

1-1-1996

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Ann Charvat

*Capital Case Evaluation*

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### Recommended Citation

Charvat, Ann (1996) "Mitigation Evaluation: Preparation for a Death Penalty Trial," *Clinical Sociology Review*: Vol. 14: Iss. 1, Article 10.

Available at: <http://digitalcommons.wayne.edu/csr/vol14/iss1/10>

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# Mitigation Evaluation: Preparation for a Death Penalty Trial

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*Ann Charvat, Ph.D., C.C.S.  
Capital Case Evaluation*

## ABSTRACT

The purpose of this article is to begin to sociologically define a legal standard for the courts of mitigating factors that should influence the sentence of death. The article also describes a method of inquiry that makes this definition reasonable. The material presented is intended to serve as a guide for the investigation of mitigating circumstances for the sentencing phase of a death penalty trial. This paper outlines a method of historical investigation that has proven effective in development of evidence at the sentencing phase of the trial. It is useful both as a foundation for expert sociological testimony, as well as providing a firm foundation for experts in other disciplines.

## Mitigation Investigation

I worked for a group of attorneys who specialized in death penalty appeals, and it was my task to provide what they termed “The mitigation.” For me, a sociologist, the product was an in-depth case study of their client which began as far back as I could obtain data and incorporated as much information as I could gather about that individual and his family. The focus of my work is the violence *experienced by the client* in the course of his life, not that which he was convicted of committing. Subsequent sociological expert testimony is available, but the main thrust of the effort is simply the collection of data utilizing sociological methodology.

A death penalty trial is like no other. Guilt and sentencing issues are heard in separate phases of the trial by the same jury. My role prior to assisting with the appeals on Death Row was to assist attorneys at trial level in preparing for the sentencing phase of the trial. At the level of appeal, I have found that many condemned men were not provided even basic mitigation evaluations, and their juries were denied relevant information at the time of their verdict. Literally, the juries had no choice in many cases but death. The defense had simply not produced the mitigation evidence.

To obtain a death sentence, a jury is asked to weigh the aggravating factors of the murder against the mitigating factors. If the aggravating factors weigh more, the sentence is death. If the mitigating factors outweigh the aggravating ones, the sentence is life. Many juries have been faced with the prospect of deciding death knowing nothing about the men who face them. These cases, many years later, are overturned and some men face new sentencing hearings after spending years on Death Row.

A common error of defense attorneys is placing too much attention on the guilt phase of a death penalty trial, and neglecting adequate preparation for the sentencing phase. The fact that some men have been sitting on Death Row in excess of ten years and that I will be the first to systematically explore their social history is unthinkable, but it happens. In fact, the longer someone has been on the Row, the more likely it is that no mitigation at all was presented in the original trial.

Mitigation is defined as any facet of an individual or characteristic of a crime that would lessen the individual's culpability. There is an obligation to present to the jury the entirety of an individual's life in any instance when they will be asked to consider the death penalty (Blum 1985). Unfortunately, it rarely happens.

There is no limit to what a jury can consider as mitigation in a capital murder trial. Statutory mitigation factors include: the defendant has no significant history of prior criminal activity; the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance; the victim was a participant in the defendant's conduct or consented to the act; the murder was committed under circumstances which the defendant reasonably believed to provide a moral justification for the defendant's conduct; the defendant was an accomplice in the murder committed by another person and the defendant's participation was relatively minor; the defendant acted under extreme duress or under the substantial domination of another person; the youth

or advanced age of the defendant at the time of the crime; the capacity of the defendant to appreciate the wrongfulness of the defendant's conduct or to conform the defendant's conduct to the requirements of the law was substantially impaired as a result of mental disease or defect or intoxication which was insufficient to establish a defense to the crime but which substantially affected the defendant's judgement. Non-statutory mitigating factors are any other mitigating factors which are raised by the evidence produced by either the prosecution or defense at either the guilt or sentencing hearing (Forsyth 1995).

### *Method*

The method that I utilize for mitigation investigation involves the development of a case study employing historical analysis to reconstruct an individual life history. Initially, all existing records are reviewed and a time line of all major life events is developed, as well as a list of potential witnesses. A preliminary interview takes place with the defendant which elaborates the time line and identifies additional witnesses. It is important to note that guilt witnesses and mitigation witnesses are often the same people. The content of their contribution to a mitigation study, however, is very different than what might be useful in the guilt phase.

