

TAB 12:

Aggravating &

Mitigating

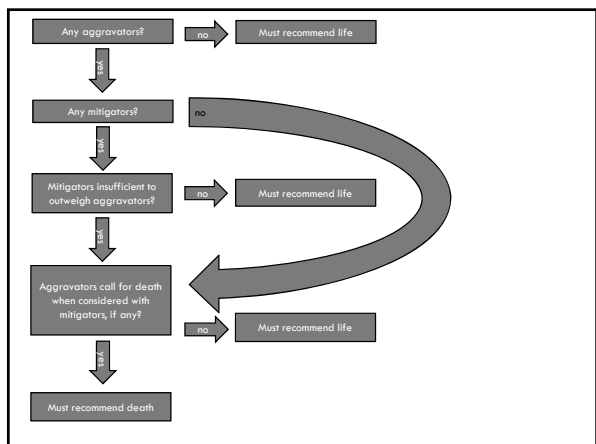
Circumstances

AGGRAVATING AND MITIGATING CIRCUMSTANCES

Jeff Welty and Jamie Markham

Overview of Penalty Phase

- Same jury as guilt phase
- Opening statements discretionary
- Rules of evidence don't apply but provide "guidance"
 - Confrontation Clause/Crawford does apply
- Intellectual disability and Enmund issues must be decided first
- If none, or if resolved in the state's favor, the jury uses a four-step process to determine sentence



Aggravating Circumstances

Overview of Aggravating Circumstances

- There are 11
- Listed in G.S. 15A-2000(e)
- Burden is on state to prove beyond a reasonable doubt
- Whether to submit
 - View evidence in the light most favorable to the state
 - But resolve doubt in favor of the defendant
- Jury must find unanimously

Double Counting

- Can't submitting multiple aggravating circumstances based on the same evidence
 - Example:** Fact that a defendant killed a victim during a rape cannot support both (e)(5) (during a specified felony) and (e)(9) (especially heinous, atrocious, or cruel)
- "While a complete overlap is impermissible, some overlap in the evidence supporting each aggravating circumstance is permissible."
 - State v. Miller**, 357 N.C. 583 (2003)
 - Example:** Evidence that a defendant severely beat the victim during the rape can support (e)(9) while the rape itself can support (e)(5)

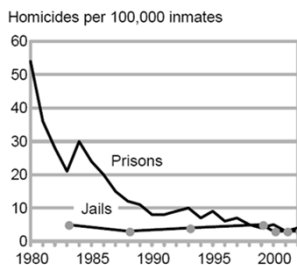
More Double Counting

- Exception: The same evidence may support aggravators directed at different aspects of the offense
 - ▣ **Example:** The fact that a defendant killed a police officer while resisting arrest may support both (e)(4) (murder to prevent arrest or effect escape) and (e)(8) (murder of LEO). While (e)(4) is directed at the defendant's motive, (e)(8) is directed at the status of the victim

Still More Double Counting

- If a defendant is convicted only of felony murder, the underlying felony can't be used to support (e)(5) (during specified felony)
- The same evidence can be used to prove an element of first-degree murder and to support an aggravating circumstance

(e)(1) Incarcerated Defendant



(e)(2) Previous Capital Felony

- Crime must have been punishable by death at the time it was committed
- Prosecution need not have sought or obtained a death sentence
- Previous capital felony must have been committed before current capital felony, but previous conviction need not antedate current crime

(e)(3) Previous Violent Felony

- “[F]elony involving the use or threat of violence to the person” means
 - Felony with violence or threat as an element
 - Felony that was in fact committed by violence or threat
- Previous violent felony must have been committed before current capital felony, but previous conviction need not antedate current crime
- Multiple previous violent felonies may be submitted as separate aggravators or in support of a single aggravator

(e)(4) Prevent Arrest/Effect Escape

- Cases focus on preventing arrest, not effecting escape
- “Witness elimination” is the most common theory
 - Easy when based on defendant’s statements
 - May sometimes be inferred from circumstances
- Proper to submit (e)(4) on the same evidence as (e)(8) (murder of law enforcement officer)

(e)(5) During Specified Felony

- Applies if defendant was committing, attempting, or fleeing after “any homicide, robbery, rape or a sex offense, arson, burglary, kidnapping,” aircraft piracy, or bombing
- Can’t submit based on felony used to support felony murder if defendant was convicted only under felony murder
- Continuous transaction doctrine/afterthoughts
- May submit multiple (e)(5) circumstances based on multiple felonies

