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**Using This Mitigation Workbook**

**A. Using the Mitigation Workbook**

In order to receive the full benefit of the information contained in the workbook, the defense team needs to approach the process in the following way:

**1. Investigation**

The key to any capital case is comprehensive investigation. For a more complete outline of the investigation process, counsel should refer to the manual, but at the very least investigation includes:

**a. The Client**

Multiple interviews with the client to establish a basic social history including family history, academic achievement, medical history, psychological background, incidents of substance abuse, military experience, occupational record, criminal activity, institutional history, religious background, and other factors. Counsel should interview the client several times and not be dependent upon self-reporting to be accurate: the client probably has a very subjective and inaccurate view of his or her place in the world. Most capital clients deny or minimize mental illness, trauma, sexual abuse, and family dysfunction, especially prior to the development of a trusting relationship with defense counsel.

**b. Family and Friends**

Counsel should interview those closest to the client using the same basic criteria of questioning used with the client. These interviews may corroborate the client's information, expand upon the information, or totally contradict the client's claims. Counsel should interview friends or neighbors who can offer a more objective view of the client and family.

**c. Professionals**

Doctors, teachers, social service workers and others may have had extensive contact with the client and his or her family and can provide very objective and professional assessments of various factors operative in the client's life.

**d. Documents**

The gathering of documents from all institutions, social service agencies, schools and others that had contact with the client is imperative.

**e. Crime-Related Facts**

Mitigation is most effective when counsel can describe how the client's particular problems were operative at the time of the offense. Counsel must do a comprehensive investigation of the crime to establish the precipitating factors, the client's role and state of mind during the offense, and any actions after the homicide. This may assist in establishing various types of mitigation or rebutting aggravation.

**2. Identification**

Upon completion of a comprehensive social history, counsel should use the checklist included in this chapter to identify possible mitigation. If an issue is identified, counsel should:

**a. Read the Section Heading**

Once a form of particular mitigation is identified, counsel should begin by reading the section heading which describes the various aspects of that type of mitigation. These chapter headings attempt to outline both the possibilities and the pitfalls of these forms of mitigation.

**b. Review the Specific Form of Mitigation**

Recognizing that the short section on each form of mitigation is a bare outline of the available and necessary information, counsel should establish whether there is a possibility that this form of mitigation is operative in the case.

**c. Follow-Up**

In most sections, there is an attempt to provide a bibliography and list of other helpful resources. Counsel should not be limited by this list, but should review the proposed material and contact the suggested resources to gain a better understanding of the particular form of mitigation.

**3. Presentation**

It isn't mitigation until it is presented to someone with the authority to offer a sentence less than death. Though this may traditionally be the jury, counsel may want to consider presenting the mitigation case to the prosecutor pretrial to extract a negotiated plea. This workbook attempts to provide guidance in mitigation through:

**a. Identifying Themes**

Each section attempts to outline general themes in this type of mitigation. Counsel is neither bound to or limited by these themes and should explore other themes that may be effective with your particular jury.

**b. Identifying Witnesses**

Just as with the mitigation themes, counsel is in no way bound to these particular witnesses and the themes of their testimony. Though the client is listed in most cases as a potential witness, counsel should seriously consider the efficacy of the client's testimony and any potential damage that might be incurred.

**B. Beyond the Workbook**

It can't be said often enough that this workbook is not adequate to develop a capital sentencing hearing. Counsel must also have:

**1. Expert Assistance**

Capital resource centers do nothing but work in capital punishment. Though they may not know the particular social, political and legal issues of your county, they can provide a broad and comprehensive perspective on capital case law which you can integrate into your particular situation.

**2. Bibliography**

At the very least, counsel needs to have a copy of the *Diagnostic and Statistical Manual of Mental Disorders IV* (DSM-IV) published by the American Psychiatric Association. Another very helpful text is the *Comprehensive Textbook of Psychiatry, VII*, edited by Kaplan and Sadock and published by Williams and Wilkins. Most chapters mention additional books and articles that have a specific focus and can supplement the general information provided in the above-mentioned two resources listed above.