Release of information forms are signed for all schools, hospitals, jobs, social services, correctional and law enforcement agencies identified in the social history. Additional releases are obtained from significant family members for purposes of substantiation.

An ongoing and involved relationship with the defendant is recommended. In addition, one or more contacts in the community to be investigated must be identified to facilitate the investigation. The initial interview should educate the defendant on the nature of the investigation and develop the investigative instruments. The instruments, the time line and list of witnesses, are organic documents which are elaborated throughout the investigation. Data collection from interviews and records ultimately provides the attorney with direction in securing witnesses and identifying mitigation factors for trial.

Clarification and substantiation is provided by a practice of historical analysis which requires verification of significant events or issues by independent sources. Four principal sources of information are explored including: primary relationships; secondary relationships; historical documents; and scholarly research. Verification of an event or concept by at least three of these independent sources is necessary prior to acceptance at this level of analysis.

Primary relationships generally refer to family members and friends of the defendant. Secondary relationships include representatives from institutions outside the family, such as teachers, counselors, landlords, probation officers, or judges. If contact is infrequent or strained within the family, the appropriate classification is secondary. If the defendant is in close contact with these individuals, effort should be made to verify by other sources. These individuals will often provide information in an informal interview which they are unwilling to provide in court. Historical documents include written records obtained from a variety of sources, including newspapers, court transcripts, lawyer's notes, psychological evaluations, and school records. Effort should be made to gather any and all documentation that exists. If not yet ordered, the mitigation specialist should encourage psychological testing that seeks evidence of learning disabilities, attention/deficit disorders, as well as the diagnosis of a mental disorder. Finally, scholarly research is utilized which identifies characteristics which are correlated with a variety of mitigating factors, such as child or institutional abuse. As a source of verification, this research increases both the reliability and validity of the investigator's observations and provides the basis for expert testimony.

### **Steps of the Investigation**

**Step One:** Review the historical documents and create the time line. This will produce a time line of major events in the client's life that is substantiated by only historical documents, the firmest data in the analysis.

**Step Two:** Review previous interview data from attorney file and add it to the time line. This will produce the initial witness list, as well as fill in some gaps on the time line. These data are less reliable, but are extremely useful for purposes of substantiation and clarification. Methods of sorting data are flexible and should be designed for each case around preliminary mitigation themes.

**Step Three:** Interview defendant. A time line is generated with events and dates only. The narrative produced from historical preliminary interviews is blocked, and time line entries are elaborated by the defendant in this interview. Recollections of events and memories further expand the witness list.

**Step Four:** Repeat step three with significant family or community informants.

**Step Five:** Conduct interviews from witness list. The defense team establishes mitigation themes which are used to direct interviews, all of

which are open-ended. Follow-up is necessary for most informants making major contributions to the mitigation argument.

Step Six: Cement themes and substantiate utilizing at least three of the four types of data: primary relationship, secondary relationship, historical document, or scholarly research. These sources correspond to the triangulation method utilized in legal arenas. Obviously, the first three make the most convincing testimony if available. If not, expert testimony based on the research is available. Expert testimony, however, is best used as a supplement for actual witnesses in a courtroom, instead of a substitution or replacement.

## **Tools of the Investigation**

Although most cases can be managed on word processors, it is strongly recommended that data be managed with a data base application. (I use an application from Alpha Four.) Three organic reports are generated throughout the investigation: the time line, the witness list, and the inventory of documents. These reports begin with the first interview and are expanded as information is provided by additional sources.

The first report, the time line, is a simple chronology of the individual's complete life history. It includes all interview data, as well as that which has been obtained from the document search. Initial time lines are useful interviewing tools, and are subsequently used to inform experts on a case in an efficient manner. For most cases, the time line includes family history prior to the birth of the client, and moves to the present time. This tool is very useful for the attorney, and citations should be accurate and complete.

