

## Mitigating Sexual Homicide in Capital Murder Cases

By John Matthew Fabian

While the death penalty is the most significant and extraordinary criminal punishment, the preparation of a capital case can also be the most essential and laborious professional undertaking that a criminal defense lawyer and capital defense team can embark upon. This article's focus is on the preparation of perhaps the most difficult, but yet richest type of death penalty mitigation case, that of sexual homicide. The author will briefly describe the investigation and evaluation of capital mitigation in sexual homicide cases from a forensic psychological and neuropsychological perspective.

### Against All Odds

In every state that has the death penalty, a defendant who commits a murder contemporaneous to a rape may be eligible for the death penalty.<sup>1</sup> Prosecutors have broad discretion in determining whether to seek the death penalty in a particular case, but the emotional outrage that sexual homicide evokes makes it more susceptible to being considered as an appropriate death penalty case.

The percentage of men on death row for rape-murder is remarkably high in light of the percentage of murders that are categorized as rape-murders statewide and nationally. Legal research informs us that defendant's convicted of rape-murder offenses are disproportionately populated on death row.<sup>2</sup> Nationally, sexual assault murders represent about only 1.5 percent of all murders with known circumstances. In one state studied (Ohio), less than 1 percent of the murders were rape-murders, yet 12 percent of those persons on death row had been convicted of rape-murder. Interestingly, 55 percent of those inmates had stranger victims. In Florida, while less than 1 percent of murders can be characterized as sexual in nature, 20 percent of the state's death row inmates have been convicted of rape-murder.

Due to the emotionally laden elements of a sexual homicide, it is not surprising that prosecutors seek the death penalty disproportionately as compared to other types of murder. In a sexual murder capital case, the prosecution often will get two opportunities (guilt phase and mitigation phase) to provide the jury with the often heinous facts of the crimes. In fact, some of the aggravating factors at sentencing as in the State of Florida, allow the jury to find aggravating circumstance that the murder was "heinous, atrocious, or cruel."<sup>3</sup> Rape-murder may readily fit this description either because of the manner of death or the facts of the rape.

Given the focus of this article, sexual homicide cases manifest emotional responses from the jury, especially when the crime is especially egregious and heinous. Often the reprehensible and abhorrent nature of the crime will be communicated to the jury through multiple photos of the crime scene. While a critical piece of the state's trial objectives at both phases is to repetitively communicate the heinousness

of the crime(s) through testimony to and dialogue with the jury, the defense must combat this information with a rich and meaningful mitigation investigation.

### The Purpose of Mitigation

Black's Law Dictionary (5 Ed. 1979) 903 defines "mitigating circumstances" as those that "do not constitute a justification or excuse of the offense in question but which, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability (blameworthiness/deathworthiness). Mitigation may serve to lessen the penalty in light of the circumstances and ideally to assist in explaining the etiology of the homicidal act, not to condone the offense or offer excuses for the crime.

When considering various objectives that mitigation at capital sentencing can serve, this author emphasizes the following elements<sup>4</sup>:

- Reveals the defendant as a human being, humanizes the defendant, and separates his character and background from his crime;
- Explains the defendant's homicidal acts and prior violent/criminal behavior in a humanly understandable light given his past history, unique characteristics affecting his development, and exposure to heightened risk factors and deficits in protective/mediating factors;
- Explains mental illness and neurological deficits and their nexus with the homicide when these impairments are not enough to constitute a defense at trial (i.e., diminished capacity and insanity); and
- Provides evidence of extenuating circumstances surrounding the offense; informs the jury about empirically relevant factors associated with specific types of homicidal acts (i.e., intimate partner homicide, battered-child syndrome relevant to a parricide case, battered-women's syndrome, sexual homicide).

### Mitigating Sexual Homicide

#### Understanding Sexual Homicide

When considering the investigation and forensic mental health evaluation of a capital sexual homicide case, the defense team must consider that they are not only dealing with a defendant charged with murder, but also one who has been charged with a sex offense.

