A New Era: Mitigation in Sentencing Without the Death Penalty

Seminar Topic: This material provides an in-depth examination of the process and procedure of mitigation since the abolition of the death penalty in Illinois. Despite the abolition of the death penalty, this presentation stresses how what we have learned from mitigation with the death penalty can be applied to mitigation without the penalty. This program goes on to defines mitigation both broadly and specifically through the use of court cases and their rulings. Most importantly, the role of a mitigation specialist is thoroughly analyzed along with mitigation in Illinois today.

This material is intended to be a guide in general. As always, if you have any specific question regarding the state of the law in any particular jurisdiction, we recommend that you seek legal guidance relating to your particular fact situation.

The course materials will provide the attendee with the knowledge and tools necessary to identify the current legal trends with respect to these issues. The course materials are designed to provide the attendee with current law, impending issues and future trends that can be applied in practical situations.
About The Author

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I. Introduction

- On July 1, 2011, the abolition of the death penalty took effect in the State of Illinois. Illinois had been living under a moratorium on executions for 11 years, but prosecutors kept pursuing death penalty charges. After twenty years of debate about the risks of executing innocent people and the looming state-budget crisis, Governor Quinn signed the legislation saying, "If the system can't be guaranteed, 100-percent error-free, then we shouldn't have the system. It cannot stand."\(^1\)

- We have made advancements in understanding, gathering, and presenting mitigation, which can still be useful to us today.

II. Keeping what we have learned

- With or without the death penalty in Illinois, our criminal trials still require that we prepare and present a case for sentencing.

- Our work is more than just proving innocence in trial.
  - Work as defense attorneys also includes getting the lowest sentence possible sentence for our clients. Winning for clients does not just come during the guilt-innocence portion of the trial. Winning can also come during sentencing.

- We should not forget what we learned and what tools we can use in defense of our clients.

- We need to understand how we used that knowledge and those tools then and envisage how we can apply them in the new era, especially since life-without-the-possibility-of-parole can be argued to be a sentence to die while in the State’s custody, albeit without an execution.

- Mitigation development prior to trial and presentation during trial are essential bits of knowledge and tools for us keep.

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A. The Illinois Unified Code of Corrections

- The statute that governs sentencing procedures in Illinois criminal courts is the Unified Code of Corrections. The stated purposes of the Code are:
  - To prescribe sentences proportionate to the seriousness of the offenses and permit the recognition of differences in rehabilitation possibilities among individual offenders;
  - Forbid and prevent the commission of offenses;
  - Prevent arbitrary or oppressive treatment of persons adjudicated offenders or delinquents; and
  - Restore offenders to useful citizenship.

- Our sentencing preparation and argument should take advantage of the factors that judges use in their decision-making processes. Prior to imposing sentencing, an Illinois court must hold a sentencing hearing in order to:
  - Consider the evidence from trial;
  - Consider any presentence reports (PSIs);
  - Consider the financial impact of incarceration;
  - Consider aggravation and mitigation;
  - Hear arguments for sentencing alternatives;
  - Afford the defendant an opportunity to make a statement;
  - Allow a victim impact statement from a victim; and
  - In reckless homicide cases, allow the victim’s immediate family an opportunity to make oral statements.

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3 *Id.* (citing 730 ILCS 5/1-1-2).

4 *Id.* at 19-20 (citing 730 ILCS 5/5-4-1(a)).
Without proper sentencing preparation and informed argument on our behalf of our clients, convictions, PSI’s, aggravation, victim’s statements, and the prosecution’s versions of events become a victor’s version of history.

The Code is accommodating to our ability and opportunity to present a thorough, passionate, and persuasive argument into the sentencing hearing. The sentencing inquiry may be broad in scope and largely unlimited as to the kind of information that can be considered.\(^5\) The rules of evidence that apply at trial are inapplicable to the sentencing hearing.\(^6\) Ultimately, however, the Code puts its trust on defense counsel to prepare the argument through investigation because the only limitations upon admissibility of evidence are relevance and reliability.\(^7\)

B. The ABA Guidelines

- ABA Guidelines for the *Appointment and Performance of Defense Counsel in Death Penalty Cases*
  - Since death as a sentence is considered different than in other murder cases, death penalty cases have exceptional requirements to ensure effective assistance of counsel. Part of those guidelines established the primacy of mitigation as defense counsel’s effective representation.

- ABA *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*
  - Gives direction on how to properly conduct mitigation.\(^8\)

- The mitigation investigation and presentation at trial was an important part of defending clients during the death penalty era in Illinois. Defense teams spent thousands of hours working with clients, their families, and acquaintances, and collecting documentary proof to explain clients’ lives, their personal perils and

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\(^7\) *People v. Young*, 538 N.E.2d 461 (1989).

struggles, their strengths and weaknesses, and their mental capacities in order to enlighten jurors why the crimes may have happened, why the clients were worth saving, and why jurors should bestow mercy on them.

• Since the repeal of the death penalty on July 1, 2011, it seems that we cannot rely on the ABA Guidelines as argument to justify mitigation for our clients facing life-in-prison-without-the-possibility-of-parole.

• Ostensibly, the need to conduct an exhaustive mitigation investigation and hire a mitigation specialist seems to be unnecessary. Yet the Illinois Unified Code of Corrections offers defense attorneys the opportunity to present mitigation during sentencing in order to persuade the fact finder to impose a lesser sentence. Moreover, the prosecution must be checked so that the new-era’s ultimate sentence is not used arbitrarily or oppressively.

• Just because death penalty is gone, does not mean that we should forget about mitigation investigation, how to conduct it, or why it is useful. Professor Todd Haugh from Chicago-Kent Law School rightly points out, “white collar defendants and their counsel can learn much by understanding how capital defense attorneys approach sentencing mitigation.”