**Mitigation Checklist**

**Neurological Impairment**

**Prenatal**

\_\_\_\_\_\_ Alcoholic mother

\_\_\_\_\_\_ Drug addicted mother

\_\_\_\_\_\_ Mother physically abused

\_\_\_\_\_\_ Maternal accident or injury

\_\_\_\_\_\_ Maternal illness

\_\_\_\_\_\_ Mother exposed to toxins during pregnancy

\_\_\_\_\_\_ Mother exposed to disease during pregnancy

**Birth Complications**

\_\_\_\_\_\_ Long/difficult labor

\_\_\_\_\_\_ Rapid delivery

\_\_\_\_\_\_ Emergency caesarian

\_\_\_\_\_\_ Premature birth

\_\_\_\_\_\_ Low birth weight

\_\_\_\_\_\_ Oxygen deprivation (e.g., “blue baby”)

\_\_\_\_\_\_ Use of drugs during labor

\_\_\_\_\_\_ Use of forceps during labor

\_\_\_\_\_\_ Placental abruptions

\_\_\_\_\_\_ Uterine rupture

\_\_\_\_\_\_ Breech presentation

\_\_\_\_\_\_ Low Apgar scores

\_\_\_\_\_\_ Failure to properly resuscitate baby with low Apgar scores

**Childhood Illness/Accident**

\_\_\_\_\_\_ Incidents of asphyxia such as near drowning

\_\_\_\_\_\_ High fever: scarlet fever, roseola

\_\_\_\_\_\_ Other diseases: measels, encephalitis, dyptheria, meningitis, influenza, epilepsy, pneumonia

\_\_\_\_\_\_ Ingestion of toxic substance

\_\_\_\_\_\_ Bicycle/auto/motorcycle accidents

\_\_\_\_\_\_ Obvious head scars or indentations

\_\_\_\_\_\_ Head trauma/loss of consciousness from fall, beating or shaking

\_\_\_\_\_\_ Delay in development: walking, talking, sitting up straight

**Drugs / Toxic Chemicals**

\_\_\_\_\_\_ Substance abuser

\_\_\_\_\_\_ Industrial worker (exposure to industrial chemicals)

\_\_\_\_\_\_ Farm worker (exposure to herbicides, pesticides)

\_\_\_\_\_\_ Exposure to other toxins: lead, mercury, arsenic, carbon disulfide, manganese

**School Performance**

\_\_\_\_\_\_ Flunked grades

\_\_\_\_\_\_ Special education classes

\_\_\_\_\_\_ Poor attendance record

\_\_\_\_\_\_ Hyperactivity/impulsivity

**Physical Features (reference childhood pictures)**

\_\_\_\_\_\_ Low birth weight

\_\_\_\_\_\_ Small head

\_\_\_\_\_\_ Wide area between eyes

\_\_\_\_\_\_ Short nose

\_\_\_\_\_\_ Epicanthal lobes on eyes

\_\_\_\_\_\_ Malaligned teeth

**Chronic Illnesses/Conditions**

\_\_\_\_\_\_ Diabetes

\_\_\_\_\_\_ Asthma

\_\_\_\_\_\_ Hypoglycemia

\_\_\_\_\_\_ Childhood/sibling heart problems

\_\_\_\_\_\_ Advanced age (60 or older)

\_\_\_\_\_\_ History of surgery

\_\_\_\_\_\_ History of headaches

**Psychological Impairment**

**Social History**

\_\_\_\_\_\_ Schizophrenic parent

\_\_\_\_\_\_ Other family mental illness

\_\_\_\_\_\_ Victim of violence/trauma

\_\_\_\_\_\_ Suicidal episodes

\_\_\_\_\_\_ Self-destructive practices

\_\_\_\_\_\_ Truancy

\_\_\_\_\_\_ Recklessness (accidents, injury)

\_\_\_\_\_\_ Travel/runaway

\_\_\_\_\_\_ Periods of depression

**Sexual**

\_\_\_\_\_\_ Homosexual

\_\_\_\_\_\_ Object fetishes (underwear, shoes)

\_\_\_\_\_\_ Transvestite behavior

\_\_\_\_\_\_ Pedophilia

\_\_\_\_\_\_ Masochistic sex practices

\_\_\_\_\_\_ Sadistic sex practices

\_\_\_\_\_\_ Impulsive, non-consensual touching

\_\_\_\_\_\_ Exhibitionism

\_\_\_\_\_\_ Voyeurism

**Sleep**

\_\_\_\_\_\_ Insomnia

\_\_\_\_\_\_ Uncontrolled daytime sleep

\_\_\_\_\_\_ Inappropriate sleep/wake cycle

\_\_\_\_\_\_ Consistent nightmare

\_\_\_\_\_\_ Sleep terror (wakes screaming, disoriented)

\_\_\_\_\_\_ Sleepwalking

\_\_\_\_\_\_ Needs little sleep (3-4 hours)

