

## A MOMENT IN TIME

by Terry Alford

We want our jurors to vote for life without parole, even though they believe in the death penalty and have seen and heard how our client brutally killed someone. They have just all agreed that our client is guilty beyond a reasonable doubt that he is a guilty murderer. They are rightfully angry, mad, and want justice for the victim and for society.

We begin our mitigation presentation. A teacher testifies, and so does a co-worker. Mom begs for his life and mental health experts tell us what's wrong with him. It does not help, and the jurors vote death.

What was missing? What else could we have done?

Perhaps what was missing was a connection between the client and the crime. We tend to shy away from connecting our client to the crime as if that is a bad thing. The problem is the jury has already connected your client to the crime. Through testimony and photographs they were out there at the scene of the killing watching your client kill the victim. They know every movement of your client; they know every action of your client. As the teacher and mom testify, they are still out there watching in their mind the killing. That is the moment in time they are focused on. So maybe we could begin our story where they already are, at the moment the killing happened. You can then help explain to the jury what they are seeing by explaining the why – why was

your client out there with a gun and why did he decide that the right thing to do at that moment was to kill the victim.

That is the purpose of mitigation – to explain why he was where he was and why he killed the victim. By starting where the jurors are at the moment in time when the killing happened, you are accepting and embracing their thoughts instead of just telling them about your client’s rotten childhood. To the juror who is seeing your client as a man who pulled a gun and killed someone, what has his childhood got to do with anything? Start at the juror’s perspective and talk about the moment in time that is on his or her mind.

Dissect what the juror sees and explain each layer in great detail. Why was your client out there at that place at that time? Why did he have a gun? Why did he feel the need to shoot the person? Then, dissect each of those questions and you get more questions. Why would a 19-year-old boy be in a car full of gang members? Why did he have a gun like the others in the car? Why did he go with them knowing they were going to confront another gang? Why did he fire his weapon when his leader told him to shoot?

That is the first level of slicing up the moment in time when the killing happened. The jury will start to have their own questions. They may wonder why the parents did not stop him from hanging out with the gang. The jurors will say to themselves that they would have been on top of this and intervened had it been their child. That opens up the chance to have Mom explain how there was no dad in his life, and that her string of

boyfriends were there to provide her with her drugs. The jury may begin to understand that parenting, and lack of parenting, makes a difference.

This evidence of parenting issues is no longer presented in a vacuum. There is a connection between why he was out there in the car with his substitute parents.

You can add the rest of the story. You now have an idea that he had a gun because the others had guns. You can explain why he fired when told to fire. And you never strayed far from the scene of the crime.

But do you see that the jurors are connecting your client's background to his actions? That gets the jury to consider a central assumption we all share, that under normal circumstances, normal people do not rationally contemplate and calmly decide to take the life of another person. The goal is to get the jurors to thinking about what was not normal with your client. Was something wrong with him?

Now that the jurors are wondering if problems with his parents may be one of the reasons he was involved in all this, you must deliver the goods and go into detail about the problems your client endured that made him who he is.

We know many people feel that someone who commits a crime is depicted as the product of the totally free and morally blameworthy choices made by a bad person who acted unencumbered by their past history or present circumstances. They were simply cold-hearted and selfish monsters, or they are just plain evil.

There you have it. The two competing thoughts that are going through the juror's mind.

Was he a stone-cold monster who had the freedom to make a choice, or can a socially rotten background affect his blame and culpability?

We need to show the jury that societal and familial forces can help shape the life course of our clients and explain their actions. To do so we need an accurate, in-depth and comprehensive study of the life history of the client. The background and character of the client produces an effective mitigating narrative about the traumas and tragedies that pushed and pulled him. That gives us stories – stories that place the jury in a larger focus than the moment of the killing, a focus that includes the forces in our society that helped shape his violent criminal behavior. This focus highlights the crucial interplay between mitigating evidence and assessment of moral culpability.

The jury is required to consider and assess moral culpability. *California v. Brown*, 479 U.S. 538 (1987) states that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.

This important nexus between levels of moral culpability and the appropriateness of a death sentence is why we present mitigation. Jurors are allowed to weigh social justice and other fairness considerations in selecting a morally appropriate punishment. We must remind the jurors that criminal responsibility is not the same as moral culpability. You may be criminally responsible for the crime, meaning you were sane

and did not have any legal defenses and therefore guilty but have experiences that lessen your degree of moral culpability. There may be misfortunes, bad experiences, character flaws, and weaknesses that are due to various forms of social and cultural deprivations. We can share with the jury our client's human frailties, his humanity.

In showing our client's humanity we are linking his actions to ordinary ways of responding to the demands of hostile or corrupted life circumstances that have perverted the formative development of the client. We can connect in context these frailties and flaws to the man out there with a gun in a moment in time.

Note: much of this paper came from the book "Death Penalty Mitigation" by Jose Ashford and Melissa Kupferberg, Oxford Press 2013.