to Ms. Thomas's defense, the prosecuting attorney argued to the jury that because Ms. Thomas had not presented physical evidence to support her claim, the jury should infer that she was lying. The exploitation of the screen's destruction exacerbated the prejudice to Ms. Thomas. The argument also took advantage of the prosecution's failure to turn over Hammond's record by stating that Juanita Thomas's actions in defending herself from Hammond were clearly more reasonable in light of his extensive criminal and violent background.

B. The Failure of Defense Counsel at Trial

Of course, it didn't help that the trial lawyer appointed for Juanita did no investigative work, couldn't recognize good defenses, failed to object to important matters, and "forgot" to call corroborative witnesses. An accused person has the right to effective assistance of counsel.

⁶² When defense counsel attempted to elicit testimony regarding Hammond's violent nature and past acts, his mother stated that she and her son had some "misunderstandings," but that they were "fine." (Vol. VII, 404.) When defense counsel attempted to inquire further regarding specific acts of violence, the trial judge disallowed the questions as irrelevant. (Vol. VII, 406). Later, defense counsel asked Hammond's mother whether she knew if her son had "abuse[d] anybody" in the "last five years," and she answered that "[h]e didn't." (Vol. VII, 424).

Although this right is more often observed in its breach, it was of particular significance in Juanita's case. We needed to show that the trial lawyer's performance fell below professional norms and that Juanita Thomas was prejudiced by this failure.⁶³ It wasn't difficult to do that.

For example, the trial lawyer never went to see the physical evidence for himself before trial.⁶⁴ If he had, he may have recognized the significance of the screen with the blood on it and asked the trial judge for a protective order. In addition, while the prosecution had a duty to disclose Hammond's record, defense counsel could have done what we did and gone to find it himself. The trial attorney should have asked for an order to allow him into the scene of the offense before it was no longer protected, then taken his own photographs, measured distances, and seen the screen *in situ*, where its significance would have been obvious. The list of what competent counsel should have done is a long one, but what Juanita's attorney did to prepare this case was woefully inadequate.⁶⁵

We scheduled a meeting to talk with the trial attorney in his office in Lansing. An elderly man with white hair and a kind demeanor, he seemed genuinely concerned about how the appeal was developing and listened intently as we talked. He was not evasive in his answers, but it was difficult to discern whether the sixteen years that had passed had strained his mastery of details, or

⁶³ The Sixth Amendment guarantees the right to counsel. U.S. Const. Amend. VI. The Supreme Court has subsequently held that the "right to counsel is the right to effective assistance of counsel." Strickland v Washington, 466 US 668,686 (1984)

⁶⁴ In our petition we asked the court to consider the prosecution's failure to produce and preserve this exculpatory physical evidence violated Ms. Thomas's right to due process pursuant to the Fifth Amendment and Brady v Maryland, *supra*, and in the alternative as an indication of his ineffectiveness since he failed to discover the screen.

⁶⁵ Not only was Juanita Thomas's trial lawyer ineffective, the lawyer who represented her on direct appeal (where you are limited to what is inside the record) was ineffective as well. The Strickland standard also applies to claims of ineffective assistance of appellate counsel, *see* Smith v Murray, 477 US 527, 533-537 (1986), so appellate counsel's ineffectiveness was also part of our appeal.

whether he never knew the details in the first place.

What most surprised me was how obviously he cared for Ms. Thomas as a person and had tried to do his best, but how his best had failed her by falling far short of effective assistance of counsel. After Ms. Thomas was sentenced to life without parole her trial attorney wrote to her and they corresponded for years. This was not a man who had tried to sabotage his client's defense, but it was clearly a man whose pride had prevented him from realizing he was over his head, until it was far too late.

VIII. Going to Court

We filed the motion and the brief in January of 1997. The case was assigned to Judge Glazer in Lansing. Usually 6500 motions are dismissed on the original filing, but the judge can require the prosecution to answer. Judge Glazer did require them to do so and the case was assigned to Assistant Prosecutor Sam Smith.

Communication did not start out on the right foot between prosecutor Smith and I. He didn't answer the petition for months, and when we complained, he wrote a vituperative, angry motion to dismiss in which he referred, with contempt, to my high "P" number. In Michigan each attorney licensed is assigned a practice number, commonly called a "P" number, and we must sign out pleadings with that number. Because my number was high it looked as if I had only been practicing a couple of years. Which was true -- in Michigan. By 1997, however, I had already been an attorney for more than twenty years.

I later realized that the prosecutor's reaction was mostly to how the petition looked. Unfortunately, post-conviction practice in Michigan (and in most states) is a neglected arena, and lawyers who do it tend to think of it as "another appeal." So the prosecutor was unprepared for the

exhibits we filed,⁶⁶ the investigation we had done, and all of the *work* involved in opposing us. His pleadings seemed resentful and angry at being the recipient of a “school project.”

I was concerned at the angry tone of the pleadings, so I called a friend for advice. Her name is Jeannice Dagher-Margosian. We got to know each other when I moved from Chicago to Ann Arbor and her former roommate, who had worked in the public defender’s office with me, put us in touch. Jeannice is a long-time Michigan criminal defense attorney who specializes in appellate and post-conviction work. I knew she knew everybody and could give me the low-down.