• Illinois criminal defense attorneys, too, should take what we learned from the by-gone era, including the ABA Guidelines and Supplementary Guidelines, and find ways to improve our work and fit our knowledge and tools into the new Illinois-reality.

C. Bi-furcated Trial and Early Preparation for Sentencing

• In death penalty trials, the ABA Guidelines declare that counsel faces effectively two different trials:
  
  o One regarding whether the client is guilty of capital crime (the merits phase),
  
  o And the other regarding whether the client should be sentenced to death (the penalty phase).

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• Conceptualizing the trial as bifurcated motivates defense counsel to investigate, plan, and prepare both phases, each with equal vigor as the other. It also encourages counsel to begin investigation into the sentencing portion early on, even before the prosecution has affirmatively indicated that it will seek the death penalty.

• In having the penalty-phase investigation completed by the time of trial, defense counsel, reeling in shock of a conviction, is saved from scrambling to put together a sentencing case. Incorporation of a mitigation specialist onto the team is among the preparatory actions of counsel so that the mitigation investigation can begin. All this pretrial investigation gives counsel the ammunition to negotiate a plea deal, to persuade the prosecution to forego the death penalty at trial, or to uncover facts that make the client ineligible for the death penalty.

• At the same time, counsel can establish a rapport with the client for a productive professional relationship over an extended period of stress. Meanwhile, development of the sentencing portion early in the case allows counsel to develop a theme that is persuasive because it can be integrated into the merits phase and create a consistent theme throughout the trial – also known as “frontloading mitigation.”

• Preparing for the penalty phase allows defense counsel the opportunity to investigate the client’s behavior and the circumstances behind these prior convictions to combat aggravation of prior convictions.10

D. Counter-Narrative Strategy in Sentencing

• Scholarly discussions about death penalty also made us acutely aware of the discourse of crime and punishment, in particular the “crime master narrative.”

10 ABA Guidelines, Guideline 1.1 Objective and Scope of Guidelines, comm. 5-10.
• The crime master narrative is Craig Haney’s theory of how media and pop culture condition us into participating in killing on behalf of the prosecution during death penalty trials.\textsuperscript{11}

• A morphology of the crime master narrative uncovers how simple the tale really is, how it enforces the death penalty, and how it truncates alternatives:
  - The defendant autonomously chooses to commit a crime;
  - The defendant commits the crime, alone, and is fully culpable;
  - The only appropriate response for society is to punish the defendant with the maximum penalty. Relying solely on the crime master narrative, potential jurors rarely get the full story about the crime and the lives of the people who commit it.

• To counteract this conditioning to kill in the capital penalty trial, Haney points out that mitigation is the counter-narrative that can expose, disarm, and hopefully defeat the crime master narrative.\textsuperscript{12}

  The mitigation counter-narrative:
  - Proves that no meaningful account of criminal behavior can begin without extensive bio-psycho-social historical knowledge about the life of the client and that the crime is not an autonomous act but rather influenced by interconnected life experiences, treatments, and events.\textsuperscript{13}
  - Humanizes the client, gives value to his life, illustrates his struggles and efforts to overcome, exposes his vulnerabilities, takes away his individual acts, and shows that the crime is one instance that cannot happen again in prison.\textsuperscript{14}


\textsuperscript{12} \textit{Id.} at 843.

\textsuperscript{13} \textit{Id.} at 843-45.

\textsuperscript{14} \textit{Id.} 879-81.
Re-sensitizes fact finders to the life of the client and makes killing less conditional, thereby reinstating David Grossman's and S.L.A. Marshall's theoretical beliefs that human beings will resist killing and prefer to turn away from that responsibility.\(^{15}\)

- An example of the power of the crime master narrative can be discerned through an analysis of *The Ballad of Tom Dooley*. Association of America and the National Endowment for the Arts’ “Songs of the Century.”\(^{16}\) It was one of the earliest conditioning tales of crime, punishment. The song points out:

  - (1, Choice) Tom Dooley met a beautiful woman on a mountain, and then he killed her with a knife;
  - (2, Autonomy) of the three available dramatis personae, Tom, Sheriff Grayson, and the woman, Tom, and Tom alone, murdered her and tried to get away with it; and
  - (3, Response) Tom should be remorseful, accept the maximum penalty, and prepare to die by hanging.\(^{17}\)

\(^{15}\) David Grossman borrows from S.L.A. Marshall’s inquiry into non-firing rates of American soldiers in World War II. Marshall realized, the average and healthy individual . . . has such an inner and usually unrealized resistance towards killing a fellow man that he will not of his own volition take life if it is possible to turn away from that responsibility . . .” Moreover, “men will kill under compulsion – men will do almost anything if they know it is expected of them and they are under strong social pressure to comply – but the vast majority of men are not killers.” After further study, Grossman concluded that human beings can learn (1) to accept killing other humans through desensitization and conditional response, (2) to partake in killing through operant response, and (3) to acquire a taste for killing through social learning. Dave Grossman, *On Killing: The Psychological Cost of Learning to Kill in War and Society*, 4, 30-31 (2009).

\(^{16}\) [http://nfo.net/usa/365y.htm](http://nfo.net/usa/365y.htm) (last visited Nov. 11, 2010).

There’ve been many songs written about the eternal triangle
This next one tells the story of Mr. Grayson, a beautiful woman
And a condemned man named Tom Dooley
When the sun rises tomorrow, Tom Dooley must hang.
• The mitigation counter-narrative explains the missing details of the crime, resonates with our own lives, produces empathy for the client's life, provides reason to give a sentence less than death, and de-conditions us from killing when sitting as fact finders on a death penalty jury. It breaks the rhythm, aesthetics, and interpolating effect of the prosecution's spin: the crime master narrative.

