



Spring 4-1-1992

MITIGATION: AN OUTLINE OF LAW, METHOD AND STRATEGY

Peter T. Hansen

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/wlucdj>



Part of the [Criminal Procedure Commons](#), [Fourteenth Amendment Commons](#), and the [Law Enforcement and Corrections Commons](#)

Recommended Citation

Peter T. Hansen, *MITIGATION: AN OUTLINE OF LAW, METHOD AND STRATEGY*, 4 Cap. Def. Dig. 29 (1992).

Available at: <https://scholarlycommons.law.wlu.edu/wlucdj/vol4/iss2/10>

This Article is brought to you for free and open access by the Law School Journals at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Capital Defense Journal by an authorized editor of Washington and Lee University School of Law Scholarly Commons. For more information, please contact christensena@wlu.edu.

MITIGATION: AN OUTLINE OF LAW, METHOD AND STRATEGY

BY: PETER T. HANSEN

Introduction

After the conclusion of the guilt phase of a bifurcated capital trial, and the defendant has been found guilty of an offense qualifying him to be sentenced to death, the second crucial portion of the trial commences: the penalty phase. It is during the penalty phase that defense counsel must present evidence sufficient in the mind of the jury to spare the defendant. At this stage of the trial, the defendant's situation is serious. Counsel must maximize remaining evidence and take the "last chance" to save the defendant's life. The preparation for this "last chance", however, should begin early.

Three distinct areas must be thoroughly prepared for the penalty phase to succeed. They are: learning and becoming familiar with the law of mitigation; collecting information and developing a theory of mitigation; and assembling the evidence in a way that explains, but not excuses, what the defendant did.

Although no "foolproof" methods of presenting mitigation exist, this article seeks to present some concepts that have been utilized effectively to achieve non-capital dispositions of death penalty cases. Though not directly addressed here, it is worthwhile to mention that many of the techniques discussed in this article are equally, if not more profitable in plea negotiations.

The Law of Mitigation

Federal Requirements

A discussion of the law of the penalty phase of a capital trial from the defendant's viewpoint may begin with a definition of mitigation. Broadly defined, mitigation is anything that makes it less likely for the jury to sentence the defendant to death. The polestar mitigation case is *Lockett v. Ohio*¹, in which the Court enunciated the well known rule "the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."² The Court also stated that the sentencer must be able to give effect to the mitigating evidence that is presented:

[A] statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.³

The *Lockett* directive was expanded in *Eddings v. Oklahoma*.⁴ *Eddings* dealt with the case of a sixteen year-old male who was sentenced to death for the murder of a police officer. *Eddings* forbids limitations which prohibit the sentencer from considering and giving weight to mitigating evidence through the operation of statutes and evidentiary rules. The Court stated: "Just as the state may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating factor."⁵ The Court added specifically: "We note that the Oklahoma death penalty statute permits the defendant to present evidence 'as to any mitigating circumstances.' *Lockett* requires the sentencer to listen."⁶ The Supreme Court stated categorically that the defendant's troubled background, including his psychological impairments, parental divorce, the possibility that his mother was a prostitute, mental limitations, history of parental abuse, and possibility of treatment were

all relevant.⁷ *Eddings* is both precedent and guide to what information is "relevant" to the mitigation case.⁸

Additional cases from the federal system provide other directions to counsel on mitigation issues. *Skipper v. South Carolina*⁹ holds that favorable adjustment to incarceration can be considered as a mitigating factor. *Hitchcock v. Dugger*¹⁰ mentions the size and occupation of the petitioner's family, the death of defendant's father, and the fact that he had been a good uncle. *McKoy v. North Carolina*¹¹ highlighted old age as a mitigating factor, as well as several decades of untreated emotional defect, and that this was aggravated by poor health. *Penry v. Lynaugh*¹² holds that evidence of mental retardation and child abuse is mitigating. The *Penry* Court added that sentencers must be able to give effect to any mitigating evidence regardless of the existence of aggravating factors.¹³

Recent decisions have added some new considerations to mitigation evidence. A basic change in the landscape of penalty trials occurred with the 1991 case *Payne v. Tennessee*.¹⁴ The Supreme Court overruled two previous cases which held that statements regarding the impact of the crime on the victim's survivors are irrelevant to the culpability of the defendant. The Court in *Payne* stated that victim impact evidence levels the playing field by offsetting the unlimited ability the defendant has to present evidence in mitigation. Defense counsel henceforth must prepare for the introduction of such evidence and be prepared either to rebut what is offered or deflect its impact by additional evidence.

At present, the law of the Commonwealth is more restrictive than the federal system. *Payne*, while allowing states to consider victim impact statements, does not require consideration, and the states are free to admit or not admit them as their courts and legislatures decide. Virginia Code § 19.2-264.4(C) is clear that the only relevant factors supporting a sentence of death are vileness of the crime and likelihood of future dangerousness of the defendant. These factors relate only to the culpability of the defendant, and are expressly directed to his conduct in committing the offense. Additionally, *Dingus v. Commonwealth*¹⁵ holds that feelings of sympathy for the victims of crime are irrelevant in determining guilt or innocence. Because the purpose of the capital sentence is in itself a finding of extra culpability and communal outrage at the crime,¹⁶ *Dingus* is applicable to the penalty phase of a capital trial. The Supreme Court of Virginia has recently indicated a possible willingness to abandon this rule. In *George v. Commonwealth*,¹⁷ the court cited *Payne v. Tennessee*,¹⁸ which sustained the admission of a victim impact statement:

[A] state may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant.¹⁹

Despite the favorable citation, however, the *George* court did not specifically adopt *Payne* in Virginia, and whether the traditional rule will be altered remains for future cases to decide. Also of note is Justice Scalia's concurring opinion in *Walton v. Arizona*.²⁰ Justice Scalia announced there his intention to follow no longer the rule set forth in *Lockett* and *Woodson v. North Carolina*.²¹ He reasoned that the constitutional requirement to untrammel the sentencer's freedom to consider mitigation evidence in the aforementioned cases is irreconcilable with *Furman v. Georgia*'s²² requirement that the sentencer's ability to vote death be narrowed by guiding the sentencer's discretion.

