Using Lessons from the Capital Arena for Sentencing Advocacy in All Cases

Over time, advocates in the capital defense arena have figured out which strategies work and which do not lawyers in noncapital cases can learn from the strategies developed during several decades of capital represent incorporate these strategies into sentencing advocacy for clients charged with drug offenses, noncapital murd crime. While the process has begun to incorporate mitigation in noncapital cases, the practice has not become noncapital cases, the offender is more likely someday to be released and returned to society. This requires development and resources for the offender that will facilitate a smooth

---

James E. Boren and Alyson Lang
The Champion® Issue July 2018 {/issue/ChampionIssueJuly2018} Page: 42

Defense lawyers in noncapital cases can learn from the strategies developed during several decades of capital representation. They can incorporate sentencing advocacy for clients charged with drug offenses, burglary, noncapital murder, or an

HUMANIZING THE CLIENT

In 1976 whe*Gregg*[1] reinstated the death penalty, a whole new world was created for the capital defense community. There were to be two phases of a t and the penalty phase. No one had any idea what should be done in a penalty phase, and it took decades for the capital defense community to develop an portion of the case. The only issue at that point of the case was to determine whether the appropriate sentence was life in prison or death for the def convicted unanimously by a jury of 12 people, all of whom had already said they believed in and would impose the death penalty under approp

"Winning" was redefined in death cases. A win was a conviction of first degree murder with a sentence of life which, in almost any other world, wc defeat.

Many dedicated capital defenders struggled with how to convince jurors to give life sentences to clients who had just been convicted of committing t killing children, perhaps raping them first; raping and murdering adults; killing police officers; and killing multiple people

Many lawyers believed the penalty phase was hopeless and despaired for lack of anything to do. As a result, they even more aggressively defende ironically, cemented the death penalty as inev

Veteran lawyers who tried dozens of murder cases had no training, no experience, and no plan for the penalty phase. However, even in Louisiana, the s more people per capita than any other state or nation, the aggressive training and preparation for penalty phase work has resulted in a stunning turr years, one person has been executed (he volunteered) and 11 have been removed from death row, some of them exonerated as innocent. But the real sto: more people on death row. It is now rare that prosecutors seek the death penalty in murder cnot rare that juries return verdicts of life. The reason for th vision and foresight of people like Scharlette Holdman, who developed the concept of mitigation. Holdman was fond of saying that while she was proud teaching lawyers how to mitigate a person's bad acts, she wished she had called the field "humanity" rather than mitigation. Why? When it is all distill point, that is what the penalty phase in a capital case is all about — humanizing the client and convincing a jury that despite the bad things she has sufficient punishment in her c

Eighth Amendment law — developed in capital cases — establishes that the trend the jurisprudence supports is that to be constitutional a capital schem pool of crimes eligible for the death sentence by carefully defining and narrowing the offense. Even more important, sentencing must take into a offender and determine that of all the people who are convicted of first degree murder, only the "worst of the worst" should recei

The decision to kill a fellow human is not easy and never has been, even in times of war. In the criminal justice system, 12 people sit around a table ar will kill the defendant (another human), and that conversation can occur only if the state has succeeded in dehumanizing the client. It is easier to kill s gas, a bomb, or a rifle than it is to kill someone up close. But it is not hard to kill people labeled subhuman predators who are monsters, thugs, and not murderers, drug dealers, and sex offen

Over time, advocates in the capital defense arena have figured out which things do not work. Arguing that the death penalty is wrong and immoral d arguing that child pornography or distribution of drugs should not be a crime. A trial strategy that "shoots everything that moves" does not work t points the defense is attempting to make for reasonable doubt or to temper the punishment or degree

HOW DID THE CLIENT END UP HERE?

