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**ARTICLE:** **DEATH PENALTY MITIGATION AND THE ROLE OF THE FORENSIC PSYCHOLOGIST**

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**BIO:**

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**SUMMARY:**

... Since the death penalty is the ultimate punishment, the United States Supreme Court has emphasized specific rights of defendants facing capital punishment. ... Although future dangerousness as applied to statutes addressing aggravating factors is beyond the scope of this Article, defense counsel in mitigation cases may utilize the expert to inform the jury that capital defendants are not likely to violently re-offend when considering violence base rates within that population. ... If the expert believes there is a mental disorder that affects the defendant's behavior, which may lead them to a nexus between the disorder and the offense, then the defense team may consider pursuing specific psychological defenses such as diminished capacity and insanity. ... Occasionally it may be difficult for an expert to substantiate a mental retardation diagnosis, which can have profound effects on the outcome of a death penalty case. ... A psychologist expert should be appointed as a **death penalty mitigation** expert in all capital cases because he provides an opinion which thoroughly describes the defendant's background and associates psychiatric diagnoses and their bio-psychosocial and environmental etiological components to the homicide. ...

**TEXT:**

INTRODUCTION

Since the death penalty is the ultimate punishment, the United States Supreme Court has emphasized specific rights of defendants facing capital punishment. Defendants are entitled to expert opinions by professionals that address psychological factors in their life--mitigating factors that the jury should consider when deciding whether life in prison or death is more commensurate with the defendant's crime and character. The mental health and mitigation experts in these cases usually include psychologists, social workers and psychiatrists.

Courts often call upon forensic psychologists and psychiatrists to assist in addressing issues such as competency and sanity. In addition, they provide sexual predator and violence risk assessments/evaluations for various populations, as well as psychiatric mitigation and sentencing evaluations for non-capital cases. A psychologist offers testimony that addresses the mental status of the defendant at the time of the offense, psychological and etiological factors of the crime, and the likelihood of committing future crimes. Psychological reports assist the court with issues of culpability, amenability to treatment, likelihood of rehabilitation, violence risk and need for incapacitation. <sup>1</sup> Therefore, forensic evaluations associate one's mental status to a legal issue. <sup>2</sup>

In **death penalty mitigation** cases, the forensic psychologist offers expert assistance in exploring the defendant's life by interviewing the defendant and his family as well as reviewing any relevant records. The psychologist performs psychological testing and offers diagnostic impressions with the goal of describing the defendant in a sympathetic light to the jury and attempts to explain why he committed the crime. The objective is not to condone the offense, but rather to understand how it could have occurred in light of the defendant's background. In some states, future dangerousness may be considered as an aggravating factor that the jury considers when making their sentencing decision. A psychological expert may testify as an aggravation witness regarding the defendant's future dangerousness. <sup>3</sup> Although future dangerousness as applied to statutes addressing aggravating factors is beyond the scope of this Article, defense counsel in mitigation cases may utilize the expert to inform the jury that capital defendants are not likely to violently re-offend when considering violence base rates within that population. <sup>4</sup>

Forensic psychologists should be utilized more aggressively and more often in capital cases as **death penalty mitigation** experts since they are an integral component in describing the defendant's background and character, and providing some insight as to why he committed the offense. This information ultimately allows the jury to make more informed decisions during the sentencing phase. While defense counsel almost always obtain social worker mitigation specialists to assist with mitigation investigations during the guilt/innocence phase of the trial, they often fail to raise motions for mitigation assistance by an expert psychologist. Consequently, thorough preparation for the sentencing phase is often neglected and delayed.

Part I of this Article will explore United States Supreme Court cases addressing **death penalty mitigation**. Parts II and III will explore the purpose and strategy of mitigation

during the capital sentencing phase will also be explored in detail. Part IV of this Article will describe the role of the forensic psychologist in capital sentencing evaluations of individuals who are facing the death penalty. In addition, Part V will address problems associated with **death penalty mitigation**, focusing on mental health issues including Antisocial Personality Disorder (APD) and mental retardation, and their diagnostic dilemmas in capital sentencing. Because most capital defendants qualify for the diagnosis of APD, and psychologists performing **death penalty mitigation** must be able to explain the causation of the disorder, the etiological factors of APD will be described in detail.

## I. U.S. SUPREME COURT CASES ADDRESSING **DEATH PENALTY MITIGATION**

The capital defendant should have the opportunity to have an expert communicate to the jury his life story in order to better explain both how he may have been exposed to certain mental health issues and lifestyles, and how these circumstances led to his crime. In *Woodson v. North Carolina*,<sup>5</sup> the United States Supreme Court considered the issue of whether a mandatory death penalty statute was constitutional under the Eighth and Fourteenth Amendments.<sup>6</sup> *Woodson* was convicted of first-degree murder in an armed robbery case and automatically sentenced to death.<sup>7</sup> The Court held that the statute was unconstitutional because it failed to allow the sentencer to consider specific relevant aspects of the defendant's character, criminal record, and nature of the offense prior to the imposition of a death sentence.<sup>8</sup> The Court highlighted the importance of compassionate and mitigating factors that occur in human nature, and the exclusion of these elements treats all convicted capital offenders the same, rather than as unique individuals.<sup>9</sup> The Court reasoned that individualizing sentencing determinations in capital cases respected humanity under the principles of the Eighth Amendment.<sup>10</sup>

In *Lockett v. Ohio*,<sup>11</sup> the United States Supreme Court held that the Eighth and Fourteenth Amendments required the consideration of individualized mitigating factors for a jury to consider in a capital case.<sup>12</sup> In *Lockett*, the defendant was convicted by a jury of aggravated murder.<sup>13</sup> At the time the case was decided,

the Ohio death penalty statute required the trial judge to impose a death penalty sentence unless, after "considering the nature and circumstances of the offense" and Lockett's "history, character, and condition," he found by a preponderance of the evidence that (1) the victim had induced or facilitated the offense, (2) it was unlikely that Lockett would have committed the offense but for the fact that she "was under duress, coercion, or strong provocation," or (3) the offense was "primarily the product of [Lockett's] psychosis or mental deficiency."<sup>14</sup>

The ultimate issue for review by the Court was whether the Ohio death penalty statute was invalid because it "did not permit the sentencing judge to consider, as mitigating factors, [the defendant's] character, prior record, age, lack of specific intent to cause death, and her relatively minor part in the crime."<sup>15</sup> Upon review of the statute and the

various reports, the trial judge determined that he was required to impose the death penalty because the offense was not primarily the product of psychosis or mental deficiency.<sup>16</sup> The Court held that

the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, 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>17</sup>

The Court recognized that the death penalty is essentially the ultimate punishment for an offense and therefore, requires the most serious scrutiny by the sentencer.<sup>18</sup> In addition, due to the serious nature of the penalty, the Court concluded that the jury must have the opportunity to review mitigating factors relevant to each individual's case.<sup>19</sup>