Mitigation law in Virginia

The law of mitigation in Virginia derives from statute.²³ Consideration of mitigating factors cannot be limited to those listed in the statute,

however.²⁴ The enumerated mitigating factors are simply those that have been expressly recognized for consideration by the legislature. Virginia Code § 19.2-264.4(B) states:

Evidence which may be admissible . . . may include the circumstance surrounding the offense, the history and background of the defendant, and any other facts in mitigation of the offense.

Although the statute mentions mitigating factors separately, the defense is permitted the same latitude as provided in *Lockett*. The Fourth Circuit Court of Appeals construed Virginia Code § 19.2-264 in *Briley v. Bass*:

A list of five non-exclusive mitigating circumstances appears in the statute, but the defense is permitted to introduce any evidence relevant to the penalty decision, including "the circumstances surrounding the offense, the history and background of the defendant, and any other facts in mitigation of the offense."²⁵

The statute then continues to enumerate six specific examples of what is considered as mitigating: no significant prior criminal history; felony committed while defendant was under extreme mental or emotional disturbance; the victim participated in the defendant's conduct or consented to the conduct in some way; at the time of the felony the defendant's capacity to appreciate the criminal nature of his conduct or his ability to conform to the requirements of the law was significantly impaired; the age of the defendant; and mental retardation of the defendant.²⁶

Several of these statutory mitigating factors deserve further comment. The factor which looks at extreme emotional disturbance seems to be related to the crime of passion defense, which could negate premeditation and reduce a homicide to second degree murder. If the defendant committed the offense in fear or anger brought on by some type of trauma, this could be invoked as a defense. This factor was unsuccessfully urged in the case of *Savino v. Commonwealth*,²⁷ in which the defendant killed his homosexual lover in "what can only be described as a crime of passion comparable to a domestic killing arising out of an extremely intense personal relationship between [the victim and defendant]".²⁸

The statutory mitigating factor which addresses extreme emotional disturbance might also be demonstrated with evidence similar to that which would be proffered when making a defense of heat of passion upon sudden and adequate provocation to reduce murder to manslaughter. The difference would be, however, that sudden and adequate provocation would not be required. The provocation prong, while not included in the extreme emotional disturbance factor, is implicated in the factor that inquires into the victim's consent or involvement in the crime. Evidence that demonstrates that the victim provoked or enraged the defendant or put him in such jeopardy to the extent that the defendant thought it necessary to kill would probably be relevant to proving the existence of this factor. Perhaps this mitigating factor will become important to capital cases under the new "drug transaction" statute.

The final two statutory mitigating factors, concerning mental illness and mental retardation respectively, are areas of mitigation law that are worthy of study in their own right and are extremely complex. A common error that is made in this area is confusing the two, when in fact they are quite different. Essentially, mental illness in Virginia is most often seen in assertions of the insanity defense under the common law M'Naghten standard.²⁹ Establishment of the mitigating factor again requires the use of the insanity defense. Ability to appreciate the criminality must only be "impaired," not completely eliminated. Impairment of ability to conform conduct to law is added, and the requirement that the source of the impairment be a recognized mental disease or defect is eliminated. Care should be taken, however, when the source of the impairment is not a recognized mental illness. Drug use that cause substantial impairment, for

example, will probably be construed as **aggravating**.

Two kinds of diminished capacity exist in Virginia. The first, discussed above, is based on M'Naghten, and is a re-casting of the traditional common law defense of insanity. The second is based upon an "irresistible impulse" defense. The irresistible impulse defense would frequently be urged by a defendant who was under the influence of drugs or alcohol (or both) at the time of the commission of the felony. In Virginia, at least in the arena of capital defense, this defense has not met with great success in terms of mitigation. The current status of a diminished capacity mitigation can be gleaned from several cases from the previous decade. In *Fitzgerald v. Commonwealth*,³⁰ the defendant committed capital murder while under the influence of alcohol, tranxene, and LSD. The defendant was also an alcoholic, and introduced expert psychiatric testimony at trial that the combination of these drugs with the defendant's personality disorders and alcoholism could produce explosive violence. The court found the defendant capable of intent, and the sentencer apparently gave no effect to the evidence, for it sentenced Fitzgerald to death.