Defenders who successfully put on a mitigation case do it in the same way that people attack or endorse scientific evidence. Blood type, blood spatter, efficiency, false confessions, and faulty eyewitness identification are successfully attacked or advocated by careful preparation. The defense must under simplify it for judges (to get expert funding) or jurors (so they can understand the concept

Mitigation is telling the story of the client's life so the sentencer can understand how he wound up where he is. The defense attorney cannot tell the understands it, which she cannot do until she has taken an adequate social history that goes back at least three generations. This is not the theory: "D child so pity him and let him live." Although that was at one time the state of the art, now it has been refined: "David was molested as a child and her kids are abused." Ted Cruz, as the solicitor general in Texas, filed an amicus brief in the U.S. Supreme Court that argued Mr. Kennedy should be (without death) of a child. Along with the attorney generals of numerous states, Ted Cruz argued: child rape causes people to become criminals, creates causes people to look at child pornography, and thus causes people to develop numerous serious mental health issues that can result in violence. B consequences of child rape, the argument continued, child rapists should be executed. Their argument was not successful. But they recognized, inher damage caused by mental, physical, or emotional t

Prosecutors will effectively argue that many people suffer abuse during childhood, but they do not become killers. An expert witness, however, can ta childhood trauma or maltreatment that includes physical, sexual, and emotional abuse. Some trauma is considered so severe that it is comparable to th Victims of child sexual abuse suffer adverse consequences in their physical, emotional, social, and cognitive development. They are more likely t outcomes throughout their lifespan. Victims of child abuse experience nearly twice the number of serious physical and mental health problems as cl abused. Adverse outcomes of childhood sexual abuse include high-risk health behaviors such as higher number of lifetime sexual partners, younger intercourse, teen pregnancy, alcohol and substance abuse, and behavioral problems including delinquency, aggression, adult criminality, and abusiv

As for the impact on society, child abuse is similarly drastic. Child sexual abuse has been correlated with an increased prevalence of health problems, wh correlated with increased utilization of public and private resources. Child sexual abuse also plays a major role in shaping the future sex criminal and "s of the victin

Prosecutors who handle capital cases go to seminars to learn how to attack mitigation evidence. They know it is effective. That they worry about and fe evidence is reason enough for defense attorneys to contemplate putting that arrow in their quive

MITIGATING FACTORS

The American Bar Association guidelines on capital defense at 10.11 present a summary of factors considered to be mitigating that are either listed in stat the penalty phase of capital cases or that fall under the "any other mitigating fac

The following are among the many mitigating f

- Abuse and/or neglect of the client during child
- Mental impairment disorders or limitations of any nature. It need not rise to the level of incompetency or insanity necessarily require a battle over the proper diagnosis of the problem. If the client suffers from some pathology that in mental functioning, that is something that a jury or judge can take int
- Personal characteristics such as youth, old age, religious commitment, work history, or good character. This, unfortun thing many lawyers investigate — maybe because it
- Efforts at self-improvement or to overcome problems, even if those efforts were unsuccessful. For example, drugs a many people consider to be "excuses," are often successfully urged as mitigating factors, particularly if family m enabled the person to continue the destructive effects of substan
- The client's love of family, spouse, or others. This touches the heart of some but must be distinguished from the uti "putting me in jail hurts my family" arg
- Love that others have for the client. In capital cases and in cases involving homicide and physical injury to the vi counter the "victim impact" testimony that the state introduces. Reverse vic
- Service in the military, post-traumatic stress syndrome, emotional scars from military service, and drug addiction fron How do defense attorneys find out about these things? Th
- Addiction to drugs or alcohol, if presented so that the jury understands how the client is susceptible to addiction an became addicted. Examples include resorting to alcohol after a particularly traumatic loss or using drugs to self-mec reasons
- Cooperation with authorities such as the client turning himself in or confessing to the crime. If the client waiv confessed, it can be used to his advantage to say he showed remorse by cooperating, realizing his mistakes, and accepti It is not snitching, but could
- Lesser culpability of the client than others involved in the same offense. This requires knowledge of co-defendants' c involvemen
- Remorse. Most studies indicate the single most important factor that juries take into consideration in determinin whether the defendant expresses remorse. Some mental health disorders preclude a person from sharing his emotions case, it is worth addressing at the sentencing stage, during guilt, or voir dire. Remorse when guilt is contested, howev is a problem a bifurcated trial complic
- Good adjustment in prison and the capacity for rehabilitation. Jail records and interviews with custodians if the pe pretrial can result in rich stories supporting any of the issues list
- Needless suffering of the client's family. In one case, a juror voted for life and spared the client's life because his daug The juror felt that if her father had been sentenced to death, it would also cause his daughter to commit suicide. This

to admit, but possib

INTELLECTUAL DISABILITY

Mental retardation, now called "intellectual disability" in most statutory schemes, illustrates the transformation of what could be a "bad fact" into a "g with people who are intellectually disabled is that they make bad choices and are considered dangerous or "scary" for that reason. After advocates under disability is a condition with predictable symptoms and consequences, it allowed them to argue that a person who is unable to make cognitive de punished at the same level of culpability as a person who is not afflicted with th