In *Eddings v. Oklahoma*,<sup>20</sup> the Court again addressed mitigating factors in death penalty cases. Eddings entered a "no contest" plea to one count of first-degree murder for the shooting death of a police officer committed when Eddings was sixteen years old.<sup>21</sup> The record indicated that the juvenile defendant shot the officer with a rifle he had stolen from his father before running away from home.<sup>22</sup> Eddings was sentenced to death.<sup>23</sup> The death penalty statute in Oklahoma enumerated seven specific aggravating circumstances for a jury to consider and also provided that the jury may consider "any mitigating circumstances."<sup>24</sup>

The Supreme Court decided that the lower courts erred in their rulings upholding Eddings' death sentence and that it was improper to consider the offender's age as the only mitigating factor in this case.<sup>25</sup> The majority adopted the holding in *Lockett*, pointing out that the death penalty is the most serious penalty and therefore the courts must consider each case individually and with as much information as possible to draw a fair conclusion as to the punishment.<sup>26</sup> The Court stated "the rule in *Lockett* followed from the earlier decisions of the Court and from the Court's insistence that capital punishment be imposed fairly, and with reasonable consistency, or not at all."<sup>27</sup> In rendering its decision that the lower courts should have considered all the mitigating factors which were presented, the Court stated, "just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence."<sup>28</sup> The Court stated that the determination of what weight to give specific mitigating factors could be made by the trial or appellate courts, but to give no weight to mitigating factors is impermissible.<sup>29</sup> In a footnote, the Court clearly and unquestionably voiced an opinion in this case stating, "that the Oklahoma death penalty statute permits the defendant to present evidence 'as to any mitigating circumstances' . . . *Lockett* requires the sentencer to listen."<sup>30</sup>

## II. DEFINITION AND PURPOSE OF **DEATH PENALTY MITIGATION**

It is important to correctly define mitigation. According to the Webster's Dictionary, mitigate means "to make or become milder, less severe, less rigorous, or less painful."<sup>31</sup>

A definition of mitigation expert is found in the definition of mitigation investigator in *State v. Langley*.<sup>32</sup> The court adopted the defendant's description of a mitigation investigator as "an individual who specializes in compiling potentially mitigating information about the accused in a capital case, . . . developed to aid capital defendants in presenting favorable evidence to the fact-finder in the penalty phase of the trial."<sup>33</sup> Therefore, in a capital case, the goal is to lessen the penalty from death, to a life sentence or life with or without parole. "Mitigation is not a defense to prosecution, nor an excuse for the crime, . . . rather it is evidence of a disability or condition which inspires compassion, but which offers neither justification, nor excuse for the capital crime."<sup>34</sup>

States incorporate different statutes that address mitigating factors in capital cases. The Ohio death penalty statute includes the following: (1) whether the victim induced or facilitated the crime, (2) whether the offender was under duress, coercion, or strong provocation, (3) whether the offender was mentally ill or defective and lacked substantial capacity to appreciate the criminality of the act or to conform his conduct to the requirements of the law, (4) youth of offender, (5) lack of significant prior criminal history, (6) offender was not the principal participant in the offense, (7) other relevant factors, nature and circumstances of the offense, history, character, and background of the offender.<sup>35</sup> The category of other relevant factors is a catch-all category in which most of the mitigation is usually concentrated, including childhood abuse and mental health problems.

When considering mitigation of sentencing in a capital case, mitigating factors usually concern mental health issues such as mental retardation, depression, schizophrenia, posttraumatic stress disorder (PTSD), and life circumstances such as physical, sexual and emotional abuse, neglect, abandonment in childhood, caregiver criminality, economic deprivation and hardship.

In capital cases, the mental health expert must describe the defendant as lacking sinister qualities. The humanization strategy is important because the jury must see the defendant as a human being, a breathing person, who has thoughts and feelings, and the mental health expert must illustrate the feelings and motivations that led up to the offense.<sup>36</sup> However, when there is no question of guilt it is often difficult to humanize the defendant and make the jury feel sympathetic to him, especially since the murder is often a heinous one and the defendant is markedly antisocial and/or psychopathic.<sup>37</sup>

It is not uncommon for juries to decide before the end of the guilt phase that the defendant should be put to death.<sup>38</sup> Juries fear that a similar violent offense might happen again, and the attorney(s) must prove that the defendant is not evil or born evil.<sup>39</sup> The jury has the power or authority to put the defendant to death; therefore, it is imperative that the jury understand the defendant and what led up to the murder.<sup>40</sup>

While the prosecution will attempt to place the defendant in a damning light by emphasizing that there is inherent evil within the defendant, the defense has to refute this and not present him as an angel, but as a human being.<sup>41</sup> The conception of taking another's life is difficult for juries to comprehend and it is easier for them to do so when

they believe the defendant is inherently evil.<sup>42</sup> Therefore, it is necessary to explain the crime and the defendant's life events that led up to the commission of the crime in order to explain why the offense took place.<sup>43</sup> The defense must offer some mitigating evidence to dispel the jury's conception of the inherently evil character of the defendant, including lack of remorse, implausibility of rehabilitation, and high risk of future violence.<sup>44</sup> The expert must link the defendant's behaviors and crime to his negative upbringing, social environment, or substance abuse and/or deprivation, since these issues assist in shaping and molding a person. However, a jury often believes otherwise and (they must be demonstrated how these issues and forces led the defendant to kill).<sup>45</sup>

"Unless one accepts the [prosecution's] theory of inherent evil, most capital cases will reveal an explanation for [defendant's] personality and actions."<sup>46</sup> One key is to mitigate the crime for the jury and have them understand and comprehend the crime.<sup>47</sup> The explanation of a defendant's life and what led up to the crime goes far beyond the psychologist's ultimate diagnosis.<sup>48</sup> There is more to mitigation evidence than presenting elements of a bad childhood such as sexual and physical abuse, as some of the jurors may have suffered from similar histories and have not committed such offenses.<sup>49</sup> The role of a psychologist is to tie all of the mitigating evidence together, including testimony of family, teachers, and friends, and to communicate to the fact-finder/jury how specific factors in the defendant's life formed the person who committed the murder.<sup>50</sup>

### III. DEFENSE STRATEGY IN **DEATH PENALTY MITIGATION**

There are two stages of a death penalty case (a bifurcated trial). The first stage is the trial phase. One can either be found guilty of the crime charged, a lesser included charge, or be found not guilty. If the defendant is found guilty of a murder eligible for the death penalty, he will then be subject to the sentencing phase. The jury who convicts the defendant must then, in a second stage, decide whether he deserves a life sentence or the death penalty. All defendants are entitled to have mitigation evidence presented at the sentencing phase.

