FORENSIC PSYCHOLOGICAL CONSULTATION IN U.S. DEATH PENALTY CASES IN STATE AND FEDERAL COURTS

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The death penalty has always been, and will always be, a topic of controversy from the issue of its constitutionality to the variability in its application. The authors provide focus upon the role of the forensic psychologist, specifically as it applies to mitigation.

In order to address the multifaceted role of the psychologist in death penalty litigation a brief understanding of the process is necessary. While there may be some deviation from jurisdiction to jurisdiction, the key elements are very similar. First, in most cases, there will be a jury selection process, called *voir dire*, where jurors are questioned individually to examine any possible biases they may posses and determine whether they will become a part of the jury. Next, a bifurcated trial occurs, with the first phase of the trial determining the guilt or innocence of the defendant, and the second phase determining the appropriate penalty. If, in the first phase, a defendant is convicted of first-degree murder, the second phase occurs and the jury decides what punishment should be imposed. In most cases, this means the jury will determine whether to impose the death penalty or, an alternative, usually life imprisonment. According to a series of Supreme Court decisions in the 1970s, the jury must be allowed to consider both aggravating circumstances—those that indicate that the death penalty is more appropriate, and mitigating factors—those that indicate that the death penalty is less appropriate (1). Generally, while any mitigating evidence may be considered, aggravating factors are enumerated. For example, aggravators might include: the facts and circumstances of the crime, such as whether the victim endured torture or others were endangered or prior convictions for crimes of violence. In contrast, the jury will be allowed to consider mitigators enumerated in statutes, such as childhood abuse, mental illness, along with any other relevant factors that fall within a catch-all phrase normally contained in death

penalty statutes.[1] While states accomplish this in a variety of ways, essentially, after this evidence is presented, if the defendant is found guilty, the jury weighs the aggravating and mitigating factors to make a determination about the proper sentence to be imposed. States may accomplish this by guiding jury discretion with questions that determine whether the death sentence should be imposed, having them determine whether the mitigators outweigh the aggravators, or allowing them to impose a death sentence at their discretion if at least one aggravating factor is present.

Aggravating factors enumerated in statutes, such as the details of the crime, are frequently not the province of the psychologist. As questions of fact, they are, instead, usually for the fact finder alone. In contrast, much mitigation evidence arises from the psychological background of the defendant; therefore, this is the part of the trial process where the psychologist plays a pivotal role.

While psychologists are usually called upon to evaluate whether mitigators are present, it is important to recognize that the psychologist may be called upon to fill different roles depending on the circumstances. In many cases, the psychologist is seen and employed as an independent evaluator and expert witness. As an independent evaluator, he or she will obtain and review evidence relevant to mitigation, provide a written report of a diagnosis or findings, and testify before the jury regarding his or her findings. In addition to the role of independent evaluator, the psychologist may also serve as a consultant to counsel. In this role, based upon the understanding that the consultant has developed of the defendant, the psychologist may assist counsel. For example, he or she may aid in devising communication strategies to reach and aid the defendant in making the difficult choices that arise in capital litigation, such as accepting a plea to a life sentence in order to avoid a death sentence.

In the following pages, there are examples of the psychologist in each of these roles. It is important to note that these roles should be considered as separate and distinct, but of equal value. They arise from the foundation of a thorough psychological evaluation.

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[1] E.g., 42 Pa. C.S.A. section 9711 (e) (8) (stating "(e) Mitigating Circumstances.—Mitigating circumstances shall include the following: (8) Any other evidence of mitigation concerning the character and record of the defendant and the circumstances of the offense.").

This article will first outline the process of death penalty litigation. It will then discuss legal standards governing mitigation and offer criticisms of the current law. Finally, it will outline the various roles of the forensic psychologist, offer examples from some of the authors' experience, and outline the process of information gathering for forensic evaluation in death penalty cases.

MITIGATION: LEGAL STANDARDS GOVERNING THE ROLE OF THE FORENSIC PSYCHOLOGIST

In 2003, the ABA significantly elevated the standard of representation in death penalty cases. Their revised *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (2) provided the basis for the 2003 Supreme Court decision in *Wiggins v. Smith* (3) which established the requirement for a thorough and comprehensive mitigation review. The *Wiggins* court found that Mr. Wiggins' attorneys failed to conduct a comprehensive social history of Mr. Wiggins, violating his Sixth Amendment rights. Specifically, the Court set forth the requirement that mitigation investigations include efforts to discover "all reasonably available" mitigating evidence, as well as evidence to rebut any aggravating evidence that may be introduced by the prosecutor. The Wiggins' court made clear the reliance upon the ABA guidelines, whose objective is to "set forth a national standard of practice for the defense of capital cases in order to insure high quality legal representation for all persons facing the possible imposition or execution of a death sentence by any jurisdiction" (2).