INSANITY

Most states have extremely tight definitions and extremely difficult burdens to prove insanity. The inability to "distinguish right from wrong" is not a mental health professional to describe insanity, and thus it is a defense that is rarely used. When used, it is rarely successful. Many "lesser" mental he constitute mitigating factors. For example, Louisiana considers the following factors (among others) to be mitigating circumstances: (1) the offense wa offender was under the influence of extreme mental or emotional disturbance; (2) the offense was committed while the offender was under the influer (3) at the time of the offense, the capacity of the offender to conform his conduct to the law was impaired due to mental defect or intoxication; an offender at the time of the offe An advocate can use these factors to develop an argument

> In cases in which the life sentence or death sentence is litigated, courts have been forced to identify what constitutes legal grounds for mitigation aggravation. If we consider these factors in the most serious of crimes, why should we not consider them in all crimes? Put another way, if i decision not to impose death, why should it not mitigate a decision as to whether to impose five years or 50 yea

FETAL ALCOHOL SPECTRUM DISORDERS

Prosecutors have long argued that people who have anti-social personality disorder, or are a sociopath, have an "aggravating factor" that should i punishment received. It impacts future dangerousness, and is a bad fact. Recent research discovered that fetal alcohol spectrum disorders (FASD) can ex that appear to be anti-social personality. For a client with FASD, the favorable fact is that it is a disease that a person is born with and thus it is not the result when a mother drinks alcohol during the first three months of pregnancy. Defense counsel does not have to blame the mother because many pregnant for the first three months. Whether the mom was a good person or a bad person is irrelevant: the point is that a child was born with serious p FASD appears to have the same symptoms as anti-social personality disorder. Attorneys who attend a seminar on FASD will find their sentencing ad improved

A first step is to try to obtain a history of the mother's use of alcohol at the time the child was in the womb. An interview with a mom who denies dri not the end, of the investigation. In addition, do not assume the amount of alcohol the mother says she drank was too small to

Examining a client's school records may reveal diagnoses of anti-social personality disorder or attention deficit disorder. Speech and language ha disabilities are also symptoms of fetal alcohol syndrome. Behavioral problems such as oppositional defiant disorder, conduct disorder, and reactive atta also indicators of FASD. In addition, defense counsel should try to obtain the mother's medical records. Moreover, if defense counsel finds prenatal r care records that indicate failure to thrive, it means that more digging shou

In order to corroborate a client's impairment as organic rather than behavioral, which is significant to most prosecutors, judges and juries, it is anecdotal evidence from the client's early years. From birth records, one can look at the child's weight, height, and head circumference. Many people v physical or cognitive disabilities, but they still have serious brain-based neuro-behavioral disabilities. Incredibly important information can be unea educational records, especially at the lower grades; (2) looking at attendance; (3) determining if the person was socially passed; and (4) interviewing sc school psychologi

Juvenile records are a fertile field of investigation. The problem of a client demonstrating a lack of remorse can easily be a symptom of FASD becau understand the cause and effect and implication of his actions. This helps judges, juries, and prosecutors understand a client's inability to express re girl charged with multiple murders by arson, was saved by discovery of a note she wrote to God when she was seven years old. In her note, Angel pra because she could not stand to go on living while everyone h

Similarly, a client's desire to please can cause him to smile at people in the courtroom and appear unconcerned with the proceedings, and t misinterpreted by the uneducated observer. FASD and a low IQ are completely different, although they can coexist in a person. From defense cou favorable aspect of FASD is that it can be "seen" and it is not simply a lack o

Telling a court or a prosecutor that the client was "depressed" at the time of his crime is generally not effective. However, understanding basic psy better disposition of the case. Situational depression ("My dog died and I lost my job.") is not like clinical depression, which has associated feature impairment of cognitive functioning. As an example, Eeyore of Winnie the Pooh fame, after receiving a check for one hundred thousand dollars, despai street about depositing it for fear he would be run over by a truck or that the bank would be closed or that he would forget his