The Constitution requires an individualized determination as to whether death is the appropriate penalty in any given case.<sup>51</sup> In making this determination, the fact-finder must consider aggravating circumstances of the offense, including the degree and nature of the culpability of the defendant, evidence of the defendant's life and personal characteristics, (including the environment in which he was raised), the effects of that environment on their behavior, contributions to society, and nature and limitations of the impairments which he suffers.<sup>52</sup> The defendant's life history is relevant at the penalty phase and the refusal of a court to admit or consider all evidence of mitigation is considered reversible error.<sup>53</sup> A solid investigation is crucial because capital cases must be won at the trial level since the opportunity for post conviction relief continues to narrow.<sup>54</sup>

Most defendants in death penalty cases are indigent and are therefore appointed attorneys who are compensated by the state. In addition, if mitigation specialists and psychologists are employed, the state usually compensates them. All mitigation information is obtained

by the defense team, often including the social worker, but is protected from the prosecution. Due to the time necessary to try a death penalty case and to discover evidence helpful in mitigation, attorneys often depend on a mitigation expert/investigator to assist in the sentencing phase. The expert psychologist is generally court appointed to aid the defense. Although appointed by the trial judge, the witness is partial to the defense and the purpose of mitigation.

Defense counsel tends to focus attention to two investigations during a capital case. First, the criminal investigation is conducted for preparation for trial. Second, there is a social investigation conducted for the mitigation and sentencing phase. Ideally, the defense attorney appoints a mitigation expert/investigator, usually a social worker, who gathers social records describing school, mental health, military, prison, medical and family history.<sup>55</sup> The same investigator often collects evidence for both the criminal investigation in preparation for the trial and mitigation data for the sentencing phase.<sup>56</sup> The mitigation evidence will include events of significant importance in the defendant's life from birth to the present.<sup>57</sup> The goal is to provide a detailed history of the defendant's life in order to assist the psychologist and counsel in better understanding the defendant, thus enabling the defense attorney to better explain the basis of the defendant's actions.<sup>58</sup> It is vital that the social worker collects a substantial amount of collateral information concerning the defendant's life, rather than only relying on the self-report of the defendant and his family.<sup>59</sup> Significant life events should be highlighted and considerations given whether they are evidence of mitigating factors.<sup>60</sup>

Ideally, a psychologist and social worker will be appointed to the case.

However, due to neglect by defense counsel, a psychologist's services often remain unused. Defense counsel should always consider appointing a mental health expert, usually a clinical/forensic psychologist, to assist in investigating such issues as mental retardation, mental disorder, substance abuse, and childhood abuse.

The illustration of defendant's positive features should be discussed as early as possible, and as often as possible throughout the trial.<sup>61</sup> Also, attorneys should attempt to introduce mental health issues, if they exist, early in the proceedings to influence the tone of the case and communicate their theory to the court and jury.<sup>62</sup> Attorneys may raise mental health issues such as competency and insanity to reveal mental health concerns.<sup>63</sup> The defendant's ability to understand the charges against him, the legal proceedings, and to assist with his defense are also important concerns.<sup>64</sup> In addition, the defendant's ability to make legal decisions and understand legal predicaments, such as plea bargains, is imperative since as many as eighty percent of death row inmates are offered and refuse pleas that would have resulted in life in prison.<sup>65</sup> Depending on the jurisdiction, the defendant's inability to know the wrongfulness of his acts at the time of the offense, and/or inability to refrain from committing his acts due to mental illness are pertinent to the question of sanity at the time of the offense.<sup>66</sup> Further, questions regarding specific intent or irresistible impulse should be explored by the expert.<sup>67</sup>

Mental illness can affect not only the defendants' feelings and behaviors, but also the

nature of the defendant's confession--whether or not he even confesses, and if he does, whether or not it was voluntary or coerced. <sup>68</sup> For example, a mentally deficient defendant may have been coerced into making a confession or statement, raising a challenge to the statement. <sup>69</sup> Further, he may not have understood his Miranda rights prior to making his confession. <sup>70</sup>

Additionally, in order to support a pattern of mental illness and violence, it is necessary to link mental health issues observed in any prior admissible convictions to those mental health issues experienced in the present case. <sup>71</sup>

It is essential that the mitigation specialist and the psychologist initiate and coordinate their activities early on, preferably months before the guilt phase commences in order to obtain all pertinent records. <sup>72</sup> They must work together, share information and consult with each other, in order to plot a strategy using the records and information gathered from the defendant and family members. <sup>73</sup> It is not uncommon for a psychologist to spend at least thirty hours on one case from the initial investigation through final testimony in front of a jury during the mitigation phase.

As part of a mitigation strategy, the defense counsel usually will work with the expert to develop "themes" of mitigation. <sup>74</sup> There should be a consideration of a cast of witnesses including an assessment of family members and friends of the defendant that would assist in communicating the chosen theme to the jury. A common theme in **death penalty mitigation** cases is showing that the defendant experienced a terribly abusive and dysfunctional childhood, in which some or all of his siblings had problems and no offspring in the family had much hope or chance of living a successful life. <sup>75</sup> Yet, despite his background, the defendant has some positive attributes worthy of allowing him to live. <sup>76</sup> If he has limited positive qualities and an extremely antisocial and violent background, the defense team may consider not presenting mitigation evidence. Typically, however, there are mitigation themes present and capital defendants usually have some redeeming or positive traits.

The mitigation expert psychologist should be conversant with both law and social science research regarding the issues of each case. This could include relevant topics such as Phencyclidine (PCP) use and how it relates to violence and drug induced psychosis, as well as Fetal Alcohol Syndrome and its effects on offspring. Also, the expert psychologist should have an understanding of behavioral sciences literature concerning the issue of jury selection, and be able to assist the defense counsel in jury selection strategy.

