

## ARTICLES

# CAN THE CEO LEARN FROM THE CONDEMNED? THE APPLICATION OF CAPITAL MITIGATION STRATEGIES TO WHITE COLLAR CASES

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*Ted Kaczynski and Bernie Madoff share much in common. Both are well-educated, extremely intelligent, charismatic figures. Both rose to the height of their chosen professions—mathematics and finance. And both will die in federal prison, Kaczynski for committing a twenty-year mail-bombing spree that killed three people and seriously injured dozens more and Madoff for committing the largest Ponzi scheme in history, bilking thousands of people out of almost \$65 billion. But that last similarity—Kaczynski’s and Madoff’s plight at sentencing—may not have had to be. While Kaczynski’s attorneys tirelessly investigated and argued every aspect of their client’s personal history, mental state, motivations, and sentencing options, Madoff’s attorneys offered almost nothing to mitigate his conduct, simply accepting his fate at sentencing. In the end, Kaczynski’s attorneys were able to convince the government, the court, and their client that a life sentence was appropriate despite that he committed one of the most heinous and well-publicized death penalty-eligible crimes in recent history. Madoff, on the other hand, with almost unlimited resources at his disposal, received effectively the same sentence—150 years in prison—for a nonviolent offense. Why were these two men ultimately given the same sentence? And what can*

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*Madoff, the financier with unimaginable wealth, learn from Kaczynski, the reclusive and remorseless killer, when it comes to federal sentencing?*

*The answer lies in how attorneys use sentencing mitigation strategies. This Article contends that federal white collar defendants and their attorneys have failed to effectively use mitigation strategies to lessen sentences, resulting in unnecessarily long prison terms for nonviolent offenders committing financial crimes. The white collar defense bar has inexplicably ignored the mitigation techniques perfected by capital defense attorneys, and in the process has failed to effectively represent its clients. After discussing the development of the mitigation function in capital cases and paralleling it with the evolution of white collar sentencing jurisprudence, particularly post-Booker, this Article will present seven key mitigation strategies currently used by capital defense teams and discuss how these strategies might be employed in federal white collar cases. The goal throughout this Article will be to highlight new strategies and techniques available in defending white collar clients and to enhance sentencing advocacy in federal criminal cases.*

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## INTRODUCTION

Anyone who watched television, listened to the radio, or read a newspaper during the late 1990s is likely familiar with the “Unabomber” crime saga. Ted Kaczynski, a Harvard-educated math genius and one-time Berkeley professor, gave up his life as a promising academic and moved to the woods in rural Lincoln, Montana.<sup>1</sup> There, he built his own home—the infamous shack<sup>2</sup>—and lived off “what he could grow or kill,” shunning the technological world of computers, electricity, and even running water.<sup>3</sup> Although he held odd jobs at various times, Kaczynski apparently lived on just a few hundred dollars a year.<sup>4</sup> His primary vocation was “the disruption of the industrial society he had left behind.”<sup>5</sup> And in that endeavor he was successful. Over an almost twenty year period, from May 1978 until his arrest in April 1996, Kaczynski killed three people and injured twenty-nine others.<sup>6</sup> The tools of his destruction were always the same: package bombs sent to individuals and companies he targeted as “techno-nerds . . . changing the world.”<sup>7</sup>

The manhunt for the Unabomber reached its crescendo in April 1996, when agents stormed Kaczynski’s cabin and arrested the target of what had become the longest and most expensive manhunt for a serial killer in U.S. history.<sup>8</sup> Federal agents were led to Kaczynski by an unlikely source: his own 35,000-word manifesto on the “evil of

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1. For a detailed account of the events leading to Kaczynski’s capture, see generally Robert D. McFadden, *Prisoner of Rage—A Special Report: From a Child of Promise to the Unabomber Suspect*, N.Y. TIMES (May 26, 1996), <http://www.nytimes.com/1996/05/26/us/prisoner-of-rage-a-special-report-from-a-child-of-promise-to-the-unabomber-suspect.html?pagewanted=all>.

2. Kaczynski’s ten-by-twelve-foot plywood cabin is now a permanent exhibit at the Newseum in Washington, D.C. See Jacqueline Trescott, *Unabomber Objects to Newseum’s Exhibit*, WASH. POST (Aug. 13, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/08/12/AR2008081202660.html>.

3. See Nancy Gibbs, *Unabomber: Tracking Down the Unabomber*, TIME (Apr. 15, 1996), <http://www.time.com/time/magazine/article/0,9171,984392,00.html> (describing the desolate location that Kaczynski called home).

4. *Id.*

5. *Id.*

6. See Adam K. Magid, *The Unabomber Revisited: Reexamining the Use of Mental Disorder Diagnoses as Evidence of the Mental Condition of Criminal Defendants*, 84 IND. L.J. SUPP. 1, 2 (2009), [http://ilj.law.indiana.edu/articles/84/84\\_Magid.pdf](http://ilj.law.indiana.edu/articles/84/84_Magid.pdf) (describing how one of Kaczynski’s victims lost sight in one eye, hearing in one ear, and part of his hand); see also William Booth, *Kaczynski Resists the Insanity Defense*, WASH. POST (Dec. 26, 1997), <http://www.washingtonpost.com/wp-srv/local/longterm/aron/kaczynski122697.htm> (providing further summary of Kaczynski’s crimes).

7. Gibbs, *supra* note 3; see also Magid, *supra* note 6, at 2 (describing targets that included computer scientists, airline passengers, and a high-profile advertising executive).

8. Gibbs, *supra* note 3.

modern technology” published in the *Washington Post*.<sup>9</sup> Kaczynski’s brother recognized his writing and directed the FBI to the Montana shack, where agents found writings, bomb-making tools, and “signature” components identifying the Unabomber’s handiwork.<sup>10</sup> Kaczynski’s bearded, half-mad face was splashed across cable news in an infinite loop, and he was instantly labeled a brilliant and deadly sociopath.<sup>11</sup>

Kaczynski’s arrest was just the beginning of the saga. Over the next two years, he battled lawyers (the government’s and his own), judges, psychiatrists, and the legal system itself, fighting to defend himself as a sane man in order to profess his seemingly insane view of the world—a view that justified his crimes as part of a greater good to protect society against the evils of technology.<sup>12</sup> In the end, Kaczynski accepted a plea agreement on the eve of trial in exchange for the prosecution’s assurance to not seek the death penalty.<sup>13</sup> He was sentenced to four life sentences plus thirty years.<sup>14</sup> There is no doubt Kaczynski will die in federal prison.

But while the details of Kaczynski’s arrest and almost-trial may be well-known, what is less understood is the role his lawyers played in sparing him from a death sentence. As one expert capital litigator has said:

Kaczynski’s guilty plea to avoid a death sentence was . . . dependent on tireless mitigation investigation . . . . The Unabomber case is an important reminder that the development of mitigation evidence may be as critical to resolving cases through successful dispositions as to winning life sentences before juries.<sup>15</sup>

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9. Magid, *supra* note 6, at 2 (detailing how Kaczynski originally contacted the *New York Times* and the *San Francisco Chronicle*, offering to stop sending bombs if the papers published his writings; the *Washington Post* ultimately published the manifesto).

10. See Gibbs, *supra* note 3 (describing how “[e]very bombmaker . . . develops a hallmark: he may loop wires in a certain way, or set his switches at a certain angle or, in this case, create his contraptions out of wood”).

11. See *id.* (reporting that Ken Thompson, a former FBI agent and domestic terrorism expert, mused that “[t]he boys in the basement at Quantico are going to spend years studying this case”).

12. See William Finnegan, *Defending the Unabomber*, *NEW YORKER*, Mar. 16, 1998, at 52, 57 (explaining that Kaczynski’s Manifesto “urged revolution in the name of Wild Nature”).

13. *Id.*

14. David Johnston, *Judge Sentences Confessed Bomber to Four Life Terms*, *N.Y. TIMES* (May 5, 1998), <http://www.nytimes.com/1998/05/05/us/judge-sentences-confessed-bomber-to-four-life-terms.html>.

15. Russell Stetler, *Mitigation Evidence in Death Penalty Cases*, *CHAMPION*, Jan.-Feb. 1999, at 35, 36 n.1 [hereinafter Stetler, *Mitigation Evidence*].

Kaczynski benefitted from the expertise of a team of veteran capital litigators and mitigation experts who spent hundreds of hours constructing a sympathetic life story, which included compiling extensive evidence of Kaczynski's mental impairment, paranoid schizophrenia.<sup>16</sup> Kaczynski's lawyers used what are now considered standard capital mitigation strategies—extensive in-person interviews with anyone associated with the defendant throughout his lifetime, a multi-generational investigation of potential mental illnesses, the development of extensive expert and lay testimonial and documentary evidence, and the creation of a compelling anti-death narrative—to secure a plea agreement that would spare his life.<sup>17</sup> From a sentencing standpoint, the defense of the Unabomber was an incredible success.<sup>18</sup>

Compare Kaczynski's case with that of Bernie Madoff, another high profile federal defendant who also captured the attention of the American public. Like Kaczynski, Madoff was well-educated, at the top of his chosen profession, and had he taken a different path, he could have lived a life of considerable comfort.<sup>19</sup> Instead, Madoff committed the “largest, longest, and most widespread Ponzi scheme in history,”<sup>20</sup> which lasted an astounding twenty-two years and cost investors upwards of \$65 billion.<sup>21</sup> Madoff used his considerable abilities to attract billions of dollars to support fictitious hedge fund

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16. See Finnegan, *supra* note 12, at 54 (noting that no one doubted Kaczynski was legally sane, but his lawyers thought by presenting his psychiatric classification they could significantly mitigate his culpability).

17. See *id.* (describing how Kaczynski's lawyers met with mental health experts and also with family historians to develop mitigation evidence); Joseph Goldstein & Marc Lacey, *To Defend the Accused in a Tucson Rampage, First a Battle To Get Inside a Mind*, N.Y. TIMES (Feb. 12, 2011), <http://www.nytimes.com/2011/02/13/us/13tucson.html> (elaborating that Judy Clarke, Kaczynski's lead attorney, does not focus on her clients' innocence, but rather on how to save their lives by showing the jury a “mitigating social history” of her clients, including history of abuse or mental illness that the client may have suffered).

18. See Beau Friedlander, *The Legendary Lawyer Who Will Defend Loughner: Judy Clarke*, TIME (Jan. 12, 2011), <http://www.time.com/time/nation/article/0,8599,2041943,00.html> (discussing the extraordinary abilities of Clarke, who currently represents Jared Loughner, the shooter of Arizona Representative Gabrielle Giffords). But see Finnegan, *supra* note 12, at 61 (suggesting Kaczynski's attorneys did him a disservice by forcing the narrative of mental illness when he rejected that line of defense).

19. See, e.g., Les Christie, *Peek Inside Madoff's Homes and Boats*, CNN.COM, [http://money.cnn.com/2009/09/09/real\\_estate/madoff\\_homes\\_boats/index.htm](http://money.cnn.com/2009/09/09/real_estate/madoff_homes_boats/index.htm) (last updated Sept. 10, 2009, 4:24 PM) (detailing Madoff's many multimillion dollar homes and yachts).

20. Diana B. Henriques, *Madoff Is Sentenced to 150 Years for Ponzi Scheme*, N.Y. TIMES (June 30, 2009), <http://www.nytimes.com/2009/06/30/business/30madoff.html?pagewanted=print>.

21. See Steve Fishman, *The Madoff Tapes*, N.Y. MAGAZINE (Feb. 27, 2011), <http://nymag.com/news/features/berniemadoff-2011-3/>.

returns, used the money to live a lavish lifestyle, and then repeatedly lied as investigators began uncovering the fraud.<sup>22</sup> Madoff, like Kaczynski, was ultimately labeled a sociopath<sup>23</sup> and is reviled by millions.<sup>24</sup> Also like Kaczynski, Madoff will die in federal prison. The seventy-one-year-old Madoff was sentenced to 150 years—ten times what would have been necessary to ensure he never left prison.<sup>25</sup> The judge called his crimes “extraordinarily evil.”<sup>26</sup>

Where Madoff’s case differs from Kaczynski’s is in how Madoff approached his sentencing. In contrast to Kaczynski’s attorneys’ hundreds of hours of work and tireless efforts, Madoff’s attorneys did almost *nothing* at sentencing to mitigate their client’s criminal conduct. They presented no evidence of any mental condition that might lessen Madoff’s culpability, even though there was ample indication of his extreme narcissism and lack of impulse control, common diagnoses of white collar defendants.<sup>27</sup> Nor did they present any evidence of his extensive good works prior to committing his

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22. See JAMES B. STEWART, *TANGLED WEBS* 374–75, 420–21 (2011) (documenting the lavish lifestyle Madoff led and providing examples of his “flagrant lies,” such as Madoff’s claim that he only had about twenty investors when in reality he had thousands).

23. See Mona Ackerman, *The Psychology Behind Bernie Madoff*, HUFFINGTON POST (Dec. 18, 2008, 08:39 AM), [http://www.huffingtonpost.com/mona-ackerman/the-psychology-behind-ber\\_b\\_151966.html?view=print](http://www.huffingtonpost.com/mona-ackerman/the-psychology-behind-ber_b_151966.html?view=print) (agreeing that Madoff had, at the least, “sociopathic tendencies that bloomed in the proper environment”).

24. See Transcript of Sentencing Hearing at 18–21, *United States v. Madoff*, No. 09 CR 213 (S.D.N.Y. June 29, 2009) [hereinafter *Madoff Transcript*] (on file with the *American University Law Review*).

25. *Id.* at 49.

26. *Id.* at 47. Professor Craig Haney has identified this type of description as part of the “crime master narrative” that capital mitigation evidence is meant to combat. Craig Haney, *Evolving Standards of Decency: Advancing the Nature and Logic of Capital Mitigation*, 36 HOFSTRA L. REV. 835, 841 (2008).

27. See STEWART, *supra* note 22, at 435 (suggesting Madoff’s pattern of lies indicates a sociopathic personality (citing MARTHA STOUT, *THE SOCIOPATH NEXT DOOR* 6–7 (2005))); Marilyn Price & Donna M. Norris, *White-Collar Crime: Corporate and Securities and Commodities Fraud*, 37 J. AM. ACAD. PSYCHIATRY L. 538, 542 (2009) (identifying personality characteristics of white collar criminals, which include exhibiting “narcissistic tendencies,” the “fear [of] losing their status and position,” and the lack of a “social conscience”); Fishman, *supra* note 21 (Madoff’s son described him as a “bully and a gifted manipulator” and identified his extreme narcissism). Recent statements by Madoff support such diagnoses. In letters Madoff wrote from prison, he described himself as “quite the celebrity” and said he was “treated like a Mafia don.” Joseph Rhee and Shana Druckerman, *‘Like a Mafia Don’: Bernie Madoff’s Boastful Letter to Angry Daughter-in-Law*, ABC NEWS (Oct. 20, 2011), <http://abcnews.go.com/US/mafia-don-bernie-madoffs-boastful-letter-angry-daughter/story?id=14777562>. He also stated that the prison was “filled with ‘loads of friends’ who respected him.” *Id.* However, he did admit being relieved because he was “no longer in control.” Chris Michaud, *Madoff Says He Is Happier in Prison than Free*, FOX BUS. (Oct. 27, 2011), <http://www.foxbusiness.com/industries/2011/10/27/madoff-says-is-happier-in-prison-than-free>.

fraud.<sup>28</sup> In fact, Madoff's attorneys presented no narrative whatsoever to offset what even they called the "heart-wrenching stories of loss and deprivation" suffered by his victims.<sup>29</sup> Madoff's attorneys even failed to offer letters of support from family and friends, a basic mitigation technique used in most white collar cases.<sup>30</sup> His attorneys offered only a dry statistical breakdown of federal sentencing data to argue for a non-disparate sentence<sup>31</sup> and a plea allocution that explained the operation of his crime without explaining why he deserved leniency.<sup>32</sup> In the end, Madoff turned to the courtroom gallery and offered only, "I am sorry. I know that doesn't help you."<sup>33</sup> The judge sentenced Madoff to the maximum sought by the government—100 years more than recommended by the probation

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28. See Fishman, *supra* note 21 (quoting Madoff as asking, "[d]oes anybody want to hear that I had a successful business and did all these wonderful things for the industry?"). By all accounts, Madoff was a well-regarded financier who gave millions to charities even before his Ponzi scheme began in the 1990s. See *Charity Caught Up in Wall Street Ponzi Scandal*, FOX NEWS (Dec. 13, 2008), <http://www.foxnews.com/story/0,2933,466665,00.html> (recognizing that in 1998, the Madoff family established its charity, the Madoff Family Foundation, and for many years gave multi-million dollar donations to many New York charities).

29. Letter from Ira Lee Sorkin to Hon. Denny Chin (June 22, 2009) (on file with the *American University Law Review*).

30. Judge Denny Chin specifically mentioned the lack of supporting letters during Madoff's sentencing hearing, stating that "[t]he absence of such support is telling." Madoff Transcript, *supra* note 24, at 46. Compare Benjamin Weiser, *Judge Explains 150-Year Sentence for Madoff*, N.Y. TIMES (June 28, 2011), <http://www.nytimes.com/2011/06/29/nyregion/judge-denny-chin-recounts-his-thoughts-in-bernard-madoff-sentencing.html?pagewanted=all> (noting that the judge received 450 emails and letters from victims of Madoff hoping to see him punished), with Ron Kampeas, *Sharansky, 173 Others Plead Leniency for Libby*, JWEEKLY.COM (June 8, 2007), <http://www.jweekly.com/article/full/32649/sharansky-173-others-plead-leniency-for-libby/> (summarizing the case of Scooter Libby, convicted of obstructing the investigation into the leaked name of covert CIA operative Valerie Plame, who submitted 174 letters appealing for leniency when facing just a thirty-seven-month sentence).

31. Of course, this argument was not compelling given there had never been a Ponzi scheme of this magnitude.

32. See Madoff Transcript, *supra* note 24, at 31–38 (noting that no letters were submitted attesting to Madoff's good character or providing insight into his motivations).

33. *Id.* at 38. Judge Chin has remarked that he did not believe Madoff was genuinely remorseful. Weiser, *supra* note 30. It should be obvious that Madoff's case is not exactly typical. Most white collar cases are not so extreme—the frauds are smaller, the public outcry is less, some mitigating arguments are made at sentencing, and the punishment is not so severe. The sharp relief Madoff's case offers from the typical, however, is precisely why it is a compelling example from which to draw. That Madoff's attorneys used so few mitigation strategies and their client was sentenced so drastically demonstrates the dangers in ignoring the lessons of mitigation experts.

department—noting that sentencing a seventy-one-year-old to 150 years was “largely, if not entirely, symbolic.”<sup>34</sup>

So what can be learned from comparing the Madoff and Kaczynski cases—in which a first-time white collar offender charged with a nonviolent financial crime (albeit a massive one) receives a sentence functionally equivalent to that of a serial killer who terrorized the nation for twenty years? Is there a lesson for the CEO from the case of the condemned?

