

The Role of the Forensic Psychologist in the Mitigation Phase of the Death Penalty

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Overview

- **Part I**: Development of Supreme Court case law in this area
- **Part II**: Structure of constitutionally-acceptable statutes, focusing on the roles of aggravators and mitigators.
- **Part III**: Role of forensic expert in presenting mitigation evidence
- **Part IV**: Special Issues

I. Supreme Court Case Law

Furman v. Georgia (1972)

- Defendants argue that the 8th and 14th Amendment ban “cruel and unusual punishment”
- Following *Furman*, approximately 35 states initiate process of passing new death penalty statutes
- However, it has opposite effect of revitalizing death penalty in the United States

I. Supreme Court Case Law

Five S.Ct. rulings then reinstate death penalty, establishing limits on states' statutory death penalty schemes, and thus set in motion an "historic" change in death penalty jurisprudence. These are often characterized as the "July 2" decisions. They are:

- *Gregg v. Georgia* (1976)
- *Woodson v. North Carolina*, (1976)
- *Roberts v. Louisiana*, (1976)
- *Jurek v. Texas*, (1976)
- *Proffitt v. Florida* (1976)

I. Supreme Court Case Law

The July 2 decisions attempted to establish a foundation for a fair and uniform application of this punishment

- Court rules death penalty is constitutional only when the sentencing authority is provided adequate individualized information, and is guided by clear and objective standards
- 3 of the rulings uphold death penalty statutes devised by the respective states
- These statutes share several factors that, in the Court's eyes, make the death penalty more fairly imposed, essentially creating a system of guided discretion

I. Supreme Court Case Law

Two Subsequent rulings focus on questions of mitigation, that judge and jury must consider

- *Lockett v. Ohio* (1978)
- *Eddings v. Oklahoma* (1982)

***Additionally, Penry v. Lynaugh* (1989) holds that defendant's mitigating evidence of mental retardation and childhood abuse had relevance to his moral culpability beyond the scope of the special issues.**

II. Current Structures

In 38 states with DP statutes, and military and federal jurisdictions, special circumstances or aggravating factors may be established by trier of fact (judge or jury) to determine if the defendant may be sentenced to death.

II. Current Structures

For example, in Pennsylvania, aggravators include:

- murder of a prosecution witness
- murder in the perpetration of a felony
- knowingly creating a grave risk of death to another person in addition to the victim of the offense
- use of torture
- a prior murder conviction
- a murder for hire.

II. Current Structures

In the same statutory scheme, mitigators include:

- age
- lack of significant criminal history
- acting under “extreme duress”
- The defendant was under the influence of extreme mental or emotional disturbance **
- capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired **

II. Current Structures

Critically, in *Ring v. Arizona* (2002) Court Rules:

- juries, not judges, make the decision as to whether or not an individual may be sentenced to death.
- Ring underscores the importance of a penalty phase trial as opposed to a sentencing hearing.
- A death sentence imposed by a judge violates the Constitutional right to a trial by jury according to *Ring*.

III. Role of the Forensic Psychologist

Factors To Consider

- A. ABA Guidelines
- B. The Meaning Of Mitigation
- C. Gathering Information For Mitigation
- D. Mitigation Report Writing
- E. Testimony Preparation For Penalty Phase

III(A): ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases

- A. Provided basis for the 2003 Supreme Court decision in *Wiggins v. Smith*, which established the requirement for a thorough and comprehensive mitigation review.
- B. Court rules all reasonably available mitigating evidence and evidence to rebut any aggravating evidence by prosecutor.
- C. *The Guidelines* Recommend need for at least one member of the defense team to be qualified by training and experience to screen individuals for presence of mental or psychological disorders or impairments.

III(A): ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases

Specifically, the Guidelines State:

Creating a competent and reliable mental health evaluation consistent with prevailing standards of practices is a time consuming and expensive process. Counsel must compile extensive historical data, as well as obtaining a thorough physical and neurological examination. Diagnostic studies, neuropsychological testing, appropriate brain scans, blood tests or genetic studies, and consultation with additional mental health specialists may also be necessary. (Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, American Bar Association, p. 959, 2003)

III(A): ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases

The Guidelines Also State:

Clinical and information-gathering skills and training that most lawyers simply do not have. They have the time and ability to elicit sensitive, embarrassing and often humiliating evidence that the defendant may have never disclosed. They have the clinical skills to recognize such things as congenital, mental or neurological conditions, to understand how these conditions may have affected the defendant's development and behavior, and to identify the most appropriate experts to examine the defendant or testify on his behalf. (Guidelines, p. 959, 2003)

III(B): The Meaning Of “Mitigation

- **“Mitigating circumstances do not constitute a justification or excuse of the offense in question, but in fairness and mercy may be considered as extenuating or reducing the degree of moral culpability.”** (Black’s Law Dictionary, 1979, p. 903, quoting, Glueck, 1924, p. 955)
- The jury, in considering mitigating evidence, must determine whether the facts alleged in mitigation are supported by the evidence. A jury is obligated to find and weigh all valid mitigating evidence available in the record at the conclusion of the penalty phase. Evidence is mitigating if, in fairness or in the totality of the defendant’s life or character, it may be considered as extenuating or reducing the degree of moral culpability for the crime committed.