**Personality and Behavior**

\_\_\_\_\_\_ Grandiosity/delusions

\_\_\_\_\_\_ Two or more distinct personalities

\_\_\_\_\_\_ Obsession with death

\_\_\_\_\_\_ Obsessively clean/organized

\_\_\_\_\_\_ Compulsive behavior (gambling, stealing, fires)

\_\_\_\_\_\_ Exaggerated health concerns / hypochondria

\_\_\_\_\_\_ Self-conscious about particular body part

\_\_\_\_\_\_ Manic demeanor

\_\_\_\_\_\_ Depressed demeanor

\_\_\_\_\_\_ Inordinate guilt

**Interpersonal**

\_\_\_\_\_\_ Aggressive: constant

\_\_\_\_\_\_ Aggressive: sporadic

\_\_\_\_\_\_ Anxious/withdrawn

\_\_\_\_\_\_ Detached/distant

\_\_\_\_\_\_ Exaggerated need for approval

\_\_\_\_\_\_ Fears abandonment

\_\_\_\_\_\_ Shallow emotional attachment

**Family**

**Parent Profile**

\_\_\_\_\_\_ Divorced

\_\_\_\_\_\_ Alcoholic

\_\_\_\_\_\_ Mentally ill / retarded

\_\_\_\_\_\_ Criminal/incarcerated

\_\_\_\_\_\_ Intermittent parent

\_\_\_\_\_\_ Multiple parents

\_\_\_\_\_\_ Adoptive parents

\_\_\_\_\_\_ Institutional (foster homes, orphanage)

\_\_\_\_\_\_ Constant moving / instability

**Child Maltreatment**

\_\_\_\_\_\_ Physical

\_\_\_\_\_\_ Sexual

\_\_\_\_\_\_ Psychological

\_\_\_\_\_\_ Witnessing violence

\_\_\_\_\_\_ Parental violence

**Neglect**

\_\_\_\_\_\_ Childhood malnutrition/anemia/poor hygiene

\_\_\_\_\_\_ No medical help for serious illness

\_\_\_\_\_\_ Neighbor dependence for food/clothing

\_\_\_\_\_\_ No child caretaker for long periods

\_\_\_\_\_\_ Early sexuality

\_\_\_\_\_\_ Permitted chronic truancy

\_\_\_\_\_\_ Failure to enroll child in school

\_\_\_\_\_\_ Inattention to special educational needs

\_\_\_\_\_\_ Expulsion of child from home, refusal of custody

\_\_\_\_\_\_ Abandonment

\_\_\_\_\_\_ Exposing child to extreme abuse of parent’s partner

\_\_\_\_\_\_ Allowing child to use alcohol or drugs

**Tragedy**

\_\_\_\_\_\_ Natural disaster

\_\_\_\_\_\_ Parent death

\_\_\_\_\_\_ Sibling death

\_\_\_\_\_\_ Child death

\_\_\_\_\_\_ Significant other death

\_\_\_\_\_\_ Witnessing death of someone

**Psychoactive Substances**

**Admitted use of**

\_\_\_\_\_\_ Alcohol

\_\_\_\_\_\_ Amphetamines

\_\_\_\_\_\_ Marijuana/THC/hashish

\_\_\_\_\_\_ Cocaine/crack

\_\_\_\_\_\_ Hallucinogens (LSD, mescaline)

\_\_\_\_\_\_ Inhalants (gas, glue, transmission fluid)

\_\_\_\_\_\_ Opiates (heroin, opium)

\_\_\_\_\_\_ PCP (angel dust)

\_\_\_\_\_\_ Sedatives (Valium, Quaaludes)

**Physical**

\_\_\_\_\_\_ Needlemarks

\_\_\_\_\_\_ Tremors

\_\_\_\_\_\_ Blackouts/amnesia

\_\_\_\_\_\_ Nasal problems

**Behavioral**

\_\_\_\_\_\_ Hallucinations

\_\_\_\_\_\_ Hyperactivity

\_\_\_\_\_\_ Stupor

\_\_\_\_\_\_ Euphoria

\_\_\_\_\_\_ Lethargy

\_\_\_\_\_\_ Grandiosity/confidence

\_\_\_\_\_\_ Flashbacks

**Social and Cultural**

**Race/Sex of Defendant**

\_\_\_\_\_\_ Black

\_\_\_\_\_\_ White (race motivated killing)

\_\_\_\_\_\_ Asian

\_\_\_\_\_\_ Hispanic

\_\_\_\_\_\_ Native American

\_\_\_\_\_\_ Female

\_\_\_\_\_\_ Homosexual

**Poverty**

\_\_\_\_\_\_ Urban resident

\_\_\_\_\_\_ Raised in “projects”