(e)(6) Pecuniary Gain

- Need only be a motive, not the motive
- Can’t be an afterthought
- Can’t submit (e)(5) (during specified felony) and (e)(6) where motive for the specified felony is pecuniary gain
 - Must choose one
 - Recall that (e)(5) is precluded if the specified felony was the basis for felony murder and the defendant was convicted only under that theory

(e)(7) Hinder Governmental Function or Law Enforcement

- Applies when the murder “was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws”
- May overlap with (e)(4) (prevent arrest/effect escape)
 - Can’t submit both
- May overlap with (e)(8) (against law enforcement officer or specified others)
 - Can’t submit both

(e)(8) Against Law Enforcement Officer or Specified Others

- Applies when victim is an officer, correction officer, fireman, judge, prosecutor, juror or witness killed “while engaged in the performance of his official duties or because of the exercise of his official duty.”
- Witnesses aren’t perpetually “engaged in” duties
- “Off duty” officers may be “engaged in” duties
- Can submit on same evidence as (e)(4) (prevent arrest/effect escape)

(e)(9) HAC

- Applies when the murder is “especially heinous, atrocious, or cruel”
 - Includes unusually agonizing, dehumanizing, pitiless, torturous, or depraved murders, or those committed using grossly excessive force
- Frequent partial overlap with (e)(5) (during specified felony)

(e)(10) Risk of Death to Multiple People by Hazardous Weapon

- “The defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person”
- Use of any gun when more than one person (other than the shooter) is present likely supports this circumstance
 - But may not so instruct the jury as a matter of law
- Other examples: vehicles, bombs and incendiary devices

(e)(11) Course of Violent Conduct

- Murder was “part of a course of conduct . . . which included the commission . . . of other crimes of violence against another person or persons”
- Are two crimes part of one course of conduct?
 - Close in time?
 - Same modus operandi?
 - Similar motive?
- In multiple murders, each may aggravate the other

Mitigating Circumstances

Overview of Mitigating Circumstances

- Statutory mitigating circumstances
 - Eight specific circumstances, plus a catchall
 - Must submit the catchall and any specific circumstances that are supported by the evidence
- Non-statutory mitigating circumstances
 - Must submit if supported by the evidence
- General rules
 - Burden of proof is on the defendant by the preponderance of the evidence
 - Jury need not be unanimous

(f)(1) No Significant Prior Criminal Activity

- "The defendant has no significant history of prior criminal activity"
- "Significant" = likely to affect sentencing recommendation
- Number, recency, and severity of prior crimes are all relevant
- If no evidence from either side, do not submit
- If defendant objects to submission, special procedures are required

(f)(2) Mental/Emotional Disturbance

- Murder "was committed while the defendant was under the influence of mental or emotional disturbance"
- Must be some nexus between the disturbance and the crime
- Voluntary intoxication alone doesn't count

(f)(3) Victim Voluntary Participant

- "The victim was a voluntary participant in the defendant's homicidal conduct or consented to the homicidal act"
- Not frequently submitted
- What if the victim voluntarily fought with the defendant?

(f)(4) Minor Participant

- "The defendant was an accomplice in or an accessory to the capital felony committed by another person and his participation was relatively minor"
- Not frequently submitted
- Relationship to Enmund

(f)(5) Duress or Domination by Another

- "The defendant acted under duress or under the domination of another person"
- Must be some nexus between the domination and the crime
- Not frequently submitted

(f)(6) Impaired Capacity

- "The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired"
- Two distinct prongs
- "Insanity light"?
- Mental conditions, voluntary intoxication may establish if evidence shows they impaired capacity
- Expert testimony not required

(f)(7) Age

- "The age of the defendant at the time of the crime"
- Not just chronological: immaturity, lack of emotional or intellectual development must also be considered
- Rough rule of thumb: actually or constructively a teenager?



(f)(8) Assistance to Law Enforcement

- "The defendant aided in the apprehension of another capital felon or testified truthfully on behalf of the prosecution" in a felony case
- A defendant may aid in apprehension unintentionally (?)
- Truthful testimony may be in connection with any felony, not just capital felonies

(f)(9) Catchall

- "Any other circumstance arising from the evidence which the jury deems to have mitigating value"
- Must submit (f)(9) itself
- Must submit any specific circumstance that the evidence supports and that a juror might reasonably view as mitigating
 - Generally, any aspect of the defendant's character or history, or any aspect of the crime itself, that might provide a basis for a sentence less than death

(f)(9) Catchall (cont'd)