Included among the Guidelines' recommendations is the need for at least one member of the defense team to be "qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments" (2). The guidelines address this issue:

> Creating a competent and reliable mental health evaluation consistent with prevailing standards of practices is a time consuming and expensive process. Counsel must compile extensive historical data, as well as obtaining a thorough physical and neurological examination. Diagnostic studies, neuropsychological testing, appropriate brain scans, blood tests or genetic studies, and consultation with additional mental health specialists may also be necessary (2).

The guidelines also recommend the inclusion of a mitigation specialist, a mental health professional who possesses:

> Clinical and information-gathering skills and training that most lawyers simply do not have. They have the time and the ability to elicit sensitive, embarrassing and often humiliating evidence that the defendant may have never disclosed. They have the clinical skills to recognize such things as congenital, mental or neurological conditions, to understand how these conditions may have affected the defendant's development and behavior, and to identify the most appropriate experts to examine the defendant or testify on his behalf (2).

The short-term goal of mitigation is to humanize the client to the jury. In the long-term, the goal is to save the client's life. The process of obtaining the information necessary to achieve these goals requires:

> Overcoming considerable barriers, such as shame, denial and repression, as well as other mental or emotional impairments from which the client may suffer (2).

The standards established with the reintroduction of the death penalty brought more structure to the trial process and introduced the requirement of an individualized consideration of the defendant in determining punishment. While, on a positive note, these standards contain mitigation as a required element, it would be erroneous to assume that they cured the ills addressed by the Supreme Court in *Furman*, such as the death penalty's arbitrary imposition and lack of guidance for the jury (4). Many studies of death penalty trials and procedures since it was reintroduced indicate that the imposition of the death penalty remains arbitrary and capricious. One area of major concern, and relevance to this article, is the inability of many jurors to understand and fairly and correctly implement the complicated procedures for the evaluation of aggravating and mitigating evidence. It can be argued that the requirement of mitigation evidence in the sentencing decision is of little moment if not properly presented to, or adequately considered by, the jury. Thus, mitigation evidence should be developed with an eye toward the system in which it will be presented. While the role of the mitigation psychologist in working with the defense can support a separate article, consider two examples of why the early development of psychological mitigation evidence

is critical to decision making and the effective representation of capital defendants. First, identifying jurors who may not be willing to consider the type of psychological mitigation that will be offered and, second, determining at what point psychological mitigation evidence will be presented to the jury.

Among other flaws in death penalty trials, the jury selection process does not adequately identify those jurors who are mitigation impaired, that is, unwilling or unable to fairly consider mitigation evidence. For example, a juror may not believe that mental illness is anything other than an excuse, or may believe that alcoholism is merely a lack of willpower; however, unless the defense becomes aware of the fact that these issues are relevant prior to voir dire, they will not be able to challenge the inclusion of jurors on this basis. In contrast, if the defense attorney is clearly aware of the nature of the psychological mitigation evidence to be used, he or she can make efforts, during the jury selection process, to avoid those jurors who would not consider that evidence and possibly begin to educate the jurors as to the nature of the mitigation evidence they will hear. To the extent that the Court blocks the defense efforts to exclude such jurors, appeal issues may arise.

Premature decision making by jurors is another difficulty that will arise during the trial process. In the bifurcated capital trial, the jury is instructed that it is not to consider penalty until after it has made a determination of innocence or guilt in the first phase of the trial. Studies show, however, that jurors are unable to refrain from considering possible punishments and form the foundation for penalty decisions, if not outright make a decision on penalty, during the first phase. The efficacy of mitigation evidence may, therefore, be greatly diminished if the jury receives it for the first time during the penalty phase. A strategic response to this propensity is to introduce the mitigation evidence as part of the first phase of the trial (sometimes referred to as "frontloading" the mitigation). With the early determination of psychological mitigation evidence, there can be an analysis by the defense as to whether it can legitimately be used in the first phase. For example, a diminished capacity defense may be attempted, not because it will carry the day as a defense, but because it will place the defendant's mental state before the jury at the earliest possible time in their decision making process.

As is obvious from the above, to consider psychological mitigation as merely a diagnosis to be expressed to the jury at the last stage of the trial process greatly underestimates the impact that the psychologist can have and limits his/her role in the process. In this partnership between the disciplines of psychology and law it is imperative that there be a full recognition by both partners of how the information developed is best used. Before beginning our discussion of the information gathering role of the mitigation psychologist, it may be helpful to consider briefly the role of the psychologist as the criminal case develops.