The second case which demonstrates the unwillingness of Virginia to accept diminished capacity as a mitigating factor is *Giarratano v. Commonwealth*.³¹ There, the defendant was under the influence of cocaine, large amounts of the drug Dilaudid, was alcoholic and was, at a minimum, seriously mentally disturbed. The court stated:

[The defendant] contends that the court below confused the statutory standards of § 19.2-264.4, *supra*, relating to mental disturbance and impaired capacity, with the legal test for insanity at the time of the offense. He points out that facts in mitigation of punishment need not rise to the level required to prove defendant insane and argues that the trial court did not assign "proper weight to the evidence of defendant's mental state at the time of the commission of the offenses." Defendant concludes that the reasonable and just sentence, if the conviction is affirmed, is more properly life in the penitentiary rather than death. We do not agree.³²

The final comment on diminished capacity receptiveness that defense counsel is likely to encounter in the array is shown in the following colloquy reported in *Levasseur v. Commonwealth*:

[Counsel for defense]: I would assume . . . you are opposed to drugs, the use of illegal drugs. Do you have any bias or prejudice that would make you unable to consider the usage by the defendant, of illegal drugs, as part of his defense? . . .

[Venirewoman]: I think so.

The Court: You would be able to consider it or -

[Venirewoman]: I would be against the use of drugs. . . .

The Court: The fact that he might have used . . . illegal drugs, could you consider that as part of his defense?

[Venirewoman]: No.

[Defense Counsel]: Your Honor, I have a motion.

The Court: Motion is denied.³³

Tangent to mental illness is mental retardation. Mental retardation has been defined as

significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.³⁴

If the capital defendant is mentally retarded, this should be a central theme in the mitigation case. It is compelling as mitigation because retardation is not the fault of the defendant, it is permanent, it cannot be falsified, and because it impairs the ability of the defendant to recognize options when

under stress.³⁵ As *Penry* indicates, however, mental retardation can be a two-edged sword because it can indicate future dangerousness by demonstrating that the defendant is unable to learn from the past. Mitigation evidence should accordingly be presented in a way that maximizes information showing the potential for improvement within the penal institution.

The Virginia courts have in fact occasionally excluded certain evidence from being considered as mitigation, in spite of *Lockett*. The court in *Coppola v. Commonwealth*³⁶ precluded the defendant from entering evidence of the humiliating effect of his incarceration on his children. The same court approved admission of evidence of a good previous record. The *Coppola* court also precluded evidence that his co-defendant was sentenced to life imprisonment for the same capital murder. The court stated:

[O]ur Court is required to consider and determine whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, but no such responsibility upon the jury in the trial court. The jury, in the sentencing phase of the trial, is required to consider evidence in mitigation of the offense relevant to the defendant's past record and the nature of his conduct in committing the crime. Evidence as to the result of another defendant's trial for the same crime is irrelevant to the determination by the jury of the appropriate punishment for the defendant whose sentence is being weighed.³⁷

Evidence regarding defendant's concern over his ability to adjust to Lorton penitentiary has been held inadmissible on relevancy grounds in *Mackall v. Commonwealth*.³⁸ The defendant in this case had expressed his concern that he would be influenced by the wrong crowd in the prison. The same court also stated that in order for hearsay statements concerning the defendant's hallucinations by his psychologist to come in, she would have had to use the statements as a basis for her opinion as to the overall diagnosis of the defendant. Attorneys will find it worthwhile to advise psychiatrists to be clear in stating that all statements made by the defendant to them are considered and relied upon in arriving at a diagnosis on which a subsequent opinion is expressed at trial. In this manner the requirements of evidentiary procedure may be satisfied, and the mitigation evidence made a part of the record. The court also refused to consider the reaction of the defendant's former parole officer when he heard about the defendant's arrest for murder. The court noted that no proffer of what the evidence would have been was made. The prompting of the court should henceforth be heeded, and regardless of the ruling, counsel should proffer what the evidence will show for the record.

Jury consideration of mitigation law in Virginia is also hampered by statutory verdict forms. The forms are set out in Va. Code § 19.2-264 (D)(1) - (2). Nowhere are the statutory mitigating factors mentioned. The vileness factor and the future dangerousness factor are mentioned specifically, however, in the first instruction choice. The U.S. Court of Appeals for the Fourth Circuit has held that it is not a violation of the Constitution to make no instruction on the finding of statutory mitigation factors in *Clozza v. Murray*.³⁹ The effect of this is to force counsel to stress the law in their closing arguments of the mitigation phase because no mention will be made in the forms. It is noteworthy also that the Virginia Supreme Court, in *LaVassuer v. Commonwealth*⁴⁰ has held it no violation that a judge failed to give a specific instruction drawing the jury's attention to the mitigation evidence. There, the court upheld an instruction directing that if one or both the vileness and aggravating factor were proved, the jury "may fix the punishment at death; but if they believed from *all the evidence* that the death penalty was not justified, then it *shall* fix the punishment at life imprisonment...[and] that if the Commonwealth failed to prove either predicate beyond a reasonable doubt, the jury must impose life imprisonment."⁴¹ No mention was made in the instructions of specific elements of mitigation brought out by the defense.

The Client as Starting Point

When counsel meets with client for the first time, preparation for the case in mitigation should begin. In the majority of cases, the best source of information will be the client.

