

# MITIGATION IN CAPITAL CASES

## 1. Overview

-Capital cases unlike any other criminal case

-This presentation contemplates that the Client has committed a murder where the penalty is either death or LWOPP.

-the ultimate penalty

-unlimited funding

-use of experts

-travel to places client lived/interview of family, etc.

-*Absolute duty to comply with* USSC and ABA guidelines while defending a capital case

-*Two phases to captl case*: once guilty is determined so as to qualify the penalty as either death or LWOPP, then there is a second phase that determines the punishment.

-State puts on its evidence re why death should be imposed; Defenses offers its mitigation evidence, giving jury the option of putting client in prison forever as opposed to death

## 2. Alabama's Death Penalty

### A. Summary of 13A-5-40 (a).

**"Murder by the Defendant during:**

- (1) **Kidnaping 1<sup>st</sup>** or an attempt by the defendant;
- (2) **Robbery 1<sup>st</sup>** or an attempt by the defendant;
- (3) **Rape 1<sup>st</sup>, sodomy 1<sup>st</sup> or 2<sup>nd</sup>** or an attempt by the defendant;
- (4) **Burglary 1<sup>st</sup>** or an attempt by the defendant;
- (5) **Murder of any law enforcement officer** while officer on duty;
- (6) **Under a sentence of life imprisonment;**
- (7) **Pecuniary gain** (contract for hire);
- (8) **Sex abuse 1<sup>st</sup> or 2<sup>nd</sup>** or attempt by the defendant;
- (9) **Arson 1<sup>st</sup> or 2<sup>nd</sup>**, or by means of explosion;
- (10) **2 or more persons murdered by Defendant** by one act or course of conduct;

- (11) **Victim is State/Federal official** (or former official) and murder stems from or caused by or related to his official position, act or capacity;
- (12) **Aircraft hijacking** where demand for **valuable consideration** is made;
- (13) Defendant convicted of murder in 20 yrs preceding this event;
- (14) Where Victim is witness in any other court proceeding (if under subpoena);
- (15) Victim less than **14 yrs of age**;
- (16) Shooting from or into a dwelling while Victim in dwelling;
- (17) Victim killed while in a vehicle;
- (18) Defendant kills victim from a vehicle;”

**B. Summary of 13A-5-40 (b) [Intentionally Omitted]**

**C. Summary of 13A-5-40 (c).** *A defendant who does not personally commit the act of killing which constitutes the murder is not guilty of a capital offense defined in subsection (a) of this section **unless** that **defendant is legally accountable for the murder because of complicity in the murder itself under the provisions of Section 13A-2-23**, in addition to being guilty of the other elements of the capital offense as defined in subsection (a) of this section.*

**D. Summary of 13A-5-40 (d).** To the extent that a crime other than murder is an element of a capital offense defined in subsection (a) of this section, a defendant's guilt of that other crime may also be established under Section 13A-2-23. When the defendant's guilt of that other crime is established under Section 13A-2-23, that crime shall be deemed to have been "committed by the defendant" within the meaning of that phrase as it is used in subsection (a) of this section.

**3. Sentencing & Mitigation**

**A. Sentencing 13A-5-45 (c) (State)**

“(a) Death or Life Without Possibility of Parole

(c) Evidence of **aggravating circumstances** under 13A-5-49

- (1) Defendant under sentence of imprisonment
- (2) Previous capital offense or felony involving use/threat of violence
- (3) Defendant knowing created great risk of death to many persons
- (4) Capital offense committed while Defendant engaged in or flight from rape, robbery, kidnapping or burglary, or attempt thereof.
- (5) Made for purpose of avoiding/preventing lawful arrest or effecting escape from custody.

- (6) Pecuniary gain.
- (7) Committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws
- (8) Offense was especially heinous, atrocious, or cruel compared to other capital offenses.
- (9) 2 or more deaths by one act or pursuant to one scheme or course of conduct.
- (10) One in a series of killings committed by Defendant.”

**B. Mitigation 13A-5-45 (c) (Defendant)**

**1) General Mitigation: 13A-5-51**

*Mitigating circumstances shall include, but not be limited to,* the following:

- (1) no significant history of prior criminal activity;
- (2) offense was committed while the defendant was under the influence of extreme mental or emotional disturbance;
- (3) victim was a participant in the defendant's conduct or consented to it;
- (4) defendant's participation relatively minor as an accomplice;
- (5) defendant acted under extreme duress or under substantial domination of another person;
- (6) capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired;
- (7) Age of the Defendant the time of the crime.

**2) Mitigation Re Defendant's Character/Record/Etc.: 13A-5-52**

**“In addition** to the mitigating circumstances specified in Section 13A-5-51, *mitigating circumstances shall include ANY aspect of a defendant's character or record* and any of the circumstances of the offense that the defendant offers as a basis for a sentence of life imprisonment without parole instead of death, **and any other relevant mitigating circumstance which the defendant offers as a basis for a sentence of life imprisonment without parole instead of death.**” Emphasis added.

*This statute evolved from various USSC decisions regarding the penalty phase of a capital case*

#### 4. Evolution of Mitigation in Capital Cases.

##### A. USSC Decisions Re The Mandatory Nature of Mitigation.

1) **Woodson v. North Carolina 42 US 280 (1976)**: Process must take into account relevant facets of the character and record of Defendant, or circumstances of the particular offense when the ultimate punishment is death. *Possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind.* Cannot treat defendants as a faceless undifferentiated mass to be subjected to the blind infliction of the death penalty.