This Article contends that white collar defendants and their counsel can learn much by understanding how capital defense attorneys approach sentencing mitigation. Federal white collar defense attorneys have failed to learn—indeed, have ignored—the lessons of sentencing mitigation employed so effectively by capital litigators and their teams of mitigation experts. Most white collar defense attorneys approach sentencing as Madoff’s attorneys did, with little imagination and even less proven strategies to mitigate their client’s conduct. This approach ignores the considerable mitigation arguments allowed under *United States v. Booker*<sup>35</sup> and its progeny, and does a disservice to white collar defendants by exposing them to excessive sentences imposed in the name of “symbolism.” Effective sentencing advocacy demands that white collar defense attorneys “take a lesson from their comrades in the realm of capital litigation: these attorneys have repeatedly demonstrated how to save clients’ lives through conducting a thorough investigation into the client’s social and psychological history and producing evidence that mitigates the crimes committed.”<sup>36</sup>

While white collar sentencing will not change overnight, the goal of this Article is to highlight new strategies available in defending

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34. Madoff Transcript, *supra* note 24, at 47. Judge Chin has recounted that he considered a twenty- to twenty-five-year sentence, but ultimately rejected it as “just way too low.” Weiser, *supra* note 30. He said sentencing Madoff to any additional years would be “purely symbolic,” yet he felt “symbolism was important . . . given the enormity of Mr. Madoff’s crimes.” *Id.* Judge Chin determined that sentencing Madoff to anything less than 150 years would be perceived as showing mercy, and “[f]rankly, that was not the message [he] wanted to be sent.” *Id.* Ultimately, Judge Chin said he feels “comfortable with the decision [he] reached.” Hon. Denny Chin, Remarks at the University of Pennsylvania Law Review Symposium: Sentencing Law: Rhetoric & Reality (Nov. 4, 2011) (notes on file with author); *see also* Denny Chin, *Sentencing: A Role for Empathy*, 160 U. PA. L. REV. 1561, 1574–75 (2012) (providing further insight into Judge Chin’s reasoning behind imposing such a lengthy sentence).

35. 543 U.S. 220 (2005) (holding that provisions of the then-mandatory United States Sentencing Guidelines violated the Sixth Amendment and excising those provisions to create an advisory sentencing guidelines regime).

36. Alan Ellis et al., *Litigating in a Post-Booker World*, CRIM. JUST., Spring 2005, at 24, 31 [hereinafter Ellis et al., *Litigating*].



white collar clients based on proven capital mitigation techniques. Part I discusses the development of the mitigation function in capital cases. Part II discusses the parallel arc of federal sentencing jurisprudence, focusing particularly on the state of white collar sentencing post-*Booker*. Finally, Part III presents seven key mitigation strategies currently used by capital mitigation experts and discusses how these strategies might be effectively employed in federal white collar cases.

## I. THE DEVELOPMENT OF THE MITIGATION FUNCTION IN CAPITAL CASES

Understanding how federal white collar defendants and attorneys can learn from their capital defense counterparts begins with understanding capital mitigation. It should come as no surprise that most attorneys, even experienced defense attorneys, have no concept of how mitigation evidence is developed and used in capital cases. Why would they? Aside from a small cadre of nationally-recognized capital defense experts, a criminal defense attorney will probably never try a capital case and never put on mitigation evidence.<sup>37</sup> That is especially true for white collar defense counsel. Therefore, it is necessary to first provide an overview of the development of the mitigation function in capital cases in order to dispel the “mystery of mitigation.”<sup>38</sup>

### A. *The Legal Framework of Capital Mitigation*

Capital mitigation as we know it today, loosely defined as “the empathy-evoking evidence that attempts to humanize the accused killer in death penalty cases,”<sup>39</sup> begins with the modern era of the death penalty. In 1972, the Supreme Court decided *Furman v. Georgia*,<sup>40</sup> addressing whether states’ discretionary death penalty

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37. See Sean D. O’Brien, *When Life Depends on It: Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 HOFSTRA L. REV. 693, 713 (2008) [hereinafter O’Brien, *When Life Depends on It*] (stating that mitigation is probably the least understood concept in capital sentencing); Russell Stetler, *The Mystery of Mitigation: What Jurors Need To Make a Reasoned Moral Response in Capital Sentencing*, 11 U. PA. J.L. SOC. CHANGE 237, 237 (2008) [hereinafter Stetler, *Mystery of Mitigation*] (“Indeed, in twenty years of federal death penalty prosecutions, very few judges have presided over more than one penalty proceeding. Some of the most experienced public defenders specializing in capital cases have presented mitigating evidence only a handful of times over their long careers.”).

38. See Stetler, *Mystery of Mitigation*, *supra* note 37, at 237 (explaining that capital mitigation is the process by which an attorney attempts to humanize an accused killer).

39. *Id.*

40. 408 U.S. 238 (1972).

statutes, which gave juries the decision to impose death sentences, were constitutional under the Eighth and Fourteenth Amendments.<sup>41</sup> In a 5-4 decision, with all the Justices writing separately, the Court held that all capital statutes then in place violated the Constitution.<sup>42</sup> The consensus of the fractured opinion was that juries could not constitutionally be given unfettered discretion, which was often exercised arbitrarily, to determine which defendants were sentenced to death.<sup>43</sup> The dramatic effect of *Furman* was to halt the execution of every person on death row at the time.<sup>44</sup>

In response, state legislatures drafted new death penalty statutes, beginning a thirty-year “work-in-progress.”<sup>45</sup> Many of these statutes gave capital juries “guided discretion,” meaning they instructed jury members to consider specific aggravating and mitigating factors during sentencing, as a way to comply with *Furman*.<sup>46</sup> In *Gregg v. Georgia*,<sup>47</sup> the Court upheld the constitutionality of Georgia’s guided discretion statute, thereby reinstating the death penalty in a portion of states.<sup>48</sup> Justice Stewart, writing the plurality opinion, held that Georgia’s statute, which directed the jury’s attention to “the specific circumstances of the crime,”<sup>49</sup> did not violate the Eighth Amendment because it gave the jury “clear and objective standards” to consider.<sup>50</sup>

Although the opinion hinted at the importance of mitigation evidence, the Court gave little guidance as to what the mitigation

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41. See Jeffrey L. Kirchmeier, *A Tear in the Eye of the Law. Mitigating Factors and the Progression Toward a Disease Theory of Criminal Justice*, 83 OR. L. REV. 631, 651–52 (2004) (mandatory death penalty statutes had been phased out in large part by 1963). The Supreme Court had earlier held that discretionary death penalty statutes did not violate the Fourteenth Amendment, but had not addressed whether they violated the Eighth Amendment. See *McGautha v. California*, 402 U.S. 183, 185 (1971) (stating that an accused’s rights were not violated by the imposition of a death sentence), *vacated*, *Crampton v. Ohio*, 92 S. Ct. 2873 (1972).

42. *Furman*, 408 U.S. at 240.

43. See *id.* at 239–40, 256–57 (noting that the statute at issue, which imposed the death penalty on defendants convicted of murder and rape, leads to discrimination by jurors that is “not compatible with the idea of equal protection of the laws that is implicit in the ban on ‘cruel and unusual’ punishments”); Kirchmeier, *supra* note 41, at 652 (explaining that the arbitrary imposition of death was of great concern for the majority of the Justices).

44. See Kirchmeier, *supra* note 41, at 652 (explaining that some state legislatures reverted back to mandatory death sentencing statutes in the wake of *Furman*, while others sought to limit the sentencer’s discretion through guided discretion statutes).

45. Haney, *supra* note 26, at 845.

46. Kirchmeier, *supra* note 41, at 653.

47. 428 U.S. 153 (1976).

48. Haney, *supra* note 26, at 845; see also *Jurek v. Texas*, 428 U.S. 262 (1976) (upholding a guided discretion death penalty statute); *Proffitt v. Florida*, 428 U.S. 242 (1976) (same).

49. *Gregg*, 428 U.S. at 197–98 (plurality opinion).

50. *Id.* at 198 (quoting *Coley v. State*, 204 S.E.2d 612, 615 (Ga. 1974)).

function encompassed. Professor Craig Haney has explained that *Gregg* merely adopted the Model Penal Code's (MPC) listing of aggravating and mitigating factors to be weighed without any practical or theoretical elaboration:

Justice Stewart . . . noted, with a degree of understatement, that the standards to be considered by a jury in determining whether to impose a death sentence "are by necessity somewhat general." There was no explanation or discussion—in the MPC or by the Court—about exactly what the concept of aggravation or mitigation meant, why they were important to include in a constitutional scheme of death penalty decision-making, or precisely how capital jurors were supposed to use them in choosing between life and death.<sup>51</sup>

*Gregg* did, however, specifically approve of the jury's consideration of the "circumstances of the crime *and the criminal*," mentioning that "special facts about th[e] defendant that [might] mitigate against imposing capital punishment" included the defendant's youth, his cooperation with the police, and his emotional state during the commission of the crime.<sup>52</sup> Albeit vaguely, *Gregg* had planted the first seeds concerning the use of mitigation evidence in capital cases.

In *Woodson v. North Carolina*<sup>53</sup> and *Roberts v. Louisiana*,<sup>54</sup> the concept of mitigation in capital cases began to grow. In *Woodson*, Justice Stewart, again writing for a plurality, struck down a mandatory death penalty statute, stating that the Eighth Amendment "requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."<sup>55</sup> The mandatory statute in *Roberts*, although more narrowly drafted, was struck down for the same reasons.<sup>56</sup> Neither case, however, specified what individual offender characteristics should be considered, or why and how the "diverse frailties of humankind" alluded to in the *Woodson* opinion might be employed as mitigating evidence.<sup>57</sup>

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51. Haney, *supra* note 26, at 845–46 (footnote omitted).

52. *Gregg*, 428 U.S. at 197 (plurality opinion) (emphasis added).

53. 428 U.S. 280 (1976).

54. 428 U.S. 325 (1976).

55. *Woodson*, 428 U.S. at 304.

56. *See Roberts*, 428 U.S. at 335–36 (stating that "Louisiana's mandatory death sentence law employs a procedure that was rejected by that State's legislature 130 years ago and that subsequently has been renounced by legislatures and juries in every jurisdiction in this Nation" (footnote omitted)).

57. Haney, *supra* note 26, at 846 (quoting *Woodson*, 428 U.S. at 304).

Yet within two years, the concept of mitigation had firmly taken hold in death penalty jurisprudence. In *Lockett v. Ohio*,<sup>58</sup> the Court invalidated Ohio's death penalty statute, which "narrowly limit[ed] the sentencer's discretion to consider the circumstances of the crime and the record and character of the offender as mitigating factors."<sup>59</sup> In what became known as the *Lockett* doctrine, Chief Justice Burger significantly broadened the scope of potential mitigation evidence available at trial.<sup>60</sup> After recognizing the long history of individualized sentencing in the United States, the Court held there could be almost no limits on mitigating evidence offered by a defendant in a capital case.<sup>61</sup> "[T]he sentencer . . . [can]not be precluded from considering, as a mitigating factor, *any* aspect of a defendant's character or record and *any* of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."<sup>62</sup> The Court struck down the Ohio statute because it limited mitigation to questions of whether the defendant had facilitated the offense, whether it was unlikely that the defendant would have committed the crime but for some strong provocation, and whether the offense was primarily the product of a mental deficiency.<sup>63</sup> Although the *Lockett* doctrine was a significant advance in death penalty jurisprudence because it ensured that capital sentencers would be in "possession of the fullest information possible concerning the defendant's life and characteristics,"<sup>64</sup> the decision still did not explain what actually constituted mitigation evidence or how it could be effectively used.

While *Lockett* had certainly "made up in breadth what [the Court's explanation of capital mitigation] lacked in clarity," the decision's failure to specify what comprised mitigation evidence or its boundaries was problematic.<sup>65</sup> "In essence, *Lockett* told trial courts to allow evidence to be admitted that . . . might serve as the basis of a sentence less than death. But it did not suggest how or why [the

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58. 438 U.S. 586 (1978).

59. *Id.* at 589.

60. See Haney, *supra* note 26, at 846–47 (noting that besides elaborating on the great breadth of information the jury was to possess, the Court failed to provide substantive guidelines for mitigation).

61. See *id.* at 847.

62. *Lockett*, 438 U.S. at 604 (emphasis omitted and added).

63. See *id.* at 593–94 (summarizing how the trial judge determined he had no alternative but to impose a death sentence under the statute).

64. *Id.* at 603 (quoting *Williams v. New York*, 337 U.S. 241, 247 (1949)).

65. Haney, *supra* note 26, at 846 (elaborating that Justice Stewart's opinion "did not specify which diverse frailties he had in mind, or why and how he believed those frailties might generate compassion or constitute mitigation").

sentencer] could or should actually be inclined by the evidence to lean . . . .”<sup>66</sup> This lack of clarity caused “unevenness” in how capital defense attorneys approached the use of mitigation.<sup>67</sup> Some did nothing, arguing the same way and with the same evidence as they had during pre-*Lockett* cases.<sup>68</sup> Others, however, thought “expansively and creatively” about the issue of mitigation and began exploring every tool available to mitigate their client’s conduct, including developing arguments based on advancements in psychology, psychiatry, and physiology.<sup>69</sup> *Lockett*, therefore, invigorated the imaginations of at least some dedicated capital litigators.

In a series of decisions after *Lockett*, the Court began to flesh out the parameters of mitigation. In *Skipper v. South Carolina*,<sup>70</sup> the Court struck down a statute that excluded mitigation evidence detailing the defendant’s behavior after the offense, such as the defendant’s adjustment to prison.<sup>71</sup> In *Eddings v. Oklahoma*,<sup>72</sup> the Court held that mitigation evidence related to the defendant’s violent upbringing also could not be excluded at trial.<sup>73</sup> The Court furthered this line of reasoning in *California v. Brown*,<sup>74</sup> stating that evidence of the defendant’s background was particularly relevant in death penalty cases.<sup>75</sup> And in *Penry v. Lynaugh*,<sup>76</sup> the Court held that a capital jury must be given instructions allowing it to consider mitigating evidence of the defendant’s mental retardation and childhood abuse.<sup>77</sup> The

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66. *Id.* at 847.

67. *See id.* at 848 (stating that many attorneys simply did not know what would now constitute mitigating evidence).

68. *See id.* (explaining that many defense attorneys could not figure out which parts of a defendant’s past could be mitigating to a juror, while others did not present mitigation evidence at all).

69. *Id.*

70. 476 U.S. 1 (1986).

71. *See id.* at 5 (“Consideration of a defendant’s past conduct as indicative of his probable future behavior is an inevitable and not undesirable element of criminal sentencing; ‘any sentencing authority must predict a convicted person’s probable future conduct when it engages in the process of determining what punishment to impose.’” (quoting *Jurek v. Texas*, 428 U.S. 262, 275 (1976))).

72. 455 U.S. 104 (1982).

73. *See id.* at 116 (“[J]ust as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered in sentencing.”).

74. 479 U.S. 538 (1987).

75. *See id.* at 545 (O’Connor, J., concurring) (“[E]vidence about the defendant’s background and character is relevant because of the belief, long held by this society, 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.”).

76. 492 U.S. 302 (1989), *abrogated by* *Atkins v. Virginia*, 536 U.S. 304 (2002).

77. *See id.* at 322, 340 (concluding that evidence of mental retardation and childhood abuse is relevant in determining moral culpability and should be considered when imposing sentences).

*Penry* decision solidified the validity and scope of mitigation—the Court now widely recognized a capital defendant’s Eighth Amendment right to present evidence of *any* mitigating factor that would allow the jury a “reasoned moral response to the defendant’s background, character, and crime.”<sup>78</sup>

The next important development in capital mitigation came ten years later in *Williams v. Taylor*.<sup>79</sup> Although it was clear that mitigation evidence could not be excluded from a capital sentencer’s penalty determination, it was less clear whether the law *required* that evidence be presented on a capital defendant’s behalf.<sup>80</sup> *Williams* answered the question affirmatively, finding that capital counsel violated a defendant’s Sixth Amendment right to effective assistance of counsel by failing to investigate and present mitigation evidence.<sup>81</sup> In *Williams*, the Court admonished defense counsel’s failure to seek records that would have demonstrated the defendant’s brutal upbringing, nonviolent nature, borderline mental retardation, and positive rehabilitation.<sup>82</sup> *Williams* established that not only were

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78. *Id.* at 328 (emphasis omitted) (quoting *Franklin v. Lynaugh*, 487 U.S. 164, 184 (1988) (O’Connor, J., concurring)).

79. 529 U.S. 362 (2000).

80. *See id.* at 370–74 (recounting the lower courts’ conflicting application of the standards set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), which determined whether counsel’s failure to submit mitigating evidence violated the Sixth Amendment).

81. *See id.* at 398–99 (holding that counsel’s failure to unearth his client’s social history records to use as mitigating evidence violated the Constitution).

82. In a chilling passage, Justice Stevens described the type of mitigating evidence the defendant’s attorneys should have found if they had conducted a thorough investigation:

The record establishes that counsel did not begin to prepare for [the sentencing] phase of the proceeding until a week before the trial. They failed to conduct an investigation that would have uncovered extensive records graphically describing Williams’ nightmarish childhood . . . . Had they done so, the jury would have learned that Williams’ parents had been imprisoned for the criminal neglect of Williams and his siblings, that Williams had been severely and repeatedly beaten by his father, that he had been committed to the custody of the social services bureau for two years during his parents’ incarceration (including one stint in an abusive foster home), and then, after his parents were released from prison, had been returned to his parents’ custody.

Counsel failed to introduce available evidence that Williams was “borderline mentally retarded” and did not advance beyond sixth grade in school. They failed to seek prison records recording Williams’ commendations for helping to crack a prison drug ring and for returning a guard’s missing wallet, or the testimony of prison officials who described Williams as among the inmates “least likely to act in a violent, dangerous or provocative way.” Counsel failed even to return the phone call of a certified public accountant who had offered to testify that he had visited Williams frequently when Williams was incarcerated as part of a prison ministry program, that Williams “seemed to thrive in a more regimented and

capital defense attorneys required to present any *available* mitigation evidence, they were required to conduct a thorough investigation into a defendant's background and social history to *uncover* evidence that may prove effective in mitigating a client's sentence.<sup>83</sup>

Two subsequent cases further clarified both the "[c]ritical role"<sup>84</sup> of mitigating background evidence and the necessary scope of defense counsel's investigation. In *Wiggins v. Smith*,<sup>85</sup> the Court found capital counsel ineffective when they made a "strategic" decision to discontinue an investigation into the defendant's personal background, despite evidence of the defendant's extreme abuse.<sup>86</sup> The Court faulted the attorneys' half-hearted investigatory approach, asserting that counsel "acquired only rudimentary knowledge of [their client's] history from a narrow set of sources" and ignored their client's "medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences."<sup>87</sup> *Wiggins* "acknowledged—in a clear and definitive way—the importance of developing and, when appropriate, presenting a mitigating social history."<sup>88</sup> *Rompilla v. Beard*<sup>89</sup> furthered the holding in *Wiggins*, finding defense counsel ineffective for failing to fully investigate a defendant's social history, even when the defendant insisted his background was unexceptional and tried to obstruct his attorneys' investigative efforts.<sup>90</sup>

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structured environment," and that Williams was proud of the carpentry degree he earned while in prison.  
*Id.* at 395–96.

83. *Id.* at 393.

84. Haney, *supra* note 26, at 851.

85. 539 U.S. 510 (2003).

86. *Id.* at 516–17, 526.

87. *Id.* at 524 (emphasis omitted) (citation omitted).

88. Haney, *supra* note 26, at 851.

89. 545 U.S. 374 (2005).