Individuals suffering from diagnosable mental diseases may not qualify for the not guilty by reason of insanity defense. In capital cases mental health is the level of an insanity defense are nevertheless mitigating. Jurors are told that if they cannot accept it, they cannot serve on the jury. Why not try to on the diagnosis, symptoms, and ability to be rehabi

GUILT PHASE AND PENALTY PHASE

Capital defenders have learned that lawyers must simultaneously develop defenses for the guilt phase and the penalty phase. In noncapital cases, th focus all efforts on establishing a defense to the crime or a reason a responsive verdict is appropriate. "We'll cross the sentencing bridge when and if some defenders think. It is hard to talk sentencing strategy to a client before trial without appearing weak or pessimistic and without injuring the attor In capital cases, however, defense attorneys learned that if they are not careful to coordinate the guilt phase and the penalty phase, they may close ma and sentencing advocacy. One way to think of it is that there should be one phrase for both phases of trial — guilt

Obviously, this requires that the defense attorney prepare for sentencing at the same time he is preparing his opening statement telling jurors that t client's alibi or claim of self-defense. What capital defenders do is front-end load their mitigation by tying in the mental health difficulties of the client for example, why the client confessed or why the client ran away and hid. The presumption of guilt by escape is a state of mind issue. Because of a men person may panic or confess to crimes not committed when facing any kind of stress, or the person may appear without remorse

Psychiatrist Elizabeth Kubler-Ross, author of "On Death and Dying," studied grief and how mental health professionals and doctors could help pa patients struggling with terminal diagnoses. She determined that grief went through s

- Shock — the initial paralysis at hearing the ba
- Denial — trying to avoid the inevi
- Anger — A frustrated outpouring of bottled-up en
- Bargaining — seeking in vain for a w
- Depression — final realization of the inev
- Testing stage — where one seeks realistic sol
- Acceptance — finding the way for

These stages are what victims of crimes, prosecutors, judges, and jurors go through. Recognizing the stage helps in negotiations with the prosecutor. I punishment are made in the anger stage, clients are in

ABA Guideline 11.8.6 sets out topics counsel should consider pre[3]

- Medical history (including mental and physical illness or injury, alcohol and drug use, birth trauma, and develo
- Educational history (including achievement, performance and behavior, special educational needs including cognitive learning disabilities) and opportunity or lack th
- Military services (including length and type of service, conduct, and specia
- Employment and training history (including skills and performance, and barriers to em
- Family and social history (including physical, sexual, or emotional abuse, neighborhood surroundings and peer influ cultural or religious influence; professional intervention (by medical personnel, social workers, law enforcement per others) or lack thereof; prior correctional experience (including conduct on supervision and in institutions, education clinical services
- Rehabilitative potenti
- Record of prior offenses (adult and juvenile), especially when there is no record, a short record, or a record of non
- Expert testimony concerning any of the above and the resulting impact on the client, relating to the offense and to the at the time of sentenci

Which witnesses and evidence should counsel consider presenting at sentencing? ABA Sentencing Guideline 11.8.3(F) discusses penalt[4]

- Witnesses familiar with and evidence relating to the client's life and development, from birth to the time of sentenci favorable to the client, explicative of the offense(s) for which the client is being sentenced, or would contravene evide the prosecuto
- Expert witnesses to provide medical, psychological, sociological or other explanations for the offense(s) for which th sentenced, to give a favorable opinion as to the client's capacity for rehabilitation, etc. and/or to rebut expert testimony prosecutor
- Witnesses with knowledge and opinions about the lack of effectiveness of the death p
- Witnesses drawn from the victim's family or intimates who are willing to speak against kil

The U.S. Supreme Court —*Wiggins v. Smith*[5] and*Rompilla v. Beard*[6] — relied on the 1989 ABA Guidelines to determine that failure to do a thorough inves mitigating factors constituted ineffective assistance of

Sources of suggested mitigation work may be found at ABA Capital Defense Guid[7] as well as the 20[8]*Hofstra Law Review* symposium issue on t Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Pe[9]

RE-ENTRY POTENTIAL

Mitigation in capital cases is important, but the reality is that there are many more noncapital offenders being sentenced without any mitigation eff same mitigation factors listed in the American Bar Association guidelines on capital defense at 10.11 are also relevant in noncapital cases. While the incorporate mitigation in noncapital cases, the practice has not become widespread. If mitigation were used in all noncapital cases, offenders would be hopefully prison time overall would be red