In addition to the time line, two other documents are useful in the management of a mitigation investigation. Mitigation witness lists are needed for the substantiation process, as well as for determining the utility of a witness in court. A mitigation witness list will typically include between 200 to 300 names of people who are potential informants to the study. Of these, as many as 50 may be located and interviewed.

Finally, it is important to maintain a numbered inventory of documents. These numbers should be used for citation in the chronology of events. It is important that an attorney be able to quickly identify supporting documentation during case preparation, and especially at the time of trial.

## Mitigation Themes

Some mitigation themes are identified early in an investigation. Clearly, these should be noted and used to direct the investigation. Final identification of themes, however, should occur at the end of the investigation. These themes will assist the defense team in identifying other experts who will be necessary to explain the significance of certain life events on individual behavior.

Although each case is different, five general themes should be examined in every case.

These themes are listed below with some examples of specific mitigating factors. This list is far from exhaustive, but is included to suggest potentially fruitful directions of inquiry.

**Family Abuse:** Intra-family abuse is typically a strong component of every death row defendant. It does not, however, make a convincing mitigation argument when used alone. The primary function is the identification of a place to begin the investigation. More significant will be the social components of the family background, such as poverty, unemployment, social isolation, racism, and other chronic stressors (Bolton and Bolton 1987).

**Community Response:** Neighbors and community members are useful informants for both the violence that occurred within the family, as well as that which occurred to the family. Themes of exclusion should be noted. Often community members were aware of the early victimization of these people, and of the difficulties experienced by their families (White, Padina, and LaGrange 1987).

**Institutional Indifference:** In some cases, this category becomes institutional violence. Many of these men were beaten as children in elementary schools by principals and teachers. Nearly all of them will remember public humiliation at the hands of authority figures. Oftentimes long histories will be identified in medical records, Child and Family Services reports, or parole or probation records that indicate that the social institutions these men encountered were negligent in their responsibilities (Blum 1985).

**Cognitive/Emotional Disorder:** Some have been diagnosed prior to their investigation, and some have not. Most will have individual irregularities that will require psychological evaluation. Examples include learning diagnosis, fetal alcohol syndrome, head injuries, family history of mental illness, exposure to toxic substance, drug and alcohol dependencies, untreated mental illness. Ironically, a mitigation investi-

gation gives some defendants their first insight into the nature of their behavior (Stebbins 1988).

**Perceptions of Society:** Many times, psychological evaluation that is not based on a complete social history will diagnose the defendant as having an anti-social personality disorder. If unquestioned, this diagnosis is considered legally “fatal.” It is essential that sociological testimony be available to attorneys to assist them in explaining the perceptions of society and culture that develop over the life course as needs are systematically unmet by conventional sources (Sampson and Laub 1993). A “stake in conformity” is learned through experiences with the social world that reward conformity and punish deviance. This is clearly not the social world of many of death penalty defendants. In my experience, Hirschi’s Social Bonding Theory (1969) has repeatedly proven effective in describing and explaining the failure of an individual to conform.

Each case, of course, is unique, and consequently the mitigation themes vary. It is recommended that discussion between all members of a defense team facilitate the identification of the mitigation themes that will be substantiated by lay and expert testimony.

The following section includes some analysis by themes directed by Social Bonding Theory.

### **MITIGATION THEME: Abusive Home**

Characteristics of the defendant’s life which are substantiated by the data include: low family SES; family disruption; parental substance abuse; paternal abandonment; severe and chronic child abuse; prenatal abuse; parental spousal abuse. The defendant’s parents are relatively low functioning and suffer from emotional disturbance. His mother and stepfather have long arrest records. Sexual abuse is prevalent in the extended family, but has not been substantiated for the defendant.

Early behavioral problems were noticed by extended family members, but no intervention was attempted. Parental alcoholism and low educational achievement would have inhibited early recognition of a possible organic origin. Between the ages of 1-7, the family moved frequently and family composition was inconsistent. Extended family, however, remained within close proximity and may have provided some affection and stability to the client, as well as some protection against violence. When the family moved to another state, the escalation of



violence within this family system was exacerbated by social isolation, unemployment, alcoholism, poverty, and legal difficulties.