• The defense team must make the mitigation counter-narrative the centerpiece in the penalty phase, but it must also create a persuasive narrative, while also foreshadowing it in the preceding merits phase, in order to make it understandable and credible.

E. The Mitigation Specialist

• Since mitigation is such an important part of the trial in death penalty, it fostered a skilled profession and position on the defense team: the mitigation specialist. The mitigation specialist became a standard of care to ensure high quality investigation and preparation of the penalty phase. Mitigation specialists focused on why the

"Refrain:
Hang down your, head, Tom Dooley
Hang down your head, and cry
Poor boy, you're bound to die.

“Stanza 1:
I met her on a mountain
There I took her life
Met her on a mountain
Stabbed her with my knife.

“Stanza 2:
This time tomorrow
Reckon where I'll be
Hadn't a-been for Grayson
I'd a-been in Tennessee.

“Stanza 3:
This time tomorrow
Reckon where I'll be
Down in a lonesome valley
Hangin' from a white-oak tree.”

crime could have occurred and why death penalty is not an appropriate sentence.\textsuperscript{19}

- In one of the first post-Furman death penalty cases, the defense team realized the need for someone on the team to concentrate solely on mitigation. A team member helping to develop mitigation in this case, a journalist by training, stated,

- A significant legal blind spot existed between the roles played by the private investigator and the psychiatrist, the two standard information-getters in the trial process. Neither one was suited to the task at hand here - namely discovering and then communicating the complex human reality of the defendant’s personality in a sympathetic way.

- Significantly, the defendant’s personal history and family life, his obsessions, aspirations, hopes, and flaws, are rarely a matter of physical evidence. Instead they are both discovered and portrayed through:

  - Narrative, incident, scene, memory, language, style, and even a whole array of intangibles like eye contact, body movement, patterns of speech - things that to a jury convey as much information, if not more, as any set of facts.
  
  - All of this is hard to recognize or develop, understand or systematize without someone on the defense team having it as his specific function. This person should have nothing else to do but work with the defendant, his family, friends, enemies, business associates and casual acquaintances, perhaps even duplicating some of what the private detective does, but going beyond that and looking for more.

- Mitigation specialists help to overcome barriers to the client’s disclosure of sensitive life history. Additional barriers typically include nationality, ethnicity, language, class, education, age, religion, politics, social values, gender, and sexual orientation.\textsuperscript{20}

\textsuperscript{19} Pamela Blume Leonard, \textit{A New Profession for an Old Need: Why a Mitigation Specialist Must be Included on the Capital Defense Team}, 31 Hofstra L. Rev. 1143, 1151 (2003).

\textsuperscript{20} Sean O’Brien, \textit{When Life Depends on It: Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases}, 36 Hof. L. Rev. 693, 739 (quoting
• The mitigation specialist plays a role in maintaining close relationships with the client and the client’s family while the case is pending. The rapport developed in this process can be key to persuading the client to accept a plea and to participating in other experts’ work.\(^{21}\)

• The mitigation specialist:
  
  o Makes defense counsel aware of all potential mitigating factors.\(^{22}\)
  
  o Finds, interviews, and assesses witnesses for mitigation, and communicates the client’s life-history to counsel.
  
  o Collects significant records related to the client and his family and organizes and analyzes these records.
  
  o Screens for mental health matters, and brings cultural competency to the defense team.
  
  o Compiles a psycho-social history based on an exhaustive investigation, looking at development, personality, and behavior.
  
  o Discovers mitigation themes, identifies needs for further expert assistance, assists in locating experts, and provides experts with information to conduct competent and reliable evaluations.\(^{23}\)

• The mitigation specialist’s ongoing work and reports to the defense team ensures that the presentation to be made at the penalty phase is integrated into the overall preparation of the case rather than being hurriedly thrown together by defense counsel still in shock at the guilty verdict.

Russell Stetler, *Mitigation Evidence in Death Penalty Cases*, Champion, 36 Jan-Fe. 1999.\(^{2}\)

\(^{21}\) ABA Guidelines, *supra* note 33.


\(^{23}\) ABA Guidelines, *supra* note 33; O’Brien, *supra* note 37 at 733-58
III. About Mitigation

A. The Humanizing Goal

- Humanizing our client in the eyes of fact finders is the primary goal of mitigation.\(^{24}\)

- Mitigation is showing that the client possesses vulnerabilities and susceptibilities to biological, social, and psychological influences, which may have had some effect during the alleged crime.\(^{25}\) But also, it is presenting our client’s strengths, capabilities, and potentials so that the jury or judge realizes that our client's life continues to have value.

- To better help ourselves in reaching the goal of humanization, defense team members must consider David Livingstone Smith’s antithetical study, Less than Human: Why We Demean, Enslave, and Exterminate Others.
  
    o By first internalizing the theories, practices, and effects of dehumanization from this illuminative book, we can instill the proper compass within us, which will guide us to our primary goal.

    o Furthermore, Smith’s book can help us reconsider the dynamics of the courtroom, guard against the rhetoric of argument, and better understand fact finders.

- Smith relies on a basic postulate: Unless one is a sociopath, a psychologically disturbed person devoid of moral empathy and feeling, a human being has a robust inhibition to killing other human


beings and even has difficulty treating other human beings inhumanely.26.