90. *See id.* at 391. If counsel would have investigated further, they would have found:

*Rompilla* thus capped the Court's thirty-year "work-in-progress" surrounding capital mitigation.<sup>91</sup> In three decades, "the Court had moved from merely mentioning mitigation (without defining the term or even commenting that none had been presented in the cases it was deciding) to reversing a death sentence on the basis of counsel's failure to conduct an adequate background and social history investigation."<sup>92</sup> The constitutional requirements of presenting mitigation evidence were established, but it remained to be seen how capital litigators would implement the mitigation function in practice.

*B. The ABA Guidelines and the Institutionalized Role of Capital Mitigation*

Soon after the Court's pronouncement in *Williams* that capital defense counsel were required to investigate and present mitigation evidence, the American Bar Association (ABA) began updating its Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases ("ABA Guidelines").<sup>93</sup> While the previous version of the ABA Guidelines provided that investigations into mitigating evidence "should comprise efforts to discover *all*

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Rompilla's parents were both severe alcoholics who drank constantly. His mother drank during her pregnancy with Rompilla, and he and his brothers eventually developed serious drinking problems. His father, who had a vicious temper, frequently beat Rompilla's mother, leaving her bruised and black-eyed, and bragged about his cheating on her. His parents fought violently, and on at least one occasion his mother stabbed his father. He was abused by his father who beat him when he was young with his hands, fists, leather straps, belts and sticks. All of the children lived in terror. There were no expressions of parental love, affection or approval. Instead, he was subjected to yelling and verbal abuse. His father locked Rompilla and his brother Richard in a small wire mesh dog pen that was filthy and excrement filled. He had an isolated background, and was not allowed to visit other children or to speak to anyone on the phone. They had no indoor plumbing in the house, he slept in the attic with no heat, and the children were not given clothes and attended school in rags.

*Id.* at 391–92 (citations omitted).

91. The Court reaffirmed its commitment to individualized sentencing in the most recent Term. See *Miller v. Alabama*, 132 S. Ct. 2455, 2475 (2012) ("[I]ndividualized sentencing decisions make clear that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalties [life without the possibility of parole] for juveniles."). However, it remains to be seen whether the decision will lead to an expansion of protection for non-juvenile offenders facing sentences of life without parole.

92. Haney, *supra* note 26, at 855. However, capital counsel's strategic decision to not introduce mitigation evidence is not ineffective assistance so long as counsel demonstrates that he completed an adequate investigation. See *Wood v. Allen*, 130 S. Ct. 841, 850 (2010) (finding that the decision not to pursue or present possible mitigating evidence does not qualify as ineffective counsel if the record shows that the decision was deliberate and strategic).

93. GUIDELINES FOR THE APPOINTMENT & PERFORMANCE OF DEF. COUNSEL IN DEATH PENALTY CASES (rev. ed. 2003).



*reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor,”<sup>94</sup> the revisions specifically addressed the newly-established investigation requirement.<sup>95</sup> The revised ABA Guidelines were also a direct response to cases in which defense counsel, despite the *Williams* ruling, had failed to conduct a thorough and independent investigation of the defendant’s background and social history.<sup>96</sup> The ABA determined that capital attorneys knew the importance of developing mitigation evidence, but they simply “did not know how to do it properly.”<sup>97</sup>

The ABA Guidelines provided attorneys a template for building their client’s mitigation case. First, capital attorneys were required to expand and restructure their defense teams.<sup>98</sup> Defense teams were now obligated to consist of at least two attorneys, an investigator, *and* a mitigation specialist, with one team member qualified to identify mental or psychological disorders.<sup>99</sup> This was no small change; many capital cases at the time were tried with a single defense attorney and an investigator. Second, mitigation investigations were required to be conducted regardless of the defendant’s cooperation.<sup>100</sup> Finally, the ABA Guidelines recognized that developing mitigation evidence “require[d] extensive and generally unparalleled investigation into personal and family history,” which included inquiry into the defendant’s medical, family, social, educational, military, employment, and correctional history from “the moment of conception.”<sup>101</sup> While the Supreme Court had generally outlined the necessary scope of social history investigations, the ABA Guidelines “codified” the specific areas in which a capital defense team, and

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94. GUIDELINES FOR THE APPOINTMENT & PERFORMANCE OF DEF. COUNSEL IN DEATH PENALTY CASES guideline 11.4.1(C) (1989) (emphasis added).

95. See Robin M. Maher, *The ABA and the Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 HOFSTRA L. REV. 763, 770 (2008) (addressing the frequent failure of defense counsel to investigate and present mitigation evidence by suggesting that capital defendants retain the assistance of a mitigation specialist).

96. *Id.* at 768; see, e.g., *Douglas v. Woodford*, 316 F.3d 1079, 1094 (9th Cir. 2003) (faulting counsel for the minimal investigation into the petitioner’s mental health and social history); *Collier v. Turpin*, 177 F.3d 1184, 1202 (11th Cir. 1999) (criticizing defense counsel’s performance at trial in failing to present any mitigating evidence of defendant’s past and therefore calling into doubt the jury’s decision to sentence the defendant to death).

97. Maher, *supra* note 95, at 769.

98. GUIDELINES FOR THE APPOINTMENT & PERFORMANCE OF DEF. COUNSEL IN DEATH PENALTY CASES guideline 4.1.

99. *Id.*

100. *Id.* guideline 10.7.

101. *Id.* guideline 10.7 cmt.

particularly a mitigation specialist, must investigate.<sup>102</sup> The ABA Guidelines represented a significant advancement in the attempt to achieve individualized and constitutionally valid capital sentencing, thereby becoming the national standard as courts adopted and enforced their provisions.<sup>103</sup>

In 2008, the *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases* (“*Supplementary Guidelines*”) were issued to further develop the mitigation function in capital cases.<sup>104</sup> The *Supplementary Guidelines* not only confirmed the indispensable role of the mitigation specialist on the capital defense team, they also identified and institutionalized those specialists’ best practices.<sup>105</sup> For example, the *Supplementary Guidelines* provided a more detailed list of the areas of mitigation a specialist was required to investigate:

Mitigation evidence includes, but is not limited to, compassionate factors stemming from the diverse frailties of humankind, the ability to make a positive adjustment to incarceration, the realities of incarceration and the actual meaning of a life sentence, capacity for redemption, remorse, execution impact, vulnerabilities related to mental health, explanations of patterns of behavior, negation of aggravating evidence regardless of its designation as an aggravating factor, positive acts or qualities, responsible conduct in other areas of life (e.g. employment, education, military service, as a family member), any evidence bearing on the degree of moral culpability, and any other reason for a sentence less than death.<sup>106</sup>

The *Supplementary Guidelines* also outlined the necessary skills a mitigation specialist must possess. Specialists could come from any background, so long as they were “skilled interviewers who [could] recognize and elicit information about mental health signs and symptoms,” had the ability to “establish rapport with witnesses, the client, the client’s family and significant others,” and were able to “advise counsel on appropriate mental health and other expert

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102. *Id.* guideline 4.1.

103. See Stetler, *Mystery of Mitigation*, *supra* note 37, at 246–47 (referring to the revised ABA Guidelines as “national standards of practice” that “have guided numerous courts in rejecting proffered excuses for failing to investigate mitigation”); see also *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (calling the 1989 ABA Guidelines “well-defined norms”).

104. *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 HOFSTRA L. REV. 677 (2008) [hereinafter *Supplementary Guidelines*]. Although the *Supplementary Guidelines* were developed in cooperation with the ABA’s Death Penalty Representation Project, they were not an official publication of the ABA. For an account of how the *Supplementary Guidelines* came into being, see O’Brien, *When Life Depends on It*, *supra* note 37, at 694–702.

105. *Supplementary Guidelines*, *supra* note 104, at 679.

106. *Id.* at 679.

assistance.”<sup>107</sup> In addition, the *Supplementary Guidelines* required that the defense team’s mitigation specialist conduct an exhaustive and detailed investigation into the defendant’s life history, delving into every possible influence that may have impacted the defendant since birth.<sup>108</sup>

Finally, the *Supplementary Guidelines* explained that a mitigation investigation must include multiple “in-person, face-to-face, one-on-one interviews” by the mitigation specialist, which should be supported with both documentary evidence (e.g., genealogies, social history reports, chronologies) and expert and lay testimony from a variety of witnesses.<sup>109</sup> Taken together, these directives confirmed that the mitigation function is of “utmost importance in the defense of capital cases,” and that the mitigation specialist—with all the expertise that person brings to a case—is essential to the effective representation of capital defendants.<sup>110</sup>

Capital mitigation is no longer a mystery—at least to those paying attention. What started as a vague mention in a single death penalty case<sup>111</sup> has developed into a series of specific, institutionalized mandates that require an exceptionally high standard of legal representation.<sup>112</sup> These mandates, developed and perfected over the last thirty-plus years, compel a broad investigation into every aspect of a capital defendant’s background and social history—and not just by a single lawyer, but by a team of experts knowledgeable in the legal complexities of the guilt and penalty phases of capital trials, who are also able to construct a detailed social history of the defendant from a variety of sources.<sup>113</sup>

When the mitigation function operates as intended, it works. “Life verdicts in cases involving horrendous loss of life,” as well as “[m]ore mundane examples occur[ring] week after week in courtrooms

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107. *Id.* at 682; *see also* Stetler, *Mystery of Mitigation*, *supra* note 37, at 248–50 (recounting how mitigation investigation requires a distinct skill-set typically unlearned in the legal profession).

108. *See Supplementary Guidelines*, *supra* note 104, at 682 (life history can range from a defendant’s medical, mental health, or substance abuse history, to evidence of past trauma, educational problems, military experience, and community influences).

109. *See id.* at 689–92 (“It is the duty of the defense team to aid counsel in coordinating and integrating the case for life with the guilt or innocence [sic] phase strategy . . . . Multiple interviews will be necessary to establish trust, elicit sensitive information and conduct a thorough and reliable life-history investigation.”).

110. *Id.* at 677.

111. *See* *Gregg v. Georgia*, 428 U.S. 153, 196–98 (1976) (plurality opinion) (requiring the jury to consider the circumstances surrounding the crime and the characteristics of the alleged criminal before recommending a sentence).

112. *See supra* notes 53–110 and accompanying text.

113. *Id.*

across the country,” demonstrate that death sentences are “never automatic or inevitable.”<sup>114</sup> That is true because when skilled and motivated capital defense teams use proven mitigation strategies, the evidence they develop and present has a remarkable “transformative” power to impact a defendant’s sentence.<sup>115</sup> This power is what rendered the Unabomber’s seemingly hopeless death penalty case into one in which Ted Kaczynski will serve a life sentence. The question remains, however, whether that power may be successfully harnessed outside the death penalty context. While mitigation may no longer be a mystery, can defendants like Madoff use it effectively in federal white collar cases?

## II. THE EVOLUTION OF FEDERAL WHITE COLLAR SENTENCING JURISPRUDENCE

The answer to that question is yes. But to fully understand how the development of mitigation strategies for death penalty defendants could benefit white collar defendants, it is necessary to review the current state of federal white collar sentencing. As will be seen, the evolution of white collar sentencing follows a parallel arc with the development of capital mitigation. Recent changes in federal sentencing law, similar to those occurring in the capital context a generation prior, have completely remade the white collar sentencing landscape. These changes, particularly the increase in judicial sentencing discretion post-*Booker*, provide white collar counsel new opportunities to use the tools of capital mitigation to more effectively advocate for their clients at sentencing.

### A. *The Changing Role of the Federal Sentencing Guidelines*

Much like with *Furman* in the death penalty context, the current state of federal white collar sentencing was created by an “earthquake” Supreme Court decision, the effects of which are still

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114. Stetler, *Mystery of Mitigation*, *supra* note 37, at 238 (listing high-profile death penalty defendants, such as Lee Boyd Malvo, Zacarias Moussaoui, and Terry Nichols, who all received life sentences, as well as Jeremy Gross, who was given a life sentence despite that the murder he committed in a liquor store was recorded in its entirety).

115. *Id.*; see also Sarah Elizabeth Richards, *How To Humanize a Killer*, SALON (June 7, 2006, 9:00 AM), [http://www.salon.com/2006/06/07/mitigation\\_specialists](http://www.salon.com/2006/06/07/mitigation_specialists) (validating the effectiveness of presenting mitigation evidence in court). Of course, not all capital defendants have access to dedicated and skilled attorneys. See, e.g., *Williams v. Hobbs*, 131 S. Ct. 558 (2010) (Sotomayor, J., dissenting from denial of certiorari) (criticizing a capital defense attorney who called only one witness at the penalty phase who did not personally know the defendant, and then failed to introduce evidence of the defendant’s negligent upbringing, which involved extreme sexual and physical abuse).

being felt today.<sup>116</sup> In the two decades leading up to 2005, federal sentences were determined almost exclusively by the United States Sentencing Guidelines (“Guidelines”).<sup>117</sup> Promulgated under the authority of the Sentencing Reform Act of 1984,<sup>118</sup> the Guidelines had the goal of creating honesty in sentencing and reducing unwarranted sentencing disparities prevalent in the indeterminate, parole-based scheme operating at the time.<sup>119</sup> The Guidelines replaced the indeterminate system with one in which judicial sentencing discretion was significantly reduced by establishing narrow sentencing ranges based on a series of factors, including the type of offense, characteristics of the victim and offender, and the defendant’s criminal history.<sup>120</sup>

From their inception, the Guidelines were a lightning rod for criticism. One of the primary arguments against the Guidelines was that they were too rigid.<sup>121</sup> Part of that rigidity came from the Guidelines’ sharp limitations of the arguments available to defendants at sentencing.<sup>122</sup> Dozens of Guidelines provisions directed judges to consider a range of aggravating factors, but at the same time directed them to disregard many mitigating factors, including education level, family history, socioeconomic status, and drug

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116. Douglas A. Berman, *Foreword: Beyond Blakely and Booker: Pondering Modern Sentencing Process*, 95 J. CRIM. L. & CRIMINOLOGY 653, 670 (2005).

117. See generally Frank O. Bowman, III, *Pour encourager les autres? The Curious History and Distressing Implications of the Criminal Provisions of the Sarbanes-Oxley Act and the Sentencing Guidelines Amendments that Followed*, 1 OHIO ST. J. CRIM. L. 373, 380–82 (2004) [hereinafter Bowman, *Curious History*] (providing an overview of the Guidelines and an explanation of how they operate to calculate a defendant’s sentence).

118. Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended in scattered sections of 18 & 28 U.S.C.).

119. See U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, subpt. 1.3 (2011) (identifying Congress’s three objectives in enacting the Sentencing Reform Act); see also Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 AM. CRIM. L. REV. 19, 20 (2003) (“The Sentencing Reform Act of 1984 was intended to eliminate unwarranted sentencing disparity . . .”). See generally KATE STITH & JOSÉ A. CABRANES, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS* 38–77 (1998) (offering a comprehensive history of federal sentencing).

120. U.S. SENTENCING GUIDELINES MANUAL § 1B1.1; see also Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 6–8 (1988) (providing an overview of how the Guidelines work and the basic principles underlying their implementation).

121. See J.C. Oleson, *Blowing Out All the Candles: A Few Thoughts on the Twenty-Fifth Birthday of the Sentencing Reform Act of 1984*, 45 U. RICH. L. REV. 693, 723–28 (2011) [hereinafter Oleson, *Blowing Out All the Candles*] (highlighting the friction between Congress and federal judges forced to adhere to the Guidelines).

122. See *id.* at 726 (“The rigidity of the Guidelines can be traced to a zeal for parity. . . . [T]he Guidelines imposed dramatic limits on judicial discretion. Yet in doing so, the Guidelines deprived judges of the ability to tailor appropriate sentences to the characteristics of each offender and each offense.” (footnotes omitted)).

addiction.<sup>123</sup> While departures outside the calculated sentencing range were contemplated, they were only allowed when the circumstances of a case were not adequately taken into consideration by the Guidelines, i.e., when the case was outside the “heartland” of typical cases.<sup>124</sup> Departures were rarely granted, and when they did begin to increase Congress attempted to limit their use.<sup>125</sup>

Another criticism of the Guidelines was that they were too harsh.<sup>126</sup> Particularly as to white collar offenders, the Guidelines operated as a one-way “upward ratchet,” continually driving sentencing ranges higher.<sup>127</sup> Indeed, one of the compromises embodied in the Guidelines concerned increased penalties for white collar defendants.<sup>128</sup> While the sentencing ranges for most crimes were determined first by analyzing pre-Guidelines sentences and then by establishing sentencing ranges based on past practices, the sentencing ranges for economic crimes were set higher than in the past based on policy decisions.<sup>129</sup> The Sentencing Commission

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123. U.S. SENTENCING GUIDELINES MANUAL §§ 5H1.2, 1.4–1.6, 1.10–1.12 (identifying specific offender characteristics not ordinarily relevant in sentencing); see also Breyer, *supra* note 120, at 19–20 (explaining that compromises by the Sentencing Commission resulted in leaving out mitigating personal characteristics of the defendant in favor of using criminal history to increase sentences).

124. *Koon v. United States*, 518 U.S. 81, 96 (1996); U.S. SENTENCING GUIDELINES MANUAL § 5K2.0(a)(4).

125. See Oleson, *Blowing Out All the Candles*, *supra* note 121, at 712–13, 724 (“At one point, House Majority Whip Tom DeLay threatened, ‘The judges need to be intimidated . . . [t]hey need to uphold the Constitution. If they don’t behave, we’re going to go after them in a big way.’ And in what sometimes seemed like a battle between branches of government, some legislators threatened to strip judges of *all* discretion, enacting broad slates of mandatory minimums.” (footnotes omitted) (internal quotation marks omitted)).

126. See *id.* at 707–11 (evaluating the arguments opposing the Guidelines’ severity).

127. See James E. Felman, *The Need To Reform the Federal Sentencing Guidelines for High-Loss Economic Crimes*, 23 FED. SENT’G REP. 138, 138 (2010) (arguing that the Guidelines caused unnecessarily long sentences for white-collar defendants who typically lacked previous criminal records).

128. Breyer, *supra* note 120, at 20–21; Alan Ellis et al., *At a “Loss” for Justice: Federal Sentencing for Economic Offenses*, 25 CRIM. JUST. 34, 36 (2011) [hereinafter Ellis et al., *Loss for Justice*].

129. See Bowman, *Curious History*, *supra* note 117, at 385 (detailing how the Sentencing Commission purposefully increased sentences for crimes against property over pre-Guidelines levels because the Commissioners “were plainly concerned that probationary sentences had been too common in economic crimes” and thus longer prison terms for white-collar offenders better served the Guidelines’ objectives); Felman, *supra* note 127, at 138 (“Unlike the penalties for most offenses, which the initial Sentencing Commission pegged to match pre-Guidelines practice, the commission specifically elected to increase the penalties for economic crimes in the initial 1987 Guidelines over the pre-Guidelines as a whole.”). But see John R. Steer, *The Sentencing Commission’s Implementation of Sarbanes-Oxley*, 15 FED. SENT’G REP. 263, 263 (2003) (suggesting both a policy and empirical basis for the initial fraud guidelines).

believed that white collar offenders deserved higher penalties because they were receiving less severe treatment than other similar offenders.<sup>130</sup>

In addition, between 1987 and 2001, sentencing ranges climbed from those initial elevated levels as the “loss table,” the main determiner of offense level for white collar crimes, was repeatedly adjusted upward.<sup>131</sup> A series of aggravating specific offense characteristics was also added, which increased sentencing ranges even more.<sup>132</sup> This trend continued into the early 2000s as Congress, through its Sarbanes-Oxley legislation, directed heightened penalties for economic crimes in the wake of the Enron, WorldCom, and Tyco corporate scandals.<sup>133</sup> The result was a sentencing framework for white collar offenders that limited probation, increased average sentences, and exposed high-loss defendants to decades—and even a lifetime—of imprisonment.<sup>134</sup>

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130. See U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, subpt. 1.3 (2011) (noting that economic crimes were being treated more leniently than other equivalent behavior); Breyer, *supra* note 120, at 20 (“The Commission found in its data significant discrepancies between pre-Guideline punishment of certain white-collar crimes, such as fraud, and other similar common law crimes, such as theft.”).