- Examples
 - Defendant has been gainfully employed
 - Defendant was abused by his parents
 - Defendant has shown remorse
- Not nonstatutory mitigating circumstances
 - Accomplice/codefendant received lesser sentence
 - Absence of an aggravating circumstance (or circumstances)
 - Residual doubt about guilt

Peremptory instructions

- Must be given upon timely written request if evidence of a mitigating circumstance is uncontroverted
 - Statutory: find factor if you find what all the evidence tends to show
 - Nonstatutory: find factor if you find what all the evidence tends to show and you determine that the circumstance has mitigating value

Scenario

AGGRAVATING AND
MITIGATING CIRCUMSTANCES

Jeff Welty and Jamie Markham

Penalty Phase Exercise

Jeff Welty

May 2017



You are presiding over the case of State v. Angelos. At the guilt phase, the state's evidence showed the following:

Eric Angelos is a 22-year-old member of the Chatham County Crips. The highest-ranking member of that "set," Dante Bowman, told Angelos that he could be Bowman's top assistant if Angelos proved his loyalty and toughness by killing Frank Valentine. Bowman disliked Valentine because he had recently started dating Bowman's ex-girlfriend.

Angelos agreed. One night, he waited for Valentine outside the restaurant where Valentine worked. Valentine came out the back door of the restaurant at 11:30 p.m. and headed for his car. As Valentine neared his vehicle, Angelos leaped out from behind a dumpster, pointed a gun at Valentine, and ordered him to the ground. Valentine complied. Angelos said "you're going to die tonight," and Valentine begged Angelos not to kill him.

Angelos took Valentine's car keys. He ordered Valentine to get into the trunk of his own car. Angelos then drove the car to Bowman's house to show Valentine off to Bowman. Bowman got in the car, and Angelos drove to a wooded area near the border with Orange County. They got Valentine out of the trunk. Valentine again pleaded for his life. Bowman said "we couldn't let you go at this point even if we wanted to. Angelos, do what you have to do." Angelos shot Valentine in the chest. Valentine fell to the ground, then Angelos shot Valentine in the head and killed him. Angelos took Valentine's wallet, which contained \$26. Angelos and Bowman covered Valentine's body with leaves and branches and departed.

Angelos presented no evidence at the guilt phase. He was convicted of first-degree murder on the theory of premeditation and deliberation and on the theory of felony murder, with kidnapping as the underlying felony. At the penalty phase, the state presented the following:

A deputy clerk of court testified that Angelos has a prior conviction for first-degree burglary. The judgment shows that Angelos was charged shortly before he killed Valentine, and was convicted shortly afterwards. His appeal is pending.

A former gang member testified that three months before Angelos killed Valentine, Angelos and Bowman, along with other individuals, initiated the former gang member into the gang by beating him with their hands and feet. The beating was worse than the former gang member expected and he suffered a broken rib, which has healed.

Angelos presented the following:

Angelos is the third of five children his mother had with four different men. Angelos's father was not involved in his life. Angelos's mother worked intermittently as a housekeeper, drank too

much, and disciplined her children frequently by spanking them with a wooden spoon. The family was poor and moved often. Angelos had few close friends. He achieved an 87 on an IQ test as a child, did poorly in school, and was often suspended. He dropped out in 10th grade. He stayed out late and his mother did not attempt to control him.

He used marijuana daily, and began to sell marijuana to support his habit. He joined the Crips at age 18 and spent most of his time with members of the gang. He looked up to Bowman, who was older, and frequently undertook "missions" assigned by Bowman, including stealing a car and vandalizing the home of a rival gang member. Other than the burglary conviction, Angelos's criminal record consists of a conviction for possession of less than ½ ounce of marijuana at age 18 and a conviction for felony larceny (the car) at age 20.

Angelos fathered a son at age 21, but was never in a serious relationship with the boy's mother. He sees the child every few weeks and sometimes buys him clothes or shoes.

A psychologist diagnosed Angelos as suffering, at the time of the murder, from depression, marijuana dependence, and borderline personality disorder. Based on an interview with Angelos, the psychologist opined that at the time of the murder, Angelos was high on marijuana, which diminished his ability to control his conduct. The psychologist further testified that Angelos's depression made him more fatalistic and more likely to engage in criminal activity without regard for the possible consequences. Finally, he stated that Angelos saw Bowman as a father figure and that he only undertook the murder because Bowman instructed him to do so, though he acknowledged that Bowman did not threaten Angelos.