The following are some ideas that were offered by attorneys in capital cases, and are a synopsis of techniques that have proved successful in preventing clients from being sentenced to death. Counsel should know that information gathered in preparation for the case in mitigation is useful before the penalty trial. In fact, the information can be better employed prior to trial, especially in negotiating a plea. Selective release of information can convince a prosecutor not to pursue a capital conviction before the jury is empaneled.⁴²

Elizabeth Murtagh is a criminal defense attorney in Lexington, Virginia, and was formerly a public defender in Jacksonville, Florida. Ms. Murtagh commences preparation for the mitigation case from the first meeting with the client. She begins by informing the client that she is now the lawyer for the case, and by explaining her position as an attorney from the public defender's office or that she has been appointed by the court as counsel. Unless the client desires to talk about the case, which is rare, she then informs him of what she knows concerning the case. "Often, the client looks to you to find out where to start with his story or how to talk to you. You run the show, you're the lawyer, you are the one providing the service." The introduction to the client is a vital opportunity because capital defendants, like people everywhere, are strongly influenced by the first impression. If the client begins with favorable impression of the attorney, he will be much more likely to reveal the necessary information needed for use in his mitigation case.

As the client begins to tell the facts of his case, Ms. Murtagh's advises to listen carefully to the way he tells it. Active listening can lead to insights about what the defendant thinks is important. These might not be the legal facts important to the determination of guilt, but emphasis on certain people, places or emotions may well provide clues to how the defendant thinks and what kind of person he is, which are precisely the elements needed to convince the jury not to execute him.

One subject that needs to be addressed early is the need for mitigation evidence as it relates to the structure of the bifurcated trial. Capital defendants may not understand why one wishes to prepare for the penalty phase when the guilt phase has not even begun. Clients may understandably lose confidence when asked to assist in preparing for a proceeding that assumes a guilty verdict. Capital defendants may still believe that they will be found not guilty, or that the Commonwealth really will not seek the death penalty. One way of handling these problems and still keeping the client's trust is to explain the timing of the bifurcated trial: once the guilt phase is over, the penalty phase begins immediately, with the same jurors and the same judge. No time lag exists between the two phases and that the mitigation evidence has to be ready to present at the outset.

Ms. Murtagh observes further that gathering mitigation evidence is quite likely to take the attorney into places where the defendant either grew up or spent much of his time. In most capital cases, the environment is vastly different from what the attorney is accustomed to. Defendants' homes are usually in poor areas, with the concomitant problem of crime. Lawyers should not be averse to visiting the parental home or the home of the defendant, however. Anxiety over these visits can be avoided simply by going in the mid-morning and departing by the mid-afternoon. Also, if the lawyer is going to interview, he can bring someone with him to be a witness to the conversation. Sometimes, however, this may not be appropriate. An example of when the attorney might be better advised to go alone is when visiting the parents of the defendant. Parents might feel ashamed at talking about their child, and if the attorney is alone, it may be easier for them to communicate the facts of an often troubled childhood.

A visit to the parental home can be as revealing indirectly as directly. For instance, photographs of siblings give clues to the way they were, or what they are doing now. Mementos like sports trophies in the home relate to good things that the defendant did or accomplished when

he was younger. Just by observing the home, the attorney may be able to gather useful mitigation evidence as to what kind of hurdles and barriers the defendant faced at an early age. At the least, it will humanize the client in the eyes of the lawyer, making it easier for the attorney to put the spirit that is necessary into a successful mitigation defense. Additionally, seeing parents and the home will give the lawyer something to talk about with the client when they next meet, which in turn can open the door to further mitigation evidence sources.

When interviewing potential mitigation witnesses, the lawyer should keep in mind that the interviewee will be as apprehensive about the interview as the attorney. The lawyer can use methods which defuse some of the tension inherent in these meetings and open the door to meaningful discussion about the client. One method facilitating the interview is not to wear expensive clothes. Dress that is appropriate for the courtroom is not necessarily clothing that is appropriate for the interview. The lawyer's aim is not to emphasize the differences between the witness and the lawyer, but to bridge that gap and communicate about what they have in common: a concern for the defendant. Wear ordinary clothes.

Another method to which eases tension meetings is to accept an offering of food or coffee. Ms. Murtagh's experience has been that it is the rule rather than the exception that such an offer will be made. By accepting, you alleviate the tension of having nothing in common and at the same time it gives the witness a feeling of giving something back. This is the mindset the attorney wants to foster, because the more at ease the witness is, the more useful information surfaces.

Racial difference between counsel and the defendant and his peers, whom the lawyer will encounter during the mitigation case investigation, is a very sensitive and important issue.

In the case of black defendants, it is probable that many of their prior experiences with whites have been negative. Most of the policemen who have arrested them in the past will have been white, as well as their judges and past lawyers. If counsel for the defendant's capital case is white, a period of confidence building on behalf of the client must occur. Similarly, if defendant is white and counsel is black, counsel may confront ingrained racism.

Without confidence in his lawyer, the defendant will not be willing to provide the information on mitigation issues vital to the ultimate success of a capital trial. Explaining the attorney-client privilege can help build trust, as can the honoring of time commitments by the lawyer. If the lawyer tells the client that he will be at the jail to interview the client at a certain time, it is crucial that the lawyer make the appointment on time. The lawyer can inform the defendant that he has been to the prisoner's home or to his parent's home, or discuss the defendant's family or children, which can draw out the defendant through conversation relating to matters that are important to him. The separation caused by incarceration from family, spouse, children, girlfriend or boyfriend, may make the client more willing to talk the lawyer, who then becomes a link to the outside world. By increasing the level of communication, attorney and client can accelerate the investigation of the mitigation case. These simple tactics can convince the client that the lawyer is not impaired by racial or social differences and will represent the client zealously.