131. U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(b)(1); see also Bowman, *Curious History*, *supra* note 117, at 387–91 (offering a comprehensive history of the evolution and reform of the Guidelines); Ellis et al., *Loss for Justice*, *supra* note 128, at 36 (evaluating the Commission’s continuous adjustments to the loss table). The loss table increases offense level, which is one of two factors that determines the sentencing range (the other is criminal history), as the loss to the victim increases. The current table has fifteen, two-level increases, up to thirty offense levels for a loss of more than \$400,000,000. Each increase of six offense levels approximately doubles the sentence. Felman, *supra* note 127, at 138.

132. See Bowman, *Curious History*, *supra* note 117, at 387 (noting that in the years following the 1989 updates to the Guidelines, the Commission “added an array of specific offense characteristics and passed numerous amendments”).

133. Compare *id.* at 431–35 (characterizing the Congressional motives of the Sarbanes-Oxley legislation), with Frank O. Bowman, *Sentencing High-Loss Corporate Insider Frauds After Booker*, 20 FED. SENT’G REP. 167, 168–69 (2008) [hereinafter Bowman, *Sentencing*] (indicating how the Guidelines resulted in CEOs receiving lengthy prison sentences in white collar cases).

134. See Bowman, *Sentencing*, *supra* note 133, at 168 (charting increases in a hypothetical corporate defendant’s sentence from 1987 to 2007). Most recently, Congress has asked the Sentencing Commission to evaluate whether penalties for securities and mortgage fraud should be increased in response to the global financial collapse of 2008. See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1079A, 124 Stat. 1376, 2077 (2010) (directing the Sentencing Commission to “review and, if appropriate, amend the Federal Sentencing Guidelines and policy statements applicable to persons convicted of offenses relating to securities fraud or any other similar provision of law, in order to reflect the intent of Congress that penalties for the offenses under the guidelines and policy statements appropriately account for the potential and actual harm to the public and the financial markets from the offenses”). The Act contains a similarly worded provision related to financial institution and mortgage fraud, requiring the Commission to “ensure appropriate terms of imprisonment for offenders involved in substantial bank frauds or other frauds relating to financial institutions.” *Id.* While

Then, in 2004, the entire landscape shifted. In *Blakely v. Washington*,<sup>135</sup> the Supreme Court considered whether the Sixth Amendment permitted a Washington sentencing judge to increase a defendant's sentence above a prescribed sentencing range based on an aggravating factor found by the judge but not admitted by the defendant or proved to a jury.<sup>136</sup> The State of Washington charged defendant Ralph Blakely with first-degree kidnapping and domestic violence after he threatened his wife and thirteen-year-old son with a shotgun.<sup>137</sup> Blakely pleaded guilty to second-degree kidnapping, a lesser offense that subjected him to a maximum of fifty-three months' imprisonment under Washington's determinate guideline sentencing scheme.<sup>138</sup> However, upon hearing the sordid details of the crime at sentencing, the judge found by a preponderance of the evidence that Blakely had been "deliberately cruel[]" and imposed a ninety-month sentence.<sup>139</sup> This "exceptional" sentence was thirty-seven months higher than the "standard maximum" under the guidelines, but was still within the statutory maximum for second-degree kidnapping.<sup>140</sup>

Justice Scalia, writing for the 5-4 majority, found this increase beyond the presumptive guideline range unconstitutional because it deprived Blakely of his Sixth Amendment jury trial rights.<sup>141</sup> The *Blakely* Court, extending the reach of its decision in *Apprendi v. New Jersey*,<sup>142</sup> held that any fact other than a prior conviction that raises the

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the explicit text of the Act does not require the Commission to promulgate guidelines increasing penalties, it is unlikely that Congress intended for the Commission to lower sentences for white collar offenders after the largest financial collapse in U.S. history. *See id.*

135. 542 U.S. 296 (2004).

136. *Id.* at 298.

137. *Id.*

138. *Id.* at 298-99. For an overview of how various sentencing schemes, including determinant schemes, may meet the goals of sentencing, see generally CASSIA C. SPOHN, *HOW DO JUDGES DECIDE?* (2d ed. 2009).

139. *Blakely*, 542 U.S. at 300.

140. *Id.*

141. *Id.* at 305. The Court in *Blakely* relied on a different aspect of the Sixth Amendment than it had in the *Williams* line of capital cases. *Compare id.* at 300 (relying on the right to trial by jury), *with Williams v. Taylor*, 529 U.S. 362, 399 (2000) (relying on the right to effective counsel).

142. 530 U.S. 466 (2000). *Apprendi* is considered a "watershed" decision.

[It] declared unconstitutional a New Jersey hate crime enhancement that enabled a sentencing judge to impose a sentence higher than the otherwise available statutory maximum for various crimes based on a finding by a preponderance of the evidence that an offense involved racial animus. The *Apprendi* Court asserted the hate crime sentencing enhancement was constitutionally problematic because, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."



penalty “beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”<sup>143</sup> The Court defined “statutory maximum” not as the overall statutory maximum based on the type of offense, but as the “maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*”<sup>144</sup> In other words, “the relevant ‘statutory maximum’ is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings” beyond what the jury found in its verdict or what was admitted by the defendant.<sup>145</sup>

Despite the obvious implications for the federal sentencing scheme, which was strikingly similar to Washington’s scheme, the majority did not address *Blakely*’s application to the Guidelines.<sup>146</sup> In separate dissents, however, four Justices warned that the majority’s opinion would mean an end to *all* determinate guidelines systems, hindering sentencing reforms aimed at increasing fairness and decreasing disparity.<sup>147</sup> Observers believed *Blakely* meant the end of what had been known as the “sentencing revolution”—the move from indeterminate sentencing culminating in the passage of the Sentencing Reform Act and the implementation of the Guidelines.<sup>148</sup>

The observers were half right. A year later, in *United States v. Booker*,<sup>149</sup> the Court squarely addressed whether the Federal Sentencing Guidelines violated the Sixth Amendment.<sup>150</sup> In another 5-4 decision, the Court, as predicted, found “no distinction of constitutional significance between the Federal Sentencing Guidelines and the Washington procedures at issue in [*Blakely*].”<sup>151</sup> The Court reiterated that other than the fact of prior conviction, any

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Berman, *supra* note 116, at 672 (alteration in original) (quoting *Apprendi*, 530 U.S. at 490).

143. *Apprendi*, 530 U.S. at 490; *see also Blakely*, 542 U.S. at 308 (supporting *Apprendi*’s “bright-line rule” based on the constitutional right to a jury-trial); Berman, *supra* note 116, at 672–73 (describing *Apprendi* as a “watershed” decision due to its categorization of judicial fact-finding as “constitutionally problematic”).

144. *Blakely*, 542 U.S. at 303.

145. *Id.* at 303–04.

146. *See id.* at 305 n.9 (“The Federal Guidelines are not before us, and we express no opinion on them.”).

147. *See id.* at 323 (O’Connor, J., dissenting) (“The consequences of today’s decision will be as far reaching as they are disturbing. Washington’s sentencing system is by no means unique. Numerous other States have enacted guidelines systems, as has the Federal Government. Today’s decision casts constitutional doubt over them all . . . .” (citations omitted)).

148. Berman, *supra* note 116, at 654–59.

149. 543 U.S. 220 (2005).

150. *Id.* at 226–27.

151. *Id.* at 233.

fact necessary to support a sentence exceeding the maximum authorized by the facts established in a guilty plea or by jury verdict must be proven beyond a reasonable doubt.<sup>152</sup> Because the Guidelines were mandatory, thereby requiring judges to increase a defendant's "statutory maximum for *Apprendi* purposes" based on factual findings not submitted to a jury, they violated the Sixth Amendment.<sup>153</sup>

The obvious remedy was to invalidate the Guidelines entirely, as the Court had done in *Blakely*; however, the Court took another path. In what was essentially a separate opinion, a different majority of Justices determined that the constitutional remedy was to excise two provisions of the Sentencing Reform Act, thereby rendering the Guidelines advisory.<sup>154</sup> The Court determined this option was consistent with both legislative intent and the Sixth Amendment.<sup>155</sup> According to the Court, sentencing judges would still be required to consider the Guidelines when making sentencing decisions, but they also would be permitted to tailor sentences in light of other statutory factors.<sup>156</sup> Because the now-advisory Guidelines did not create "statutory maximums" under *Apprendi* and *Blakely*, no Sixth Amendment concerns were implicated.<sup>157</sup> Thus, the Court remedied the constitutional infirmities of the Guidelines without completely destroying the federal sentencing scheme that had been in place for the past twenty years.

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152. *See id.* at 230–32 (describing protection against conviction except upon proof beyond a reasonable doubt as a basic precept that "provide[s] the basis for . . . interpreting modern criminal statutes and sentencing procedures").

153. *Id.* at 232 (internal quotation marks omitted). The Court rejected the argument that the availability of a sentencing departure in specific circumstances avoided the constitutional issue, stating that:

[I]n most cases, as a matter of law, the [Sentencing] Commission will have adequately taken all relevant factors into account, and no departures will be legally permissible. In those instances, the judge is bound to impose a sentence within the Guidelines . . . . It was for this reason we rejected a similar argument in *Blakely*.

*Id.* at 234.

154. *See id.* at 245 (excising § 3553(b)(1), which required sentencing courts to impose a sentence within the applicable guidelines range, and § 3742(e), which set forth standards of review on appeal, including de novo review of departures from the applicable guidelines range).

155. *See id.* at 246–49 (concluding that Congress would likely have preferred the excision of two provisions to the invalidation of the Sentencing Reform Act in its entirety).

156. *Id.* at 245–46.

157. *See id.* at 259 ("With [the] two sections excised . . . the remainder of the Act satisfies the Court's constitutional requirements.").

As clever as the *Booker* opinion might have been in avoiding a wholesale invalidation of the Guidelines, it was not exactly a bastion of clarity. Professor Douglas Berman has commented:

The *Booker* decision, remarkable for many reasons, found a way to make a conceptually muddled constitutional jurisprudence concerning sentencing procedures even more opaque . . . . Through the dual rulings of dueling majorities, the Supreme Court in *Booker* declared that the federal sentencing system could no longer rely upon mandated and tightly directed judicial fact-finding, and as a remedy it created a system which now depends upon discretionary and loosely directed judicial fact-finding. Thus, to culminate a jurisprudence seemingly seeking to vindicate the role of the jury and to require a new set of sentencing procedures in modern sentencing systems, the so-called “remedial majority” in *Booker* devised a new system of federal sentencing which granted judges more sentencing power than they had ever previously wielded and seemingly endorsed the entire panoply of relatively lax sentencing procedures that had been used in the federal system over the prior two decades.<sup>158</sup>

Just as *Lockett* had done previously, *Booker* transformed the legal landscape, but it failed to give clear direction to sentencing judges and those practicing sentencing advocacy. It was certain that judges now had considerably more discretion to conduct individualized sentencing; less certain was how that discretion would be exercised in practice. Could judges essentially ignore the Guidelines and base sentences on any mitigating or aggravating factor? How would attorneys react to *Booker*’s new grant of judicial discretion—would they continue to act as if the Guidelines were still binding and do nothing, or would they, as some in the capital realm had done, look at sentencing creatively and become more effective advocates? And what would be the nuances of post-*Booker* appellate review of sentences inside and outside of the Guidelines?

Since *Booker*, the Court has continued to address the operation of the now-advisory federal sentencing system in an attempt to answer these questions. In *Rita v. United States*,<sup>159</sup> the Court held that courts of appeals may apply a presumption of reasonableness standard when reviewing a sentence imposed within a properly-calculated Guidelines range.<sup>160</sup> The Court emphasized the close relationship between the Guidelines and the sentencing objectives stated in 18 U.S.C.

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158. Berman, *supra* note 116, at 676.

159. 551 U.S. 338 (2007).

160. *Id.* at 347.

§ 3553(a), the broad statutory sentencing factors underlying the Sentencing Reform Act.<sup>161</sup> The Court stated that a reasonableness presumption reflects the “double determination” of the § 3553(a) factors and the Guidelines, which require “the *same* conclusion as to the proper sentence in [a] particular case.”<sup>162</sup> According to the Court, an appellate court could presume a sentence within the Guidelines was reasonable because the Guidelines “reflect a rough approximation of sentences that might achieve § 3553(a)’s objectives.”<sup>163</sup>

In *Gall v. United States*,<sup>164</sup> the Court addressed the flipside of *Rita*, holding that a presumption of unreasonableness did not apply to a sentence outside the Guidelines.<sup>165</sup> The Court rejected the proportionality calculus used by some circuit courts in reviewing sentences because such a calculus came “too close to creating an impermissible presumption of unreasonableness for sentences outside the Guidelines range.”<sup>166</sup> In *Kimbrough v. United States*,<sup>167</sup> decided the same day as *Gall*, the Court continued to refine the bounds of judicial sentencing discretion by holding that a judge could reasonably grant a downward variance from the sentencing range based on a policy disagreement with the Guidelines.<sup>168</sup>

*Rita*, *Gall*, and *Kimbrough* also clarified important procedural issues left open by *Booker*. The Court explained that when sentencing a defendant, a district judge must follow a three-step process. First, the judge must calculate the applicable Guidelines range.<sup>169</sup> Then, the

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161. *Id.* at 345; see 18 U.S.C. § 3553(a) (2006) (providing that “[t]he Court shall impose a sentence sufficient, but not greater than necessary” to comply with the specific purposes codified in the statute).

162. *Rita*, 551 U.S. at 347.

163. *Id.* at 350. The Court has further clarified that the presumption of reasonableness does not apply at the district court level; the presumption is only applicable on appeal. See *Nelson v. United States*, 555 U.S. 350, 352 (2009) (*per curiam*) (“The Guidelines are not only *not mandatory* on sentencing courts; they are also not to be *presumed* reasonable.”).

164. 552 U.S. 38 (2007).

165. See *id.* at 41 (“[C]ourts of appeals must review all sentences—whether inside, just outside, or significantly outside the Guidelines range—under a deferential abuse-of-discretion standard.”).

166. *Id.* at 47.

167. 552 U.S. 85 (2007).

168. See *id.* at 111 (determining that in light of the inconsistencies and particular circumstances of the case, a reviewing court could not rationally find the sentence reduction to be an abuse of discretion). In *Kimbrough*, the Court upheld the district court’s below-Guidelines sentence based on the judge’s disagreement with the hundred-to-one ratio for crack versus powder cocaine sentences. See *id.* at 91.

169. See *Gall*, 552 U.S. at 49 (explaining that “the Guidelines should be the starting point and the initial benchmark” at sentencing); *Rita v. United States*, 551 U.S. 338, 351 (2007) (finding that a judge will usually consider the presentence report first and how it affects the guidelines).

judge must determine whether to depart from the sentencing range in situations falling outside the “heartland” of cases to which the Guidelines were intended to apply.<sup>170</sup> Third, after the sentencing range is calculated, the judge must “then consider all of the § 3553(a) factors to determine whether they support the sentence requested.”<sup>171</sup> A judge is free to provide a “variance” if he decides an outside-Guidelines sentence is warranted.<sup>172</sup> Appellate courts reviewing sentences must also follow a prescribed structure: first determining whether the sentencing court committed a procedural error by miscalculating the Guidelines, then determining whether the sentence was substantively reasonable under an abuse of discretion standard.<sup>173</sup>

With its *Kimbrough* decision, the Court had gone far in clarifying the procedural and substantive boundaries of the advisory guidelines system.<sup>174</sup> But not until *Pepper v. United States*<sup>175</sup> did the Court unequivocally establish the breadth of a district court’s “wide discretion” at sentencing. The decision allowed courts to consider the “fullest information possible concerning the defendant’s life and characteristics”<sup>176</sup> and brought federal sentencing much in line with the Court’s capital sentencing jurisprudence developed twenty years prior.

In *Pepper*, the Court was asked to determine whether a district court could consider evidence of a defendant’s post-sentencing rehabilitation at resentencing.<sup>177</sup> Based on a large downward departure under the Guidelines, Jason Pepper was originally sentenced to twenty-four months’ imprisonment for conspiracy to distribute methamphetamine.<sup>178</sup> The government appealed, arguing the departure was too great.<sup>179</sup> After a *Booker* remand, the district court resentenced Pepper to the original sentence, this time based

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170. *Rita*, 551 U.S. at 351.

171. *Gall*, 552 U.S. at 49–50.

172. *Id.* at 50.

173. *Id.* at 51.

174. *Kimbrough v. United States*, 552 U.S. 85, 93 (2007). Between *Rita*, *Gall*, and *Kimbrough*, the Court had sanctioned the sentencing court’s consideration of a number of mitigating factors: withdrawal from a criminal drug conspiracy, possessing a college degree and starting a successful business, support of family and friends, age at time of the offense, lack of criminal history, military experience, vulnerability in prison, physical condition, and the unjust effect of a particular provision in the Guidelines. *Id.*; *Gall*, 552 U.S. at 43–44; *Rita*, 551 U.S. at 344–45.

175. 131 S. Ct. 1229 (2011).

176. *Id.* at 1233 (quoting *Williams v. New York*, 337 U.S. 241, 46–47 (1949)).

177. *Id.* at 1235–36.

178. *Id.* at 1236.

179. *United States v. Pepper*, 412 F.3d 995, 997 (8th Cir. 2005).

partly on his post-sentencing rehabilitation, which included successful drug treatment, a straight-A performance as a full-time college student, steady employment, and strong family support.<sup>180</sup> Following a second government appeal, the Eighth Circuit determined that “evidence of [defendant]’s post-sentencing rehabilitation is not relevant and will not be permitted at resentencing,” and the case was once again remanded.<sup>181</sup> Without the benefit of his post-sentencing rehabilitation arguments, Pepper was resentenced to sixty-five months imprisonment.<sup>182</sup> Pepper appealed again, and this time the Eighth Circuit sustained the sentence.<sup>183</sup>

Writing for the majority, Justice Sotomayor reversed the Eighth Circuit’s decision.<sup>184</sup> The Court’s opinion began by echoing the language of its capital cases: “It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue.”<sup>185</sup> The Court went on to state, again quoting from capital cases, that it was “essential” that the district court “consider the widest possible breadth of

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180. *Pepper*, 131 S. Ct. at 1236.