- Next, Smith surveys the theoretical works of philosophers, scholars, and behavioral scientists and the historical experiences of warfare, colonialism, slavery, and genocides, and he builds a theoretical model of the dehumanization process. Humans become dehumanizers when
  
  o They employ their folk-based knowledge (Note: not scientific knowledge) to parse the biological world into natural kinds (species) and then make inferences about these kinds;
  
  o Similarly, they use their folk-based knowledge to categorize people into natural kinds (sub-populations based on ethno-races) and then make inferences about these kinds;
  
  o They reflect on where they, themselves, fit in relation to these natural kinds they have made;
  
  o They imagine that natural kinds are distinguishable because their members share common essences that are passed down through the bloodline of parents to children; and
  
  o They rate the value of these natural kinds into a hierarchy of intrinsic worth known as “the great chain of being,” with human beings located on top.

- Dehumanizers attribute non-human essences of the species to these others, likening the others to those species further down the great chain of being, pushing them further away from their own selves, aligning them with the less appealing on the hierarchy – most often with creatures that are unclean, dangerous, predatory, or prey – and making them sub-humans.

  o This twisted logic leads dehumanizers to rationalize how best to handle the sub-humans. They manage the dehumanized just as they would manage lower biological species to which the dehumanized share similar essences.

• Critical to Smith's work are the concepts of race, essences, and quasi-humans.
  o Race and dehumanization are always bound together because race separates and categorizes human beings in the eyes of the dehumanizers and begins the slippery slope toward dehumanization.

• A central inquiry in Smith's book is: How can we look at a person standing right in front of us and fool ourselves into seeing him as something other than human?
  o This can happen because we believe that natural kinds (things we believe to naturally belong together) possess “essences,” or inner properties, that make them the kind of beings they are, and that are not always reflected in the way they look. Without that human essence, a person is human only in form, and he cannot be considered a member of humanity. Hence, to dehumanize a person is also to deny him his human essence.

• Smith also looks at how dehumanization played a role in the Nazi propaganda, violence, slavery, and extermination of indigenous peoples by the Spanish conquerors, of Native Americans by the American colonists and westward expansionists, of Africans by European slavers, of ethnic Vietnamese by the Khmer Rouge, and of Tutsis by Hutus, just to name a few of his inquiries.

• Smith's theory has an important connection to mitigation.
  o First, we must recognize that the culture and ceremony of the courtroom assists in separating out our client as a natural kind unto himself: he is not among the lawyers who have the right to speak, the judge who rules with the voice and accoutrements of state authority, the staff who administers during the proceedings, or the jurors who separately sit together in the box and the jury room.
  o Second, we must protect against the prosecution’s dehumanizing rhetoric meant to seal our client’s isolation.
  o Finally, we can gain a certain comfort in knowing that fact finders, as human beings, should have a robust aversion to killing or harming our client – as long as they see him as
another human being. Our work must recover, restore, and protect the human essence of our client. Without awareness of his human essence, fact finders can exclude our client from the universe of their moral obligation.

- Smith points out that we can overcome dehumanization by educating dehumanizers and appealing to their feelings instead of offering them dry theoretical arguments.

B. The Enigma of Mitigation

- A mitigating factor is anything which might lead a reasonable fact finder to find that there exists a basis for a sentence less than death, but, as Haney points out, our knowledge of what is mitigating is still “a work-in-progress.”

- “Anything” is very broad and by virtue of it expansive meaning precludes the creation of an exclusive list of factors in a statute, although states have statutory mitigating factors. When a fact finder weighs whether a factor is mitigating or not, she is making her own moral and normative decision, and what may be mitigating in one mind may be aggravating to another.

- Mitigation in death penalty cases has evolved over the past thirty-five years since the case of Gregg v. Georgia, which gave no substantive definition of mitigation.

  o Since Gregg, the Supreme Court has adopted a more sophisticated and expansive understanding of mitigation and why it is critical to fairness and responsibility in capital cases.

- Scientific and medical advances and social mores and expectations have changed over time, too. As case law developed, mental health sciences made significant advances that provided insight into criminal behavior and culpability. In particular, psychologists found: background, social history, and immediate social

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27 Haney, supra note 9 at 845.


29 Haney, supra note 17 at xxxx.

30 Id. at 856.
circumstances profoundly influence people’s behavior, the experiences in childhood helps to shape thoughts, feelings, and actions as adults, and trauma – whether poverty, racial discrimination, abuse, and neglect – can be deeply criminogenic (that is, persons exposed to them have a higher probability of subsequently engaging in crime).³¹

- Furthermore, each client’s life is unique, and each case brings on different fact finders with different experiences and thoughts, changing what facts in the client’s life may resonate with them. Therefore, there is no cookie-cutter approach to mitigation, making mitigation, on the one hand, rather enigmatic, and, on the other hand, giving mitigation allowance to be a highly innovative, imaginative, and creative practice.


  o In essence, the Supreme Court defined mitigation

    - vaguely, then
    - broadly, then
    - specifically, then
    - mandatorily, and then
    - normatively, giving defense teams direction of what must be done during mitigation.

1. Mitigation Vaguely

- In Gregg v. Georgia, the Court endorsed mitigating circumstances as part of the decision-making process in death-penalty-sentencing trials, balancing aggravation and mitigation.

³¹ Id. at 856-57.
It was not clear about exactly what the concepts of mitigation or aggravation meant, why they were important to include in a constitutional scheme of death penalty decision-making, or precisely how capital jurors were supposed to use them in choosing between life and death.\(^\text{32}\)

The Court stated that “youth, the extent of his cooperation with the police, and his emotional state at the time of the crime” might constitute mitigation.\(^\text{33}\)

- In *Woodson v. North Carolina*, the Court stated that “relevant facets of the character and record of the individual offender” along with compassionate or factors stemming from the diverse frailties of humankind can be mitigating.

- However, the Court did not specify which diverse frailties it had in mind or how such frailties could generate compassion or qualify as mitigation.\(^\text{34}\)

### 2. Mitigation Broadly

- In *Lockett v. Ohio*, the Court believed that the juror’s decision-making process must respect the uniqueness of the individual.