The attorney should direct the investigative work to ensure that the psychologist and social worker search for and find evidence that is consistent with the defense theory and mitigation. <sup>77</sup> Evidence must be credible in order for the defense to support a theory of mitigation, relying on a thorough life history investigation, lay witnesses and documents, and expert witness testimony, all of which must supercede a defendant's self-report. <sup>78</sup> The evidence must be comprehensive since the mental health data will be applied at every stage of litigation, including the meetings with the defendant, meetings by defense

counsel with opposing attorneys, and during motion hearings and court appearances.<sup>79</sup> Moreover, the evidence presented should be consistent, providing a unified account of the mitigation theory that includes facts and circumstances in the defendant's life and tells the same story at every level of litigation.<sup>80</sup> Finally, the evidence should be conveyed to the jury in a clear and comprehensible manner using simple and concise language.<sup>81</sup>

In essence, the use of an expert psychologist provides the defense team with two closing arguments: one through direct testimony, and a second through repetition in the attorney's closing arguments.<sup>82</sup> The defense attorney must work closely with the expert to learn more about the defendant and how to present the case, and at the same time prepare the expert for testimony.<sup>83</sup> Unfortunately, in many cases, the defense attorney concentrates too heavily on the guilt phase of the trial, allotting little time to communicate with the expert about mitigation strategy. There should be considerable effort from both the lawyer and the expert to communicate with each other so the defense counsel fully understands the diversity of mental health issues and diagnoses, how the expert(s) arrived at a diagnoses, and, finally, is able to determine how the mental illness or personality and emotional features influenced the defendant's behavior at the time of the offense.<sup>84</sup>

#### IV. THE FORENSIC PSYCHOLOGIST'S ROLE AS EXPERT

Traditionally, psychologists are trained in the field of psychological testing, diagnosis, assessment and treatment of mental disorders. A psychologist obtains information in at least three general areas regarding human functioning: (1) cognition, measuring intelligence level and how one understand things; (2) social functioning, measuring how one understands and responds appropriately to his environment and displays social judgment; and (3) emotional functioning and mood control, describing behavior and impulsivity including violence and substance use.<sup>85</sup> Forensic psychologists are usually clinical psychologists trained in evaluating offenders and preparing psychological reports addressing legal and psychological questions within the criminal justice system. Court evaluations generally include referral issues such as competency and sanity, sexual predator assessment, dangerousness, child custody evaluations, and mental/emotional distress pertaining to civil psychiatric issues.

Traditionally in insanity cases, psychologists perform interviews, administer psychological tests, offer a diagnosis, and discuss clinical impressions attempting to link the mental illness and the crime.<sup>86</sup> The forensic psychologist may determine if there is a mental disorder, assess whether it is treatable, assist in leading counsel to other theories (such as neuropsychological impairment or PTSD), and guide the attorney to other specialists that the attorney may not have considered.<sup>87</sup> If the expert believes there is a mental disorder that affects the defendant's behavior, which may lead them to a nexus between the disorder and the offense, then the defense team may consider pursuing specific psychological defenses such as diminished capacity and insanity.<sup>88</sup> On the other hand, if the forensic psychologist does not find any mental disease, the defense might have to focus on the sociological and environmental factors affecting the defendant at the time of the offense.<sup>89</sup>

The attorney may request the expert evaluate the defendant's competency to stand trial, determining whether or not the defendant understands his charges, the nature of the legal proceedings, and is able to assist with his defense.<sup>90</sup> For example, if the defendant has a history of psychotic features, he may experience a renewed onset of delusions and need psychiatric treatment, and perhaps competency restoration. The issue of the defendant's inability to waive Miranda rights because of mental illness or retardation is another concern.<sup>91</sup> The defendant's ability to intelligently, knowingly, and voluntarily offer a statement without a lawyer present may be in question, as he may not have understood his rights or may have even been coerced to make a statement due to his mental health issues, such as mental retardation.<sup>92</sup>

Further, given the fact that a death-qualified jury presents special concerns, jury selection is another important area where a psychological expert can be of assistance to the defense.<sup>93</sup> Ideally, psychologists would be active in the preparation for voir dire, including assisting with the assessment of each juror's background and experiences, values, attitudes about substance abuse and mental disorders, and whether they have been abused during childhood.<sup>94</sup> Each of these considerations help to shape how the juror will view the defendant, making the expert's input invaluable.

The expert's role(s) must be addressed even before he is hired.<sup>95</sup> Once retained, the expert needs to be clear about the absolute confidentiality of the evaluation and the specific referral question(s) to be addressed.<sup>96</sup> When defining the expert's role(s), the defendant's characteristics and mental health issues determine what type of mental health expertise is required.<sup>97</sup>

The forensic psychologist's role in death penalty cases is unique compared to their role in other psychological evaluations they routinely perform, although he might conduct some of the same evaluations in both type of cases. He generally performs a traditional standard psychological assessment and battery, intellectual tests measuring IQ, and personality tests, as well as conducting hours of clinical interviewing. By demonstrating how little the defendant knows or understands, how different the defendant is, how disadvantaged his educational upbringing was, or how little educational achievement was emphasized in his family, the defense attorney may effectively humanize the defendant, thus eliciting empathy from the jury.<sup>98</sup> The psychologist must tell the defendant's life story emphasizing that the defendant was "dealt a poor hand" in life, if appropriate.<sup>99</sup>

The psychologist can take on varied roles such as a consultant, "whose job it is just to help develop themes to integrate the first and second phases of the trial . . . and explain [to the jury] the connection between the client's behavior in the capital crime and his or her mental infirmities"<sup>100</sup> The psychologist consultant may be asked to review prior mental health evaluations, past psychiatric diagnoses and labels, and consider alternative explanations for the defendant's negative and antisocial behaviors.<sup>101</sup>

A psychologist may also act in a quasi-therapeutic capacity suggesting ways in which legal counsel may deal with the defendant, or assist with the defendant's behavior in the courtroom.<sup>102</sup> A common problem that the psychologist may have to address when

working in this capacity is if the defendant is an experienced legal consumer with a history of criminal offenses, he may lack trust in his counsel, believing that he is getting "railroaded." This lack of trust may filter down to the mitigation specialist and the psychologist, and the defendant may not want to cooperate at all in the process.

The psychologist must assess whether this distrust is due to the defendant's history of working with attorneys, or whether it is due to a persecutory delusional thought system. In the latter case, competency issues should be considered. In acting as a consultant, the psychologist must also assist the defense counsel in recognizing and minimizing the defendant's selfdestructive behavior,<sup>103</sup> such as refusing to consider a plea bargain. The defendant must be educated about the evidence and the likelihood of winning the case, as well as the consequences of taking a plea versus taking the case to trial.

Additionally, racial issues may cause a conflict between the defendant and his defense team. This problem arises, in particular, when the defendant is African-American, and his defense team is (generally) Caucasian. The defendant may believe his counsel is basking in the high profile case, concerned only with his own glory, without the defendant's best interests in mind. A psychologist must employ empathy and understanding, and establish rapport with the defendant.

If the defendant distrusts his defense team, it is unlikely that the defendant will provide pertinent or valid information for mitigation. This lack of cooperation makes preparing a defense strategy during the guilt phase extremely difficult. In other cases, the defendant may be a poor historian or his mental impairments may cause his inability to provide accurate information.<sup>104</sup>

The expert must be active in defining and explaining mental illness to the jury, and when applicable, associate the illness to the murder. Many judges and attorneys view mental illness as both potentially aggravating and mitigating evidence, a "double-edged sword."<sup>105</sup> Although mental illness will be described in more detail below regarding diagnostic dilemmas in mitigation, it is important to note that the expert must define the mental illness, explain its diagnostic properties and if possible associate the illness to the crime. One can suffer from a mental illness such as Bipolar Disorder, a mood disorder caused by a biochemical imbalance in the brain, marked by intense cycles of depression and mania, which may ultimately become psychotic and aggressive. The psychotic mania may have in part led to the homicide. The judge and/or jury may understand the link and consider it as mitigation, but may at the same time fear the defendant's propensity for future violence resulting from this disorder. The expert must attempt to negate this fear by suggesting the disorder can be medicated and treated, and cite that the violence was caused by an illness that responds to medication rather than a questionably untreatable criminal personality. The expert must also cite applicable research that indicates low rates of violence for defendants with specific mental illnesses, as well as low rates of violence within specific contexts, such as maximum security prisons.