You are conducting the penalty phase charge conference. The state has asked you to instruct the jury on the following aggravating circumstances:

- (e)(3) – previous violent felony
- (e)(4) – capital felony was committed to avoid/prevent a lawful arrest
- (e)(5) – capital felony was committed during a kidnapping
- (e)(6) – capital felony was committed for pecuniary gain
- (e)(7) – capital felony was committed to disrupt/hinder law enforcement
- (e)(9) – especially heinous, atrocious, or cruel

The defense has asked you not to submit mitigating circumstance (f)(1) (no significant criminal history). It has asked you to submit, and to give peremptory instructions on, the following statutory mitigating circumstances:

- (f)(2) – capital felony committed under the influence of a mental or emotional disturbance
- (f)(5) – capital felony under the domination of another person
- (f)(6) – diminished capacity
- (f)(7) – defendant's age

The defense has also asked you to submit (f)(9), the catchall statutory mitigating circumstance, and has asked you to submit, and to give peremptory instructions on, the following non-statutory mitigating circumstances:

- Angelos was raised without a father
- Angelos is of below average intelligence
- Angelos suffers from substance addiction
- Bowman, rather than Angelos, came up with the idea of the murder

Penalty Phase Worksheet

Aggravating circumstance (e)(3): Previous violent felony

Evidence supporting circumstance, if any: _____

Legal issues to consider other than sufficiency of evidence: _____

Submit circumstance? Yes No

Aggravating circumstance (e)(4): Capital felony was committed to avoid/prevent a lawful arrest

Evidence supporting circumstance, if any: _____

Legal issues to consider other than sufficiency of evidence: _____

Submit circumstance? Yes No

Aggravating circumstance (e)(5): Capital felony was committed during a kidnapping

Evidence supporting circumstance, if any: _____

Legal issues to consider other than sufficiency of evidence: _____

Submit circumstance? Yes No

Aggravating circumstance (e)(6): Capital felony committed for pecuniary gain

Evidence supporting circumstance, if any: _____

Legal issues to consider other than sufficiency of evidence: _____

Submit circumstance? Yes No

Aggravating circumstance (e)(7): Capital felony committed to disrupt/hinder law enforcement

Evidence supporting circumstance, if any: _____

Legal issues to consider other than sufficiency of evidence: _____

Submit circumstance? Yes No

Aggravating circumstance (e)(9): Especially heinous, atrocious, or cruel

Evidence supporting circumstance, if any: _____

Legal issues to consider other than sufficiency of evidence: _____

Submit circumstance? Yes No

Mitigating circumstance (f)(1): No significant criminal history

Evidence supporting circumstance, if any: _____

Legal issues to consider other than sufficiency of evidence: _____

Submit circumstance? Yes No

Peremptory instruction? Yes No

Mitigating circumstance (f)(2): Capital felony committed under the influence of a mental or emotional disturbance

Evidence supporting circumstance, if any: _____

Legal issues to consider other than sufficiency of evidence: _____

Submit circumstance? Yes No

Peremptory instruction? Yes No

Mitigating circumstance (f)(5): Capital felony committed under the domination of another person

Evidence supporting circumstance, if any: _____

Legal issues to consider other than sufficiency of evidence: _____

Submit circumstance? Yes No

Peremptory instruction? Yes No

Mitigating circumstance (f)(6): Diminished capacity

Evidence supporting circumstance, if any: _____

Legal issues to consider other than sufficiency of evidence: _____

Submit circumstance? Yes No

Peremptory instruction? Yes No

Mitigating circumstance (f)(7): Defendant's age

Evidence supporting circumstance, if any: _____

Legal issues to consider other than sufficiency of evidence: _____

Submit circumstance? Yes No

Peremptory instruction? Yes No

Nonstatutory mitigating circumstance: Angelos was raised without a father

Evidence supporting circumstance, if any: _____

Legal issues to consider other than sufficiency of evidence: _____

Submit circumstance? Yes No

Peremptory instruction? Yes No

Nonstatutory mitigating circumstance: Angelos is of below average intelligence

Evidence supporting circumstance, if any: _____

Legal issues to consider other than sufficiency of evidence: _____

Submit circumstance? Yes No

Peremptory instruction? Yes No

Nonstatutory mitigating circumstance: Angelos suffers from substance addiction

Evidence supporting circumstance, if any: _____

Legal issues to consider other than sufficiency of evidence: _____

Submit circumstance? Yes No

Peremptory instruction? Yes No

Nonstatutory mitigating circumstance: Bowman, rather than Angelos, came up with the idea of the murder

Evidence supporting circumstance, if any: _____

Legal issues to consider other than sufficiency of evidence: _____

Submit circumstance? Yes No

Peremptory instruction? Yes No

Any other thoughts about submitting the aggravating and mitigating circumstances to the jury?