The one obvious hurdle is the huge time and financial burden this requirement would put on already strained defense lawyers, but one must hope for a Who is going to pay for a thorough investigation into mitigation factors? Some of the most fun litigation for appointed counsel is to ask for money for e hearing to say why the defense needs it. The defense teaches the court some law and makes everyone understand why PTSD or FASD is relevant to t choose to give defense attorneys what they want (a deal) instead of giving them money. If fighting about funding accomplishes nothing else, it allows educate the judge and prosecutor about *concept* of mitigatio

A distinguishing factor in noncapital mitigation is the additional focus on the offender's rehabilitation and re-entry potential. In death penalty case explaining why the defendant should not die. In noncapital cases, however, the offender is more likely someday to be released and return to society. Th on researching skills and development and resources for the offender that will facilitate a sm

A notable and rising example of noncapital mitigation is the mitigation of those juvenile offenders sentenced to mandatory life without parole for crim age 18. These individuals can be resentenced and potentially released. The mitigation of such youthful offenders must focus on not only re-entry capa person's success and adaptation to life in prison. The mitigation materials should include a list of accomplishments (religious, skill or social-based) incarcerated, combined with a solid re-entry and employment plan upon release. The difficulty in this type of mitigation is the ability to gather preinca In cases in which the juvenile was 16 years old at the time of the offense and has since served 30 or 40 years in prison, information such as family, ed history preincarceration may be difficult to find or non[8]

CONCLUSION

It would be great if, one day soon, law school capital punishment courses become history courses. The most serious punishment, sooner or later, wi

A lawyer should never say he or she cannot find any mitigation for a person. If the lawyer cannot find the humanity in the client, it is because the la enough. Defense attorneys must present the theory of mitigation to the prosecutor. Sometimes that results in a better plea and allows discussions sentencing which, in addition to retribution and incapacitation, includes rehabilitation and deterrence. What do defense attor

If mitigation is constitutionally required for the most serious punishment, why should the defense save that effort only for p

NOTES

1. *Gregg v. Georgia*, 96 S. Ct. 2909 (197
2. La. Code Crim. Proc. Ar art. 905.5
3. https://www.americanbar.org/groups/committees/death_penalty_representation/resources/aba_guidelines/1989-gu guideline-11-8-6.h (https://www.americanbar.org/groups/committees/death_penalty_representation/resources/aba /1989-guidelines/1989-guideline-11-8-).
4. https://www.americanbar.org/groups/committees/death_penalty_representation/resources/aba_guidelines/1989-gu guideline-11-8-3.h (https://www.americanbar.org/groups/committees/death_penalty_representation/resources/aba /1989-guidelines/1989-guideline-11-8-).
5. *Wiggins v. Smith*, 539 U.S. 510 (2003
6. *Rompilla v. Beard*, 545 U.S. 374 (200
7. https://scholarlycommons.law.hofstra.edu/hlr/vol3 (https://scholarlycommons.law.hofstra.edu/hlr/vol3).
8. For further information on noncapital mitig *see* Miriam Gohara, *A Case for Making Mitigation the Heart of Noncapital Sentencing*, 41 Am. J. Crim. L 41 (2014); Dana Cook, Lauren Fine & Joanna Visser Ad *Miller, Montgomery, and Mitigation: Incorporating Life History Investigations and Re-entry Planning into Effective Representation for 'Juvenile Lifers,'* The Champio, April 2017, at 44; James Tibens *Interviewing for Noncapital Mitigation*, The Champio, June 2014, at 3(

ABOUT THE AUTHORS

Jim Boren has been defending the rights of the accused and the lawyers who defend them since 1976. He appears frequently in the legislature to testify He is an Adjunct Professor at LSU, teaching courses on wrongful conviction of the innocent and capita

James E. Boren
Baton Rouge, Louisia
225-387-578
jim@jamesboren.co (mailto:jim@jamesboren.c)
www.jamesboren.cc (http://www.jamesboren.c)

Alyson Lang is a 2018 graduate of LSU Law School who formerly clerked for Jim Boren. She currently serves as a law clerk for the Honorable Marilyn Judicial District Court in Lafayette, Louis

Alyson Lang

TOPICS ON THIS PAGE

Explore these keywords to find related inform