On the part of the defense, it is important to dispel the jury's belief that if they sentence the defendant to anything less than death, he might violently re-offend in the future. This

can be accomplished by a psychological report to the jury regarding the research addressing the low rates of reoffending by capital defendants while incarcerated and while on parole.<sup>106</sup>

In all cases is it important for both mitigation specialist(s) and mental health expert(s) to question and assess family members and other individuals who played significant roles in the defendant's life.<sup>107</sup> Friends, family members, teachers, coaches and even prison officials can testify to facts, but are not able to explain to the jury about how the family background, education, and environmental conditions interplayed in the defendant's life and related to the crime.<sup>108</sup> It is the role of the expert to communicate this integration to the jury because of their expertise in assimilating the defendant's background, family history, and life circumstances with empirical data and diagnostic impressions.

Whether or not an expert provides mitigation testimony, the defendant needs to be presented in a positive and redeemable light, often through the testimony of family.<sup>109</sup> Ideally, the defendant needs to be represented in court by a family that loves and cares about him, and wants to see him alive because even behind bars he can offer some joy to their lives.<sup>110</sup> Some defendants may have family members that do not care for him and do not wish to have anything to do with him; they are unsupportive and unavailable to testify. The expert must know who these people are in order to avoid requesting their testimony at sentencing. The expert should assess how believable a family witness is and how likely they are to testify to the horrors of the family, in order to arouse sympathy within the jury.<sup>111</sup>

In some rare cases, there is little positive to say about the defendant: he is a violent psychopath with few redeeming qualities and may not have suffered from a horrendous childhood.<sup>112</sup> He may present himself as a psychopath or sociopath, possessing a severe criminal personality offering little or no remorse, and lacking a conscience. Although the expert might not testify in these cases since the prior antisocial acts may outweigh mitigating factors, he must interview and assess the credibility/believability of the family members who may offer testimony about the defendant's positive attributes.

Instead of testifying, a defendant is given the option of presenting an unsworn statement.<sup>113</sup> If he chooses to do so, the psychologist should evaluate and assess the statement in order to address the issues of remorse (or lack thereof), empathy for the family of the victim, or a continued expression of innocence.<sup>114</sup> Some defendants continue to maintain innocence despite strong evidence or a finding of guilt, and the psychologist is placed in a difficult position as he must avoid invalidating residual doubt by describing characteristics of the accused and linking them to the homicide.<sup>115</sup> The psychologist may deal with this by focusing on personality factors, character and environment as mitigating factors rather than the link between these factors and the crime.<sup>116</sup>

Obviously, the psychologist expert has many roles in a **death penalty mitigation** case. In addition to performing the traditional roles of a clinical/ forensic psychologist, the expert must be more thorough in every aspect of assessment and interview, obtaining more collateral information than any other type of psychological evaluation, and working with

a variety of parties.

Finally, he must attempt to explain the link between the defendant's character and background and the homicide, while preserving the defendant as a human being to a jury who has likely been exposed to horrific facts during the preceding trial phase.<sup>117</sup> Although most adults who suffered child abuse live productive lives and do not murder, most capital defendants share a history of abuse and/or neglect.<sup>118</sup> It is not an easy task for the psychologist to communicate this association between mitigation evidence and a brutal homicide to the jury, and there are often obstacles and pitfalls an expert faces in mitigation.

## V. PROBLEMS ASSOCIATED WITH DEATH PENALTY MITIGATION

There are some troublesome areas in **death penalty mitigation**.<sup>119</sup> Unfortunately, the mitigation phase is often down-played as the overworked defense counsel may share the defendant's "head in the sand" denial of the offense and as a result, there is often little concern or preparation for the second phase.<sup>120</sup> Also, certain mitigating factors and circumstances may be viewed by judges and jurors as aggravating and thus have the opposite result, ultimately to the detriment of the defendant's future and hope for a favorable outcome.<sup>121</sup> Specifically, mental illness, substance abuse, and having a deprived and abusive childhood, factors that would appear to be mitigating and arising sympathy, may be viewed as aggravating and suggestive of future dangerousness.<sup>122</sup>

Deana Logan, psychologist and lawyer, identifies four general categories of defense evidence that assist in describing a capital defendant to the jury including: "good guy" evidence of good deeds and accomplishments; "positive prisoner" evidence of positive adjustment during past incarceration, or lack of a history of institutional violence; "crime-related" evidence of remorse and a confession for example; and "empathy" evidence that will elicit compassion from the jury towards the defendant, such as the defendant suffering from childhood abuse.<sup>123</sup> Logan argues that in some cases, presenting evidence of abuse, neglect, and mental disorders to create empathy in the jury might actually cause them worry and concern that the defendant is an "irreparable monster."<sup>124</sup>

She also believes that in some cases, substance abuse may be an aggravating factor since the defendant may have not only used drugs but trafficked them to make money or finance their addiction.<sup>125</sup> Drugs and drug dealers are considered to have a negative role in society, and the jury might want to aid the war on drugs by sentencing the defendant to death.<sup>126</sup>

Despite this occasional "improper consideration"<sup>127</sup> by the jury, in many circumstances evidence of abuse, neglect, mental disorders, and substance abuse are considered to be mitigating factors. In the area of mental disorders, organic and biological problems, such as mental retardation and brain damage, are more likely to be mitigating than non-organic disorders, such as personality disorders.<sup>128</sup> This is likely because they are seen as more reliable, and less likely to have been invented for a defense.<sup>129</sup> She suggests a strategy that displays a lack of potential for future dangerousness by describing how the crime was a

result of a unique set of events that are unlikely to recur in the future, and/or ways the defendant's propensity for violence can be controlled in a prison environment.<sup>130</sup>

Perhaps the most compelling and frustrating dilemma in the mitigation phase is the defendant with an antisocial background. Some defendants have committed prior violent offenses as a juvenile and an adult, and have been incarcerated for long periods of time even before the present offense.

The problem is that a jury may see a pattern of antisocial behavior leading to the homicide and may not care to keep the defendant alive, as they are horrified by his offenses and concerned about his risk of re-offending. Despite his unfortunate upbringing, they may believe they have a duty to impose the ultimate punishment to protect society and/or feel disdain towards the defendant and want punishment for his past misdeeds.

Capital defendants often have been raised in abusive environments, lived in foster homes, had one or no parents in their lives, were physically, sexually, and emotionally abused as children and lived in poor and violent neighborhoods where antisocial behavior is common.<sup>131</sup> They may have an antisocial history that is developmental, and often violent and diverse.<sup>132</sup> Much less frequently, the defendant may have been raised by two parents or grandparents, was not deprived, and the file may be devoid of any record of mental health issues or emotional or economic deprivation. Occasionally, the defendant may have prior violent charges as a juvenile or an adult. He may offer no responsibility for the offense, deny guilt, or even boast about the offense, showing no remorse or empathy. In these latter cases, the defense team may consider not presenting any mitigating evidence by the expert. However, even if there are prior bad acts, questionable remorse, and denial of the offense, there are almost always mitigating factors and some redeemable qualities of the defendant to highlight.

In my experience as an expert, defendants have usually been African-American, abused and/or neglected as children, had multiple caregivers who were either family members or not, had no consistent male role model or never met their father, were exposed to violence within the family and in the community, grew up in poor areas, were lower functioning in intelligence, had abused drugs or alcohol as an adolescent or adult, had committed violent offenses as a juvenile, often had a prior adult criminal record, and ultimately qualified for Antisocial Personality Disorder (APD).<sup>133</sup>

While some experts argue that mitigation evidence and testimony is just that, facts that should be considered to lessen the penalty, it is difficult for the expert to both perform a detailed evaluation and attempt to avoid questions on cross-examination about prior antisocial behavior of the defendant as a juvenile and adult. It is imperative that the expert not 'tailor make' his evaluations; rather, he should testify about the poor upbringing and abuse and prior antisocial acts, and explain the association between the two. The attorney should confront the antisocial behavior and APD during direct examination of the expert and have the expert explain the causation of the behaviors and symptoms. Often, prior offenses are linked to an abusive childhood or exposure to

chronic societal and family violence that need to be described because it likely explains the etiology of violence and the homicide.

#### A. Antisocial Personality Disorder

Antisocial Personality Disorder (APD) is often present in capital cases, and is viewed as a pejorative factor, representing the defendant's dangerousness to society, past violent offenses, and lack of remorse, ultimately presenting a problem for psychologist experts.<sup>134</sup>

Defense lawyers and psychological experts are concerned with APD in **death penalty mitigation** because of its derogatory connotations. The jury may equate the term to other pejorative words such as a predator, psychopath, and sociopath, who is likely to violently re-offend. On the other hand, one can use the APD diagnosis to describe the person's deprived background as previously mentioned, and/or his ability to make an adjustment to prison without serious violent rule infractions. Further, some argue that APD is a mental disorder that can be treated with different therapy interventions.

In my limited experience in **death penalty mitigation**, every defendant I have evaluated qualified for the disorder. The expert must describe the symptoms of APD to the jury, and must describe the causative factors, outlined below, including issues beyond the defendant's control that occurred during childhood, such as parental neglect and abuse.<sup>135</sup> The expert should attempt to relate those etiological factors to the homicide so the jury has a better understanding of why the murder may have occurred.<sup>136</sup> The flaws of the diagnosis, outlined below, must be addressed, and the prevalence of the diagnosis in prison populations must be highlighted, which assists in normalizing the defendant amongst his incarcerated peers.<sup>137</sup> While testifying, the expert should acknowledge the diagnosis of APD, but attempt to civilize the defendant and describe his behaviors and their causes while limiting the use of the actual words Antisocial Personality Disorder as they are pejorative in nature.<sup>138</sup> In states that require the expert to address future dangerousness as an aggravating factor, the APD diagnosis can be utilized along with psychopathy to aid in the assessment of risk for future violence.<sup>139</sup>

Antisocial Personality Disorder is a mental disorder listed in the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV), focusing on criminal behavior and personality characteristics.<sup>140</sup> The diagnosis includes a requirement of prior juvenile antisocial history (Conduct Disorder, or CD) as well as symptoms including repeated acts of violence and aggression, irresponsibility, lack of remorse, and reckless disregard for self and others.<sup>141</sup> Individuals with APD are often described as choosing to break the law, seeking stimulation and thrill, experiencing difficulties delaying gratification for their behaviors, displaying impulsiveness, showing poor judgment, failing to consider consequences for their behaviors, and exhibiting selfishness by not caring how their behaviors affect others.<sup>142</sup>

#### B. Etiology of Antisocial Personality Disorder

It cannot be overstated how important it is for the expert to be prepared to describe to the

jury how the particular defendant chose a life of crime and ultimately took another person's life. Therefore, it is important to discuss the etiology of APD, psychopathy (severe criminal personality) and violence. There are many etiological theories of severe antisocial behavior and it is safe to say that no one factor is completely causative. Research indicates that antisocial behavior is caused by a combination of biological, psychological, and social phenomenon such as negative parenting practices, peer influence, genetics and heredity, neurobiological factors, and socioeconomic/ environmental influences.<sup>143</sup> Each causative factor will be briefly addressed.

Family factors, primarily parenting practices, have been found to have a profound impact on the socialization of youth and the development of Conduct Disorder (CD) and APD. Research on primary attachment indicates attachment to primary caregivers is necessary to produce a healthy and positively socialized human being on offspring.<sup>144</sup> Disruptions in secure, continuous and nurturing/caregiving have lasting effects in offspring, often leading a child to not internalize or anticipate punishment and seek out other attachments such as delinquent peers.<sup>145</sup> An absence of external structure and discipline can lead to inadequate self-control and predisposes some children to violence.<sup>146</sup> Further, research indicates that inconsistent discipline, harsh, punitive and lax parental disciplinary practices, abuse and neglect, and lack of supervision are associated with violence in youth as well as later antisocial practices in adulthood.<sup>147</sup> Some research indicates the "violence breeds violence" hypothesis, suggesting that youth who witness or experience violence within the home are more likely to engage in subsequent violent behavior.<sup>148</sup>

Poor family upbringing marked by childhood abuse and neglect has been found to be common in families where the offspring later commit crimes, in adolescence and adulthood.<sup>149</sup> Widom studied childhood abuse and later psychopathology and found that abused and neglected adult felons were more likely to make a suicide attempt and to be diagnosed with APD than a non-abuse/neglect group of inmates.<sup>150</sup> She theorized that abuse breeds abuse, and there is a cycle of violence that transcends generations.<sup>151</sup> She has found that although there are scant studies on backgrounds of homicidal offenders, a significant amount of these types of offenders suffered from brutal abuse in childhood and there is said to be some relationship between offenders who murder and abusive backgrounds.<sup>152</sup> Although Widom links abusive backgrounds as a risk factor to later criminal behavior, most abused children do not become criminals.<sup>153</sup> Physically abused children are more likely to become violent than neglected, physically abused/neglected, and sexually abused groups.<sup>154</sup>

McCord,<sup>155</sup> studied the backgrounds of adult offenders and found: twenty percent of the men who had experienced consistently punitive physical punishments or neglect, committed crimes as a juvenile; fifty percent of rejected children committed crimes; and eleven percent of loved children committed crimes.<sup>156</sup> Among the ninety-seven neglected or abused children; forty-four had become criminals, alcoholics, mentally ill or had died before age thirty-five, while fiftythree showed none of these issues.<sup>157</sup>

Studies have found that parental practices leading to childhood behavioral problems and delinquency included poor parental supervision and attitudes, and lack of involvement in

their children's lives. <sup>158</sup> Other researchers have found that inconsistent discipline including erratic, harsh and punitive parenting practices coupled with lax discipline is related to juvenile offending. <sup>159</sup> Finally, Bandura presents a social learning theory of behavior and aggression, theorizing that violence is modeled: young children are exposed to violence, often by parents, and they model or copy this behavior. <sup>160</sup>

Lykken distinguishes psychopaths from sociopaths, both severely antisocial personalities, and indicates that a sociopath is one who grows up unsocialized primarily because of environmental deficits whereas the psychopath is affected by genetic traits. <sup>161</sup> Lykken focuses on deficits in the family including parental mismanagement and poor parental competency and believes that youths who are poorly socialized in the home tend to do worse at school, are rejected by peers, and turn toward negative peers. <sup>162</sup> He believes that unsocialized people who lack adequate parenting and development of proper social skills are likely to become incompetent and poor parents themselves. <sup>163</sup> In addition, Lykken cites that many youths are at risk for psychopathy and sociopathy if reared without fathers. <sup>164</sup> Lykken also has theorized that there is often a history of "poor fear conditioning" or "hypoarousal to negative stimuli;" as was indicated by psychopaths experiencing poor anxiety responses, and displaying smaller electrodermal responses to an unconditioned stimulus of an electric shock. <sup>165</sup> He found that psychopaths do not have a heightened arousal system, but rather show a lack of an emotional response when shocked. <sup>166</sup>

The psychoanalytic perspective of crime involves issues of failure of object constancy, superego deficits, and inadequate control of aggressive impulses. <sup>167</sup> Kernberg theorizes that antisocial personality stems from the fundamental features of narcissistic personality and irregular superego functioning, resulting in a syndrome Kernber calls "'malignant narcissism,' a personality pattern characterized by a combination of (1) a narcissistic personality disorder; (2) antisocial behavior; (3) ego-syntonic aggression or sadism directed either toward others or toward oneself, the latter producing a perverse sense of triumph in self-mutilation or suicide," and (4) a strong paranoid orientation." <sup>168</sup> Other researchers focused on the superego and hypothesized that the personality's superego fails to gain expression under the ego's unyielding controls, and subsequently the superego cannot adequately restrain the id's seduction when faced with instinctual temptations, resulting in free expression of impulses. <sup>169</sup>

Meloy has studied psychopaths, and while providing a bio-psychosocial model to psychopathy, and also believes that psychopaths lack attachment to a primary caregiver, usually the mother. <sup>170</sup> In addition, they never achieve separation-individuation due to the "failure of object constancy and a primary narcissistic attachment to the grandiose self structure." <sup>171</sup> Psychopaths use the gratification of aggression as the mode to relating to others, displaying cruel and sadistic behaviors, showing a lack of desire to morally justify their behavior, and experience paranoid ideation. <sup>172</sup>

The impact of the environment including socioeconomic deprivation, poverty, and the influence of delinquency in adolescence and antisocial peers in adulthood is vital to the understanding of crime and antisocial behavior. It is imperative for the expert to

understand the causes of delinquency, as most capital defendants were criminals in their youth.<sup>173</sup> Many defendants grow up in a poor environment and are introduced to a world in which survival often comes at any cost. They learn from older peers that gangs offer acceptance, affirmation, respect, a sense of identity, freedom, strength, and something to bond to and feel a part of.<sup>174</sup> These youth are often products of broken homes, are not supervised and parented adequately, are not invested in school, the community or organized activities, and turn to other similar delinquent youth.<sup>175</sup> They are quickly introduced to guns, gangs, and drugs and a cycle of violence advocating a survival of the fittest attitude on the streets. They may involve themselves in criminal and violent behavior to become initiated to the gang, and then may continue antisocial behavior to feed and support the gang, protect their membership, and avoid being terminated or even assaulted or killed by their fellow gang members.<sup>176</sup>

Research suggests both genetic and neurological components of APD.<sup>177</sup> The role of genetics and parental criminality as measured by twin and adoption studies have shown a genetic etiological component to crime.<sup>178</sup> Research has indicated that twice as many biological relatives as adoptive relatives of psychopathic adoptees were also labeled as psychopaths while no major environmental elements could be found to be significant contributors.<sup>179</sup> Current research suggests that the highest proportion of adoptees with a single conviction was found in a group with both biological and adoptive criminal parents, with the biological parent being more highly correlated.<sup>180</sup>

Adrian Raine has also studied this area and found a biological and genetic basis for crime.<sup>181</sup> He believes three neurotransmitters, serotonin, norepinephrine, and dopamine are related to crime.<sup>182</sup> Importantly, murderers are found to have lower glucose metabolism in both lateral and medial prefrontal cortex areas of the brain.<sup>183</sup>

Organicity and brain damage research has identified dysfunctions and lesions in the frontal and temporal lobe regions of the brain. Raine believes that while some evidence suggests frontal lobes are impaired in criminal and violent offender populations, there is no evidence of defects to specialized areas of the brain in psychopaths.<sup>184</sup> Neuropsychological theories of violence traditionally have a limited perspective of biological influences contributing to violence, and it is likely the interaction between social and neurological factors of crime together are more important in explaining crime than either one studied alone.<sup>185</sup> Raine offered data focusing on psychophysiological response systems that have been studied, including electrodermal, cardiovascular, and cortical arousal.<sup>186</sup> He further offered data suggesting delinquents and criminals suffer cognitive dysfunction marked by low intellectual functioning and poor classical conditioning (as measured by skin conductance activity), the latter leading to poor conscience development.<sup>187</sup>

Widiger and Lynan believe that psychopathic behavior may represent extreme elements of common personality traits focusing on a five-factor model including neuroticism (negative affectivity), extraversion (positive affectivity), openness to experience (unconventionality), antagonism versus agreeableness, and conscientiousness (constraint).<sup>188</sup>