2) **Lockett v. Ohio, 438 US 586, 604 (1978)**: Reaffirms the requirement that mitigation requires consideration of character, prior record, age, lack of specific intent to cause death, and relatively minor role in the crime. Court further noted that the 8<sup>th</sup> and 14<sup>th</sup> amendments require that the sentencer not be precluded from considering, as a mitigating factor, *any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant has proffered as a basis for a sentence less than death.*

3) **Eddings v. Oklahoma, 455 US 104, 114-114 (1982)**: Defendant teenager prohibited from offering emotional disturbance and turbulent family history. USSC rejects and holds that, *as a matter of law, any mitigating evidence* can be offered. This case also discussed the issue of “youth.”

4) **Skipper v. South Carolina, 461 US 1, 4-5 (1986)**: Both pre-offense *and post-offense mitigation* can be used. Example: redemption, good adjustment in jail. Reasoning: such inferences would be mitigating in the sense that they might serve as a basis for a sentence less than death.

##### B. Duty of Counsel To Develop Mitigation Evidence.

1) **Williams v. Taylor, 120 S.Ct 1459 (2000)**: Trial Counsel ineffective for failing to effectively prepare for penalty phase (1 wk before trial). *Failing to conduct thorough investigation into defendant's background. In this case, defendant had a “nightmarish childhood/parents incarcerated for child neglect/subject to severe beatings/committed to custody of child services for 2 years/returned to parents after they were released from prison/defendant borderline retarded/did not advance beyond 6<sup>th</sup> grade/defendant given commendations while in prison for helping crack a prison drug ring/returning a prison guard's missing wallet/prison officials who would have testified that defendant was least likely to commit an act of violence. Defendant seemed to thrive in a regimented and structured environment (prison)/had obtained and proud of a carpentry degree he earned while in prison.*

## 2) ABA Guidelines: February 2003 (Professional Standards)

Developed by the ABA and recognized by the USSC as the standard by which trial counsel handles capital cases. They are the “Bible” in defending capital cases.

USSC stated in *Wiggins v. Smith*, 539 US 510 that the ABA Guidelines apply to all capital cases and must be followed.

### Key ABA Guidelines Outline (Hofstra Law Review)

#### 4.1: THE DEFENSE TEAM AND SUPPORTING SERVICES

*Defense team: 2 attorneys, mitigation specialist, investigator, plus assistance of all other ancillary professional services necessary for any aspect of the case*

#### 9.1: FUNDING AND COMPENSATION

*Money for the defense and defense team is not, nor should it be, be an issue*

#### 10.4: THE DEFENSE TEAM: *High quality defense*

#### 10.7: INVESTIGATION: *Investigate everything*

## 5. What Constitutes Mitigation? Anything and Everything Relating to Defendant’s Life.

Rationale: Jury needs to see this individual’s **entire life** before deciding to terminate his life

### A. Obtaining Records

- 1) School (Kindergarten through last school attended)
- 2) All Medical Records (From birth forward)
- 3) Mental Health Records (All)
- 4) Military
- 5) Work
- 6) Jail/Prison

- 7) DHR: investigations of parent(s) while defendant a child
- 8) Juvenile proceedings

**B. Interviews**

- 1) With Family (Digging Up The Family Secrets/Family dynamics, or lack thereof)

- abuse (physical/sexual/emotional)

- neglect

- lack of supervision

- permissive drug and/or alcohol use

- lack of structure/regimen

- 2) Friends

- defendant as a child, behavioral issues

- defendant's susceptibility to undesirable influence

- the good in defendant

- 3) Teachers/Coaches

- same as above

- defendant's response to positive influence, e.g., sports, when contrasted with a horrible home life

- 4) Juvenile Probation Officers/Court Appointed Attorney(s)  
  
-same as above  
  
-their perspective on defendant's issues, i.e., caused by family dynamics
- 5) Youth pastors, pastors
- 6) Anyone who has had contact with defendant that can offer a glimpse or the client's life

**C. What Do You With All Of This Information Once Collected?**

- 1) Mitigation Specialist typically has a graduate degree (social/psychology/etc.)  
  
-coordinates an investigation into Client's entire life history  
  
-coordinate & record full multigenerational life history  
  
-analyze factors/forces that influenced client's development, personality & behavior  
  
-identify issues requiring evals by mental health or medical professionals  
  
-assist trial counsel in obtaining experts for trial  
  
-sometimes testify at trial regarding their findings
- 2) Client is interviewed re information collected
- 3) Family interviewed  
  
-delving into the dark side of family secrets  
  
-abuse/trauma history

–substance abuse

- 4) Mitigation Specialist refers trial counsel to “*ancillary professionals*” that can testify/opine on client’s history and the option of LWPOP as opposed to death.
- 4) Review raw data/information obtained and develop mitigation theme
- 5) Anything else that would develop a mitigation theme based on client’s history.

## **6. Conclusion**

- 1) Mitigation evidence is used to put the Client’s life history in perspective to the event leading up to criminal event
- 2) It is not designed nor intended to justify the Client’s conduct, but to illustrate to the jury or court that a sentence of LWOPP is a sufficient punishment

Sources: Santa Clara University School of Law Death Penalty College, 2012  
Alabama Capital Defense Trial Manual, 4<sup>th</sup> Ed.