181. *United States v. Pepper*, 486 F.3d 408, 413 (8th Cir. 2007) (quoting *United States v. Jenners*, 473 F.3d 894, 899 (8th Cir. 2007)), *vacated*, 552 U.S. 1089 (2008). A policy statement in the Guidelines against considering post-sentencing rehabilitation, section 5K2.19 (2010) (“Post-Sentencing Rehabilitative Efforts”), formed the basis of the Eighth Circuit’s decision. *Compare Pepper*, 486 F.3d at 413, with U.S. SENTENCING GUIDELINES MANUAL § 5K2.19 cmt. (2011) (“[P]ost-sentencing rehabilitative measures should not provide a basis for downward departure when resentencing a defendant initially sentenced to a term of imprisonment . . .”).

182. *Pepper*, 131 S. Ct. at 1238. Because he had already served his original twenty-four-month sentence, Pepper would have had to surrender to the Bureau of Prisons for an additional forty-one months, likely losing his job and apartment in the process.

183. *Id.* *Pepper* had an intervening trip up to the Eighth Circuit and back down for resentencing; all told, the case was before the Eighth Circuit four times and the Supreme Court twice. See *United States v. Pepper*, 570 F.3d 958 (8th Cir. 2009), *aff’d in part, vacated in part*, 131 S. Ct. 1229; *United States v. Pepper*, 518 F.3d 949 (8th Cir. 2008); *Pepper*, 486 F.3d 408; *Pepper*, 412 F.3d 995.

184. *Pepper*, 131 S. Ct. at 1250 (rejecting “the Court of Appeals’ erroneous views regarding post-sentencing rehabilitation evidence”).

185. *Id.* at 1239–40 (quoting *Koon v. United States*, 518 U.S. 81, 113 (1996)). *Compare id.* at 1240 (highlighting that the punishment should fit the individual offender, including not only the facts of the crime at issue but also the defendant’s character), with *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (discussing the “diverse frailties of humankind” that must be explored in death penalty cases while considering both the “offender and the offense”).

information about the defendant” to ensure that the sentence “will suit not merely the offense but the individual defendant.”<sup>186</sup>

The Court found that the language of the Sentencing Reform Act surviving after *Booker* did not constrain judicial sentencing discretion; indeed, it “preserved the traditional discretion of sentencing courts to ‘conduct an inquiry broad in scope [and] largely unlimited’” in the kind of information that may be considered.<sup>187</sup> “In determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted, the court may consider, *without limitation*, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law.”<sup>188</sup> The Court therefore held that a district court may consider a defendant’s post-sentencing rehabilitation at resentencing and grant a downward variance when appropriate as part of the court’s consideration of the § 3553(a) factors.<sup>189</sup> Because this conclusion conflicted with a statutory provision that precluded a court on resentencing from imposing a sentence outside “the Guidelines range except upon a ‘ground of departure’ that was expressly relied upon in the prior sentencing,” the Court invalidated the provision as inconsistent with *Booker*.<sup>190</sup>

### B. *The Current State of White Collar Sentencing*

Much has been written about the *Booker* line of cases and their impact on federal sentencing. Suffice it to say, the *Booker* decision was a bombshell, a massive “aftershock” of *Blakely* that continues to “surprise and confound” judges, practitioners, and academics.<sup>191</sup> Just a few years ago, few observers would have expected the sentencing landscape to look as it does today. In less than a decade, a determinate sentencing guidelines system that “mandated and tightly directed judicial fact-finding”<sup>192</sup> was transformed into one that

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186. *Pepper*, 131 S. Ct. at 1240 (citation omitted) (internal quotation marks omitted).

187. *Id.* (quoting *United States v. Tucker*, 404 U.S. 443, 446 (1972)).

188. *Id.* (quoting U.S. SENTENCING GUIDELINES MANUAL § 1B1.4 (2010) (citing 18 U.S.C. § 3661 (2006))).

189. *Id.* at 1241.

190. *See id.* at 1244 (explaining that *Booker* rendered the Guidelines “effectively advisory by invalidating . . . [18 U.S.C.] § 3742(e), which prescribed the standard of appellate review, including de novo review of Guidelines departures”).

191. Berman, *supra* note 116, at 670, 675. “The potential impact of *Blakely* on modern sentencing systems is truly staggering because the decision not only redefined the reach of *Apprendi*, but also suggests that any and every fact legally essential to the punishment must be either proven beyond a reasonable doubt to a jury or admitted by the defendant.” *Id.* at 675 (internal quotation marks omitted).

192. *Id.* at 676.

depends upon discretion and allows judges to consider “*without limitation*” a defendant’s “background, character, and conduct.”<sup>193</sup> With the *Pepper* decision, the Court’s federal sentencing jurisprudence appears to be traveling a similar arc to that of its capital jurisprudence, in which individualized determinations by a sentencer possessed of wide discretion are paramount in the sentencing process. But the question remains: What does this mean for federal defendants, particularly white collar defendants such as Bernie Madoff, who are facing the upward ratchet of higher sentences?

*Booker* and its progeny have had a number of significant practical effects in white collar cases. First, and most fundamentally, courts now have almost unrestrained discretion to impose a sentence.<sup>194</sup> There is no more forced rigidity in sentencing. *Booker* eliminated the required adherence to the Guidelines, replacing it with discretion bounded by the broad statutory sentencing factors underlying the Sentencing Reform Act.<sup>195</sup> The § 3553(a) factors had always governed sentencing,<sup>196</sup> but because the Guidelines were mandatory and provided much more specific guidance during a sentencing calculation,<sup>197</sup> courts and litigators paid the sentencing statute little attention.<sup>198</sup> Now, with the Guidelines just one factor among many, § 3553(a) is the driving force at sentencing.<sup>199</sup> And as *Pepper* made clear, Congress, through its statutory language, “expressly preserved”

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193. *Pepper*, 131 S. Ct. at 1252 (quoting U.S. SENTENCING GUIDELINES MANUAL § 1B1.4 (citing 18 U.S.C. § 3661)).

194. See Berman, *supra* note 116, at 676 (describing the emergence of “a system which now depends upon discretionary and loosely directed judicial fact-finding” and “grant[s] judges more sentencing power than they had ever previously wielded”).

195. *United States v. Booker*, 543 U.S. 220, 245 (2005).

196. See 18 U.S.C. § 3553(a)(4) (establishing the “kinds of sentence and the sentencing range” for the “applicable category of offense committed . . . [or] in the case of violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission”); U.S. SENTENCING GUIDELINES MANUAL § 1B1.1(a) (2011).

197. *E.g.*, U.S. SENTENCING GUIDELINES MANUAL § 1B1.1.

198. Although somewhat anecdotal, a review of a sample of defense sentencing submissions and sentencing opinions prior to *Booker* reveals little or no mention of § 3553(a) factors; if the section is referenced, it is in passing. The focus is always on application and operation of the Guidelines. This is consistent with the author’s experience defending federal white collar clients prior to *Booker*.

199. See AMY BARON-EVANS, NAT’L FED. DEFENDER SENTENCING RES. COUNSEL, RITA, GALL AND KIMBROUGH: A CHANCE FOR REAL SENTENCING IMPROVEMENTS 4 (2008), available at <http://www.fd.org/docs/select-topics—sentencing/rita-gall-kimbrough-sentencing-strategies-5-11-08.pdf> (“Section 3553(a)(1) requires the sentencing court to consider the nature and circumstances of the offense and the history and characteristics of the defendant in every case, and the statute trumps any guideline or policy statement to the contrary.” (internal quotation marks omitted)).



the traditional discretion of sentencing courts to consider “largely unlimited” information regarding the defendant’s conduct.<sup>200</sup> The standard of appellate review as clarified by *Rita* and *Gall* also strengthens district courts’ discretion. A court that follows the correct procedure—first determining the Guidelines range, and then sentencing pursuant to § 3553(a)—will have a sentence overturned *only* if it is unreasonable.<sup>201</sup> It should be obvious then why Judge Denny Chin felt free to sentence Madoff to a largely “symbolic” sentence that was 100 years more than recommended by the probation department—he knew he could.<sup>202</sup>

Second, flowing from the increase in judicial discretion afforded by *Booker*, advocates may now make a wide variety of arguments at sentencing. *Booker*, like *Lockett* in the death penalty context, opened the door to a variety of new mitigating arguments previously unavailable to defense counsel.<sup>203</sup> And *Pepper*, like *Williams*, signaled to advocates just how important the development of mitigating evidence could be to support those arguments.<sup>204</sup> Advocates are no longer constrained by the Guidelines commentary or policy

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200. *Pepper v. United States*, 131 S. Ct. 1229, 1240 (2011).

201. See *Gall v. United States*, 552 U.S. 38, 51 (2007) (“Assuming that the district court’s sentencing decision is procedurally sound, the appellate court should then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard.”).

202. Madoff Transcript, *supra* note 24, at 4, 49. Madoff chose not to appeal his sentence given the obvious futility. Even if he had, however, it is extremely unlikely the Second Circuit would have found the sentence procedurally defective or substantively unreasonable. See Allan Chernoff, *Madoff Won’t Appeal 150-year Sentence, Attorney Says*, CNN.COM (July 9, 2009), [http://articles.cnn.com/2009-07-09/justice/madoff.appeal\\_1\\_bernard-madoff-madoff-attorney-district-judge-denny-chin?](http://articles.cnn.com/2009-07-09/justice/madoff.appeal_1_bernard-madoff-madoff-attorney-district-judge-denny-chin?) (labeling Madoff’s sentence as “symbolic” of the severity of his crime, despite the insistence of his attorney that “people are not symbols” and “are sentenced under a reasonable standard”).

203. Of course, prosecutors are also allowed to argue more freely at sentencing. However, they are generally less likely to argue for variances from the Guidelines based on something other than substantial assistance or safety valve relief. Moreover, the government has always been a staunch supporter of determinate sentencing and curtailing judicial discretion as a way to reduce sentencing disparity. See Letter from Lanny A. Breuer to Hon. Patti B. Saris, Chair, U.S. Sentencing Comm’n (Sept. 2, 2011), *reprinted in* 24 FED. SENT’G REP. 137 (2011) (setting out the Department of Justice’s goals for federal sentencing policy, which include “eliminat[ing] unwarranted sentencing disparities”); Letter from Jonathan J. Wroblewski, Dir. of Office of Policy and Legislation, U.S. Dep’t of Justice, to Hon. William K. Sessions, Chair, U. S. Sentencing Comm’n, (June 28, 2010), *reprinted in* 23 FED. SENT’G REP. 282 (2011) (lamenting a “significant set of criminal cases . . . sentenced by judges who regularly impose sentences outside the applicable guidelines range irrespective of offense type or nature of the offender”).

204. See *Pepper*, 131 S. Ct. at 1240 (emphasizing the importance of mitigating evidence and the underlying principle that “the punishment should fit the offender and not merely the crime” (quoting *Williams v. New York*, 337 U.S. 241, 247 (1949))).

statements.<sup>205</sup> Instead, a defendant may argue “*without limitation*” any mitigating evidence concerning the background, character, or conduct of the defendant in order to achieve a sentence within the Guidelines range, a Guideline-sanctioned departure, or a “variance” outside the Guidelines pursuant to the § 3553(a) factors.<sup>206</sup>

Indeed, the § 3553(a) factors offer an incredibly broad range of possible mitigating arguments at sentencing. Section 3553(a) begins with an overarching mandate: “[C]ourt[s] shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes [of the statute].”<sup>207</sup> The statute goes on to direct courts to consider almost anything related to the defendant or his potential punishment:

The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the [Guidelines] sentencing range . . .

. . .

(5) any pertinent policy statement [contained in the Guidelines] . . .

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205. *See id.* at 1239, 1241 (explaining that, though a sentencing court must “give respectful consideration to the Guidelines, *Booker* permits the court to tailor the sentence in light of other statutory concerns as well” (quoting *Kimrough v. United States*, 552 U.S. 85, 101 (2007))).

206. *Id.* at 1240–41.

207. 18 U.S.C. § 3553(a) (2006). This provision embodies the “parsimony principle,” which has been described as requiring “a sentencing court when handing down a sentence [to] be stingy enough to avoid one that is too long, but also that it be generous enough to avoid one that is too short.” *United States v. Irey*, 612 F.3d 1160, 1197 (11th Cir. 2010); *see also* Nancy Gertner, *Federal Sentencing Guidelines: A View from the Bench*, 29 HUM. RTS. 6, 6 (2002) (defining the “parsimony principle” as a judge imposing “a sentence only long enough to achieve the purposes of sentencing, but no longer”).

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(6) the need to avoid unwarranted sentence disparities . . . and

(7) the need to provide restitution to any victims of the offense.<sup>208</sup>

In addition, a companion provision states that “[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.”<sup>209</sup> This expansive language sounds strikingly similar to the *Supplementary Guidelines*’ directives to mitigation specialists regarding the areas they must investigate during a social history investigation.<sup>210</sup> And just as in the capital context, the “fundamental point” is that sentencing mitigation arguments have essentially “no boundaries” under current federal law.<sup>211</sup>

Increased judicial discretion and the broad ability of advocates to argue the § 3553(a) factors lead to a third practical effect of *Booker*. Sentences, particularly for white collar defendants, are becoming increasingly separated from the sentencing ranges calculated under the Guidelines. Prior to *Booker*, judges granted non-governmental sponsored below-Guidelines-range sentences in only 5.5% of cases.<sup>212</sup>

208. 18 U.S.C. § 3553(a).

209. *Id.* § 3661.

210. Compare 28 U.S.C. § 994(d) (directing the Sentencing Commission to consider a defendant’s age, education, vocational skills, mental and emotional condition, physical condition (including drug dependence), previous employment, family ties and responsibilities, community ties, role in the offense, criminal history, and the degree of dependence upon criminal activity for a livelihood when creating the Guidelines), with *Supplementary Guidelines*, *supra* note 104, at 679 (“Mitigation evidence includes . . . compassionate factors stemming from the diverse frailties of humankind, . . . vulnerabilities related to mental health, explanations of patterns of behavior, negation of aggravating evidence regardless . . . positive acts or qualities, responsible conduct in other areas of life . . .”). However, the Commission “seized upon criminal history as highly relevant,” but concluded other factors were not. See J.C. Oleson, *Risk in Sentencing: Constitutionally Suspect Variables and Evidence-Based Sentencing*, 64 SMU L. REV. 1329, 1346 (2011).

211. Stetler, *Mystery of Mitigation*, *supra* note 37, at 240; see O’Brien, *When Life Depends on It*, *supra* note 37, at 713 (noting that “the scope of mitigation evidence [is] ‘potentially infinite’” and “‘anything under the sun’ can be tendered by the defense in mitigation of punishment” (footnotes omitted)). Of course, there are bounds to what evidence an advocate may introduce at a sentencing hearing. See FED. R. CRIM. P. 32(i)(2) (allowing parties to introduce evidence at a sentencing hearing, but requiring witness testimony to comply with certain rules).

212. See *Implications of the Booker/Fanfan Decisions for the Federal Sentencing Guidelines: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 109th Cong. 20 (2005) (statement of J. Ricardo H. Hinojosa, Chair, U.S. Sentencing Comm’n) (discussing non-governmental sponsored below Guidelines range sentences during the post-PROTECT Act period, i.e., the time after the PROTECT Act was passed, which attempted to curtail departures and increase appellate review of below-Guidelines sentences, and before *Booker*). Government

In the year after *Booker*, that number jumped to 12.5%.<sup>213</sup> Since then, there has been a steady increase of below Guidelines range sentences, rising to a peak of 17.8% in 2010,<sup>214</sup> and now sitting at 17.4%.<sup>215</sup> The trend for fraud offenses<sup>216</sup> is even more pronounced. Non-governmental sponsored below-Guidelines range sentences in fraud cases rose from 6.2% prior to *Booker*, to 16.4% after *Booker*, and now sit at 22.6%.<sup>217</sup> This means that judges, following arguments raised by counsel at sentencing, are increasingly willing to exercise their discretion and sentence defendants, including white collar defendants, outside the Guidelines.

While the statistics demonstrate that judges are more often being persuaded to sentence outside the applicable Guidelines range, this does not mean judicial discretion is always exercised in a white collar defendant's favor. Nor does it mean a defendant's sentence will be minimal even if the court grants a variance. In fact, many contend the sentencing of white collar defendants, particularly those of high-loss offenders such as Madoff, has retained all of its "harshness."<sup>218</sup> Some say, more pointedly, that white collar sentencing, even under the advisory Guidelines system, is completely "out of whack"<sup>219</sup> and "patently absurd on [its] face."<sup>220</sup> Critics cite the steady increases in

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sponsored below-Guidelines sentences include substantial assistance departures (section 5K1.1) and safety valve departures (section 5K3.1), which are incorporated into the Guidelines. Because government sponsored below-range sentences are granted pursuant to the Guidelines, non-governmental sponsored below range sentences are the best measure of whether the Guidelines are being followed by sentencing courts.

213. See *id.* (discussing the changes in below-Guidelines sentencing after *Booker*).

214. U.S. SENTENCING COMM'N, 2010 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS fig.G [hereinafter 2010 SOURCEBOOK], available at [http://www.usc.gov/Data\\_and\\_Statistics/Annual\\_Reports\\_and\\_Sourcebooks/2010/FigureG.pdf](http://www.usc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2010/FigureG.pdf).

215. U.S. SENTENCING COMM'N, 2011 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.N [hereinafter 2011 SOURCEBOOK], available at [http://www.usc.gov/Data\\_and\\_Statistics/Annual\\_Reports\\_and\\_Sourcebooks/2011/TableN.pdf](http://www.usc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2011/TableN.pdf).

216. The Sentencing Commission does not consistently break out statistics for white collar offenses; the fraud offense category includes most white collar crimes, as well as other forms of economic crimes sentenced under section 2B1.1. *Id.* tbl.27.

217. *Id.* tbl.27A. The numbers are even higher when focusing on offenders sentenced under the economic fraud guideline, section 2B1.1, which would include the vast majority of white collar offenders. See U.S. Sentencing Comm'n, *White Collar Sentencing Data Fiscal Year 2005–Fiscal Year 2009*, 22 FED. SENT'G REP. 127, 128 (2009) [hereinafter *White Collar Sentencing Data*]. In fiscal year 2011, 22.9% of section 2B1.1 offenders received a non-governmental sponsored below range sentence. 2011 SOURCEBOOK, *supra* note 214, tbl.27A. The limited data available focusing specifically on white collar offenders indicates that current non-governmental sponsored below range sentences top twenty-five percent. *White Collar Sentencing Data, supra*.

218. See Bowman, *Sentencing, supra* note 133, at 172 (concluding that the Guidelines sentences are drastically severe).

219. *Id.*

220. *United States v. Adelson*, 441 F. Supp. 2d 506, 515 (S.D.N.Y. 2006).

the Guidelines ranges for economic crimes and public outrage over high-profile corporate scandals as the reason white collar defendants are being sentenced drastically higher than in the past.<sup>221</sup> As Professor Frank Bowman points out, “[u]nder the current Guidelines,” which are the starting point for determining a federal sentence, “a judge who wanted to impose a twenty-five-year sentence on an Ebbers, Skilling, or a Rigas, thus equating their economic offenses with murder by a five-time felon, *would have to depart downward nineteen offense levels to do it.*”<sup>222</sup> Putting aside whether these types of “marquee corporate convicts” are deserving of such lengthy sentences, it can hardly be argued that white collar defendants have significantly more exposure at sentencing than they did in years past.<sup>223</sup>

In short, federal white collar sentencing is in a schizophrenic state. Despite the increased opportunities to argue for a below-Guidelines sentence based on expanded judicial sentencing discretion post-*Booker*, white collar defendants still routinely face harsh, and many times extreme, penalties. If a white collar defendant commits a high loss crime, he could face a sentence comparable to that of the most reviled corporate offenders—the Skillings, Ebbers, and Madoffs of the world—possibly resulting in a Guidelines sentence of life imprisonment.<sup>224</sup> Yet that same defendant might be able to persuade a judge to exercise his wide discretion and grant a downward variance from the Guidelines, resulting in a sentence of a few years.<sup>225</sup> This

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221. See Bowman, *Sentencing*, *supra* note 133, at 169 (discussing the sentences of high-profile white collar criminals); Felman, *supra* note 127, at 138 (explaining how the Guidelines were increased in response to high-profile scandals).