TYPE: Historical Document	SOURCE: Dept. Human Resources Charity Hospital Sheriff's Department
TYPE: Primary Relationship	SOURCE: Mother Stepfather Uncle's wife Uncle Half brother Stepsister Grandmother Mother's friend Grandfather Aunt Family friend
TYPE: Secondary Relationship	SOURCE: Current CPS Worker Biological fat Past CPS Worker

### **MITIGATION THEME: Cognitive-Emotional Disorder**

The defendant was classified as learning disabled when he first entered fifth grade. Although learning difficulties were evidenced in first grade, intervention was not attempted until later. This may have been the result of frequent moves in early years to flee violence. The defendant was regularly sent to live with extended family members out of state when the injuries he suffered were to the extent that his parents feared prosecution if detected. Once his learning disability was diagnosed, marked improvement was noted in grades, but not in academic achievement.

At least two teachers and one vice-principal noted severe behavioral difficulties emerging in the fifth grade. It was noted that the rural school district had limited resources for special education students and, consequently, they did not certify the defendant as behaviorally disturbed, despite the fact that he would have met the criteria. Services were not provided through the school system or through the local community mental health system. At one point the family was court-ordered to counseling.

They did not attend and no follow-up was attempted by the court. The defendant perceived his parents to be empowered by the court.

TYPE: Historical Document	SOURCE: Metro School District 1963 Psychological Eval. 1972 Psychological Eval. 13th School District Dept. of Human Services
TYPE: Primary Relationship	SOURCE: Cousin Brother Friend Aunt
TYPE: Secondary Relationship	SOURCE: Employer HS-Teacher JH High Vice Principal JH Teacher HS Teacher EL Principal HS Counselor CPS Supervisor EL Principal Juvenile Court Judge Juvenile Probation Officer

### **MITIGATION THEME: Community Response**

By the time the defendant reached school age, the bruises and injuries produced by frequent beatings from his stepfather became problematic to the family. Extended family members became involved in elaborate plans to hide the abuse from authorities. Both parents were guilty of emotional and physical abuse, but the stepfather was most culpable of physical abuse and thus was most vulnerable to arrest. His mother actively protected her husband. Neighbors also knew of the injuries, and police were frequently called to manage conflicts in the home.

When too bruised to attend school, the defendant was frequently sent to live with relatives in another state. There is evidence that this abuse was known to authorities by age 8, but historical documents have not been forthcoming from expected sources. Official informants from this time period have not cooperated with the investigation. The defendant himself disclosed the abuse at age 15, but was again sent to relatives. Services were not provided to the family who had younger siblings, and the defendant returned soon after, reportedly to protect his mother and younger siblings. His mother began to utilize the services of the domestic violence shelter, but without sincerity. Neighbors, teachers, CPS workers, and police were all aware of the level of violence within the family. No one intervened.

TYPE: Historical Document	SOURCE: Charity Police Reports School Reports CPS Records
TYPE: Primary Relationship	SOURCE: Step-Grandfather Aunt Uncle Cousin Family Friend Family Friend Family Friend Neighbor Ex-neighbor Neighbor Friend Friend Neighbor Family Friend Friend
TYPE: Secondary Relationship	SOURCE: Employer Employer Co-worker Ex-girl friend Minister

**MITIGATION THEME: Institutional Indifference**

By age 15, the defendant's mother began using the newly developed services for victims of domestic violence. She and her children were frequent residents of the shelter, stayed short periods of time, and returned to the stepfather's home each time. The children were transferred to new schools after each visit, but records do not document these moves accurately. The defendant's mother has been described as a classic example of a battered wife who repeatedly returned to her abuser and discounted the needs of her children. She was not the target of most of the violence. She allegedly left to protect the defendant.

Intervention efforts by Child Protective Services were inappropriate. The defendant himself reported the abuse. Workers indicate that the process was inhibited by the intensity of the mother's influence of the defendant. Both the mother and stepfather now receive disability payments for emotional disease, but no assistance was available at the time. At 17, the defendant was taken to a boarding house by his stepfather. No intervention was attempted, although many individuals who knew were legally responsible to report. Consequently, the defendant was denied social and financial entitlement, and placed into an adult role despite low academic attainment, minimal resources, and limited social skills.