Developing a Theory of Mitigation

Once the extensive legal research and even more extensive gathering and investigation of mitigation information is complete, it is time for the defense counsel to develop a theory of mitigation. A theory of mitigation is the theme which the attorney will present to the jury during the sentencing phase in an effort to convince at least one member that the client does not deserve to die. A coherent theory of mitigation is absolutely essential because that is the only thing which will counter the presumption of death engendered in the mind of the jury by the prosecution's presentation of evidence on vileness and future dangerousness, as well as the crime itself. Counsel should not enter the guilt phase of trial without being able to articulate an answer to the question "if the jury convicts of capital

murder, why should they not vote to kill my client?"⁴³ The prosecution is handily provided with a theory for the penalty phase by the capital sentencing statute. As mentioned above, the prosecution will urge that the defendant committed a horrible, inhuman and vile act. Chances are that the crime itself will lend some support to this theme. Thus, because the prosecution has already won a capital conviction, half of the Commonwealth's penalty phase is over. The prosecution will reinforce the vileness factor with photographic evidence of the victim's remains, which will be admitted into evidence even over defendant's objection. Lastly, the prosecution will suggest to the jury that the defendant is a living hazard to civilization and a menacing threat to society. This will be accomplished by revealing to the jury all prior criminal acts, both adjudicated and unadjudicated. Then, at the completion of the prosecution's harrowing case, attention shifts to the defendant, who then is provided the opportunity to "mitigate," or dilute, the effect of what has just been presented sufficiently to save his life.

A primary element of a good theory of mitigation rests in the concept that at this late stage of a capital trial, it is impossible to offer an "excuse" for the defendant's acts. The jury already knows that no justifiable excuse exists for what the defendant did. What the jury must be made to understand is real life mitigation: why the defendant acted in the manner that he did. This is where defense counsel presents the evidence which has been gathered to the sentencer. All of the relatives, teachers, physicians and acquaintances of the defendant that are available must tell their story to the jury. In this way the jury will come to see a three-dimensional picture of the defendant and his life. The jury will not be persuaded to forgive the defendant, but they may be made to understand something about the dynamics which brought the defendant to commit the crime.

Each theory should have a part that is stressed primarily, in order that the jury can focus on an aspect of the defendant's character in opposition to the elements that the prosecution has stressed. It may be mental retardation, mental illness, social isolation or poverty compounded by years of substance abuse or sexual abuse. The key is that the jury be given something to explain why the defendant was moved to murder.

Secondly, counsel must attempt to tie in the defendant's impairment or struggle to the particular offense. This connects the background mitigation evidence counsel presents to the jury with the crime, and helps the jury understand the reason why this particular killing occurred the way it did. This linking is absolutely essential to any hope of penalty phase success. Mere presentation of good deeds, poverty, or abuse, without establishing an explanatory relation to the offense, is not likely to work. Infinite possibilities exist, but the identification of a connecting factor between defendant and crime can make the jury more likely to sentence the defendant to life.

A sub-theme that must underlie the entire case in mitigation is that of reducing the fear and revulsion that the jurors feel toward the defendant. This is done not only by carefully and systematically presenting them with evidence about the defendant, his mental and physical environment, but also through the way his defense team reacts with the defendant.⁴⁴ It is easy to forget that the jury can see the defendant during the course of the entire trial. The way in which counsel and even court officials deal with the defendant will influence the jury in their perceptions of the defendant.⁴⁵ It is beneficial to have two attorneys if possible, one to handle the guilt phase and one to present the mitigation. Also helpful is to have clerks or other members of the defense team visible around and communicating with the defendant.⁴⁶ This stresses the concept that the defendant is not so horrible that he cannot be communicated with by other people. How the police and bailiff react to the client is similarly important. The more relaxed they are, the better the jury will feel about sentencing life instead of death. The fear generated by hostile bailiffs and courtroom guards can be great, with the predictable result that the jury will be further alarmed and tempted to execute the defendant.⁴⁷ The defendant's appearance should also be made as presentable as possible, if only for the reason that it may induce the courtroom officials to behave more favorably to the defendant. The defense attorneys can influence everyone's attitude toward the client

simply by communicating with the client often, which underscores the fact that the defendant, irrespective of the crime he has been convicted of, talks and listens as do other members of society.⁴⁸

A Case Study

An example of the kind of mitigation case that does not work can be found in the case of *Commonwealth v. Strickler*.⁴⁹ The case demonstrates several failures of mitigation presentation discussed in the sections above, and illustrates by omission and also by suggestion techniques which counsel might better employ when presenting the case in mitigation.

The first witness that the defense attorney called in the penalty phase was a psychiatrist.⁵⁰ The attorney asked the psychiatrist standard questions as to qualification. He elicited from the doctor that he had conducted intelligence quotient tests on the defendant.

Q: And have you had the opportunity to do, [sic] give such a test to Tommy Strickler?

A: Yes I have...

Q: And do you remember what the results of that test were?

A: Yes I do.

Q: What were they?

A: He received a full scale IQ of seventy-five...

Q: What does that mean in terms of his range?

A: A full scale IQ of seventy-five places his intellectual functioning in a borderline range. The borderline range is between mentally retarded and the low average range.⁵¹

Following this, the defense attorney elicited testimony that the defendant was in the 95th percentile of intelligence, or in other words that 95% of his age group were more intelligent than he. Next, the attorney attempted to develop testimony that the tests would indicate that the defendant would have an impaired decisionmaking process as a result of his mental impairment. This tack was unsuccessful, and the examination concluded on the topic of what the methods of testing were, but the attorney could not get the doctor to state that the defendant would have had decision making impairment.⁵²

After an exchange that brought out only that the defendant was in a borderline retarded decisionmaking level, the direct concluded and the prosecution cross examined.