Jeannice expressed surprise that Smith had been so angry and told me that he was a reasonable prosecutor who might actually care that an injustice had been done. I asked her to sign on in an *of counsel* capacity to help me deal with my opposition, which she was kind enough to do. It made all the difference.

I met Smith and Judge Glazer for the first time on July 31, 1997, when I drove to Lansing to argue against the prosecution’s motion to dismiss our petition. They told us that the main reason for moving to dismiss was that Ms. Thomas had failed to raise these issues in her direct appeal, and thus had waived her right to do so. I explained that she *couldn’t* have raised the issues in her direct appeal because they were *de hors* (outside) the record and could not have been properly before the appellate court.

As an advocate, it is important to be certain that you use the appropriate terms before a judge,

⁶⁶ Actually, the exhibits to this petition were only one volume -- many of my other post-conviction petitions have included several volumes. The exhibits included: Attachment A: Michigan Court of Appeals order affirming conviction of Juanita Thomas, Attachment B: Trial Court denial of pro se Motion to Remand, Attachment C: Affidavit of Susan Fair, Attachment D: Affidavit of Linda Henderson, Attachment E: Court order regarding discovery and production of exculpatory evidence, Attachment F: Affidavit of Matthew Colon Regarding Criminal History of Hammond, Attachment G: Portions of closing arguments.

but you must also be certain that the judge understands what you are saying. The phrase “*de hors*” is Latin, and I was worried that this judge might not know what it meant, particularly since there was (and is) a dearth of law emanating from 6500 petitions. So I defined the term during my argument, only to be interrupted by Judge Glazer telling me that he knew perfectly well what *de hors* meant. I momentarily panicked when I thought my explanation had appeared patronizing to him, but when I looked up from my outline I saw he was smiling. He had enjoyed letting the “law professor” (and his staff) know that he understood, but he wasn’t angry at me for explaining.

The argument went well. The judge took the case under advisement and said he would decide at some later time whether to dismiss our petition. In the meantime, Jeannice had introduced me to the slight and dapper Sam Smith and we had begun talking about the merits of the case. As we walked out of the courtroom I explained to Linda (one of Juanita’s daughters) and other members of her family what had just occurred. Linda asked me if it would be okay to speak to the prosecutor. I told her of course it would be, but warned her to be polite. She took me by the elbow, walked over to Smith, and introduced herself. Softly, with tears welling in her eyes, she said, “Please, mister, don’t let my mother die in prison.” I saw Sam Smith react with sympathy to her, and thus began a negotiation with him, and then his boss. Over the next year I met with both Smith and the head of the Ingham County Prosecutor’s office, and we exchanged a lot of mail.

What we eventually worked out was that the prosecution would agree to Judge Glazer granting our petition and a new trial in return for a plea to second-degree murder and a sentence of thirty to fifty years, with credit for all of the time she had already served. Under the statutes in effect at the time of her sentencing, this result meant that Juanita would be eligible for parole almost immediately.

So in October of 1998, that is what we did. In addition to myself and Jeannice, all of

Juanita's family was there and Susan Fair was there. By then Matt, Andy, Jen, and Emily had all graduated, but they were there in spirit and later by telephone. Her family and supporters stood for her, testifying by their presence, and then they gave letters to Judge Glazer. The judge was clearly moved by our presentation and said that not only was he in accord with our agreement, but that he felt that Ms. Thomas was a victim of domestic violence and that her case was strong. The words were very affirming for her, and for all of us.

When I graduated from law school the case was still pending. I followed its progress through emails and phone calls, my heart very much involved in the case, even though I no longer had an active role. Andrea kept me posted as the focus shifted from actively litigating the appeal to getting to know the prosecutor and negotiating a solution that would allow Ms. Thomas to be released.

I remember the day vividly. I was clerking for a federal judge, in the middle of assembling jury instructions for a conspiracy trial, when my phone rang. I heard Andrea's voice on the other end, and without any preface, she said, "You'll never guess who I just talked to. Juanita called to tell me she just wanted to tell me she's having the best day: she's standing in her daughter's kitchen, baking a pie."

IX. Conclusion

I went through mental hell in prison 18 ½ years. No one never know what it's like. I should of got some time but not life. But thanks to my faith in God and attorney Lyon I made it out.

I am still adjusting to the outside world. Everything seem fast and still strange to me.

I am getting to know my kids. I still keep my 17 month old grandson a lot. I married in prison. I some time think it was a mistake. He is older and set in *his* ways.

He got beat up in the summer so he is in debt deeply. I don't work. I had a mild heart attack in May 1999, plus fell partly down stairs. My left leg go dead on me. I am to see the doctor the 24th 5 p.m. Mentally I am coming along OK.

Carl, my husband, work part time to make ends meet. His hospital doctor bills takes it all. He maxed out his insurance when he was in the hospital for that beating. He would not press charges. So I was mad at first. I have calm down. Nothing is bad as prison. I go for short walks and I take one day at a time. I know it's going to be OK.

I can never thank attorney Lyon enough for what she done for me.

Also a special thanks to the students that helped on my case. I was able to leave prison Oct. 17, 1998, on a Saturday.

Sweetest day.