Terry Lenamon on the
Death Penalty
Sidebar with a Board Certified Expert Criminal Trial Attorney

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Terence M. Lenamon is a Florida Bar certified expert in the area of criminal trial law. With over 17 years experience he has built a reputation as one of Florida's most respected criminal defense lawyers. His defense has been sought by many high-profile clients and has led him through 20 first-degree murder trials and eight death penalty cases. That experience has brought him national recognition as a go-to commentator on death penalty issues. He is the force behind both deathpenaltyblog.com and Florida Capital Resource Center (floridacapitalresourcecenter.org), and can be reached at terry@lenamonlaw.com.

The Costs of Providing a Mitigation Defense in the State of Florida

Perhaps one thing that most everyone agrees upon in a death penalty case is the need to ask WHY. Why did the crime happen? Assuming that the defendant is found guilty of murder -- and a type of murder that the Florida state legislature has deemed worthy of punishment by death -- then why did this happen? What caused the defendant to do what he (or she) did?

Should there be mercy?

Under Florida law, state law defines the circumstances that will serve as factors of mercy in a particular case. These are different from the personal characteristics that prevent the imposition of capital punishment. Certain defendants are protected from execution. For example, the United States Supreme Court prevents the prosecution from asking for capital punishment when the defendant is insane (*Ford v. Wainwright*), under a certain age (*Roper v. Simmons*) or mentally retarded (*Adkins v. Virginia*).

For those defendants convicted of crimes subject to capital punishment, and not protected from the death penalty constitutionally, Florida Statute § 921.141(6) provides the following factors to consider prior to imposing a sentence of death at the hands of Florida's executioners:

1. § 921.141(6)(a): The defendant has no significant history of prior criminal history.

2. § 921.141(6)(b): The capital felony was committed while the defendant was under influence of extreme mental or emotional disturbance.

3. § 921.141(6)(c): The victim was a participant in the defendant's conduct or consented to the act.

4. § 921.141(6)(d): The defendant was an accomplice in the capital felony committed by another person and his participation

was relatively minor.

5. § 921.141(6)(e): The defendant acted under extreme duress or under- the substantial domination of another person.

6. § 921.141(6)(f): The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law were substantially impaired.

7. § 921.141(6)(g): The age of the defendant at the time of the crime.

8. § 921.141(6)(h): The existence of any other factors in the defendant's background that would mitigate against imposition of a death sentence.

Fighting For Mercy: Offering Proof

Mercy isn't murky in a capital punishment case. Regardless of how compassionate – or vengeful – the jury may be, state and federal law carefully place boundaries on what can and cannot be considered in the decision of whether or not to allow the State of Florida to kill an individual for a committed crime.

Accordingly, one of the key tasks of the defense team in any death penalty defense case is to carefully consider all applicable elements of mercy available under the law (the mitigating factors of *§921.141(6))* and then set about to prove them to both the jury (who gives their recommendation to the judge) and the judge (who actually imposes the sentence).

This will entail a complicated and thorough effort for the defense team. It can be time-consuming, and it can be soul-wearying. All too often, those facing death have been the victims of severe abuse and neglect themselves, and many are mental and emotional cripples. It is rare for a defense lawyer in a death case not to wonder how their client was not protected much earlier by society.

Most defendants in death penalty cases have been seriously damaged during their childhoods and early lives. If the system had intersected with their lives earlier, would they be a defendant facing death penalty? Would the crime have ever happened? And what about justice for their past abuse: what about justice prevailing against the perpetrators of the harm done so long ago?

The Work of Mitigation Defense

Mitigation efforts begin as soon as the defense attorney begins representation of the defendant. While some of these efforts overlap trial preparation on the guilt/ innocence phase, the two aspects of a death case do not dovetail in all respects.

In the mitigation phase, *investigation* will be undertaken into the individual's past as well as into the events surrounding the crime itself. Professional investigation will be had, at considerable expense. Expenses will be incurred in the gathering of facts, as well: travel, telephone, subscription database searches, and other out of pocket expense will be incurred by the defense. Once the background has been completely explored, there must be *professional analysis* of the gathered information. Testing may be necessary to confirm current IQ levels, as well as extensive psychological testing to confirm mental incapacity or illness.

DNA Testing Is Not Part of Mitigation Phase

Interestingly, DNA testing is not a part of mitigation investigation. The mitigation stage of the capital punishment defense is not focused upon the proof of guilt or innocence. DNA comparisons of the defendant and the evidence obtained and submitted by the prosecution is a part of the guilt phase, or trial phase, of the case.

If DNA evidence is not properly cheeked, it may well be that the case continues on appeal all the way through the state and federal appellate systems before testing of DNA occurs. For example, currently before the United States Supreme Court is the Petition for Writ of Habeas Corpus filed by Texas Death Row inmate Hank Skinner. Skinner is asking that DNA testing be done on evidence that he asserts will prove his innocence: one hour before his scheduled execution by the State of Texas in March 2010, the High Court issued a stay to consider his request. This is a trial phase issue, not a part of the mitigation phase.

Forensic Evaluation in Mitigation

Psychological professionals must be hired by the criminal defense team to bring their level of expertise to the case. *Psychologists and psychiatrists* with forensic expertise are sought for their contributions. Their fees will be commersate with their level of scholarship and experience. Their time will include many different activities, and they will necessarily incur expenses which will be cumulatively high.

For example, a *psychiatric expert* may review reference materials, interview numerous people for fact and opinion, obtain and review the defendant's past psychiatric, medical, and substance abuse history as well as his criminal record. He or she will also learn about the offense in question, gather and review all the files and information (police reports, witness statements, hospital records, etc.) regarding the underlying crime as they form their opinion on the mental state of the defendant at the time of the offense, as well as prior to the event and afterwards. Prior to giving testimony by deposition or at trial, the expert may be asked to prepare a written report that not only explains his or her conclusions, but the methodology used to reach them.

Medical doctors and other mental capacity experts may be required, as well. Physical abnormalities must be discerned and quantified. For example, brain damaged individuals are known to have anger management issues. Fetal alcohol syndrome can be a factor in violent behavior. Traumatic brain injuries (caused by car wrecks, military action, or on the job injuries) can also leave a person with incapacity to stop themselves from acting violently.

The Cost of Indigent Defense – Mitigation versus the Budget

Aside from the obvious moral and ethical duty to fight hard (in lawyer vernacular, to "advocate zealously") for one's client, Florida law imposes its own standard on the defense attorney: to provide effective assistance of counsel. A failure to do so is a basis for appellate review of the matter, and can mean professional doom for the criminal defense lawyer.

In a perfect world, this would be a non-issue. What committed defense counsel isn't wholeheartedly fighting for his client?

In today's imperfect world, money plays a factor in every criminal case, particularly in a death penalty case. Money must be found to pay for every aspect of the mitigation efforts – from the most minor expense of the investigator's parking lot fees, to the psychiatrist's charge for preparing a report on the mental condition of the defendant. Many are willing to work at a reduced rate when a man or woman's life is at stake. Some offer to work pro bono.

However, even with reduced rates and pro bono contributions, the expenses of providing an effective and winning mitigation defense are very, very high.

Higher than the State of Florida is willing to pay? As budgets tighten and the economy continues to get worse, it's looking that way. Which begs the issue: when will it be a valid defense to the death penalty that the state responsible for proving the indigent with a right to counsel did not do so because the sate didn't have the money to pay for it?