Q: [The defendant] is able to function though with this low intelligence?

A: It depends on what you mean by function

Q: O.K. He knows the difference between right and wrong, does he not?

A: That is correct.

Q: He knows the consequences of his acts, does he not?

A: I believe, yes.⁵³

That concluded the examination of the first defense witness in the penalty phase. Several problems with this witness are visible from examination of the transcript. The first is that the doctor was not examined in sufficient detail. As an examining physician of the defendant, he potentially provided the chance to humanize the defendant to the jury. The defense could have, at a minimum, developed testimony exactly on how the defendant performed during the tests. The doctor could have been asked to describe in detail the efforts of the defendant in taking a test he apparently could barely comprehend. The jury, then, could have been given an insight into the difficulties of being mentally retarded. If the defendant tried hard on the test, made efforts to please the doctor or the staff, that information should have been brought out as well. This sort of evidence might have been useful even if the doctor were not willing to give a conclusion that one in the lower five percent intellectually suffered from impaired decision making.

Defense attorneys must be aware that the questions asked by the prosecutors on capacity are standard, and deprive them of the best chance they have with defendant's doctors. If the defense attorney had elicited the functional impairment of the defendant, and underscored it with specific information, the prosecutor might have been denied any use from the doctor, and the jury would have been introduced to the concept that the mitigation case is more complex than a search for an excuse for the killing. Another way of attacking these standard questions might be to object on grounds of relevancy. Because the prosecutor's question really went to the issue of sanity, it was relevant to the guilt phase, but not the sentencing phase.

The next two witnesses defense called were a woman and a man who knew the defendant only slightly. Virtually no personal information relating to the mitigating elements of the defendant's personality were developed from either.⁵⁴ Defense counsel must focus the penalty phase on the presentation of the defendant's life story. Temptations to stray from the structure of the mitigation theory should be resisted, and testimony or witnesses that are irrelevant should be omitted.

There was stipulated testimony from a former employer that defendant was a good and regular worker until an automobile accident forced him to give up the job.⁵⁵ If at all possible, positive testimony of this type should be elicited by in-person witnesses. It humanizes the defendant, and shows that at least at one point in his life, he was valued to some extent and had characteristics that the jury can relate to. It is important to bring in people who are not afraid of the defendant as well, as this alleviates the fear emotion that makes up part of the jury's decision vote to kill the client.

Additionally, whenever testimony alludes to a serious accident, counsel should research this and see if neurological or brain damage might have resulted, as many capital defendants suffer from these ailments. The damage, in turn, may be shown to have influenced the commission of the murder. This is an example of how an impairment can be "linked" to the crime. Any reason which can explain the conduct of the defendant is going to help his chances for life.

The next witness was potentially very helpful to the defendant's case in mitigation. The attorney called the defendant's older sister.⁵⁶ She testified that Strickler's father left the family home when the boy was two years old, and that thereafter had no contact with him. The father died when the defendant was ten. The sister testified that it was "pretty tough on us all." The sister testified further that the mother remarried, and that from the outset the relationship with the son was very poor. She testified that the boy became involved with drugs at an early age. She testified that Strickler had talked to her and "other people" about his difficulties. Then, testimony was introduced that Strickler went to live with his sister during his high school years, but that he could not perform in school, and kept getting into trouble. Although the sister tried to help, her efforts failed. The sister strenuously asserted that her brother is a good person but that he has a problem. After this point, the witness broke down and was dismissed.⁵⁷

This testimony was good to bring out because it was from a lay witness who was close to the defendant, telling the life story. This witness might have been utilized to even greater effectiveness with some more planning and preparation. Her testimony pointed the way to several areas that provide good mitigation evidence. The first was absence of parental guidance, the second poverty. The testimony alluded to possible child-abuse and the early involvement with drugs. Any one of these factors could have had a detrimental affect on the defendant's mental and moral development. Family witnesses can be effectively utilized, especially when they can detail how the family environment, which is supposed to nurture and train the child, was dysfunctional and failed the defendant so egregiously, that even if only tangentially, their failure may have been a contributing factor related to the commission of the crime. The sister would appear from her testimony to have been well suited to that kind of "life story" revelation. She was obviously in great distress over the plight of her brother, and so might have been willing to reveal the details of family life to the sentencer. Narrative on the impact of early drug involvement can be helpful to the case as well, especially if it can be demonstrated that

family members knew or encouraged the abuse but did not intervene. Assuming the risks inherent in speculation, most jurors are presumably not observing the client with a true understanding of the turmoil which is an unrelenting part of youth without guidance, with abuse, and with drug use. These are elements of the defendant's life that are going to have to made very real to the sentencer, and often family members are the best ones to do it, because they were present and may even have had a hand in the abuse.

Unless the witness truly cannot or will not continue with her narrative, it is not in the best interests of the client to dismiss the witness. The preferred tactic would have been to request a recess until the witness calmed down, or recall the witness at a later time to continue with her testimony. Although a witness may have fruitful information, it can not be capitalized upon unless brought out in full.

The penultimate witness for the defense was a neighbor.⁵⁸ Again, this witness was potentially very helpful because he testified that Strickler always seemed to be a good person and that he was a good neighbor. He told the sentencer that Strickler had helped him build an addition to his home, was honest and that the relationship he had with the defendant was healthy and normal.⁵⁹ This type of witness can be very helpful for several reasons. One, it shows that the defendant is not some fearsome creature that is shunned by all; testimony from neighbors is helpful in this regard because a neighbor is likely to be perceived as unbiased. Second, testimony of this type gives the jury a chance to see times when the defendant was able to prevail against the negative aspects of his life, and that there are pieces of his past that affirm his value as a person and his worthiness to live, albeit in prison. Perhaps most importantly, neighbors' testimony gives the jury a chance to see that not everyone is frightened of the defendant. This is necessary because the capital sentencer is statutorily directed to consider the fear factor, in the guise of the future dangerousness prong of many capital statutes and in the Virginia capital jury instructions. Finally, the testimony of neighbors can be valuable in corroborating other witness' testimony concerning the turbulence or violence in the parent's home. This in turn will strengthen the defendant's case because jurors may conclude that the circumstances in the home must have been severe, if even the neighbors were aware of the problems.

The final witness called was the defendant's mother.⁶⁰ The mother testified that the defendant's father left when defendant was two, and that she had to provide for the two sisters as well. She testified that the defendant's father did farm work and worked in a service station. She described doing odd jobs for a living. She then told how when she remarried, life became even more difficult because her second husband was "mean." She also said that the entire family had "a rough time," and that eventually Strickler was thrown out of the house. She told further how, as a young boy, the defendant could not stay in the house, and had to make do as best he could living in a variety of different places. For a time, Strickler lived in some kind of shed in the back of his mother's house, but his stepfather would not leave him alone there either. The stepfather's antipathy for the defendant was so severe that he forbade the mother from giving him money to eat or ever letting him in the house. Sometimes the defendant had nowhere to sleep except his mother's automobile. Her evidence concluded with a supposition that there would be "pure hell" when she returned home in retribution for testifying on behalf of her son. She also stated that her son never reacted violently to the abuse, but just asked his mother how she could take the treatment and told her that he would leave.⁶¹

The mother's testimony raises several areas of inquiry. One is the issue of abuse. There was never any direct testimony as to the precise nature of the abuse. That it must have been severe seems obvious, and more detailed questioning might have revealed insights into the defendant's life that could have shown the sentencer what it was actually like trying to survive in the environment created by his stepfather. The mother's testimony could have provided the central buttress of a theory of mitigation. A workable theory could have been that the defendant was a victim of abuse, had a long history of suffering from physical, emotional and economic privation and had extreme amounts of pent up rage within him;

that acts of violence, shocking to most people, were part of the fabric of his daily life. The theory could focus on how at almost every stage of his young life, the defendant had been failed by the people whom he relied on most. This theory, a variation of the "minimum shared responsibility" method,⁶² might have been sufficient to militate in favor of a life sentence to a capital conviction. At a minimum, the testimony pointed to a number of individuals who had an affect on Strickler's life: relatives who housed him, teachers, his stepfather. Although the mother's testimony implies a sorrowful youth, it fails in the crucial task of providing a reason why the defendant did the crime.

The record indicates that one attorney handled both the guilt and penalty phases of the trial. It is better to have separate attorneys argue the different phases of the trial for several reasons. The first is based on the assumption that the jury will have an easier time believing the mitigation evidence if it is presented by someone who has not spent the last few days arguing that the defendant is not guilty of the crime they just convicted him of committing. The second is the element of preparation. The guilt phase attorney may not have sufficient morale to argue strenuously for the defendant after just losing the guilt phase, which is something the jury is sure to sense. Also, factors of the guilt phase may dictate changes in the method best employed at the penalty phase, and the arguing attorney may not be able to concentrate on all these issues simultaneously.

The Commonwealth, to use Strickler as an example, relied primarily on the gruesomeness of the crime itself to argue for the death penalty. Often times the Commonwealth will have only the criminal record and the evidence of the crime the defendant has just been found guilty of. In contrast, the defendant has whatever persons he can find from his past, any good deeds he has done, any relationships with family or friends, or jobs, to argue in favor of his being given the chance to live inside the confines of the prison for the remainder of his life. Looked at from another perspective, if the defendant *arguendo* is going to spend a substantial time in prison for the crime (be it twenty-five or thirty years), the difference is still qualitatively greater between life imprisonment and death than between life imprisonment and acquittal. Therefore, if looked at dispassionately in terms only of probability and finality of result, the penalty phase, from the defendant's point of view, should be as lengthy and as substantial as the preparations for the guilt phase, if not more so.

Conclusion

The interrelation between the law, both state and federal, and the facts of the client's case and how they are presented, is in sum what is known as the case in mitigation. Although overall mitigation is considerably complex, it has as an advantage many elements drawn from common sense and simple observation. This is logical because mitigation incorporates both addressing the defendant as an individual, and then conveying that individuality to twelve jurors who sit in judgement. If this effort succeeds against the aggravating factors the prosecution presents, the client will not be sentenced to death. What is most important for counsel to accept about the penalty phase and mitigation is simply this: it is the defendant's time, not the prosecution's, and counsel's diligence and dedication here will yield either success, in the form of a life sentence, or if the final phase of the capital trial is insufficiently presented, the most severe penalty our law demands.

¹*Lockett v. Ohio*, 438 U.S. 586 (1977).

²*Id.* at 604.