THE ROLES OF THE PSYCHOLOGIST AS THE CRIMINAL CASE DEVELOPS

Even before traditional issues of mitigation are reached, the psychologist may be called upon to determine the threshold question of competency of the accused to stand trial. Whether it encompasses the ability of the defendant to participate in the criminal justice system either temporarily or permanently or rises to the level of a bar on the death penalty under *Atkins v. Virginia*,(5) it must be considered.

The next role the psychologist may fill is in identifying what mental health issues may be present in the defendant. In this role the psychologist is of invaluable assistance to defense counsel in that this information can assist counsel greatly in shaping the attorney-client relationship. For example, knowledge that the defendant shows signs of borderline personality disorder can prepare defense counsel to better interact with that client. In this role the psychologist may also serve as a facilitator between attorney and client by assisting defense counsel in developing communication strategies in light of the defendant's mental health diagnosis or assisting the defendant in comprehending the legal implications of his case.

Finally, the role of the psychologist to assist in the development of the mitigation evidence itself and the possibility to be called to testify as an expert witness, will be discussed further later in this article. But, even here, in his/her area of expertise, to be effective the psychologist must keep in mind the difficulties of the legal process. Unlike other areas of psychology, where the findings of the psychologist will be readily accepted as the basis for treatment, it can be assumed in the context of a capital trial that mitigation evidence may be viewed skeptically, or even hostilely, by the fact finder and

will certainly be challenged by the prosecution. Because of this, it is imperative that findings of psychological mitigation be firmly supported by independent corroborating evidence. Even though, as an expert witness, the psychologist may not be subject to strict hearsay evidence rules, and may therefore be permitted to repeat the substance of corroborating interviews, jurors are skeptical of expert witnesses and are more likely to accept conclusions if they are supported by independent evidence, such as a corroborating source.

To summarize, the mitigation psychologist, to be effective, must be aware of the legal framework of capital litigation and the specific challenges it creates. His/her participation should begin early in the process and he/she should have an effective working relationship with the defense team. He/she should be particularly careful to protect his/her credibility by offering opinions that can be corroborated independently and withstand challenge.

MITIGATION: CASE EXAMPLES

In consulting in a death penalty case, the forensic psychologist will, hopefully, have consulted in numerous manslaughter and homicide cases, enabling the psychologist to recognize common patterns in individuals who are charged with serious felonies. For example, many times, despite overwhelming evidence to the contrary, a defendant will insist upon his or her innocence. When faced with a potential death penalty case, many individuals will be far less than rational or cooperative due to the fact that they have convinced themselves, and at times their families, of their innocence and the fact that there will never be a penalty trial. Specifically, in a well-known California mass murder case, *People v. Juan Corona* (6), family members, including the defendant's mother, insisted on his innocence, despite a conviction for 25 separate homicides.

Quite frequently, in fact, the emotional vicissitudes of family members can markedly influence the direction of pretrial and trial proceedings, despite the best efforts of trial counsel and/or the defendant. Consequently, when working as a consultant, a psychologist must be prepared to involve the defendant's family and to appreciate their anguish and perspective.

It has been the experience of these authors that defendants frequently refuse to cooperate in a mitigation investigation. As strenuous as the client's objections may be, it is the defense team's mandate to persevere and to work

through the client's resistance to preserve the defendant's life. In our experience, this task has frequently fallen upon the consulting forensic psychologist, an individual with the requisite clinical skills and experiences for dealing with such resistance.

A recent case of one of the authors is illustrative of this process. Although he allowed himself to be interviewed, the client refused to discuss issues related to the acceptance of a plea, claiming that he preferred to face the death penalty. In spite of overwhelming inculpatory evidence, his attorneys were able to obtain for him an offer of life in exchange for a guilty plea. To a large extent, the prosecution's willingness to offer the defendant an opportunity to plead was based upon information regarding the defendant's developmental years brought to the prosecution's attention during the forensic psychological evaluation. And, in spite of his attorney's assertions that a trial would not be in his best interest, the defendant steadfastly refused to consider the prosecution's offer. In an effort to overcome the obstacles erected by the client, the author accompanied the attorneys on a trip to the client's childhood home. The purpose of this trip was to interview the client's mother, who had been estranged from the client for twenty years. After efforts to overcome the mother's resistance to allowing herself to consider the fact that she even *had* a son, the team was able to arrange a flight so she could meet with the defendant. Shortly after the meeting between the client and his mother, he agreed to accept the plea offer.