222. Bowman, *Sentencing*, *supra* note 133, at 169.

223. *Id.*; see, e.g., United States v. Parris, 573 F. Supp. 2d 744, 756–63 (E.D.N.Y. 2008) (cataloging the calculated Guidelines ranges and sentences of recent white collar defendants).

224. See Bowman, *Sentencing*, *supra* note 133, at 168 (demonstrating the increases in potential sentences for corporate defendants convicted of high-loss frauds).

225. See, e.g., United States v. Watt, 707 F. Supp. 2d 149, 151 (D. Mass. 2010) (sentencing a defendant involved in an identity theft conspiracy with total loss of more than \$200 million to twenty-four months on a sentencing range calling for life imprisonment). Concerns over inconsistencies in financial fraud sentences have also been expressed by Lanny Breuer, head of the U.S. Department of Justice’s Criminal Division. See Joe Palazzolo, *Proceedings: Highlights from the Law Blog*, WALL ST. J. (Nov. 21, 2011), <http://online.wsj.com/article/SB20001424052970203710704577050272822256642.html> (quoting Breuer, “[a] defendant in one district may be sentenced to one or two years in prison for causing hundreds of millions of dollars in losses, while a defendant in another district is sentenced to ten or twenty years in prison for causing much smaller losses”); see also, Reynolds Holding, *Rajaratnam Sentence Shows Value of Court Process*, REUTERS (Oct. 13, 2011, 11:35 PM IST), <http://in.reuters.com/article/2011/10/13/idINIndia-59881220111013> (discussing the unpredictability of white collar sentences and arguing a defendant’s “tough

level of risk and reward compels white collar counsel to employ innovative strategies at sentencing to mitigate their clients' conduct.<sup>226</sup> As one veteran white collar defense attorney has said, "after years in the wilderness, sentencing advocacy . . . is back."<sup>227</sup>

### III. THE APPLICATION OF CAPITAL MITIGATION STRATEGIES TO WHITE COLLAR CASES

The above discussion should familiarize white collar counsel with the concept of mitigation, its legal framework, and the opportunities afforded by the parallel arc of federal sentencing jurisprudence. It should also convince white collar counsel of the critical importance—and the "transformative" power—mitigation evidence has at sentencing. But, as in the capital context, counsel still needs to know "how to do it properly."<sup>228</sup> The following section provides "best practices" mitigation strategies developed and perfected during the modern capital sentencing era that can be employed in white collar cases.

Before addressing the specific strategies, however, two caveats are in order. First, mitigation strategies are applicable to *all* federal sentencings, not just white collar sentencings. However, white collar defendants are particularly well-suited to learn from and employ mitigation techniques. White collar defendants, unlike many in the federal criminal system, often have the resources to implement the strategies.<sup>229</sup> Employing a team of attorneys and mitigation specialists, and allowing them to spend the necessary time developing mitigation evidence (which requires hours of one-on-one interviews and extensive document review), is out of reach for most defendants.<sup>230</sup> Additionally, as discussed, judges may be more willing to credit

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defense" helped the sentencing judge "get it about right" when sentencing him to eleven years).

226. See, e.g., Alan Ellis, *Inside Baseball: Interview with Former Federal Probation Officer*, CRIM. JUST., Winter 2007, at 36, 36 (suggesting the defense bar cannot "simply act like 'business as usual'" and urging the use of mitigation techniques in white collar cases). Although Madoff's sentencing is the highest-profile example, there is evidence that the defense community as a whole has not altered its approach to sentencing to fully take advantage of *Booker* and its progeny. See *id.* (urging all defense attorneys to adopt mitigation strategies).

227. MARVIN PICKHOLZ, SECURITIES CRIMES § 7:10 (2011), available at Westlaw SECCRIM.

228. Maher, *supra* note 95, at 769.

229. See Robert G. Morvillo & Robert J. Anello, *The Cost of Defense*, N.Y. L.J., Aug. 7, 2007, available at [http://www.maglaw.com/publications/articles/00136/\\_res/id=Attachments/index=0/07008070012Morvillo.pdf](http://www.maglaw.com/publications/articles/00136/_res/id=Attachments/index=0/07008070012Morvillo.pdf) (explaining that many white collar defendants have a high net worth or are indemnified by their employer).

230. See *id.* (explaining that the costs of defending a typical white collar case may run in the millions of dollars).

mitigation evidence as it relates to white collar defendants, particularly those in high loss situations, because the Guidelines ranges are so “out of whack” as to be “of no help” at sentencing.<sup>231</sup> This provides an opening for white collar counsel to forcefully argue for lesser sentences using mitigation strategies.<sup>232</sup>

Second, although developing white collar mitigation evidence in the manner of capital counsel is necessary in today’s sentencing landscape, the goals of doing so are slightly different. In capital cases, counsel is trying to obtain, rather than avoid, a life sentence for their client. This is often accomplished by mitigating the defendant’s conduct by focusing on his developmental years, which are often defined by violence, abuse, and cognitive impairment.<sup>233</sup> Mitigating a white collar offender’s conduct is primarily focused on establishing the client’s capacity for rehabilitation. Because many white collar defendants have not faced the extreme upbringings as those of capital defendants (or at least appear not to have), counsel often focuses on demonstrating prior good works.

However, as will be discussed below, developing mitigation evidence can advance both goals for both types of defendants. While not every white collar defendant will share a social history with that of an accused killer—not every Madoff is a Kaczynski—some might. And even for those that do not, the *process* of uncovering and developing mitigation evidence, whatever it may be, is as important as the end result. The aim of individualized sentencing, a “uniform and constant” federal judicial tradition, is predicated on the “unique study” of each defendant to be sentenced.<sup>234</sup> Developing mitigation evidence through the specific strategies outlined in this Article allows white collar counsel to conduct that unique study in a thoughtful and principled way.

#### A. *Strategy 1—Change Your Mindset*

The first thing counsel must do to effectively use mitigation strategies in white collar cases is change their mindset. Most

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231. Bowman, *Sentencing*, *supra* note 133, at 169, 172; *see* United States v. Watt, 707 F. Supp. 2d 149, 151 (D. Mass. 2010) (discussing how the Guidelines provided little guidance because they called for a life sentence, which was much higher than the statutory maximum sentence of five years).

232. *See* Haney, *supra* note 26, at 848 (examining how attorneys took advantage of advances in psychology). All defendants, however, will benefit from their counsel understanding the current state of federal sentencing law and by viewing sentencing advocacy more creatively, as those in the capital realm have done.

233. *See, e.g.*, Rompillia v. Beard, 545 U.S. 374, 391–92 (2005).

234. Pepper v. United States, 131 S. Ct. 1229, 1239–40 (2011).

experienced defense attorneys practicing today, as well as most judges, cut their sentencing teeth during a time when the Guidelines tightly controlled all aspects of a defendant's sentence.<sup>235</sup> In fact, prior to 2005, when *Booker* was decided, most attorneys had practiced exclusively under a Guidelines regime.<sup>236</sup> This type of familiarity with a system creates a certain cognitive inertia that can be hard to overcome.<sup>237</sup> Modern white collar sentencing advocacy demands more, however. Counsel must start by taking to heart the words of the Supreme Court in *Pepper*: "In determining the sentence to impose . . . the court may consider, *without limitation*, any information concerning the background, character and conduct of the defendant . . . ."<sup>238</sup> The Guidelines, and their rigid formulaic structure that precluded consideration of most mitigating factors, no longer exclusively control a defendant's sentence.

First, the Guidelines are one factor among seven that must be addressed at sentencing.<sup>239</sup> At least two of the other § 3553(a) factors—"the nature and circumstances of the offense and the history and characteristics of the defendant," and "the need for the sentence imposed . . . to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner"—speak directly to classic notions of mitigation.<sup>240</sup> The four other factors, at the very

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235. See Ellis et al., *Litigating*, *supra* note 36, at 30 (explaining how attorneys became used to the rigid pre-*Booker* guidelines).

236. See *id.* (discussing how attorneys who grew accustomed to the rigid guidelines before *Booker* should adapt to the sentencing options now available).

237. See Ellis et al., *Loss for Justice*, *supra* note 128, at 38 (discussing the various developments in sentencing for economic offenses). Cognitive inertia is the "tendency or motive to move forward through the cognitive process in the direction indicated." Ronald Chen & Jon Hanson, *Categorically Biased: The Influence of Knowledge Structures on Law and Legal Theory*, 77 S. CAL. L. REV. 1103, 1141 (2004) ("[I]ndividuals, depending on a variety of factors—such as their cognitive load, motivations, and affect—will generally process the information as efficiently and quickly as possible, choosing the cognitive path of least resistance."). Professor Nancy Gertner has argued that the phenomenon of cognitive "anchoring" also impacts judges' continued reliance on the Guidelines. See Nancy Gertner, *From Omnipotence to Impotence: American Judges and Sentencing*, 4 OHIO ST. J. CRIM. L. 523, 535 (2007) (explaining that the Guidelines had such an impact on judges because they cognitively anchored the complex task of determining an offender's sentence to a starting point created by the Guidelines' numerical framework).

238. *Pepper*, 131 S. Ct. at 1240 (quoting U.S. SENTENCING GUIDELINES MANUAL § 1B1.4 (2010) (citing 18 U.S.C. § 3661 (2006))).

239. See 18 U.S.C. § 3553(a)(4) (directing sentencing courts that "in determining the particular sentence to be imposed, [they] shall consider . . . the kinds of sentence and the [Guidelines] sentencing range").

240. *Id.* § 3553(a)(1), (2)(D).



least, invite courts to consider mitigating arguments,<sup>241</sup> as does the parsimony principle overriding § 3553(a). Accordingly, the development and presentation of mitigation evidence should be equally important to the court's sentencing determination as a Guidelines calculation. In addition, even when applying the Guidelines there is considerably more flexibility to raise mitigating arguments than in the past. *Pepper* made explicit that its “*without limitation*” language applies not only when a court is considering the § 3553(a) factors, but also at the Guidelines calculation stage.<sup>242</sup> Thus, if the language of a Guidelines' commentary, application note, or policy statement limits a mitigating argument, it is entitled to little or no weight.<sup>243</sup>

This frees up white collar defense counsel to view sentencings from an entirely new perspective, focusing much less on the Guidelines' proscriptions and much more on the development and presentation of mitigation evidence. Advocates must now consider the entire panoply of mitigating circumstances surrounding a client. The ABA Guidelines and *Supplementary Guidelines* are an excellent place to start, but the development of mitigation evidence is bounded only by an advocate's imagination.<sup>244</sup> It is critical for counsel to think creatively

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241. See, e.g., *id.* § 3553(a)(6) (listing “need to avoid unwarranted sentence disparities” as a factor that allows a defendant to argue how his sympathetic social history is different than a defendant who received a lengthy sentence for the same offense).

242. *Pepper*, 131 S. Ct. at 1240 (“In determining the sentence to impose *within the guideline range*, or whether a departure from the guidelines is warranted, the court may consider, *without limitation*, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law.” (emphasis added) (quoting U.S. SENTENCING GUIDELINES MANUAL § 1B1.4 (citing 18 U.S.C. § 3661))).

243. See *id.* at 1247 (rejecting argument that policy statement precludes consideration of post-sentencing rehabilitation by stating that the Court's post-*Booker* decisions demonstrate that a court can impose a non-Guidelines sentence when it disagrees with the Commission's policy views). The Court further stated that imposing a non-Guidelines sentence is especially appropriate when “the [Sentencing] Commission's views rest on wholly unconvincing policy rationales not reflected in the sentencing statutes Congress enacted.” *Id.* (citation omitted). Indeed, it would be difficult for a court to refuse to consider mitigation evidence when calculating a defendant's Guidelines range, and then a few seconds later take that rejected evidence into account when determining whether a variance from the range is appropriate. See *id.* at 1229 (indicating that all mitigating information may be considered at all times up until the court determines a sentence).

244. See Kirchmeier, *supra* note 41, at 656–83 (listing more than forty mitigating factors broken into four categories: (1) good character factors; (2) crime involvement factors; (3) legal proceedings factors; and (4) disease theory factors); Pamela Blume Leonard, *A New Profession for an Old Need: Why a Mitigation Specialist Must Be Included on the Capital Defense Team*, 31 HOFSTRA L. REV. 1143, 1145–46 (2003) (explaining that there is no comprehensive list of mitigating factors, but listing eighteen factors advocates should consider, which are taken primarily from the ABA Guidelines).

about all aspects of their white collar clients—not just the details of their crime and how much exposure they have at sentencing, but who they are as individuals and what shaped their experiences leading up to the moment they will be sentenced. All mitigating arguments should be marshaled and presented at sentencing to create a complete picture of the defendant and the impact of the sentence imposed.<sup>245</sup> In other words, think Kaczynski’s defense, not Madoff’s. This requires a significant change in how most white collar defense attorneys think about the law, their role as an advocate, and the relationship with the client they represent. As one mitigation expert has put it, “[s]ay good-bye to business as usual.”<sup>246</sup>

### B. Strategy 2—Employ a Team Approach

To effectively develop mitigation evidence, capital attorneys rely on a team approach to defending clients. This is one of the most important strategies used in capital mitigation, and it is one of the most straightforward for white collar counsel to adopt. The ABA Guidelines instruct that capital teams should be comprised of no fewer than two attorneys, an investigator, and a mitigation specialist, at least one of whom (most likely the mitigation specialist) should be qualified to screen for mental or psychological disorders.<sup>247</sup> The ABA Guidelines make clear that the mitigation specialist holds a special position on the defense team, and her role cannot be substituted with an investigator or junior attorney.<sup>248</sup>

The reasons for employing a team approach in capital cases are practical: A single lawyer, despite his many strengths, does not have the time nor the expertise to adequately prepare for the guilt and

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245. See 18 U.S.C. § 3553(a) (directing the sentencing court to consider all of the philosophical justifications for sentencing—retribution, deterrence, incapacitation, and rehabilitation—as well as the parsimony principle).

246. Natman Schaye & Roseann Schaye-Glos, *Mitigation in the Death Belt—Twelve Steps To Saving Clients’ Lives*, CHAMPION, July 2005, at 18, 18; see also CAIT CLARKE ET AL., SENTENCING PROJECT, THE TEN PRINCIPLES OF SENTENCING ADVOCACY 2–3 (2003), available at <http://www.sentencingproject.org/doc/publications/tenprinciplestosentadv.pdf> (discussing how sentencing advocacy is individualized).

247. GUIDELINES FOR THE APPOINTMENT & PERFORMANCE OF DEF. COUNSEL IN DEATH PENALTY CASES guideline 10.4(C)(2)(a)–(b) (rev. ed. 2003).

248. See *Supplementary Guidelines*, *supra* note 104, at 680–81 (setting forth guideline 4.1, which states that defense counsel has a duty to their client to include a mitigation specialist on the defense team); see also Schaye & Schaye-Glos, *supra* note 246, at 19 (concluding that a lawyer cannot “fulfill” the role of a mitigation specialist because they have different skills, training, and abilities); Stetler, *Mystery of Mitigation*, *supra* note 37, at 249 (distinguishing the different role the mitigation specialist plays in a capital defense team in investigating the client’s past (citing Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. Rev. 299, 323–24 (1983))).

penalty phases of a case that involves a thorough investigation of mitigating evidence.<sup>249</sup> Properly developing a mitigation case requires potentially hundreds of hours of one-on-one interviews by someone trained to “delve into the defendant’s past to unearth circumstances . . . that might be used to paint a sympathetic picture and sway a jury toward leniency.”<sup>250</sup> A lawyer busy interviewing witnesses, analyzing documents, and arguing legal motions in preparation for trial will simply not have time to develop mitigation evidence to be used during sentencing. Even if the lawyer somehow had the time, he does not possess the right skill set to complete a mitigation investigation. Attorneys do not have the “experience nor the training necessary to recognize every potential mitigating factor when examining a defendant’s records or interviewing a witness.”<sup>251</sup> Put another way, “[l]aw school prepares one to be an advocate, not an investigator[.]”<sup>252</sup> Further, clients and witnesses “widely consider[] [attorneys] to be intimidating.”<sup>253</sup> Defendants and their families, the main source for mitigating evidence, often initially distrust their counsel and are therefore less likely to divulge

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249. Schaye & Schaye-Glos, *supra* note 246, at 19.

250. Leonard, *supra* note 244, at 1143.

251. Daniel L. Payne, *Building the Case for Life: A Mitigation Specialist as a Necessity and a Matter of Right*, 16 CAP. DEF. J. 43, 49 (2003); see Craig Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation*, 35 SANTA CLARA L. REV. 547, 605–06 (1995) (stating that “the task of compiling background and social history information is so foreign to criminal defense work generally”); Russell Stetler, *Why Capital Cases Require Mitigation Specialists* (unpublished manuscript), available at [http://www.nlada.org/DMS/Documents/998934720.005/document\\_info](http://www.nlada.org/DMS/Documents/998934720.005/document_info) (last visited Oct. 11, 2012) [hereinafter Stetler, *Mitigation Specialists*]. Stetler argues that:

Evidence presented in a typical trial is designed to answer questions relating to discrete events such as whether the car went through a red light at the time of the accident or whether defendant had the intent to kill at the time he fired the fatal shot. Mitigating evidence, on the other hand, deals with broad stretches of history. In order to explain the kind of person the defendant is and the reason for his crime, witnesses may need to testify to the defendant’s entire life, including events occurring before he was born. To present such evidence effectively, counsel should review a great mass of material to identify witnesses and events that will make the defendant’s life meaningful to the sentencer.

Stetler, *Mitigation Specialists*, *supra*, at 3 (footnote omitted).

252. Stetler, *Mystery of Mitigation*, *supra* note 37, at 252 (observing that a “mitigation specialist investigates a different factual universe and needs a wholly different set of skills” than a lawyer); Jonathan P. Tomes, *Damned If You Do, Damned If You Don’t: The Use of Mitigation Experts in Death Penalty Litigation*, 24 AM. J. CRIM. L. 359, 364 (1997) (recognizing that without a mitigation specialist “the defendant probably has little or no chance of avoiding the death sentence unless the defense [team] gives the jury something to counter both the horror of the crime and the limited information the prosecution has introduced about the defendant”).

253. Payne, *supra* note 251, at 49.

embarrassing or sensitive information that could be key to a mitigation case.<sup>254</sup>

The reasons for using the team approach in capital cases apply equally in white collar cases. While a four-person team may not be possible in every white collar matter, it should be the starting point for case staffing, not the exception. Realistically, most white collar cases handled by large or medium-sized firms will have at least six attorneys of varying experience levels assigned to the case, as well as a slew of paralegals and case managers. Finding room for an investigator and a mitigation specialist (who often work at lower rates than even first-year attorneys) should not create a hardship.<sup>255</sup>

A white collar team, regardless of its size, *must* include an experienced mitigation specialist. The fundamental task of the mitigation specialist is to conduct a comprehensive social history investigation of the defendant and identify all areas of relevant mitigation, often through one-on-one interviews with the defendant and his family, friends, and acquaintances.<sup>256</sup> The *Supplementary Guidelines* set forth in detail the qualifications a mitigation specialist must have and how mitigation evidence is developed,<sup>257</sup> but the following provides a concise summary that white collar counsel may use as a guide:

Counsel's duty . . . to thoroughly investigate the background and circumstances of the client's life and to present all relevant mitigating evidence mandates the conducting of an extensive life history study, as well as an analysis of the factors and forces that influenced the client's development, including personality and behavior. The history must be multi-generational in nature,

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254. *Id.* Lawyers are not the only members of the defense team that lack the necessary skills to investigate mitigation evidence. See Stetler, *Mystery of Mitigation*, *supra* note 37, at 248–49 (“A significant legal blind spot exists between the roles played by the private investigator and the psychiatrist, the two standard information-getters in the trial process. Neither one [is] suited to the task at hand here—namely discovering and then communicating the complex human reality of the defendant's personality in a sympathetic way.” (internal quotation marks omitted)); see also Betsy Wilson, *Creating a Capital-Defense Team That is More Than the Sum of Its Parts*, CORNERSTONE, May-Aug. 2010, at 2, 2 (discussing the barriers between various professions working together).

255. See Leonard, *supra* note 244, at 1154 (arguing that a mitigation specialist provides more reliable procedures); Payne, *supra* note 251, at 50 (arguing that appointing a mitigation specialist ultimately saves money). As a frame of reference, the last white collar case the author was involved in defending at a large Chicago firm was staffed with two capital partners, an income partner, a senior associate, a mid-level associate, a junior associate, a paralegal, and two case managers. The client also had local counsel consisting of at least two attorneys and an assistant. Each of the two co-defendants had similarly staffed legal teams.

256. Leonard, *supra* note 244, at 1145.

257. See *Supplementary Guidelines*, *supra* note 104, at 682 (guidelines 5.1(B) and (C)).

assessing the effects of heredity and the inter-generational transmissions of patterns of behavior, and must be broad in scope. It involves investigation that goes beyond the individual, family, school, and neighborhood to include an examination of socio-economic, political, cultural, and environmental influences in the client's life.

The social history investigation and psycho-social assessment should be conducted by a professional with skills and expertise not generally possessed by attorneys. It should be done by someone with an understanding of child and human development, including the manner in which development is influenced and the person shaped by heredity and environment. Skills in interviewing and information gathering, including the collection and analysis of life history records, are essential. The interviewing techniques employed in the social history investigation are different from those generally taught in law schools and employed by lawyers. Knowledge regarding human development and factors affecting it are necessary in order to know what questions to ask, what information to obtain, and how to make sense of that information. An awareness of the indicators of such things as cognitive impairments, mental illness, childhood abuse and trauma, and substance abuse and dependence is essential. The person conducting interviews must have the skills and expertise to assist the client, family members, and others in disclosing private, shameful, and sensitive information.<sup>258</sup>

The professional most qualified to perform these duties is a mitigation specialist.<sup>259</sup>

A mitigation specialist's ability to identify mental illness, psychological disorders, and the symptoms of addiction cannot be overlooked. White collar offenders, despite their perceived status and success, suffer from many of the same disorders as others committing crimes.<sup>260</sup> Studies have also identified specific negative

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258. Jill Miller, *The Defense Team in Capital Cases*, 31 HOFSTRA L. REV. 1117, 1127–28 (2003); *see also* SENTENCING PROJECT, THE THINKING ADVOCATE'S LIST OF MITIGATING FACTORS (2003), available at <http://www.sentencingproject.org/doc/publications/listofmitigatingfactors.pdf> (referencing a list of mitigating factors to be used by a capital defense team).

259. *See* Miller, *supra* note 258, at 1128 (discussing a study in which lawyers stressed the importance of mitigation specialists).

260. *See* Price & Norris, *supra* note 27, at 543 (setting forth common psychiatric impairments of white-collar criminals). Almost half of the federal prison population suffers from some sort of mental health problem. *See* DORIS J. JAMES & LAUREN E. GLAZE, BUREAU OF JUSTICE STATISTICS, MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES 2 (2009), available at [http://www.nami.org/Template.cfm?Section=Press\\_September\\_2006&Template=/ContentManagement/ContentDisplay.cfm&ContentID=38175](http://www.nami.org/Template.cfm?Section=Press_September_2006&Template=/ContentManagement/ContentDisplay.cfm&ContentID=38175) (indicating in a 2006 study that over 70,000 federal inmates, approximately forty-five percent, suffered from mental health problems). Each year, fraud

personality traits common to white collar criminals, such as low behavioral self-control, high hedonism, and high narcissism.<sup>261</sup> “It has been theorized that [white collar criminals] are charismatic, have a need-to-control, have a tendency to bully subordinates, fear losing their status and position, exhibit narcissistic tendencies, and lack integrity and a social conscience.”<sup>262</sup> In specific cases, such as Madoff’s, white collar offenders have been diagnosed as sociopathic.<sup>263</sup> It takes a skilled mitigation specialist to identify these personality traits, draw them out for investigation, and then develop

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offenders, which include white collar defendants, account for approximately fourteen percent of all offenders sentenced in federal court. See 2010 SOURCEBOOK, *supra* note 214, fig.A (including the categories of fraud and non-fraud white collar offenders, as defined by the Sentencing Commission). Of those sentenced, approximately sixty-eight percent receive a term of imprisonment. See *id.* tbl.12 (averaging the total percentages of those offenders receiving a sentence of imprisonment in fraud, embezzlement, forgery/counterfeiting, bribery, tax, and money laundering cases). It would be surprising then if white collar offenders did not make up a sizable group of prison inmates that have been identified as suffering from mental health problems. This conclusion is supported by the reflections of many federal judges. See, e.g., Carey Goldberg, *Judge in Famous “Rosie D” Case Reflects: “What Are People for?”*, WBUR (Dec. 12, 2011, 1:50 PM), <http://commonhealth.wbur.org/2011/12/rosie-d-judge>. Judge Michael A. Ponsor commented, “I can tell you from experience that a solid majority of the adults that come before me in federal court as criminal defendants suffer from mental health disorders that can easily be traced to childhood and that are directly linked to the adult’s criminal behavior.” *Id.*

261. See Price & Norris, *supra* note 27, at 543 (discussing psychiatric profiles of white collar criminals). Cornell Medical School Professor Robert B. Millman has identified a psychological dysfunction specific to the wealthy, including athletes and politicians, called acquired situational narcissism. See Stephen Sherrill, *The Year In Ideas: A to Z; Acquired Situational Narcissism*, N.Y. TIMES (Dec. 9, 2001), <http://www.nytimes.com/2001/12/09/magazine/the-year-in-ideas-a-to-z-acquired-situational-narcissism.html> (explaining that like classical narcissism, the personality disorder has symptoms of lack of empathy, grandiose fantasies, excessive need for approval, rage, social isolation, and depression). “[F]or the acquired situational narcissists . . . [t]heir marriages fall apart, they make lousy parents, they take copious quantities of drugs, they get into trouble with the law. ‘Because they truly don’t believe the world is real . . . they begin to think they’re invulnerable.’” Sherrill, *supra*.

262. See Price & Norris, *supra* note 27, at 542 (discussing the characteristics of the typical white-collar offender). See generally Tage Alalehto, *Economic Crime: Does Personality Matter?*, 47 INT’L J. OFFENDER THERAPY COMP. CRIMINOLOGY 335 (2003) (studying the effect of personality traits on economic crimes); Drew Feeley, *Personality, Environment, and the Causes of White-Collar Crime*, 30 LAW & PSYCHOL. REV. 201 (2006) (discussing the research and theories on the behavioral and environmental causes of white collar crime).

263. See STEWART, *supra* note 22, at 435 (discussing how sociopathic individuals can charm others into schemes); Ackerman, *supra* note 23, at 2 (discussing whether Madoff has sociopathic tendencies). But see Ernest Poortinga et al., *A Case Control Study: White-Collar Defendants Compared with Defendants Charged with Other Nonviolent Theft*, 34 J. AM. ACAD. PSYCHIATRY L. 82, 87 (2006) (finding white collar criminals did not have substantially higher rates of bipolar depression than a control group of defendants charged with nonviolent thefts).

them into a compelling mitigating factor to be used at sentencing.<sup>264</sup> None of that can be done if a mitigation specialist is not included on the white collar defense team.

### C. Strategy 3—Begin Mitigation Work Early

Thoroughly developing mitigation evidence to be used at sentencing is a long and work-intensive process. The days are gone when defense counsel could wait until the presentence report was issued, gather a handful of supporting letters from family and friends, and prepare a sentencing memorandum to be filed a couple of weeks before the sentencing hearing.<sup>265</sup> When the Guidelines were mandatory and there were few mitigation arguments to be made, this approach might have been sufficient. Now, mitigation must be integrated into the entire defense case, and its development begins the minute the client walks through the door. With over ninety percent of fraud cases charged ending in a sentencing hearing,<sup>266</sup> there is no reason to wait—mitigation evidence will be necessary in practically every federal white collar case.

The significant time it takes to adequately investigate and develop mitigation evidence stems from the method of conducting the defendant's social history investigation. A social history inquiry is intended to be an "unparalleled investigation into [the defendant's] personal and family history," including their medical, educational, correctional, and employment history.<sup>267</sup> That level of investigation

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264. It is important for a mitigation specialist to identify a client suffering from a mental health condition for a number of reasons. First, a history of a mental health disorder may lessen the defendant's culpability in the judge's eyes if that condition contributed to the defendant's criminal conduct. Because judges often doubt mental health claims, a mitigation specialist offers corroboration through multigenerational one-on-one interviews with the defendant's family and a review of the relevant medical records. If no mental health issue was ever documented, a mitigation specialist may be able to demonstrate that clear symptoms were present despite a lack of documented treatment. Second, a mental health disorder may disrupt the team's ability to effectively communicate with the client. For example, answers that appear evasive or guarded may be a symptom of an underlying mental health issue the mitigation specialist can identify. Finally, a mitigation specialist can ferret out untrue or exaggerated claims of mental health disorders or drug and alcohol dependence that some white collar clients might make to justify their conduct. See Stetler, *Mystery of Mitigation*, *supra* note 37, at 254–58.

265. See FED. R. CRIM. P. 32(f)–(g) (requiring objections to be made within fourteen days of receiving the sentencing memorandum and requiring the probation officer to submit a report seven days before the hearing).

266. BUREAU OF JUSTICE STATISTICS, FED. JUSTICE STATISTICS, 2008-STATISTICAL TABLES tbls.4.1 & 5.1 (2010), available at <http://bjs.ojp.usdoj.gov/content/pub/html/fjsst/2008/fjs08st.pdf>.

267. GUIDELINES FOR THE APPOINTMENT & PERFORMANCE OF DEF. COUNSEL IN DEATH PENALTY CASES guideline 10.7 cmt. (rev. ed. 2003) (quoting Stetler, *Mitigation Evidence*, *supra* note 15, at 35).

takes time. More specifically, each of the two aspects of the investigation—record gathering and in-person interviews—require many hours of dedicated work.

As white collar defense attorneys well understand, “[i]t is nearly impossible to have lived in this day and age without leaving a long paper trail.”<sup>268</sup> A complete investigation of mitigation evidence attempts to uncover *all* records relevant to the defendant beginning at the moment of conception.<sup>269</sup> While that level of investigation may not be feasible in every white collar case, it is important to gather documents relating to all stages of the defendant’s life, because each may have a mitigating story to tell or lead to critical mitigation evidence. A partial list of documents that should be gathered includes medical records, such as birth records, childhood illnesses and check-ups, immunizations, mental health records, accidents and injuries, psychiatric records, and substance abuse reports; school records, such as report cards, psychological testing, health and disciplinary records, diplomas, and awards and honors; social service records, such as welfare, foster care, and adoption; criminal records, both juvenile and adult; employment records, such as resumes, promotion and demotions, certifications, and human resources files; financial records, such as bank accounts, investment accounts, tax returns, business records, and business licenses; social and philanthropic giving records, such as membership documents, donation receipts, and volunteer logs; military records; and immigration records.<sup>270</sup> Records collection does not stop with the defendant; family, friends, and acquaintances must all be canvassed for relevant documents, and a multigenerational search may be necessary.<sup>271</sup> It is especially important to begin locating document

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268. Schaye & Schaye-Glos, *supra* note 246, at 20.

269. See GUIDELINES FOR THE APPOINTMENT & PERFORMANCE OF DEF. COUNSEL IN DEATH PENALTY CASES guideline 10.7 cmt. (outlining that counsel has a duty to thoroughly investigate defendant’s history and criminal conduct); O’Brien, *When Life Depends on It*, *supra* note 37, at 728–30 (highlighting the importance of conducting interviews with those people familiar with the defendant’s life).

270. Leonard, *supra* note 244, at 1146–47. In addition to paper documents, defense teams are now scouring social media for mitigating evidence, even using social media websites such as Facebook and MySpace as platforms to “crowd source” its collection. See Ken Strutin, *The Role of Social Media in Sentencing Advocacy*, N.Y. L.J., Sept. 29, 2010, available at <http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202472638649&slreturn=1> (reporting that county commissioner Greg Skrepenak, who was convicted of federal corruption charges, asked his Facebook friends to send character references to his counsel or the judge prior to his sentencing).

271. See Schaye & Schaye-Glos, *supra* note 246, at 20 (finding that it is “critical to obtain records for as many generations as possible” and this can be especially challenging if a defendant has a history of mental illness).



sources early because records can take months to arrive and some records can only be obtained after personal meetings with the record holder.<sup>272</sup>

In addition to record gathering, “*everyone* must be interviewed.”<sup>273</sup> This “daunting, but necessary task”<sup>274</sup> generally begins with an interview of the defendant and then radiates outward to his family, friends, neighbors, business associates, and acquaintances.<sup>275</sup> The idea is for the mitigation specialist to create a complete biography of the defendant’s life through a cyclical process of interviewing those with whom he has come in contact.<sup>276</sup> Veteran mitigation specialists describe the interview process as follows:

The investigation is not complete until the information uncovered becomes redundant and provides no new insight. It is insufficient to talk to witnesses only once because each new individual recalls different facts and anecdotes; if an aunt provides an account of [a mitigating factor] which the mother forgot to mention, it is necessary to go back to the mother and ask about it. Similarly, an interview may reveal records that must be obtained, which in turn raise new questions, questions which necessitate interviewing several witnesses again.<sup>277</sup>

Interviews must be conducted in-person, one-on-one, and usually in the interviewee’s home to establish trust, as well as to give the mitigation specialist an opportunity to observe nonverbal cues that could indicate further avenues of investigation.<sup>278</sup>

In a complex case, the interview process may involve hundreds of hours of work requiring “meticulous attention to detail,” painstaking efforts to decipher references, and “patience and sensitivity in eliciting disclosures.”<sup>279</sup> Although the process can be arduous for a

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272. *See id.* (explaining that military and Social Security records may take up to a year to locate, request, and receive, and sometimes the only way to obtain records is by requesting them in-person so the record-holder feels compelled to provide them).

273. *Id.*

274. *Id.*

275. *See* O’Brien, *When Life Depends on It*, *supra* note 37, at 726–28 (emphasizing the importance of interviewing everyone who has ever known the defendant); Payne, *supra* note 251, at 46 (noting that a proper mitigation investigation starts with interviewing the family).

276. Stetler, *Mitigation Evidence*, *supra* note 15, at 38. The process is “cyclical, rather than linear, because witnesses will [often] need to be re-interviewed when new information is discovered.” *Id.*

277. *Id.* (quoting Lee Norton, *Capital Cases: Mitigation Investigations*, CHAMPION, May 1992, at 43, 45).

278. *Id.* at 39; *see* O’Brien, *When Life Depends on It*, *supra* note 37, at 747 (noting that mitigation specialists recognize that as much as sixty-five percent of what is communicated by a witness is nonverbal).

279. Stetler, *Mitigation Evidence*, *supra* note 15, at 39.

white collar defense team, it is singularly important because “the defendant’s personal history and family life, his obsessions, aspirations, hopes, and flaws”—the heart of a mitigating social history to be presented at sentencing—“are rarely a matter of physical evidence.”<sup>280</sup> Beginning the social history investigation early ensures mitigation evidence will be fully developed in time to be used throughout the case.<sup>281</sup>

*D. Strategy 4—Better Understand Your Client by Building Trust*

How many white collar defense attorneys truly understand their clients—their motivations, aspirations, and fears? How many can effectively communicate their client’s unique humanity to the sentencing judge in a way that compels sympathy? Capital counsel, through the inclusion of mitigation specialists on the defense team, have been at the forefront of client-centered sentencing—not just effective representation from a legal standpoint, but a type of representation that genuinely endeavors to understand and articulate to the court the complete person being sentenced. For white collar counsel to do the same, to fully explain the “background, character and conduct of the defendant,” they must build a level of trust with the client that is not currently the norm.<sup>282</sup>

The reasons most white collar counsel lack this level of trust, and therefore lack a comprehensive understanding of their client to present to the court, are familiar. An attorney immersed in pre-trial investigation or trial preparation does not have the time or the training to establish a rapport with the client that allows for the unguarded discussions necessary to build genuine trust.<sup>283</sup> Moreover, most white collar counsel, despite what they may say, do not really want to—their training and experience has taught them to view client trust as a one-way street, in which the client is to trust the lawyer completely, but the lawyer constantly weighs the client’s statements for truth and consistency against known evidence. While this may be necessary to be an effective advocate, it is difficult to achieve a superior level of client trust necessary to develop mitigation evidence under these circumstances.

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280. Stetler, *Mitigation Specialists*, *supra* note 251, at 1.

281. An additional benefit of beginning the social history investigation early is that it will aid in plea negotiations and may help uncover possible prosecution arguments to be used at trial or during sentencing. See Stetler, *Mitigation Evidence*, *supra* note 15, at 35 n.1 (acknowledging the role that social history investigation had in Kaczynski’s plea to avoid the death sentence).

282. *Pepper v. United States*, 131 S. Ct. 1229, 1240 (2011).

283. Schaye & Schaye-Glos, *supra* note 246, at 19–20.

The solution is to use a mitigation specialist as a client liaison. Mitigation specialists have the time and the training to talk to the client in a way that most attorneys do not. Mitigation specialists approach their interactions with witnesses, including the client, in a manner that conveys warmth and friendliness.<sup>284</sup> They ask “innocuous biographical questions about [the client], his family, his well-being, [and the] routine aspects of his daily life.”<sup>285</sup> Because mitigation specialists spend potentially hundreds of hours with the client and his family and friends conducting a social history investigation, they know when the client is feeling agitated, scared, ignored, or falsely confident, as well as whether the client is telling the truth or shading it.<sup>286</sup> Mitigation specialists also know when to push a client and when to back off, and how to explain to the client that investigating mitigation evidence or exploring a plea agreement does not mean giving up on guilt or innocence.<sup>287</sup> Most importantly, mitigation specialists become the client’s truest advocate within the defense team, allowing others to test evidence without destroying client trust.<sup>288</sup> The result is a white collar defense team fully invested in the client’s defense and able to “inspire compassion” at sentencing.<sup>289</sup>

*E. Strategy 5—Develop the Most Persuasive Mitigation Evidence*

The breadth of possible mitigating evidence bearing on a capital case is astounding.<sup>290</sup> Mitigation specialists have identified expansive theories of mitigation to take advantage of *Lockett’s* holding that a “sentencer . . . [can]not be precluded from considering, as a mitigating factor, any aspect of a defendant’s character or record and

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284. O’Brien, *When Life Depends on It*, *supra* note 37, at 748.

285. *Id.*

286. See Schaye & Schaye-Glos, *supra* note 246, at 20 (noting that a “relationship of trust with the client is essential both to overcome the client’s natural resistance to disclosing the often personal and painful facts necessary to present an effective penalty phase defense” (quoting GUIDELINES FOR THE APPOINTMENT & PERFORMANCE OF DEF. COUNSEL IN DEATH PENALTY CASES guideline 10.5 cmt. (rev. ed. 2003))).

287. See Leonard, *supra* note 244, at 1150 (pointing out that a mitigation specialist can “assist the defense counsel in explaining the value of a negotiated plea and the risks of a capital trial to the defendant and his family”); O’Brien, *When Life Depends on It*, *supra* note 37, at 749–50 (“The effective interviewer is an ‘empathic listener,’ who ‘puts [the client] at ease, is sensitive to his suffering, and expresses his [or her] compassion.’ The interviewer’s attitude is critical to full and frank disclosure; she must listen non-judgmentally, and ‘elicit data . . . [while] encouraging the patient to tell his or her story.’” (footnote omitted)).

288. O’Brien, *When Life Depends on It*, *supra* note 37, at 744.

289. Stetler, *Mystery of Mitigation*, *supra* note 37, at 261.

290. Leonard, *supra* note 244, at 1145–46. For a list of mitigation factors, see generally Kirchmeier, *supra* note 41, at 656–83.

any of the circumstances of the offense.”<sup>291</sup> This allows a capital defense team almost unlimited avenues to pursue when developing a mitigation case. In practice, however, some mitigation arguments resonate with juries better than others. Capital defense attorneys understand that to be effective, a mitigation case must focus not just on any mitigation evidence but on the *right kinds of evidence*.<sup>292</sup> The same applies to the use of mitigation in white collar cases.

Fortunately, a body of empirical evidence is available to help guide white collar attorneys in determining which specific mitigating arguments will best persuade a sentencing judge.<sup>293</sup> Although every sentencer may be swayed to differing degrees, the data points to a number of general principles. First, the defendant should express remorse for his crime.<sup>294</sup> Sentencers credit defendants who are contrite and demonstrate they would not commit future crimes.<sup>295</sup> Second, residual doubt over the defendant’s guilt is a powerful mitigating factor.<sup>296</sup> Although residual doubt is not mitigation in the strict sense, a defendant who raises doubt about his guilt, or at least about his culpability, improves his standing at sentencing.<sup>297</sup> Third, mitigating arguments that focus on “factors that diminish the defendant’s individual responsibility for his actions” have a positive

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291. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (emphasis added).

292. See Schaye & Schaye-Glos, *supra* note 246, at 21 (noting that mitigation specialists analyze the importance of different mitigating information in terms of its potential impact).

293. See William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 IND. L.J. 1043, 1043–44 (1995). This series of studies, known as the Capital Jury Project, is a multijurisdictional analysis of how capital juries make their sentencing decisions. *Id.*; Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538, 1538–39 (1998). The backbone of the studies is a three to four-hour interview of up to 120 capital jurors in each of the participating eight states. Bowers, *supra*, at 1043. Jurors are interviewed about their views of the crime, the defendant, the victim, the victim’s family, jury deliberations, the conduct of counsel, and the jurors’ background. Garvey, *supra*, at 1538. Although a capital jury’s views may not be a perfect proxy for the views of individual district court judges sentencing white-collar defendants, the Project serves as the best available indicator of the efficacy of mitigation arguments made before a sentencer. The findings are supported by surveys of federal judges conducting sentencings. See U.S. SENTENCING COMM’N, RESULTS OF SURVEY OF UNITED STATES DISTRICT JUDGES: JANUARY 2010 THROUGH MARCH 2010 tbl.13 (2010), available at [http://www.ussc.gov/Research/Research\\_Projects/Surveys/20100608\\_Judge\\_Survey.pdf](http://www.ussc.gov/Research/Research_Projects/Surveys/20100608_Judge_Survey.pdf) (surveying judges’ responses to characteristics of a defendant at sentencing).

294. See Garvey, *supra* note 293, at 1567 (suggesting that defendants should show some remorse for their conduct).

295. See *id.* (recommending that the defendant express to the jury he will not “do it again”).

296. See *id.* at 1563 (noting that the most effective mitigating evidence raises doubt about the defendant’s guilt).

297. *Id.*

impact at sentencing.<sup>298</sup> Sentencers attach “significant mitigating potential” to circumstances demonstrating the defendant’s diminished mental capacity, such as history of mental health problems, at the time of the offense.<sup>299</sup> Defendants who suffered as children, and therefore are seen to have lesser responsibility, are also credited by sentencers, as are defendants who sought help for their problems but were unable to get it.<sup>300</sup> However, sentencers have “little patience” for defendants who attribute their wrongdoing solely to drugs or alcohol.<sup>301</sup> White collar defense teams can use these findings to focus their broadly investigated mitigation evidence to have maximum effect.<sup>302</sup>

*F. Strategy 6—Present a Compelling Mitigation Case at Sentencing*

To be effective, a comprehensive and consistent mitigation case must be presented to the sentencing judge in a compelling way. Although most white collar defense attorneys are adept at presenting arguments and evidence in motions and through trial testimony, they often fall short during sentencing. Much of this is due to mindset—white collar counsel often have the idea that a sentencing consists of a memorandum to be argued at a simple hearing.<sup>303</sup> Instead, white collar counsel must view sentencings as capital litigators do—as a

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298. *Id.* at 1539.

299. *Id.*

300. *Id.*

301. *Id.*

302. *See supra* notes 290–301 and accompanying text. White collar defense teams should not try to steer the mitigation investigation toward one of the “high impact” factors, however, as doing so would likely artificially limit the breadth and character of the mitigation evidence discovered. Instead, the mitigation expert should conduct an exhaustive investigation, present all possible avenues of mitigation to the defense team, and then the team can collectively decide which mitigating arguments to raise at sentencing based partly on the empirical data discussed above. Schaye & Schaye-Glos, *supra* note 246, at 21.

303. *See* Schaye & Schaye-Glos, *supra* note 246, at 23 (stating that attorneys should try not to “justify or excuse the crime” but explain it by developing a compelling picture of the client’s life). The risk is especially high when sentencing comes after a guilty plea. If the Guidelines range as calculated by the probation department is uncontested or there are only a few offense levels at issue, counsel sometimes views the sentencing hearing as pro forma. Nothing could be less true. Despite a plea agreement, the court is required to sentence the defendant after hearing all information related to his background, character, and conduct. *See* *Pepper v. United States*, 131 S. Ct. 1229, 1240 (2011) (holding that courts must consider all mitigating evidence). Further, most plea agreements in white collar cases leave open some opportunity to argue for sentencing at the low end of the range, for the application of particular specific offense characteristics, or even for variances, all of which provide counsel the opportunity to argue mitigation consistent with § 3553(a).

continuing and co-equal phase of the case that requires a tightly orchestrated presentation of mitigating evidence.<sup>304</sup>

As an initial matter, mitigation should be considered as part of the overall strategy of a case, not simply as an afterthought to the trial or plea negotiation phase. Because the stakes are so high in death penalty cases, capital counsel understand that opportunities to present mitigation evidence must be maximized. Therefore, mitigation themes are developed and presented whenever possible throughout all phases of a case.<sup>305</sup> This means that a mitigating narrative is woven into every interaction with the government or the court, creating a consistent and compelling picture of the defendant as a whole person.<sup>306</sup> For example, Kaczynski's defense team stressed his mental health condition (paranoid schizophrenia) at every possible opportunity prior to trial.<sup>307</sup> This helped persuade the government to accept Kaczynski's guilty plea to a life sentence in a seemingly certain death penalty case.<sup>308</sup>

White collar counsel can do the same by previewing mitigating evidence whenever possible. For example, counsel should consider weaving mitigation evidence into a pre-indictment white paper or an attorney's proffer to the government.<sup>309</sup> Counsel may also consider seeking medical evaluations of their client early in a case if there is any indication of mental health problems or addiction.<sup>310</sup> Precisely

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304. See Norton, *supra* note 277, at 45 ("The data must be integrated in such a way as to explain why the offense occurred and how all the factors came together to bring your client to the point of [committing that offense] . . . . More important, you must explain why other [similarly situated persons] . . . did not [commit the offense].").

305. See Schaye & Schaye-Glos, *supra* note 246, at 21 ("Counsel should seek a [mitigation] theory that will be effective in connection with both guilt and penalty, and should seek to minimize inconsistencies. The theme must be consistently applied to obtain resources, pursue motions, exclude evidence, [or] secure a plea agreement . . .").

306. See Haney, *supra* note 26, at 844 ("A mitigating counter-narrative that incorporates a capital defendant's social history and immediate life circumstances is now recognized as the centerpiece of an effective [capital case]."); Sean D. O'Brien, *Death Penalty Stories: Lessons in Life Saving Narratives*, 77 UMKC L. REV. 831, 836 (2009) (stating that "[t]he mitigation narrative must be presented in dealings with the prosecutor, selecting and instructing the jury, and the guilt/innocence stage of trial," in addition to the penalty phase).

307. See Finnegan, *supra* note 12, at 58 (reporting that if the case had gone to trial, Kaczynski's defense team would have offered evidence of multiple generational mental illness).

308. See Stetler, *Mitigation Evidence*, *supra* note 15, at 35, 36 n.1 (observing that the successful disposition was dependent on "tireless mitigation investigation").

309. See Howard Sklamberg, *What Really Works with Federal Prosecutors*, CORP. COUNSEL (Feb. 22, 2006), <http://www.law.com/jsp/cc/PubArticleCC.jsp?id=900005447640> (discussing the benefits of attorney proffer and most effective way to conduct one).

310. See Stetler, *Mitigation Evidence*, *supra* note 15, at 49 (providing a

when to share this type of information is a strategic decision for counsel, but it can be advantageous to present mitigation evidence early. In any event, mitigation themes cannot wait to be developed until the sentencing hearing. By then, it is difficult to alter the court's perception of the defendant and his culpability.<sup>311</sup>

In terms of the practical side of presenting mitigation evidence, capital defense counsel use two primary strategies that can be easily adopted by white collar attorneys. First, in preparation for presenting a mitigation case, a capital defense team will “triangulate” mitigating data to ensure maximum thoroughness, accuracy, and reliability.<sup>312</sup> “Triangulation of data refers to obtaining data from more than one source and, preferably from more than one type of source.”<sup>313</sup> In an ideal world, counsel would support all mitigating arguments with documentary evidence, lay testimony, and expert testimony.<sup>314</sup> For example, to present evidence of a defendant's gambling addiction, white collar counsel could “triangulate” the data by developing testimony about the defendant's addiction from his family (lay testimony), his doctor or an addiction specialist (expert testimony), and through his financial records (documentary evidence).<sup>315</sup> This approach is especially important because expert witnesses are often looked upon as “hired guns”—supporting their opinion-based testimony with first-hand accounts by family members and hard

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comprehensive discussion of mental health testing and strategic decisions regarding its use).

311. See Haney, *supra* note 26, at 837–43 (explaining the prevalence and intractability of the crime master narrative in criminal cases); Ellen S. Podgor, *The Challenge of White Collar Sentencing*, 97 J. CRIM. L. & CRIMINOLOGY 731, 740 (2007) (arguing that lack of sympathy from the general public makes white collar offenders “easy targets” for increased punishment); David Porter, *Lawyer Gets Longest-Ever Insider Trading Sentence*, BOSTON.COM (June 4, 2012), [http://www.boston.com/news/nation/articles/2012/06/04/2\\_set\\_for\\_sentencing\\_in\\_insider\\_trading\\_case](http://www.boston.com/news/nation/articles/2012/06/04/2_set_for_sentencing_in_insider_trading_case) (discussing a former attorney sentenced to twelve years for insider trading scheme after judge called him “amoral” and “thuggish,” comparing him to drug dealer).

312. Norton, *supra* note 277, at 45.

313. *Id.*

314. See O'Brien, *When Life Depends on It*, *supra* note 37, at 725–31 (demonstrating the key components of an optimal mitigation investigation).

315. Triangulation of data can also be compellingly used for positive mitigation evidence. For example, instead of simply offering letters explaining the defendant's good works (as most white collar defense attorneys do), counsel should support the letters with tax returns showing giving totals and awards for service by charitable organizations, as well as the testimony of one of the letter drafters. By triangulating a single point of mitigating data, the entire “dataset” (all the sentencing letters) gains legitimacy. If allowed by the court, an expert might also be called to testify as to the defendant's low risk of recidivism; part of the testimony might highlight the defendant's charitable works. It is difficult for a judge to disregard mitigating evidence if it is supported by multiple pieces of evidence. The sheer time mitigation evidence is in front of the court increases the chances the judge will consider it during the final sentencing determination.

documents creates a consistent and compelling mitigation argument.<sup>316</sup> If a sentencing judge will not allow a full hearing in which to present mitigating evidence, affidavits may serve as a substitute for live testimony.<sup>317</sup>

Second, capital defense counsel evaluate mitigation evidence they intend to present under the “Four Cs”: credibility, comprehensiveness, consistency, and comprehensibility.<sup>318</sup> Mitigation evidence is credible when all mitigation theories are supported by a thorough social history investigation backed-up by documents, lay witness testimony, and expert witness testimony.<sup>319</sup> A mitigation case is comprehensive when it has been applied at every stage of the defense, including during discussions with the client, meetings with the government, in motions, and in court appearances.<sup>320</sup> Consistent use of mitigation evidence occurs when defense counsel has formulated and communicated a “unified theory of the case that takes into account all the facts and circumstances of the client and the offense and tells the same story at every stage of the litigation.”<sup>321</sup> Mitigation evidence is comprehensible when it is presented in ordinary language and in a common sense manner.<sup>322</sup> White collar counsel should evaluate their mitigation case under the same rubric.

The fourth “C,” however, can be somewhat difficult to achieve when presenting the results of a detailed social history investigation. Experienced capital attorneys make liberal use of visual aids, particularly photos, videos, and physical objects (e.g., trophies, artwork, military medals), and key documents, such as earned certificates, favorable press accounts, and letters of praise, to humanize their clients.<sup>323</sup> Demonstrative timelines of the client’s life

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316. See Scott E. Sundby, *The Jury as Critic: An Empirical Look at How Capital Juries Perceive Expert and Law Testimony*, 83 VA. L. REV. 1109, 1126 (1997) (noting that some jurors perceive expert witnesses as “professional witnesses” being paid to testify favorably).

317. See FED. R. CRIM. P. 32(i)(2) (allowing defendant to introduce evidence on objections to the presentence investigation report).

318. See John H. Blume & Pamela Blume Leonard, *Capital Cases: Principles of Developing and Presenting Mental Health Evidence in Criminal Cases*, CHAMPION, Nov. 2000, at 63, 69 (“Jurors must understand your evidence before they can accept your theory. They also must believe it. If they question the credibility of your evidence, they will likely stop listening and start resisting your theory. Without doubt, for your evidence to be understood (*comprehensible*) by jurors, it must have a reliable foundation (*credible*), it must not come as a surprise (*comprehensive*) and it must not be used as an excuse only after all else has failed (*consistent*).”).

319. *Id.* at 63.

320. *Id.*

321. *Id.*

322. *Id.*

323. Schaye & Schaye-Glos, *supra* note 246, at 22.



history and genograms depicting multigenerational afflictions may also be appropriate.<sup>324</sup> The effective deployment of these types of mitigation evidence in white collar cases is only limited by the combined imagination of the defense team.

G. *Strategy 7—Keep the Ultimate Goal in Mind*

Finally, white collar counsel cannot lose sight of the ultimate goal of mitigation—presenting the “diverse frailties of humankind” to the court in a way that humanizes the client and evokes sympathy at sentencing.<sup>325</sup> This, however, does not mean mitigation evidence is a defense to prosecution or a “reason the client should get away with it.”<sup>326</sup> White collar counsel, particularly in today’s negative corporate climate, must not be perceived as attempting to justify the crime committed. Instead, mitigation should be viewed as a means of introducing evidence “which inspires compassion” and indicates capacity for redemption.<sup>327</sup> Put simply, mitigation is an explanation, not an excuse.

CONCLUSION

This Article began with a question and a goal. The question was whether two federal defendants with seemingly nothing in common other than their life terms—the nonviolent economic offender, Bernie Madoff, and the remorseless serial killer, Ted Kaczynski—could learn from one another when it came to federal sentencing practices. Was there a lesson for the CEO from the case of the condemned? The answer to that question is a certain “yes.” As seen from the discussion of the development of the mitigation function in capital cases—beginning with the Supreme Court’s *Gregg* decision and culminating with the *Supplementary Guidelines*—capital litigators

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324. *Id.* A demonstrative timeline likely starts as a chronology consisting of narrative, historical accounts of the influences or events that have the most significant effect on the client’s life. The chronology is continuously updated as new data is found, allowing the defense team to quickly locate facts, documents, physical evidence, and witnesses that are capable of communicating important aspects of the client’s life story. The chronology is then converted into a demonstrative timeline. See O’Brien, *When Life Depends on It*, *supra* note 37, at 756–57 (discussing how chronologies create a narrative of the defendant’s life and how “life history diagrams” can be used during the penalty phase). Genograms are “annotated family trees which depict the relationships between family members and patterns of impairments” within the client’s family. *Id.* at 757 (quoting Norton, *supra* note 277, at 45). They also help organize and display data “useful in explaining to juries the long-term effects of various influences on the client.” *Id.*

325. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976).

326. See Stetler, *Mystery of Mitigation*, *supra* note 37, at 261.

327. *Id.*

and their teams of mitigation experts have mastered the use of mitigating social history evidence to “inspire compassion” at sentencing. Following a parallel arc, white collar sentencing has undergone a series of seismic shifts, compelling counsel to develop new strategies to address the schizophrenic character of federal sentencing, which both subjects white collar offenders to harsh post-*Booker* sentences and offers them opportunities to harness the expansive judicial sentencing discretion as clarified in *Pepper*. The two sentencing worlds, and the worlds of Madoff and Kaczynski, merge over mitigation and its “transformative power” to impact a defendant’s sentence.

This Article’s goal was to highlight new strategies and techniques available to white collar defendants and their counsel through the use of mitigation evidence and to enhance federal sentencing advocacy as a whole. The first aspect of this goal was partially met by discussing seven strategies capital counsel use so effectively—adopting a mitigation mindset, employing a team approach, beginning mitigation work early, better understanding the client by building trust, developing the most persuasive mitigation evidence, presenting a compelling mitigation case at sentencing, and keeping the ultimate goal in mind. A deeper look at these and other key mitigation strategies is warranted. Whether the second aspect of the goal will be met remains to be seen. But if white collar attorneys do in fact learn from their capital counterparts, employing mitigation techniques in their cases and striving to understand and present their clients as complete individuals, we can all be hopeful.