

How to Conduct a Thorough Mitigation Investigation

Defense counsel in death penalty cases are required to investigate all aspects of the client's life history and present all possible mitigating factors. The goal of a mitigation presentation is to take the jury for a walk in the defendant's shoes. Mitigation evidence should never sound like an excuse for committing the crime. The defense counsel should also seek the assistance of a mitigation specialist.

ABA Standard:

Eric M. Freedman, *American Bar Association: Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 Hofstra L Rev. 913 (2003).
[ABA Guidelines](#)

Statutes:

[§ 565.030 R.S.Mo.](#)

[§ 565.032 R.S.Mo.](#)

[K.S.A. § 22-3424](#)

[K.S.A. § 21-4637](#)

Cases:

Rompilla v. Beard, 545 U.S. 374 (2005).

Defense counsel has a duty to client to investigate all available mitigation evidence even if client claims to have had a "normal" childhood

[Rompilla v. Beard, 545 U.S. 374 \(U.S. 2005\)](#)

Wiggins v. Smith, 539 U.S. 510 (2003).

Defense counsel has a duty to investigate mitigating circumstances in defendant's background

[Wiggins v. Smith, 539 U.S. 510 \(U.S. 2003\)](#)

Williams v. Taylor, 529 U.S. 362 (2000).

Defense counsel had a duty to present evidence that defendant would not pose a danger if kept in a structured environment and evidence that defendant was "borderline mentally retarded"

[Williams v. Taylor, 529 U.S. 362, 371 \(U.S. 2000\)](#)

Mills v. Maryland, 486 U.S. 367 (1988).

A jury cannot be precluded from considering mitigation evidence.

[Mills v. Maryland, 486 U.S. 367 \(U.S. 1988\)](#)

Sumner v. Shuman, 483 U.S. 66 (1987).

Doctrine of Individualized Sentencing includes mitigation and a mandatory death sentence is unconstitutional

[Sumner v. Shuman, 483 U.S. 66 \(U.S. 1987\)](#)

Ake v. Oklahoma, 470 U.S. 68 (1985).

If defendant requests access to a psychiatrist to help with defense, the State must provide a psychiatrist

[Ake v. Oklahoma, 470 U.S. 68 \(U.S. 1985\)](#)

Strickland v. Washington, 466 U.S. 668 (1984).

In order to find ineffective assistance of counsel, defendant must prove: (1) Counsel's performance was deficient and (2) Deficient performance prejudiced the defense

[Strickland v. Wash., 466 U.S. 668, 694 \(U.S. 1984\)](#)

Lockett v. Ohio, 438 U.S. 586 (1978).

Mandatory death sentences fail to account mitigating circumstances and are therefore, unconstitutional

[Lockett v. Ohio, 438 U.S. 586 \(U.S. 1978\)](#)

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

The character and record of the defendant are an indispensable part of the process of inflicting death

[Woodson v. North Carolina, 428 U.S. 280 \(U.S. 1976\)](#)

Secondary Sources - Articles:

The following articles contain information about the importance of mitigation evidence and how to obtain such evidence. The articles also contain references to cases in which mitigation is at issue.

Alex Kotlowitz, *In the Face of Death*, N.Y. Times, July 6, 2003, at [FACEOFDEATH.rtf](#).

40A Am Jur 2d Homicide § 551.

Phyllis L. Crocker, *Childhood Abuse and Adult Murder: Implications for the Death Penalty*, 77 N.C.L. Rev. 1143 (1999).

Russell Stetler, *Capital Cases: Mental Disabilities and Mitigation*, 23 Champion 49 (1999).

Deana Dorman Logan, *Learning to Observe Signs of Mental Impairment*, California Attorneys for Criminal Justice, FORUM, v. 19 (1992).

John H. Blume & Pamela Blume Leonard, *Capital Cases: Principles of Developing and Presenting Mental Health Evidence in Criminal Cases*, 24 Champion 63 (2000).

Jonathan P. Tomes, *Damned If You Do, Damned If You Don't: The Use of Mitigation Experts in Death Penalty Litigation*, 24 Am. J. Crim. L. 359 (1997).

Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 Yale L.J. 1835 (1994).

Jill Miller, *The Defense Team in Capital Cases*, 31 Hofstra L. Rev. 1117 (2003).

Vik Kanwar, *Capital Punishment as "Closure": The Limits of a Victim-Centered Jurisprudence*, 27 N.Y.U. Rev. L. & Soc. Change 215 (2002).

Craig Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation*, 35 Santa Clara L. Rev. 547 (1995).

Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 Buffalo L. Rev. 329 (1995).

John H. Blume & Pamela Blume Leonard, *Capital Cases: Principles of Developing and Presenting Mental Health Evidence in Criminal Cases*, 24 Champion 63 (2000).

John H. Blume & David P. Voisin, *Capital Cases: Avoiding or Challenging a Diagnosis of Antisocial Personality Disorder*, 24 Champion 69 (2000).

Secondary Sources – Books:

Welsh S. White, *Litigating in the Shadow of Death* (University of Michigan Press, 2006).
Welsh White describes successful mitigation techniques that have been used by the top death penalty defense attorneys.

Dorothy Otnow Lewis, *Guilty by Reason of Insanity: A Psychiatrist Explores the Minds of Killers* (Ballantine Publishing Group, 1998).
Dr. Lewis describes unorthodox mitigation techniques that should only be used by a licensed professional. She offers great insight into human behavior and the effects of abuse.

Insight and Psychosis: Awareness of Illness in Schizophrenia and Related Disorders (Xavier Amador & Anthony David eds., 2004).
This book is a resource for learning about disorders that the client may have.

Web Sites:

National Alliance for the Mentally Ill – www.nami.org

National Institute of Mental Health – www.nimh.nih.gov

Community Alternatives --

http://www.communityalternatives.org/mitigation/death_penalty.html

Sample Jury Instructions on Mitigation --

<http://www.juryinstructions.ca8.uscourts.gov/sec12.pdf>

National Association of Criminal Defense Lawyers --

<http://www.nacdl.org/public.nsf/freeform/deathpenalty?opendocument>

Death Penalty Information Center – Information on Mitigation Requirement in U.S.

Military death penalty cases --

<http://www.deathpenaltyinfo.org/article.php?did=180&scid=32>

Death Wish – <http://www.slaw.neu.edu/magazine/05winter/feature1.html>

Fair Trial Initiative (this organization is run by Steven Bright, an expert in mitigation) --

<http://www.fairtrial.org/>

This web site provides references to specialized tapes on mitigation (available for a fee)

<http://www.forensicpsychology.org/exports/death%20penalty.htm>

The Champion Magazine web site --

<http://www.nacdl.org/public.nsf/0/8de19bfcaf51a7e2852567c40050c38a?OpenDocument&Click=>

Social Workers as Mitigation Specialists -- <http://www.naswnyc.org/p2.html>

Law.com discussing problems with jury instructions on mitigation --

<http://www.law.com/jsp/article.jsp?id=1138701911792>