Sexual murder and sexual homicide is a rare and unique type of violent act. In fact, less than 1 percent of homicides in the United States are sexually motivated homicides.<sup>5</sup> In the U.S., about 60 percent of serial murderers are sexual murderers. Serial sexual murderers account for about 2 percent of all sexual murderers and they account for 20 percent of the victims in sexual homicide cases.<sup>6</sup>

Sexual homicide is the intentional killing of a person(s) during which there is sexual assaultive behavior before, during, or after the criminal homicide. Sexual homicide involves a sexual element, activity, and behavior that serves as the basis for the sequence of acts leading to death.<sup>7</sup>

Sexual murder is a murder which is accompanied by an attempted and/or a completed sexual assault and or mutilation of sexual organs, or when the perpetrator left his victim in a nude position.

While it is beyond the scope and length of this article to thoroughly discuss the behavioral nature and contexts of sexual homicides, victim types include the following:

- Adult women
- Elderly women
- Adult men
- Children

Various motives have been described in the research including anger, power, control, sexual release, sexually deviant fantasy, sexually triggered aggressive dyscontrol, sexually triggered neuropsychological dysfunction, emotional loneliness, and uncontrollable sex drive.<sup>8</sup>

Some sexual homicides are planned purposefully and organized by the offender and others are impulsive and rageful during a sexual encounter, at times precipitated by substance intoxication. Obviously, the nature of premeditation versus spontaneity in a sexual homicide will have ramifications in how it is indicted by the state. In some cases, when requested by the defense attorney(s), the forensic mental health expert will investigate in detail the offender's thoughts, feelings, and motives pertaining to his offenses.

## Early Trauma, Damaged/Disorganized Attachment and Developmental Failure

Both the literature and this author's forensic practice reveal that many sexual homicide offenders have extremely disadvantaged and traumatized childhoods and perhaps have more disturbed backgrounds than other homicidal defendants. The distressed and traumatic backgrounds of these offenders present themselves as a breeding grounds for developmental psychopathology (dysfunction and behavioral maladaptation resulting from the complex interplay of multiple psychological, social, and biological processes).

Most common in sexual homicide offenders' backgrounds is a problematic family environment which has been characterized in the literature as leading to various negative outcomes.<sup>9</sup> Common in the background of sexual murder defendants include:

- Neglect, abuse, and trauma;
- Disorganized attachment with deviant primary caregivers;
- Developmental failure and developmental psychopathology; and
- Interpersonal failure, emotional loneliness and social isolation.

More likely than not, the sexual murder cases this author has evaluated include a history of neglect and/or abuse that is so extreme that county authorities, i.e., Department of Children and Family Services (DCFS), have investigated the family for neglect and abuse. Many sex offenders and sexual homicide perpetrators have suffered from a developmental breakdown in their childhood which is characterized by damaged and disorganized attachment with their primary

parental caregivers.<sup>10</sup>

Early trauma and damaged attachment lay the foundation for severe negative life outcomes including developmental psychopathology not limited to mental illness, substance abuse, deficits in social relatedness, and criminality.<sup>11</sup> Early trauma experienced at the hands of caregivers has been demonstrated to negatively affect the child's ability to cope, regulate, and control their emotional experiences while providing an inadequate template for future intimate relationships.<sup>12</sup> Characterized by early and persistent deficits in regulating emotional states and inability to establish adequate relationships with peers, the child will often isolate himself from others.

Insecure attachment is a vulnerability factor for criminality in general, and given the difficulties sex offenders have in establishing close relationships and intimacy, it is arguably a particular etiological factor for sex offenders.<sup>13</sup> The failure of sex offenders to develop attachment bonds in childhood results in a failure to learn the interpersonal skills and self-confidence needed to achieve intimacy with other adults.

Disorganized attachment has been described as a hallmark for severe attachment insecurity between child and caregiver, and it is prevalent in the backgrounds of sex offenders.<sup>14</sup> Disorganized attachment behaviors are elicited when actions of the parent become traumatic, frightening, and threatening to the child or when the parent is perceived as being frightened, thus creating an unresolvable conflict for the child as the parent is simultaneously a source of distress and a source of comfort.

Disorganized attachment causes an inadequate or disrupted parent-child bond which creates an emotional vulnerability in the child. Mental illness, substance use, extreme stress, grief, emotional physical and sexual abuse on the part of the parent are implicated in disorganized attachment experiences with the child.

Individuals experiencing early adverse events such as impaired parental attachment, ineffective parenting, neglect, inconsistent discipline, and abuse are likely to exhibit distorted internal working models for relationships, particularly with respect to sex and aggression, resulting in poor social and self-regulation skills from an early age. As an adult, a lack of effective social and self-regulation skills makes it more probable that relationships with women will be met by rejection and result in lowered self-esteem, anger, and negative attitudes towards females. These negative emotions may fuel the intensity of sexual desires and the development of deviant sexual fantasies.

The concept of emotional loneliness is a likely consequence of difficulties in forming relationships with adults leading to hostile attitudes toward women and acceptance of violence to gain intimacy through sexual contact.<sup>15</sup>

Other family variables that detrimentally affect a child's early development and which are common in sexual homicide perpetrators including the following:

- Parental deviance (especially maternal prostitution, parental criminality, and parental substance abuse);

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- Family environments characterized by disruption, violence, and substance abuse;
- Offenders are often sexually or physically abused as children; and
- Offenders report an early reliance on sexualized coping processes.

A sexually deviant home environment, often marked by maternal prostitution and drug use in the home, as well as sexual abuse of the defendant, is common in the lives of sexual homicide offenders. Therefore, the early development of the offender is marked by deviant themes and victimization.

Ultimate early risk factors for sexually deviant behaviors and paraphilias in the sexual homicide perpetrator include:

- childhood emotional abuse;
- family dysfunction;
- childhood behavior problems; and
- childhood sexual abuse.

These offenders often have a history of integrating negative emotional states, feelings of inferiority, difficulties establishing interpersonal relationships, suicidal behaviors, and depression with externalizing behaviors such as compulsive sexual behaviors that sometimes manifest themselves into sexual paraphilias.

### Neuropsychological Evaluation

This author's examination of sexual homicide offenders has revealed that at minimum, most of these offenders have mild neurocognitive impairments, and often have significant neuropsychological deficits, especially in the areas of attention, memory, verbal IQ, and executive functioning.

This observation is consistent with some literature finding that 63 percent of sex killers failed neuropsychological tests, more than double the number in any other group (sexual aggressives, sadists, and general sex offenders).<sup>16</sup> The offenders also had more likelihood of failing grades and suffering from learning disabilities. The author reported these differences did not appear to have their roots in birth abnormalities, head injuries or neurological problems in early life. Specifically, sexual killers are said to have impairment within the right temporal lobe regions especially among sadists.<sup>17</sup>

Literature addressing structural neurological dysfunction in sexual murderers has focused on deficits in both the temporal and frontal lobe regions.<sup>18</sup> Researchers have found abnormal computed tomography scans in 40 percent of their "sex killer" group and 60 percent of their "sex aggressors" (usually right temporal horn dilation), significantly more frequent than their comparison group of nonsexual killers.<sup>19</sup> Empirical evidence has also revealed right temporal lobe abnormalities in sexually aggressive offenders.<sup>20</sup>

### Preparing the Sexual Homicide Capital Mitigation Investigation

The defense team representing, investigating, and evaluating a sexual homicide defendant must be prepared to go to great lengths to obtain relevant information into the psychosocial development of the offender. The team should attempt to obtain family social services records, parental criminal records, parental mental health and substance abuse records, offender criminal records and current and past police reports outlining sexual offense(s), and psychiatric and prison records.

The forensic psychologist evaluating the defendant should consider a neuropsychological assessment if indicated which might necessitate another expert depending on their training. Based on the defendant's background and neuropsychological assessment, the defense team should consider structural neuroimaging including PET scan, MRI, and fMRI.

While the defense lawyers may wish the forensic psychologist/neuropsychologist to discuss the nature of the sexual homicide with the jury during mitigation, the expert should consider describing the offense in light of the defendant's psychological, psychiatric, neuropsychological, and neurological impairments. The expert must communicate to the jury the defendant's developmental psychopathology as being conceptualized as the cumulative interplay of risk factors over time. Finally, the expert should consider statutory mitigating factors that are often present with sexual homicide offenders that may pertain to mental illness and its nexus to the homicide including the influence of extreme mental or emotional disturbance and impairments in the defendant's capacity to appreciate the criminality of his conduct and or to conform his conduct to the requirements of the law.<sup>21</sup> ★

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