  - It stated that mitigating factors are “any aspect of a defendant’s character . . . that the defendant proffers as a basis for a sentence less than death.” The Court understood that the juror must be in possession of the fullest information possible concerning the defendant’s life, but it gave no substantive guidance about what life-related issues or evidence might be mitigating or why.

### 3. Mitigation Specifically

- In *Eddings v. Oklahoma*,

  - The Court began to flesh out specific aspects of a defendant’s life that was undoubtedly mitigating evidence. Importantly, the Court said that mitigation does not have to suggest an

\(^{32}\) Haney, *supra* note 17 at 845-46.

\(^{33}\) *Gregg*, *supra* note 25.

absence of responsibility for murder in order to be a relevant mitigating factor of great weight.

- In *Skipper v. South Carolina*,
  - The Court held that information not specifically related to the defendant’s culpability for the crime he committed could be mitigating to serve as a basis for a sentence less than death. In particular, the Court embraced redemption and post-offense good adjustment in jail as mitigating facts.35

- In *California v. Brown*,
  - The Court stated that the defendant’s background and family history factors are specifically relevant. It said that there is a long held belief in society, that “defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.”

- In *Penry v. Lynaugh*,
  - The Court stated that *Lockett* and *Eddings* had mandated the principle that punishment should be directly related to the personal culpability of the criminal defendant, which could only be assessed if certain aspects of the defendant’s background, such as his history as an abused child, could be given mitigating effect.

4. Mitigation Mandatorily

- In *Williams v. Taylor*,
  - The Court found that investigation must inform counsel’s strategic decisions, and counsel cannot simply rely on hunches and assumptions. Furthermore, it determined that although investigation may reveal bad facts, these bad facts may be good facts when viewed as mitigating.
  - It declared Williams’s lawyers as ineffective because they failed to properly investigate and present his nightmarish childhood, including: alcoholic parents, a home filled with

trash and feces and urine on the floor, an abusive father who beat Williams regularly, and an abusive foster home.

- Moreover, Williams was “borderline retarded, and might well have influenced the jury's appraisal of his moral culpability.”

- In *Wiggins v. Smith* and *Rompilla v. Beard*,

  - The Court provided a clear mandate to vigorously investigate all potentially relevant aspects of their client's social history. It stated that counsel must make efforts to discover all reasonably available mitigating evidence.

  - It stated that a social history should not be rudimentary and developed from a narrow set of sources, but, in repeating the *ABA Guidelines* as “well-defined norms,” it must include medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience and religious and cultural influences.

- In *Rompilla*,

  - The Court reaffirmed *Wiggins* by stating that Counsel must conduct a comprehensive and vigorous social history investigation despite the defendant's statement that he had “an unexceptional background.”

5. Mitigation Normatively

- In *Wiggins*,

  - The Court cited the “well-defined norms” of the *ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*.

  - A number of sections outline the importance of mitigation, including Guidelines 4.1 and 10.4. Guideline 4.1 establishes the team approach to capital defense and provides for the assembly of a defense team consisting of no fewer than two

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capital-qualified attorneys, an investigator, and a mitigation specialist.

- Guideline 4.1 also introduces the qualities of the mitigation specialist. As an indispensable member of the defense team, the mitigation specialist is part of the standard of care in ensuring high quality investigation and preparation of the penalty phase. Most critically, the mitigation specialist ensures that the presentation to be made in the penalty phase is integrated into the defense’s preparation of the case early on so that the evidence is not hurriedly thrown together while the defense counsel is still in shock at the guilty verdict.\(^\text{38}\)

- The mitigation specialist compiles a comprehensive and well-documented psycho-social history of the client based on an exhaustive investigation and analyzes the significance of the information, builds mitigating themes, identifies needs for experts and provides them with social history information, and helps the defense team develop a comprehensive and cohesive mitigating case.\(^\text{39}\)

- Guideline 10.7 commands the defense team to conduct thorough and independent investigations from the prosecution and law enforcement, relating to the issues of guilt and innocence. The Commentary to 10.7 states that anything in the life of the defendant may be mitigating, but it specifically cites six areas that need to be explored:
  - Medical History;
  - Family and Social History;
  - Educational History;
  - Military Service;
  - Employment and Training History; and
  - Prior Juvenile and Adult Correctional Experiences.\(^\text{40}\)

\(^{38}\) Guideline 4.1, supra note 42 at 33.

\(^{39}\) Id.

\(^{40}\) Guideline 10.7, supra note 43 at 81-82.
• **C. Sui-Generis Quality**

  - Mitigation is a highly innovative practice and performance. Since each client is unique, there can be no cookie-cutter approach, and for that reason, each mitigation investigation and its final result will have a sui-generis quality.\(^{41}\)

  - Moreover, mitigation specialists are individual in their educational discipline and experience.\(^{42}\)

  - Mitigation specialists may be lawyers, social workers, psychologists, journalists, educators, or even area-studies scholars and may have worked on state or federal cases, single or multiple murders, and trial or habeas stages. Therefore, each mitigation specialist may have developed an approach and methodology from which to work, but he also works differently from others and from himself in each case.

  - Nevertheless, the fact finder does not have to treat all facts that are uncovered and presented in mitigation as actually mitigating. In fact, some evidence can also be re-argued and weighed as aggravating. The key, then, is to capture control and stability over how mitigating evidence is presented and perceived.

  - Despite the sui-generis quality of mitigation, it is possible to identify five general areas that mitigation specialists conduct their work to build the mitigation counter-narrative. They are:
    - Interviews;
    - Records;
    - Relationship building;
    - Contextual research;
    - Expert cultivation and support.