More often, the involvement of family members is directed toward overcoming the client's objections to the evaluation itself. In another recent case, the influence of the client's father (who is also incarcerated and serving a life sentence) was employed to persuade the son to agree to the evaluation.

In a recent case, two of the authors were faced with the not-so-unusual scenario of a client who insists on going to trial in spite of incontrovertible evidence regarding his culpability in the crime, his voluntary confession, and an offer of life. His intransigence intensified with time and he continued to refuse all efforts to get him to reconsider. It was only through insight gained through psychological evaluation that the defendant was willing to accept the plea bargain. During his work with the defendant, the forensic psychologist became aware of events during the defendant's life that shaped the defendant's worldview and, ultimately, lead to his resistance to accepting a plea.

During his teenage years, the defendant had traveled and lived abroad despite his family's warnings. He failed in his attempt to achieve the desired level of independence and, ultimately, was imprisoned in a foreign country. In response, his parents severed all contact with him, rebuffed his efforts to reach out and explain what had occurred. Consequently, he had never been able to tell his side of the story.

Recognizing the influence of these early events in the defendant's life, his attorney was able to pragmatically construct conditions under which he was willing to accept the plea bargain and avoid the death penalty. His willingness to accept the plea was based upon providing him the opportunity to "tell my side of the story." By being allowed to testify at a degree of guilt hearing, the defendant was able to take the stand and accomplish (at least symbolically) what he had not been able to do twenty years earlier.

In another case, the same authors were faced with their client's similar resistance to accepting a plea in the face of what appeared to be overwhelming odds that he would be convicted and sentenced to death. Once again, an understanding of the defendant's history was developed during the forensic evaluation. The psychologist, with the defendant's permission, reviewed the letters that the defendant received from his mother. An analysis of these letters provided insight into a mutually shared belief between the defendant and his mother that the defendant would be better off dead. While loving and supportive on the surface, the mother's letters included consistent references to the peace and serenity they would experience once the defendant is dead.

Armed with this information, his attorneys were able to help their client identify the extent to which his mother was exercising control and influence over him and his decision as to whether to accept a plea bargain. . In a situation, similar to the preceding example, the psychologist learned of the defendant's history of having been rejected and rebuffed by his family throughout his life. Thus, even though the mother's letters contained subliminal wishes for her son's death, on the surface, the letters represented the comfort and acceptance that had, earlier in the defendant's life, been so elusive.

In a case that was taken to trial, the defendant had alienated his family to the point that, by the time of his capital trial and, at the age of twenty, they refused to attend court, let alone participate in the penalty phase. In that circumstance the only witness to tell the defendant's story was the mitigation

psychologist. Using that information, counsel was able to obtain a hung jury, and a resultant life sentence.

In these few examples the reader can recognize the importance of a thorough mitigation investigation and a close working relationship between a consulting mitigation psychologist and the defense team.

A full discussion of the methodology involved in conducting a mitigation evaluation in death penalty cases goes beyond the scope of this article. The areas of focus in such an investigation, however, will be summarized.

a) Clinical evaluation: Clinical interviewing and psychological testing are directed toward an investigation and exploration of psychological syndromes, neurological impairment, psychosocial/familial issues and substance abuse history. An in-depth investigation of school, work, and medical and mental health records is an essential component of this stage of the evaluation.

b) Social and cultural factors: The forensic psychologist investigates the social and cultural factors that may have impacted upon the defendant's development, in general, and upon his involvement in the offense for which he is being sentenced, in particular. Examples of relevant factors include poverty, institutionalization, race, age, foreign culture, military experience, gang involvement, and sexual identity.

c) Prison experience: Issues related to the defendant's prison experience must also be explored. These variables include the defendant's adaptation to prison life, his respect for corrections officers, his assistance to other inmates and any other specific accomplishments evidenced during his or her incarceration.

d) Factors related to the offense, itself: Forensic mental health evaluators should also address the extent to which lingering doubt may exist, in spite of the jury's verdict. In addition, issues regarding the defendant's intention at the time of the crime, moral justification and role in the offense should be addressed.

e) The defendant's character: The forensic psychologist conducting a mitigation evaluation should attempt to convey issues related to the defendant's lack of criminal history, cooperation with

authorities, remorse and rehabilitation. In addition, information regarding the aberrant nature of the defendant's offense-related behavior should be addressed.

f) Victim-related variables: The extent to which the offense was provoked by the victim, if any, and/or the extent to which the victim was a participant in the offense, should be addressed. Whether or not the victim's family supports a life sentence should also be addressed.

It is very helpful when consulting in capital cases to gather information which is relevant to both the guilt phase of the trial and the penalty phase, the latter being so-called mitigating evidence. This would include information about the defendant's background and personality that hopefully will offer some insight into the individual's past behavior, and place this particular criminal act into the larger context. To that end, when pursuing both of these legal phases simultaneously, it is necessary to secure the following information:

- A complete set of the crime reports concerning the offense or offenses charged
- Both state and federal criminal records
- Juvenile criminal history, if it exists
- A complete set of the offense reports for each and every arrest entry in the defendant's adult or juvenile criminal records
- Court records of convictions for every criminal adjudication. These should include psychological evaluations (if they are not under seal)
- If possible, district attorney case files on previously filed cases against the defendant
- Interview the defendant's family of origin, friends, employers, and co-workers
- School records, including any psychological testing results
- Military records
- All psychological records, keeping in mind that there could be both outpatient and inpatient records

- All court-appointed examination records, such as those which might pertain to issues of competency or insanity
- All jail medical and psychiatric treatment records
- Jail custody logs, if possible
- All prison records, if there have been previous commitments to a department of corrections

While this sounds like a very laborious and costly undertaking, the capital case is the most serious type of litigation that occurs in the United States. Furthermore, while in the past, states such as Virginia and Alabama set financial limits for indigent defense trials amounting to only a few hundred dollars, this can no longer be accepted and any attempts to impose arbitrary limits should be appealed immediately.

Various methods are available in terms of presenting the defendant's life history, for example, the defense team might consider emphasizing the cumulative impact of risk factors, describing or interpreting significant events. In addition, a developmental context can be utilized, emphasizing the so-called formative years including specific dysfunctions, whether psychological, social, or biological.

The forensic psychological examination should, at the least, focus on the most commonly cited predisposing factors for juvenile and adult delinquency, including:

- Low IQ and learning disabilities
- ADHD (attention deficit hyperactivity disorder)
- Criminal modeling by a parent
- Peer rejection
- Childhood aggression
- Marital separation and conflict
- Child abuse
- History of mental illness in the family
- Parental absence or neglect

Biological factors, which are typically referred to as pre, peri, and postnatal variables, are often associated with violent behavior, and should be considered if relevant including:

- Prenatal (0 to 7 months gestation)
  Genetic factors
  Malnutrition
  Teratogens (illicit substances, alcohol, nicotine)
  Chronic psychological or social stress
- Perinatal (7 months gestation to one month after birth)
  Premature births
  Low birth weight
  Delivery complications such as high forceps delivery, cord around the neck, etc.
- Postnatal (one month to 24 months)
  Chronic nutritional deficiencies
  Head trauma and loss of consciousness
  Serious accidents

The following familial factors should be considered:

- Significant mental illness in the family of origin
- Criminality on the part of either parent
- Parental substance abuse
- Breaks in caregiving, lack of consistent caregiving during formative years
- Parental discord
- Child abuse
- Maternal depression
- Possible rejection

Environmental factors, which should be considered, are the following:

- Inadequacy or unavailability of proper adult modeling
- Parental dependence upon licit or illicit substances as a coping mechanism
- Parental modeling of violence to resolve conflict
- Living below community economic standards
- Over-involvement in entertainment violence, which would point to parental disinterest or unavailability
- Exposure to environmental toxins

Reviewing and considering all of these possibilities is critical if one is to provide thorough expert testimony in capital cases. Furthermore, while much derision has been directed toward the "abuse excuse," this is hardly the purpose or the impression one would receive from considering the many variables presented by this approach.

Additionally, one must be cautious to only present that evidence which has been thoroughly verified as being credible and accurate. That is, one must keep in mind that various individuals may consciously or unconsciously introduce bias.

Looking at the development of the death penalty, it becomes clear that there remain serious problems with the structure of capital trials and the imposition of the death penalty. In trying to address some of these problems, the legal community has increasingly focused on the importance of the development and presentation of mitigation evidence. In this endeavor the efforts of forensic psychologists can be of great importance.

REFERENCES

1. Lockett v. Ohio, 438 U.S. 536 (1978)
2. Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases. American Bar Association, 2003
3. Wiggins v. Smith, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed. 2d 471 (2003)
4. Furman v. Georgia, 408 U.S. 238 (1972)
5. Atkins v. Virginia, 536 U.S. 304 (2002)
6. People v. Juan Corona, 80 CA3d 684 (1978)

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