TYPE: Historical Documents	SOURCE: Women's Shelter Indigent Shelter AFDC Records
TYPE: Primary Relationship	SOURCE: Mother Stepfather Half Brother Sister Neighbor Grandmother Family Friend Family Friend Co-Worker Cousin Friend
TYPE: Secondary Relationship	SOURCE: Shelter Director Shelter Worker Shelter Children's

Worker  
 Indigent Shelter  
 Worker  
 Deputy  
 Police officer  
 Past CPS Worker  
 JH Teacher  
 HS Attendance  
 Worker  
 Principal  
 HS Nurse

### **MITIGATION THEME: Perceptual Distortion**

From familial, educational, community and social control agents, a belief system was developed by the defendant which was characterized by beliefs favoring criminality. His parents introduced theft as a means of survival, and presented themselves as belonging to a class of individuals who were not protected by societal norms and values. The defendant's early experiences with agents of social control who did not enforce the law in his behalf reinforced his belief at critical transitional periods. Within the family, his needs were not met and his acts of theft were not sanctioned. No internal controls are evidenced in the family dynamics.

The defendant does not appear to have the ability to align his values with conventional society as a direct result of its failure to protect him. Repeatedly, those socially empowered to intervene normalized and legitimized his victimization. Exacerbated by limited cognitive ability, familial abandonment, and low self-esteem, the defendant sought identity and material well-being through the opportunities available to him. Consistent with his early socialization, he reacted at the moment of the crime to fear with obedience.

TYPE: Historical Documents

TYPE: Primary Relationship

SOURCE: Stepfather

Uncle

Co-defendant

Girl friend

Uncle

TYPE: Secondary Relationship

SOURCE: Minister's Wife

Employer



tion being criminology. Between May 1989 and April 1994, I was in private practice as a mitigation specialist in capital cases throughout Kentucky and Tennessee. These cases include: *State of Tennessee v. Darrell Hines* (1989); *State of Tennessee v. Elmer Carl Garton* (1989); *State of Tennessee v. Kenneth Tubbs* (1989); *State of Tennessee v. Henry E. Hodges* (1991); *State of Tennessee v. Gary Collins* (1991); *State of Tennessee v. Michael King* (1992); *Commonwealth of Kentucky v. Mark Daniels* (1993); *State of Tennessee v. Jerry Mathis* (1993); *Commonwealth of Kentucky v. John Martinez* (1993); *State of Tennessee v. Steven Lewis* (1993); *State of Tennessee v. Walter Smothers* (1994); *State of Tennessee v. James Spann* (1994). From April, 1994 until June, 1995, I was employed by the Capital Case Resource Center of Tennessee and provided investigation and consultation on the following cases: *State of Tennessee v. Robert Campbell* (1994); *State of Tennessee v. William Tollett* (1995); *State of Tennessee v. Jon Hall* (1995); *State of Tennessee v. Victor Cazes*; *State of Tennessee v. Darrel Taylor*; *State of Tennessee v. Donald Middlebrooks*; *State of Tennessee v. Timothy Morris*; *State of Tennessee v. Gary Caughron*; *State of Tennessee v. Edward Leroy Harris*; *State of Tennessee v. Ricky Thompson*; *State of Tennessee v. Gaile Owens*; *State of Tennessee v. Jeffery Dicks*; *State of Tennessee v. Byron Black*; *State of Tennessee v. Heck Van Tran*; *State of Tennessee v. Randy Hurley*; *State of Tennessee v. Terry Barber*; *State of Tennessee v. Sylvester Smith*. The purpose of my social history and mitigation investigations has been to locate mitigating evidence to be presented at the sentencing phase of trial. I have provided assessment of mitigation on a number of these cases.

3. Additionally, in my work with criminal defense attorneys, I have been called upon to use my expertise to recommend specific types of expert services that would be necessary to assist attorneys in presenting mitigation evidence at both the trial and post-conviction levels.
4. As a mitigation specialist, I have also researched the relationship between an individual's social background and violent behavior. Additionally, I have addressed the Annual Meetings of the Academy of Criminal Justice, the Society

for Applied Sociology, the American Criminological Society, and the Sociological Practice Association about proper technique for mitigation investigation in capital cases. I received my certification as a Clinical Sociologist in 1994. My resume is attached as Exhibit A.