1. **Interviews**

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\(^{41}\) *Id.* at 1044.

\(^{42}\) *Id.* at 1036.
• Interviews are essential to the mitigation specialist’s work, and they take time, patience, and perseverance. Interviews:
  o Provide foundational information about the client, those who are or have been players in his life, and the institutions he has attended.
  o Oftentimes lead to other unknown sources.
• Approach mitigation with client-interviews and identify the outline of his life such as growing stages, home, education, employment, and relationships.
  o From here, possible chapters in the mitigation counter-narrative, skeletal time-lines, and familial trees begin to develop, and each successive interview fleshes out the chapters, time-lines, and charts or develops new such areas.
• Work with the client to identify the people in his life, such as family members, neighbors, friends, teachers, employers, and others who have touched the client’s life.
• Many clients are poor historians because they do not know, are confused about, or refuse to tell the facts of their lives. Indeed, some clients may be incapable of telling their stories because of mental impairments. Interviewing others is richly resourceful in helping to fill in gaps in the client’s knowledge or narrative.
• During interviews with others, look
  o For new information and leads to new sources of information.
  o To corroborate stories and assess the credibility and performance of the witness to determine whether the witness could be persuasive under testimony.
  o For clues to determine how much the witness is willing to help in the future.
• With questions, try to elicit information through stories and develop conclusive remarks into explanatory reasons.
  o A cursory form of psychodrama is helpful here, asking the witness to describe the event in details of color, temperature,
smells, and placements and encouraging the witness to retell conversations slowly and in the voices of others.

2. Records

- While interviews are inherently subjective, records often provide the essence of objectivity to the client’s story. A record can either fill-in as one of the triadic players or it can be so conclusive, such as a birth certificate, that it can relieve the need for triad. Obtaining records takes time, patience, and organization.

- Early in the relationship with the client and his family members, we work together to identify the institutions in the client's life, such as hospitals, schools, governmental offices, social agencies, military branches, and workplaces.

- To acquire records from these institutions, the client or family member needs to sign a confidential release form, and the release form should be drafted as broadly as possible, to avoid having to request permission from the person on multiple occasions.

- Sometimes, institutions create difficulties in record collection because they have time-consuming bureaucracies, lose requests, destroy records, or close down business. For these reasons, it is important to start record collection early, to keep track of requests and the lapse of time between requests, and to find alternative sources to get the records or their substitutes.

3. Relationship Building

- Much information and permission comes from gaining trust and understanding between the client and his family and me. The building of relationships helps in gaining knowledge of and access to reluctant witnesses and unknown witnesses.

- Building relationships gives opportunity for me to see more in the client that he would not normally reveal, and to assess the true “givers” and “concealers” of information in the family. Moreover, building relationships early also helps in gaining reliability and credibility when assisting the defense team in plea negotiations and diffusing the client’s discontent with other team members.

- Building relationships with the client and the family members provides me with motivation and purpose when things are
apparently bleak and overwhelming. Relationships help bring hope when the client and family become tired and move toward positions of volunteering for the death penalty or surrendering to helplessness.

- Remembering that the crime also creates victims of the client's family and friends is important. Family and friends of the client must negotiate their feelings of love, anger, loss, embarrassment, guilt, trauma, and helplessness, and they need help.

4. Contextual Research

- Explaining the client’s life as a part of the larger community will require identification and conduct of contextual research without going too far out of bounds.
  - Natural and social environments are highly influential and explanatory when making sense of complex behavior.
  - Institutions, industries, organizations, neighborhoods, religion, politics, and ideologies infiltrate all of our lives making us members of a multiple social networks.
  - Medical issues and identity groups also add to the mix.

- It is important to discover the client’s memberships, interactions, or afflictions in order to discover the benefits he derived from them or the criminogenic risks they provide to him. And it is important to find ways to use this research to help educate the rest of the defense team and fact finder about the client. However, the mitigation specialist cannot know everything, and must do more research outside of interviews and records. Historical records, academic studies, treatises, surveys, newspaper articles, and maps are some of the ideas to tap when looking for contextual information.

5. Expert Cultivation and Support

- The completed work is not only useful for plea negotiations or trial, but it is also useful in identifying and finding other experts to assist in pre-trial discovery or trial testimony or in eliciting support to keep the client healthy and engaged. Mitigation helps to narrow down diagnoses, histories, and referral questions for mental health experts. Oftentimes, clients enter into custody with poor health or unique medical needs. Others have specific religious needs. In order
to keep the client mentally engaged and spiritually and medically healthy, spend time helping him navigate through the system to get the appropriate attention and treatment he needs.

IV. Mitigation for Illinois Today

- Death penalty cases require “exhaustive” investigation and inquiry into all reasonably available evidence, which generally result in 800 to 1,000 hours of mitigation work prior to trial. Today, we have to re-evaluate the breadth and length of mitigation investigation to reflect realities of the new era. In fact, we can be successful, even with reductions in mitigation investigation, in building trust and confidence with the client, obtaining essential information, telling the client’s story, and reducing sentences. Counsel and the mitigation specialist will have to determine early in the case the possibilities of reducing years from the client’s sentence, of strategically narrowing and assessing the witness pool and documentation needs, and of developing a reasonable investigatory period and budget.

- Indeed, I have been involved some Illinois cases that developed such mitigation packages, and they have proven to be successful. Working closely with defense counsel, we determined key players in the client’s life, developed trust with the client, and focused the records collection. We were able to convince reluctant witnesses to participate in the process. In some of those cases, we not only provided preliminary mitigating evidence that persuaded the prosecution to remove death penalty from the charges, but the defense lawyers also presented mitigation in pre-trial conferences with the judges. Based on the arguments of defense lawyers, who armed themselves with such mitigating evidence in those conferences, these judges shaved off years from the sentences that the prosecutors were seeking in the alternative to death and life-sentences. In fact, these judges relied on the mitigation evidence so heavily that they saw no need to order a Pre-Trial Investigation Report in its place. In essence, defense counsel controlled the narrative about the client’s life with stories of strife, victimization, addictions, missed opportunities, hopes, efforts, and ultimate failures. Defense counsel won acceptable sentences for the clients and avoided the risks of going to trial.
A. The PSI Problem

- Without a credible, comprehensive, consistent, and comprehensible mitigation package developed early in the case, defense counsel is leaving itself vulnerable to the limitations of a court-ordered Presentencing Investigation Report (PSI).

- In Cook County and after a finding of guilt, the court orders the Adult Probation Department to conduct a pre-sentence report (PSI). In cases where a guilty plea is under consideration, the judge may require a pre-trial report, which contains essentially the same information. The point of the reports is to provide the judge with a biography of the client, which the judge will weigh in his sentencing decision. The PSI report is formulaic, and includes such information as,
  - (1) Criminal background, including the present conviction,
  - (2) Social history, including addresses and familial relationships,
  - (3) Marital status,
  - (4) Education,
  - (5) Employment,
  - (6) Physical and mental health histories,
  - (7) Alcohol and drug abuses,
  - (8) Companions and community involvement,
  - (9) Military service, and
  - (10) Economic status.

- The PSI is particularly disturbing because of the length of its investigation, the weight of aggravating evidence included, the dearth of details to support mitigating information, and the shallow resources used to inform the investigation. Generally, the judge orders the investigation to be conducted and completed by the next hearing, approximately 30 days. The completed report is approximately ten typed pages of biographical information on the client, including a report of the client’s criminal background.
However, it is also accompanied by the client’s rap sheet, arrest reporting for the present crime, arrest processing report, and Illinois State Police Criminal History Record Information, all of which can be quite voluminous for some clients. Comparatively, while there may be some mitigating descriptions about the client’s social, educational, health, and financial background, they are “lite,” lack impassioned and persuasive storytelling and collaborative stories from witnesses. Moreover, there are no family trees or records about birth, school, employment, or health problems attached to the report.

- Furthermore, the PSI’s sources of information generally include one interview with the client, criminal histories from the City of Chicago, State of Illinois, FBI, and Leads, AT&T Directory Assistance, and an outreach to family members. Relying on the client’s remembrance of history alone, during a single encounter with the interviewer, is highly problematic. Client’s oftentimes cannot articulate life events because they were too young to remember them, are traumatically hindered, or distrustful of the interviewer. In some instances, the interviewer does not understand the meanings of a client’s terminology. A client can claim that he lived a “normal” childhood, but the details, if uncovered, might reveal anything but normalcy. A client can state that his “mother” loved and raised him, but without a deeper investigation of the family history, the mother, whom the client refers to, is actually an aunt or grandmother. A client who was sexually abused or suffers now from PTSD may be unable to reveal his victimization or traumatic experiences because he has repressed the memories or fears reliving the experiences. In such cases, family members’ recollections and health records hold the key. Undoubtedly, we must remember that a client may fear revealing information because such information could leave family members vulnerable or because other inmates and unprofessional correctional staff may use it against him within the twisted culture of prison. When the PSI relies on such shallow resources, we cannot expect to reveal the truth about the client or produce mitigating evidence that can potentially help the client. Also reliance on the client’s criminal reports directs the narrative toward aggravation and wipes out explanations behind a criminal past.

- Defense counsel also loses control of the investigatory basis and direction when it relies on the PSI. The formulaic narrative of the PSI limits the unique and multifaceted human experience of clients to roughly ten functions. It does not develop stories of the client’s character, fears and vulnerabilities, or acts of love and kindness. It
does not reach into an experiential history of those people or institutions that raised him, contributed to his development into adulthood, and will be there to help him when he is eventually released. Without conducting an investigation into other key family members, it is difficult to assess whether abuse, addiction, criminality, or mental health history may exist in the family. Without understanding the institutions in the client’s life, it is difficult to understand whether there is institutional failure in helping the client or whether the institution will be able to help him in the future. Such knowledge could be transformative for the judge.

- Additionally, defense counsel loses control over how the judge hears the facts. Probation interviewers are not our clients’ advocates. The interviewers are not writing their reports to win our cases. Their PSIs are hesitant to use statements that will be mitigating. While we would say, “My client lives in abject poverty, struggling within a hand-to-mouth existence, and with no available basis or means to find his way out of this spiral on his own.” Instead, PSIs will use stock sayings such as, “The Defendant denied having any income, assets, monthly expenses or outstanding financial obligations. He has never declared bankruptcy.” When a PSI is complete, the report is delivered to the courtroom and revealed to the defense at the same time that the judge and prosecution receive it. From that moment, the information is shared knowledge and the prosecution is able to prepare its arguments with the information inside. The weight of aggravating evidence in the report helps their case more than the defense. There is little time for defense counsel to fully investigate the assertions of the PSI and amend the information with real knowledge as well. And if that is not enough, the PSI also enters the court file at the same time, which opens the possibility for the media to access the information in the court file and use the information in its reporting about the client. Defense counsel should not surrender its control of the narrative so easily.