III(B): The Meaning Of “Mitigation

Lemon (2010): 11 Commonalities Among States

- (1) No significant history of prior criminal activity;
- (2) The capital offense was committed while the defendant was under the influence of extreme mental or emotional disturbance and the defendant’s ability to conform his conduct to the requirements of the law was substantially impaired;
- (3) Victim was a participant in the defendant’s conduct or consented to it;
- (4) Defendant was an accomplice in the capital offense committed by another person and his participation was minor;
- (5) Defendant acted under extreme duress or under the substantial domination of another person;
- (6) Defendant is a person with borderline mental retardation (who does not meet the *Atkins v. Virginia* criteria for barring execution;

III(B): The Meaning Of “Mitigation

Lemon (2010): Continued

- (7) The age and mental maturity of the defendant at the time of the crime (Roper v. Simmons, 2005);
- (8) Whether offense was committed under circumstances that defendant reasonably believed to be a moral justification for his conduct;
- (9) Defendant’s cooperation with law enforcement officers or agencies and with the office of the prosecuting district attorney;
- (10) Defendant’s background includes a history of being the victim of extreme emotional or physical abuse;
- (11) Other non-statutory mitigating circumstances in the defendant’s character, history or potential (*Lockett v. Ohio*, 1978; *Skipper v. South Carolina*, 1994).

III(B): The Meaning Of “Mitigation

Atkins, Podboy, Larson & Schenker (2006)

6 Guidelines For Conducting Mitigation Evaluations

- (1) Clinical evaluation including interview, psychological testing & review of academic, occupational, mental health and placement records.
- (2) Exploration of social & cultural factors that that affect defendant's development and may contribute to his involvement in the offense.
- (3) Exploration of the defendant's past and current prison experience.
- (4) Exploration of factors related to offense, including defendant's intention at the time of the crime, moral justification and role in the offense.
- (5) Exploration of the defendant's character including a lack of criminal history, cooperation with authorities, remorse and rehabilitation.
- (6) Exploration of victim related variables including provocation and/or the extent that victim was a participant in the offense. Victim's family's wishes should also be addressed if they support a life sentence.

III(C): Gathering Information For Mitigation

Atkins, Podboy, Larson & Schenker (2006)

3 Critical Areas

- (1) **Biological Factors**: genetic, malnutrition, teratogens, chronic stress), perinatal (premature births, low birth weight, delivery complications), postnatal (chronic nutritional deficiencies, head trauma and loss of consciousness, serious accidents) and mental health (psychological, psychiatric, neurological, behavioral and substance abuse)
- (2) **Familial factors**: family history of mental illness and substance abuse, criminality on the part of parents, parental substance abuse, breaks in caregiving during formative years, child abuse, marital separation and conflict, parental absence, rejection or neglect, attachment issues and maternal depression
- (3) **Environmental factors**: (see below)

III(C): Gathering Information For Mitigation

Atkins, Podboy, Larson & Schenker (2006)

3 Critical Areas

(3) Environmental factors:(continued)

- a. Home: inadequate or lack of proper adult modeling, parental dependence on illicit substances for coping, parental modeling of violence to resolve conflict, economic difficulties, exposure to toxins, over involvement in entertainment violence, low socioeconomic status, interaction with child services and homelessness.
- b. School: adjustment difficulties, separation anxiety, being bullied and teased, low IQ and learning disabilities, special education placement, peer rejection, childhood aggression and behavioral problems.
- c. Community: racial differences, gang association, high level of crime, accessibility of drugs, violence, poverty and homelessness.

III(C): Gathering Information For Mitigation

2 Sub-Issues

- (1) One sub-issue that must be confronted in many cases is the need to explore the link between criminal behavior and neurological impairment. This link between criminal behavior and neuropsychological impairment is a crucial aspect in criminal defense.
- (2) The second sub-issue is from *Roper v. Simmons* (2005), in which differences between mentally retarded adults and juvenile delinquents was recognized by the Court..

III(D): Mitigation Report Writing

- Author needs to present clear and precise opinions and conclusions. The report is often prepared in advance of the trial as it can be utilized by the defense team in the negotiation of reduced charges or the withdrawal of the death penalty (Goldstein & Bursztajn, 2011).
- Prior to report writing, the forensic mental health professional should consult with the attorney regarding the overall sentencing strategy as well as to how their preliminary findings and conclusions may impact that strategy.
- During penalty phase, the prosecutor will likely use the defendant's mental health history, specifically in regard to future dangerousness, in rebuttal to the defense's mitigation presentation. The report should include information that will preemptively take any such vulnerabilities into consideration while, at the same time, serve to lessen the impact of the prosecutor's presentation of aggravating factors on the jury.

III(E): Testimony Preparation For Penalty Phase

- Testimony regarding mitigation will be heard by the jury within the context of a mind-set that may have already concluded that the defendant must die. Foglia and Schenker (2001) discuss the issue of juries' (particularly death-qualified juries') tendency toward premature decision making. In reference to the power of first impressions, the authors observed:

Bifurcating the trial, presenting evidence of mitigation during the sentencing phase, and jury instructions aimed at guiding discretion are of little use if jurors have already decided what the penalty should be. Interviews with capital jurors throughout the country show that jurors have often decided what the penalty should be by the end of the guilt phase, before they have heard the evidence they are supposed to consider or receive instructions on how they are supposed to make the decision whether the defendant should live or die. (p. 30).

IV: Special Issues

In most cases, the most critical issue in whether a defendant lives or dies is the quality of counsel (See *State v. Morton*, 1998). As suggested by one veteran death penalty litigator, “the death penalty will too often be punishment not for committing the worst crime, but for being assigned the worst lawyer.” (Bright, 1990, p. 695).

IV. Special Issues

3 Suggestions

- (1) The attorney should develop a meaningful relationship with a client who is the target of public and media animosity, and whose unpopularity may taint the quality of that relationship; thus, he or she must find a way to “humanize” her client.
- (2) He/she should investigate for mitigating evidence, obtain expert defense witnesses, investigate to rebut aggravating evidence, and attempt to negotiate a plea bargain where appropriate.
- (3) If a guilty verdict is rendered, he or she should be prepared to make informed strategic decisions about the penalty phase.