5. When conducting a mitigation investigation, it is necessary to not only collect all of the documents from all official agencies that have had contact with a client, it is necessary to compile a detailed and complete social history of the client. The statutory and non-statutory mitigating factors that require investigation include but are not limited to: physical, sexual, and/or psychological abuse and neglect in early childhood; inappropriate institutional response; ineffective juvenile intervention; brain damage; head injury; mental illness; institutional violence; learning disability; past legal history; the developmental effects of familial transience and parental abandonment; drug and alcohol abuse and family history; and the social, psychological and emotional climate surrounding this offense.
6. Adequate preparation for a capital case includes but is not limited to securing the following types of information to substantiate mitigating factors in a client's life: information regarding birth and early childhood development; the composition of the family unit, including background information of birth parents (date and place of birth, educational attainment, health history, date of marriage, age at time of marriage), age and sex of siblings, prior marriages and children of parents; early health of client, including whether he suffered any serious accidents, illnesses or injuries; residential history of the family, including where they lived, for what periods of time, and under what conditions; employment history of the parents; educational history, including date at which the client entered school, schools attended, performance and behavior, any special services provided, level attained, activities in which the client may have participated, favorite subjects, and names of teachers; religious training, practices and beliefs; discipline in the home, including form of discipline, how administered, by whom, and for what; family relationships, including the nature and quality of the client's relationship with each parent, siblings,



and other relatives, and the relationship between the parents; friends and leisure activities; other significant relationships; community activities; jobs held as a youth, including lawn work, newspaper route, babysitting, or other odd jobs; any significant childhood experiences, including death or serious injury of a family member or other significant person, divorce of parents, abandonment by parent, family violence, parental alcohol or drug use, or abuse of the client, including physical, sexual or emotional abuse; history of any alcohol or drug use; history of running away; and juvenile record. In addition, the client must be interviewed on how he perceived of himself as a child, in terms of personality, behavior, feelings, responses to various events in life, and relationships with others. Additionally, all phases of the client's adult life including the events leading up to and surrounding the crime must be thoroughly investigated.

7. Given my expertise in conducting mitigation investigations, Thomas Gunther, counsel for David Sampson, requested that I conduct a mitigation assessment of Mr. Sampson in order to provide an adequate foundation for expert opinion. I previously conducted assessments of this nature while salaried by the Capital Case Resource Center of Tennessee. On May 31, 1995, my position lost its funding due to state budget cuts. Given that I am currently unsalaried, Mr. Gunther requested that I prepare an estimate of the expense necessary to conduct this assessment.
8. A mitigation assessment involves the following: review of the sentencing phase transcript and portions of the guilt phase transcript that relates to mental health and family issues; review of any documents that are available to the attorney; review of trial attorney and District Attorney's file. From these records, I develop an initial client time line and witness list. Informed with this background material, I conduct a minimal number of interviews with the client and a family member or close friend to establish movement within the life course prior to incarceration, and names and locations of potential mitigation witnesses. Missing sources of documentation are identified by this process, and records are requested.

Specifically, my cursory review of the materials provided by Mr. Gunther reveal inadequate documentation in medi-

cal records, elementary school records, and corrections records. Many details of Mr. Sampson's life are unknown to me at this date. Given my experience with other capital cases, however, I would anticipate additional sources of information will be identified through the assessment process.

9. Based on my experience in past capital cases, I have recommended to Mr. Gunther that he seek the funding for the mitigation assessment of David Sampson. Such assessments have typically required 40 to 60 hours. It is imperative that document searches and client interviewing be conducted by a mitigation specialist, in that the skills necessary for these tasks are specialized. My usual rate of pay is \$100 an hour. I would be willing to provide this service to the court at a rate of \$50 an hour. Thus the total cost of the assessment would be between \$2000 and \$3000. Note that this quote includes assessment only. Additional investigation necessary for substantiation is not included in this estimate.

FURTHER THE AFFIANT SAITH NOT.

Dated: 6/15/1995

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ANN CHARVAT, Ph.D

Sworn to me and subscribed before me on this the 15th day of June, 1995.

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NOTARY PUBLIC

My commission expires: