

Preparing a Punishment Case (and Avoiding the ‘Abuse Excuse’)

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Introduction

The importance of mitigation investigations must never be underestimated. Each and every client I worked with had such a history to be discovered. On reflection, it is difficult to believe how anaesthetised those working in capital defence, myself included, become to the incredible sadness experienced by most of our clients. However the reality of the situation is ever present.

The last point at which the death penalty can be avoided in Texas comes with the second question posed to the jury in punishment phase. The client has been found guilty at the guilt/innocence stage of the trial. The jurors have answered the first punishment phase question in the affirmative and established that the client is a future danger. They are then asked whether there are any mitigating factors which require the client to be given life instead of death. It is here where the mitigation investigations take centre stage. They literally could save a client’s life. It is for this reason those working on capital cases refer to “fantastic mitigation” with an element of glee and pure relief. Most of the clients I worked with were undeniably guilty and their “fantastic mitigation” really was their last hope.

Preparation of the punishment case can affect the way an entire capital case is run. As the first Amicus intern fortunate enough to work with Amy Martin, Attorney at Law and one of Houston’s most sought after mitigation investigators, I was able to witness firsthand how an effective punishment case is developed throughout the preparation of a capital case. It is so important that the entire defence team including those working on the legal aspects of the case understands the necessity for and supports the development of a

rigorous mitigation investigation right from the beginning of a capital case.

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Whilst working in Houston I attended a defence attorney CLE in Fort Bend, Texas at which Amy along with another capital defence attorney, Pat McCain, presented on the very topic of ‘Preparing a Punishment Case’. I will draw on their expertise throughout this article. Amy repeatedly likened

her role as a mitigation specialist to that of a ‘biographer’. She emphasised the importance of ‘humanising’ the client and digging deeply into every single aspect of a client’s life from birth right up until the present day.

As Amy puts it:

“A Mitigation Specialist is essentially a forensic biographer. Her job is to learn as much as possible about a client so that trial counsel may present that client’s story to a jury. An author writing a biography, or even someone penning their autobiography, spends years preparing the book. For them, the stakes are critical acclaim and financial reward. In contrast, a capital case is literally a life or death situation.

The challenges of learning about a person in this stressful context can be overwhelming.

“If not given an adequate amount of time for the required all-encompassing investigation, the challenges are insurmountable”.¹

Throughout this article I will explore the law and standard mitigation practice alongside my own

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experience as an intern assisting Amy in the preparation of a wide variety of capital mitigation investigations.

The Law

Both the American Bar Association (ABA) Guidelines (October 20, 2003) and the State Bar of Texas Guidelines and Standards for Texas Capital Counsel (April 21, 2006) provide the following guidance in relation to how broad an effective mitigation investigation must be:

In deciding which witnesses and evidence to prepare concerning penalty, the areas counsel should consider include the following:

1. Witnesses familiar with and evidence relating to the client’s life and development, from conception to the time of sentencing, that would be explanatory of the offense(s) for which the client is being sentenced, would rebut or explain evidence presented by the prosecutors, would present positive aspects of the client’s life, or would otherwise support a sentence less than death;
2. Expert and lay witnesses along with supporting documentation (e.g., school records, military records) to provide medical, psychological, sociological, cultural or other insights into the client’s mental and/or emotional state and life history that may explain or lessen the client’s culpability for the underlying offense(s); to give a favorable opinion as to the client’s capacity for rehabilitation, or adaptation to prison; to explain possible treatment programs, or otherwise support a sentence less than death; and/or to rebut or explain evidence presented by the prosecutor;
3. Witnesses who can testify about the applicable alternative to a death sentence and/or the conditions under which the alternative sentence would be served;
4. Witnesses who can testify about the adverse impact of the client’s execution on the client’s family and loved ones;
5. Demonstrative evidence, such as photos,

videos, and physical objects (e.g., trophies, artwork, military medals), and documents that humanize the client or portray him positively, such as certificates of earned awards, favorable press accounts, and letters of praise or reference.

Hoping for a Plea

According to Amy and Dr Jolie Brams, a developmental psychologist who assists Amy on several of her cases, the mathematics of capital defence is as follows:

1. Plea = win
2. Trial = risk
3. Death = final²

The important question is therefore, how can we get the case to a plea? The underlying intention of mitigation investigations is often to secure a plea.

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Prosecutors do not want to risk going to trial and not getting a death verdict. Such a result could end a prosecutor’s career. For this reason, if they are presented with compelling mitigation

evidence in advance of trial they may well be persuaded to offer the client life without parole. This is seen as a victory for the defence in a capital case.

In order to make progress towards a plea the punishment case which is made up of a meticulously detailed mitigation investigation must be a primary focus for the defence team right from day one. The mitigation investigator will try to create a master chronology from which trial counsel can work. This master chronology is likely to include one or many of the following issues, each of which I will explore in further detail:

- Mental health (including mental retardation and other severe mental instability);
- Traumatic brain injury;
- Childhood/developmental issues;
- ‘Good’ mitigation.

Mental Health

Intellectual Disability/Mental Retardation

“It is rare that defense counsel will encounter a serious felony case, and particularly a capital murder case, that does not present one or more

mental health issues”.³ The golden rule of a mitigation investigation is to look into an *Atkins v. Virginia*, 536 U.S. 304 (2002) intellectual disability/mental retardation) claim first and immediately. Where an *Atkins* claim is successfully established the client cannot be executed. Whilst not all mental health issues will lead to a successful *Atkins* claim, a detailed mental health investigation at the earliest possible stage will provide a solid foundation if the case continues.

Educational records are fundamental in the investigation of an Atkins claim.

Following the landmark US Supreme Court decision in *Atkins* in 2002 the following three criteria must be established in order to succeed in an *Atkins* claim:

1. An IQ of approximately 70 or below;
2. Limitations in adaptive behaviour;
3. Manifestation of the above two criteria prior to the age of 18.

Client Focus – Client A

One of the first tasks I was given as an intern was to review Client A’s school records. I was presented with hundreds of pages of records and asked to read through them making a note of anything which could point to mental retardation. Educational records are fundamental in the investigation of an *Atkins* claim given that the intellectual disability must have become manifest before the client’s 18th birthday. I was extremely conscious of the enormity of my task and did not want to miss anything. Below is an extract from my memo summarising Client A’s school records which I hope will provide a useful example of the type of work often undertaken by interns in relation to mitigation investigations:

On November 11 1996 Client A underwent a psychological evaluation at the Rusk State Center. It was pronounced that “...although he has some scores which fall within the range of mental retardation Client A’s overall intellectual functioning appears to be most representative of the borderline range of intelligence. With this diagnosis he does not meet the criteria for mental retardation as defined in Section 591.003 (13) Title 7 Health and Safety Code (Persons with Mental Retardation) Act and is therefore ineligible for mental retardation services”.

However previous tests in September 1994 revealed that Client A was functioning well within the mildly mentally retarded range.

The pattern seems to be that he is usually somewhere between the mildly mentally retarded range and borderline intellectual functioning as assessed by mental health professionals. He is always way behind his peers in his intellectual

ability. For example at age 14 Client A’s mathematical ability was equivalent to that of a child aged 7 years and 9 months whilst his reading and spelling ability was akin to that of a child aged 6 years and 9 months.

However, despite this Client A’s academic grades do not look bad at all. At page 149 of the Friendswood State School records is a summary of Client A’s grades throughout school years 1998-2001. Client A does not get a grade below 82 and gets some grades in the 90s. However he never takes more than 4 classes in a year and in 2000/01 he only takes 2 classes in the whole year.

In May 1998 Client A was examined by Dr Andrew Baldwin, associate clinical psychologist. Dr Baldwin noted that Client A obtained an intelligence test score in the borderline range of non verbal functioning and equals or exceeds only 5% of the population. It is clear from Dr Baldwin’s report that Client A has difficulty with everyday

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activities and Dr Baldwin noted that Client A was unable to explain why we must put stamps on letters and could not formulate reasons as to why we must wear clothes without prompting. He was also unable to accurately name the days of the week backwards or complete serial subtraction of 3 from 20.

Severe Mental Instability

This is a completely different consideration to mental retardation as it includes all mental health issues, not just those which manifest themselves prior to the age of 18. The mental health issues encountered by those working in capital defence are extremely wide ranging and require detailed analysis throughout preparation of the punishment case. Many mentally ill clients will be reviewed by expert

doctors. However one of the most shocking things I came across during my time in Houston is that sometimes it may be better not to have a mentally ill client examined by a doctor. The decision is a very strategic one. Once a client has been examined the prosecution are alerted to the fact the defence may be considering a motion relating to the client's capacity. At this stage the prosecution will often seek to have the client examined by one of their own doctors. This is not likely to go well. The prosecution's doctor will do all he can to 'make' the client competent and therefore defeat any defence motion.

The way mentally ill clients are treated within the prison system in Texas is unbelievable. The client I am going to discuss below could not have been in a worse environment for his condition. I would fully have expected him to be in some kind of secure hospital. Instead he was simply another inmate at the County Jail – a facility which simply cannot provide the treatment and rehabilitation that he needs. Often my visits were the only time during the day when this particular client would come out of his cell. He told me he did not like to come out during his allotted hour of recreational time and chose to stay in his cell. All of the other inmates were alerted to his mental health problems by the fluorescent yellow jumpsuit he was made to wear instead of the standard orange. I would not be surprised if this had some part to play in his decision to remain in his cell rather than coming out to exercise.

Client Focus – Client B

Client B, currently awaiting trial in the County Jail, suffers from severe mental instability. The importance of expert examination in accordance with paragraph 2 of ABA Guidelines, the State Bar of Texas Guidelines and Standards for Texas Capital Counsel, as outlined above, is clearly paramount in Client B's case.

As part of our mitigation investigation, it was extremely important to establish how Client B functioned in the world prior to the crime. He believed in black-magic and was convinced those around him were practicing it on him. He reached out to all types of psychics and alternative practitioners for help. Client B's mental health issues led him to do ridiculous things without any evaluation of the logic of what he was doing.

As far as I could tell he clearly could not be expected to look after himself in a prison environment.

I found Client B the most difficult of all our clients to visit in the County Jail. He really is extremely sick and is incapable of engaging with the team with regard to any aspect of his defence. Every time I visited, Client B would ask the same questions about people completely unrelated to the case. He even stood up on the other side of the glass attorney booth and demonstrated how and where he believed the spirits had affected his body. As I left Houston at the end of my internship the defence team were preparing for Client B to be evaluated again by the medical expert. As part of potential plea negotiations the team are keen to show the prosecutor how much Client B's mental health is deteriorating as he awaits trial in the County Jail.

I found it particularly difficult to get my head around how a man like Client B can be kept in the County Jail along with regular inmates. It seems only natural to me that he should be in a hospital, not a jail cell. Client B would often tell me he did not take his daily recreational time, preferring to stay in his cell and not come out. As far as I could tell he clearly could not be expected to look after himself in a prison environment. I still find myself worrying about

Client B and hoping that one day he will get the help he needs to overcome his terrible illness.

Traumatic Brain Injury

Client Focus – Client C

Another case I worked on was that of Client C who is currently awaiting trial for the killing of his girlfriend. Early on in our investigations Client C's medical records revealed a history of neurological symptoms. Having explored Client C's medical issues the next logical step was to explore any related family history. We discovered that his brother suffers from such severe neurological disability that at the age of 28 years he has the mental capacity of a 1-year-old child.

Amy visited Client C's family at their home where she took video footage documenting the disability. This is a perfect example of demonstrative evidence which may humanise the client or portray him positively as required by paragraph 5 of the ABA Guidelines, the State Bar of Texas Guidelines and Standards for Texas Capital Counsel (see above). As well as providing support for the arguments in relation to Client C's neurological issues the defence

team wanted to use this video to show his caring nature because he had cared for his brother. This video footage was presented to the prosecutor along with medical records and letters from friends and family about his caring nature.

It was crucial that Amy built a positive relationship with Client C's family and particularly his mother. This enabled her to meet and take video footage of Client C's brother. Clearly the utmost sensitivity was necessary. There is often an element of mistrust between clients' families and their lawyers. It took several meetings before Client C's mother was able to tell Amy sensitive information.

Client C has even experienced seizures whilst incarcerated (discovered by the defence team's examination of his jail records) and has been examined by a neuropsychologist since I returned to the UK. I have very recently been informed by Amy that the State has changed its mind in Client C's case and is no longer pursuing the death penalty. The non-death trial will begin next month. This must be testament to the hard work of Amy and her team and must be seen as a 'victory' in a death case.

Childhood Issues

Abuse

One of the things most of our clients have in common is that they have been raised in a pretty terrible environment. However, consideration of a client's upbringing is the most likely of the factors discussed throughout this article to result in allegations of the 'abuse excuse'. Many people have experienced difficult childhoods and have still gone on to lead 'normal' crime-free lives. However, one of the things I was touched by very early on in my internship was a conversation between Amy and I during which we discussed the environments in which many of our clients grew up. I found myself asking how I would have turned out had I never experienced a nurturing and loving environment as a child. This is such a difficult question to answer. I

simply cannot imagine what my life would be like had I grown up, like so many of our clients, without the support and guidance of a loving family.

Client Focus – Client D

There is often an element of mistrust between clients' families and their lawyers.

The first client I visited in the County Jail was Client D who is currently awaiting trial for capital murder. Client D experienced an extremely unstable childhood during which he moved from boys'

home to boys' home. Client D's family had been nothing but a negative influence throughout his life. He was abandoned by his mother as a very small child. However, when it came to the issue of his life or death, Client D chose to heed his mother's advice 'not to sign for anything'.

I visited Client D regularly and as I got to know him it became clear he suffered from serious developmental problems. During one visit he asked if I could send him some word puzzles and long division problems to keep him occupied as well as cartoon drawings from the Disney movie the Lion King.

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Since I returned to the UK Client D has accepted the State's offer of life without parole. This is an enormous victory for the entire defence team. The evidence against Client D was overwhelming and the team knew that should he choose to go to trial the risk of death would be unimaginably high. A conservative Texas jury would almost certainly have voted for the death penalty if presented with DNA evidence connecting Client D to the victim.

'Good' Mitigation

The potential impact of positive or 'good' mitigation should not be overlooked. Presentation of positive facts about a client's life may be extremely persuasive for a jury.

Client Focus – Client E

I found reviewing the dozens of support letters quite an emotional task.

Throughout my internship, I worked closely with Client E, currently awaiting trial for killing someone in a drug deal gone wrong.

Client E has a devoted and supportive family,

something that is extremely rare to find along with a capital client. Client E's mother requested that friends, family and other supporters send letters outlining their experiences of Client E in an attempt to humanise him.

Additionally, the family wanted to provide hope for Client E himself by showing him how many people care about him. I was asked to catalogue all of the letters, of which there were dozens, summarising them and picking out anything particularly useful. During one visit I took my chart, summarising the letters, to show Client E. He was overwhelmed and became visibly emotional at the amount of love and support offered by all of his friends and family.

I found reviewing the dozens of support letters quite an emotional task. The general feeling throughout the letters was that Client E had simply been in the wrong place at the wrong time. Everyone emphasised Client E's easygoing and fun loving nature as well as his positivity, his caring nature and his love for everyone around him. Client E is the type of guy who would do anything for anyone. Unfortunately he found himself in a situation where, as far as he was concerned, he needed to protect his friend. As a result Client E, a normal, down to earth guy is likely to find himself in prison for a very long time.

Cover Letter and Mitigation Packet – Clinching the Plea

The final product of the months, often years of painstakingly detailed mitigation investigations is the cover letter and mitigation packet; both of which are presented to the prosecutor in the hope he or she will choose to spare a client's life.

The cover letter must be sufficiently detailed whilst simultaneously concise. It must tell a client's life story without losing the attention of the decision maker, the prosecutor. The pressure of drafting such a significant and important document must be overwhelming. Whilst a client may have several 'fantastic mitigation' points, it may be worthwhile focussing the cover letter on one or two in the hope of capturing the attention of the prosecutor and convincing him or her to save a client's life.

I learned that it is always important to 'know your audience' when drafting a cover letter. Playing on weaknesses or anything personal known of the prosecutor can be advantageous. It is paramount

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that the content as well as the theme of a mitigation presentation is very carefully considered.

The mitigation packet accompanies the cover letter and will contain materials

supporting the mitigation information presented within the letter. A mitigation packet could contain any combination of the following:

- Pertinent, full or condensed records (of any nature, e.g., educational);
- Expert report (e.g., explaining aspects of a client's mental illness);
- Photos/video footage (e.g., footage of Client C's brother);
- Letters (e.g., a selection of supportive testimonials from Client E's friends and family);
- Educational materials (e.g., explaining complicated/difficult terms).

Conclusion

Anything that can be used to show the client as an ordinary decent human being and not as a murderous monster can only help a capital case.

Whilst prosecutors are very much hardened to what they consider the 'abuse or any other excuse', an effective mitigation investigation should enable them to reconsider their position on the death penalty and start to

consider the possibility of a plea. Even where it is not possible to get a case to a plea, all of the hard work that has gone into the mitigation investigation will be invaluable in the punishment phase of a trial. At this stage the defence team only need convince one juror that there are sufficient mitigating factors indicating the client ought to receive life instead of death.

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¹ Amy Martin (Attorney at Law), General Mitigation Timeline – 'Killing Time? The time consuming task of an effective mitigation investigation in a capital case' (memo presented to the Judge in a capital case).

² Jolie S Brams, Ph.D. and Amy Martin, Attorney at Law, 'Talking to a Brick Wall'.

³ John Niland, Texas Defender Service, 'Developing mental health evidence and avoiding evaluator bias'.