\_\_\_\_\_\_ Homelessness

\_\_\_\_\_\_ Prostitution

\_\_\_\_\_\_ Rural background

\_\_\_\_\_\_ Sharecropper / migrant worker

**Cultural**

\_\_\_\_\_\_ Immigrant

**Institutionalization**

\_\_\_\_\_\_ Orphanage

\_\_\_\_\_\_ Juvenile institution

\_\_\_\_\_\_ Mental hospital

\_\_\_\_\_\_ Prison

**Alternative Life-Style**

\_\_\_\_\_\_ Biker/gang

\_\_\_\_\_\_ Religious cult

\_\_\_\_\_\_ Military

**Age**

\_\_\_\_\_\_ 18-20

\_\_\_\_\_\_ 55+

**Incarceration**

 **Jail/Prison Adaptation**

\_\_\_\_\_\_ No disciplinary reports

\_\_\_\_\_\_ Positive work record

**Family**

\_\_\_\_\_\_ Contact maintained

\_\_\_\_\_\_ Influence on life of children

**Previous Incarceration**

\_\_\_\_\_\_ Positive release

\_\_\_\_\_\_ No escape attempts

**Prison Community**

\_\_\_\_\_\_ Guard/counselor/warden support

\_\_\_\_\_\_ Helps other inmates

\_\_\_\_\_\_ Serves valuable function

\_\_\_\_\_\_ Religion

\_\_\_\_\_\_ Heroic event

**Offense**

**Lingering Doubt**

\_\_\_\_\_\_ Innocence

\_\_\_\_\_\_ Case based on shaky circumstantial evidence

\_\_\_\_\_\_ Viable alibi witnesses

\_\_\_\_\_\_ Long jury deliberation

**Intention**

\_\_\_\_\_\_ Did not bring a weapon to the crime

\_\_\_\_\_\_ Did not flee scene

\_\_\_\_\_\_ Did not endanger/threaten others

\_\_\_\_\_\_ Possible accident

\_\_\_\_\_\_ Weapon normally non-lethal

**Co-Defendant Culpability**

\_\_\_\_\_\_ Triggerperson

\_\_\_\_\_\_ Planned crime

\_\_\_\_\_\_ Committed HAC acts

\_\_\_\_\_\_ Reaped gain

**Domination or Duress by Co-Defendant**

\_\_\_\_\_\_ Co-defendant older

\_\_\_\_\_\_ Co-defendant larger

\_\_\_\_\_\_ Co-defendant has significant criminal history

\_\_\_\_\_\_ Co-defendant armed

\_\_\_\_\_\_ Co-defendant was lover

\_\_\_\_\_\_ Co-defendant parent

\_\_\_\_\_\_ Defendant dependent personality

\_\_\_\_\_\_ Defendant with mental retardation

**Good Person**

**Remorse**

\_\_\_\_\_\_ Denial in the face of overwhelming evidence

\_\_\_\_\_\_ Sincere overtures to victim’s family

\_\_\_\_\_\_ Suicide attempts

**Confession/Cooperation**

\_\_\_\_\_\_ Willingly confessed

\_\_\_\_\_\_ Cooperated in prosecution of co-defendants

\_\_\_\_\_\_ Assisted police beyond call of duty

**Lack of Criminal History / Out of Character**

\_\_\_\_\_\_ No prior arrests/convictions

\_\_\_\_\_\_ History of stability / good works

\_\_\_\_\_\_ History of steady employment

\_\_\_\_\_\_ Traumatic event immediately before offense

\_\_\_\_\_\_ Re-establishment of productive life

**Rehabilitation**

\_\_\_\_\_\_ Educational/Vocational progress

**Religion**

\_\_\_\_\_\_ Pre-offense religious involvement

\_\_\_\_\_\_ Post-offense religious involvement

**Victim**

**Victim’s Family**

\_\_\_\_\_\_ Opposed to the death penalty

\_\_\_\_\_\_ Developed/sustained relations

\_\_\_\_\_\_ Defendant willing to restitute

**Justification /Victim Responsibility**

\_\_\_\_\_\_ Participated in illegal activity

\_\_\_\_\_\_ Was not vulnerable / possibly threatening

\_\_\_\_\_\_ Victim history of violence

\_\_\_\_\_\_ Previous assault by victim

\_\_\_\_\_\_ Cultural factors

\_\_\_\_\_\_ Prison setting

\_\_\_\_\_\_ Drug culture

\_\_\_\_\_\_ Oppressor victim

**Surviving Victim**

\_\_\_\_\_\_ Does not desire death

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