B. Mitigation – Not just for death penalty or murder cases anymore

- As explained above, mitigation became a developed practice from death penalty defense. But mitigation is not just for death penalty

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43 PSIs in People v. Steshawn Brisco (Nov. 13, 2012) and People v. Ramiro Garcia (Dec. 1, 2011).
anymore. Todd Haugh has recently published an excellent article on applying mitigation practices to white-collar cases. In his article, he juxtaposes the sentences of Ted Kaczynski (a multi-murder conviction) and Bernie Madoff (a $65-billion fraud conviction), and finds that both of them received sentences that put them in jail for the rest of their lives. But Kaczynski’s lawyers conducted a tireless mitigation investigation and won at sentencing – a life sentence over a death sentence – while Madoff’s lawyers revealed virtually no mitigation at all and received 150 years – 100 years more than what the probation department recommended for the 71-year old defendant. In Haugh’s opinion, had Madoff’s lawyers conducted and presented mitigation for Madoff’s non-violent offense, his sentence might have been lessened and not have been functionally equivalent to the serial killer’s sentence.

- Haugh’s analysis is similar to my own above, but he takes the idea a step further into federal sentencing. He conducts a historical analysis of federal sentencing statutes and cases to show that, according to the state of the law today it is essential for judges to “consider the widest possible breadth of information about the defendant [to ensure that the sentence] will suit not merely the offense but the individual defendant.” Moreover, judges are no longer bound by federal sentencing guidelines but rather may depart

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44 According to Haugh, “[Madoff’s] attorneys only offered a dry statistical breakdown of federal sentencing data to argue for a non-disparate sentence and a plea allocution that explained the operation of his crime without explaining why he deserved leniency.” Haugh, supra note 16 at 4, 7. Furthermore, Haugh states, “they presented no evidence of any mental condition that might lessen Madoff’s culpability, even though there was ample indication of his extreme narcissism and lack of impulse control, common diagnoses of white collar defendants. Nor did they present any evidence of his extensive good works prior to committing his fraud.” Id. at 6.

45 Id. at 8.

46 Haugh states, “Federal white collar defense attorneys have failed to learn – indeed, have ignored – the lessons of sentencing mitigation employed so effectively by capital litigators and their teams of mitigation experts...Aside from a small cadre of nationally-recognized capital defense experts, a criminal defense attorney will probably never try a capital case and never put on mitigation evidence. That is especially true for white collar defense counsel. Therefore, it is necessary to first provide an overview of the development of the mitigation function in capital cases in order to dispel the ‘mystery of mitigation.’” Id. at 8-9.

47 Id. at 30 (citing Pepper v. United States, 131 S. Ct. 1229, 1240 (2011)).
from the guidelines after considering, “without limitation, any information concerning the background, character, and conduct of the defendant, unless otherwise prohibited by law.” Haugh even shows that federal judges are in fact increasingly giving sentences less than the guidelines (in non-governmental sponsored cases: 5.5% of cases prior to 2005, 12.5% of cases after 2005, and 17.4% of cases in 2012; and in non-governmental sponsored fraud cases: 6.2% of cases prior to 2005, 16.4% of cases, after 2005, and 22.6% of cases in 2012), although “white collar defendants still routinely face harsh, and many times extreme, penalties.” He concludes that sentencing advocacy is back in the federal system: the law provides white-collar defense teams to put on mitigation in sentencing, these defendants certainly have mitigating evidence to reveal and the resources to pay for an intensive mitigation investigation, attorneys are only bounded by their imagination in mitigation, and attorneys should take advantage of the opportunity to prepare and present mitigation at sentencing.

- In Illinois, attorneys are developing mitigation packages in cases involving juveniles who face adult sentences for murder and even sexual assault. Public defenders see the benefits in these cases because they believe these clients to be less autonomous in their acts, less culpable for their crimes, have the possibilities to rehabilitate if given the opportunities, and the reductions in sentencing outcomes might save clients’ lives and help return them into society as properly functioning individuals. Honing in on specific interviews, records, relationship-building, and contextual research can yield volumes of information and the possibility of over 20 mitigation themes for argument. To me these cases embody the “democratization” of mitigation investigation, bringing down the


49 Id. at 36-37.

50 Id. at 37, 41, 43, 57-58.

51 I borrow the concept of democratization from Daniel J. Boorstin. In his books The Americans: The Democratic Experience (1965) and Democracy and Its Discontents (1974), Boorstin points out that the unique and successful history of American democracy came about and continues through the national ability to push opportunities and commodities down the socio-economic ladders and outward to the geographic masses. In doing so, material items, experiences, values, and identities can be standardized, understood, and shared and can unite a dispersed and large population in homogenous consumption. Among the examples Boorstin
cost, limiting time requirements, and providing accessibility so that clients, other than death-penalty defendants or murder defendants, can benefit. Moreover, these cases show us that juvenile clients can have a plethora of mitigating factors even in very short life spans. The sentencing outcomes in some of those cases are yet to be determined, so we must stay tuned for their results.

V. Conclusion

- The death penalty may be gone, but we face a new challenge: combating life sentences that may be arbitrary and oppressive in some cases.

- We have obtained much knowledge and many tools on how to deal with the death penalty, including how to prepare for sentencing and how to investigate, prepare, and present mitigation. We built the tools of the ABA Guidelines and Supplemental Guidelines, the bifurcated trial and beginning sentencing preparation early, the counter-narrative strategy of mitigation, and the use of the mitigation specialist. We learned how mitigation is primarily a humanizing effort, is enigmatic in essence and sui-generis in performance. And we can develop mitigation packages for cases other than murder.

- Mitigation in sentencing did not go away with the death penalty, so we should not throw it away on our own accord. It is still a powerful tool in our toolbox. As long as we learn how to strategically hone our investigation in order to shave off years in sentences, mitigation can still provide victories for our clients. And your mitigation specialist will still be that indispensable team member to help you bring such victories.

chooses to prove his point are the democratization of beef, the law, clothing, resources, transportation, education, and images.