³*Id.* at 605.

⁴*Eddings v. Oklahoma*, 104 U.S. 455 (1982).

⁵*Id.* at 114.

⁶*Id.* at 115, footnote ten [citations omitted].

⁷*Id.* at 107.

⁸*Id.* at 116. The *Eddings* Court, however, declined to hold as a matter of law that minors are ineligible for the death penalty.

⁹*Skipper v. South Carolina*, 476 U.S. 1 (1986).

¹⁰*Hitchcock v. Dugger*, 481 U.S. 393 (1983).

¹¹*Mckoy v. North Carolina*, 494 U.S. 433 (1990).

¹²*Penry v. Lynaugh*, 492 U.S. 302 (1989).

¹³*Id.* at 327-28.

¹⁴*Payne v. Tennessee*, 111 S.Ct. 2597 (1991).

¹⁵*Dingus v. Commonwealth*, 153 Va. 846, 149 S.E. 414 (1929).

¹⁶Mello, *The Jurisdiction to do Justice: Florida's Jury Override and the State Constitution*, 18 Fla. S.L.Rev. 923, 931 (1991).

¹⁷*George v. Commonwealth*, 242 Va. 264, 411 S.E.2d 12 (1991).

¹⁸*Payne v. Tennessee*, 111 S.Ct. 2597 (1991).

¹⁹*Id.* at 2608.

²⁰*Walton v. Arizona*, 110 S.Ct. 3047 (1990).

²¹*Woodson v. North Carolina*, 428 U.S. 280 (1976).

²²*Furman v. Georgia*, 408 U.S. 153 (1972).

²³Va. Code Ann. § 19.2-264.4 (B) (1990 Repl. Vol.).

²⁴*Hitchcock v. Dugger*, 481 U.S. 393 (1987).

²⁵*Briley v. Bass*, 750 F.2d 1238, 1241 (4th Cir. 1984), cert denied, 470 U.S. 1088 (1985).

²⁶Va. Code Ann. § 19.2-264.4 (1990 Repl. Vol.)

²⁷*Savino v. Commonwealth*, 239 Va. 534, 391 S.E. 2d 276 (1990).

²⁸*Id.* at 283. Note that Virginia Code § 19.2-264.3:1 instructs the mental health expert to make a finding of opinion as to "whether the defendant acted under extreme mental or emotional disturbance at the time of the offense". If the examining psychiatrists opine that the defendant did not act under extreme emotional duress, as in *Savino*, this could be interpreted as proving an absence of the mitigating factor.

²⁹Groot, *Criminal Offenses and Defenses in Virginia* (2d ed.), p. 199 (1989).

³⁰*Fitzgerald v. Commonwealth*, 223 Va. 615, 292 S.E. 2d 798 (1982).

³¹*Giarratano v. Commonwealth*, 220 Va. 1064, 226 S.E. 2d 94 (1984).

³²*Id.* at 1073.

³³*Levasseur v. Commonwealth*, 225 Va. 564 at 578-79, 304 S.E. 2d 644 at 651 (1983).

³⁴*Penry v. Lynaugh*, 492 U.S. 308, footnote 1 quoting American Association on Mental Retardation, *Classification in Mental Retardation 1* (H. Grossman, ed. 1983).

³⁵See generally Ellis and Luckasson, *Mentally Retarded Criminal Defendants*, 53 Geo. Wash. L.Rev. 414 (1985).

³⁶*Coppola v. Commonwealth*, 220 Va. 243, 257 S.E. 2d 797 (1979).

³⁷*Id.* at 254, 257 S.E. 2d at 805.

³⁸*Mackall v. Commonwealth*, 236 Va. 240, 372 S.E. 2d 759 (1988).

³⁹*Clozza V. Murray*, 413 F.2d 1092 (4th Cir. 1990).

⁴⁰*Levasseur v. Commonwealth*, 225 Va. 564, 304 S.E. 2d 644 (1983).

⁴¹*Id.* at 595, 304 S.E. 2d at 661.

⁴²Geimer, *Law and Reality in the Capital Trial*, 18 N.Y.U. Rev.L. & Soc. Change 281 (1990-91).

⁴³Geimer, *Law and Reality in the Capital Trial*, 18 N.Y.U. Rev. L. & Soc. Change 285, footnote 53 (1991).

⁴⁴Balske, *The Penalty Phase Trial: A Practical Guide*, reprinted from *The Champion in California Death Penalty Defense Manual*, Vol. II, 1986 ed. at p. H-7. Dennis Balske, in this article at H-7, turned the illustrative and memorable phrase, "It is extremely easy for a jury to vote to kill a sack of cement. It is much more difficult for them to vote to kill a human being."

⁴⁵*Id.*

⁴⁶*Id.*

⁴⁷*Id.*

⁴⁸*Id.*

⁴⁹*Commonwealth v. Strickler*, trial transcript (Cir. Ct. Augusta Co., Va., 18 Jun., 1990).

⁵⁰*Id.* at 877.

⁵¹*Id.* at 878-879.

⁵²*Id.* at 879-881.

⁵³*Id.* at 882.

⁵⁴*Id.* at 882-886.

⁵⁵*Id.* at 887.

⁵⁶*Id.* at 887.

⁵⁷*Id.* at 888-891.

⁵⁸*Id.* at 891.

⁵⁹*Id.* at 892-893.

⁶⁰*Id.* at 893.

⁶¹*Id.* at 895-898.