Hans Eysenck developed a personality and crime theory focusing on three major dimensions of personality: psychoticism, extraversion, and neuroticism.<sup>189</sup> He believed that most of the individual variance in personality is due to genetic causes, suggesting heredity as a consideration, along with social and biological factors, in determining what makes a criminal.<sup>190</sup> He further adds a psychophysiology of crime factor, citing studies that focus on differences of testosterone and monoamine oxidase (MAO) in criminals.<sup>191</sup> He also cites that cortical arousal in criminals measured by slow EEG alpha is lower than in normal non-criminal individuals.<sup>192</sup> He theorizes that criminals lack a conscience due to a poor conditioning experience regarding punishment of right and wrong by parents.<sup>193</sup> More specifically, there are three possible reasons why there are differences among individuals in the level of socially approved behavior.<sup>194</sup> First, the conditioning experiences are simply missing.<sup>195</sup> Second, the wrong experiences are reinforced, such as parents encouraging their children to lie, fight, and steal.<sup>196</sup> Third, low arousal makes conditioning less likely to occur.<sup>197</sup> He believes that criminals are likely to be higher in psychoticism, demonstrating aggression, cold emotion, egocentric attitudes, are impersonal, impulsive, antisocial, unempathic, creative, and toughminded.<sup>198</sup> He also believes criminals are likely to be high in extraversion, displaying sociable, lively, active, assertive, sensationseeking, carefree, dominant, and venturesome attitudes and behaviors.<sup>199</sup> Finally, he believes that criminals are high in neuroticism displaying anxiety, depression, guilt feelings, low self-esteem, tension, irrationality, shyness, moodiness, and emotionality.<sup>200</sup> While he hypothesizes that neuroticism is a predictor of crime because it is related to drive properties, criminals exhibit significant psychoticism and extraversion, exhibiting low arousal which makes conditioning less likely to occur, thus causing problems combining these experiences into a properly developed functioning conscience.<sup>201</sup>

Blackburn, describes four profiles of psychopaths including the "(1) primary psychopath [described as] impulsive, aggressive, hostile, extraverted, self-confident, low to average anxiety, (2) secondary psychopaths [described as] hostile, impulsive, aggressive, socially anxious, withdrawn, moody, low in self-esteem, (3) controlled [psychopaths described as] defensive, controlled, sociable, non-anxious, and (4) inhibited [psychopaths described as] shy, withdrawn, controlled, moderately anxious, low self-esteem."<sup>202</sup>

There are many etiological theories of APD including a bio-psychosocial phenomenon encompassing parenting, peer influence, genetics and heredity, and neurobiological issues. The expert must have a grasp of the research on the causation of APD and be able to distinguish what etiological factors apply to specific defendants and be able to describe these factors in a clear, concise, and uncomplicated manner to the jury.

### C. APD as a Diagnostic Dilemma

While the diagnosis of APD can be a "kiss of death" to the defendant, the expert must explain the behaviors and discuss the causes of the disorder. Often, experts will conclude the defendant has APD due to the heinousness of the crime without carefully discerning if the client had CD as a youth and whether he qualifies for the APD criteria as an adult. It has been referred as "the lazy mental health professional's diagnosis."<sup>203</sup>

Some argue that an APD diagnosis by a defense expert results from a lack of investigation into the defendant's history.<sup>204</sup> It is important to obtain as much information as possible and not rely on any one source.<sup>205</sup> Gathering of data about the defendant's life is sometimes more important than the interview as some defendants may offer inconsistencies, act superficially, or even lie during the interview.<sup>206</sup>

I believe it is appropriate to deal with APD initially on direct examination and walk through the causation of the disorder with defense counsel so as not to surprise the jury with the pejorative diagnosis while on cross-examination with a hostile prosecutor. It is important to gain insight into the defendant's motivations for the instant offense and past criminal behavior, as well as provide context for the violent act. The APD diagnosis focuses only on behaviors and not motives or contexts in which the behaviors may have occurred. An offender's reasons for committing antisocial act(s) may make sense under certain circumstances, and due to these circumstances, there may be a pattern with types of crimes. APD must be distinguished from criminal behavior that is caused by other factors.<sup>207</sup>

On the other hand, a diagnosis of APD can help the defense's case as it informs the jury the defendant has an understandable disorder or illness and which may be treatable in prison.<sup>208</sup> APD can be explained in light of an important mitigating factor, the defendant's ability to make an adjustment to prison and lead a productive life there.<sup>209</sup>

Both the diagnoses of APD and CD, although appear straightforward, can become confusing and can lead to a fertile ground for hostile debate between opposing counsel. An expert should base his diagnostic impressions on thorough collateral investigation. The expert must follow the DSM-IV criteria specifically as they would with any other mental disorder. When diagnosing an individual, semantics often play important roles as the word "repeated" in the context of "repeated lying," "repeated physical fights or assaults," "repeated failure to sustain consistent work behavior," may have different meanings for various experts, which is important as there needs to be reliable data describing the defendant's behavior in order for there to be a reliable diagnosis of APD.<sup>210</sup> Similarly, in the diagnosis for CD, the words "repetitive" and "persistent" may attract problems during assessments, especially when the clinician must assess the defendant's past youthful behaviors based on record review and self-report.<sup>211</sup> "The antisocial behaviors [in both APD and CD] cause clinically significant impairment in social, academic, or occupational functioning."<sup>212</sup> In the APD diagnosis, if the criteria are not evident until an individual is over eighteen years of age, the criteria for APD cannot be met.<sup>213</sup> The issue of pervasiveness is important because APD requires evidence of traits that are pervasive and present themselves both frequently and in a wide range of contexts.<sup>214</sup> APD should not be diagnosed prior to age eighteen because of the diagnostic criteria of DSM-IV,<sup>215</sup> but also because many professionals believe that personalities are often not fully developed in adolescence, and problematic issues of adolescent behavior may be still lingering in adulthood. Young offenders may qualify for CD, but limitations of this diagnosis include a need to understand the context of the antisocial and violent behavior and consideration of whether the behaviors stem from another mental health issue or

diagnosis.<sup>216</sup>

There is a tendency to over-diagnose APD, and not all children with CD develop APD.<sup>217</sup> In addition to CD, differential diagnoses in childhood, including Attention Deficit Hyperactivity Disorder, Oppositional Defiant Disorder (ODD), Disruptive Behavior Disorder Not Otherwise Specified (NOS), as well as Posttraumatic Stress Disorder, Bipolar Disorder and depression, cause similar behaviors, aggression, and antiauthority attitudes in youth that may overlap with CD.<sup>218</sup> While symptoms of ODD can include a youth losing his/her temper, argumentative attitude, and increased levels of anger and resentment, Disruptive Behavior Disorder NOS is a category characterized by symptoms of CD and ODD that does not meet the full criteria for either disorder.<sup>219</sup> A youth's antisocial acts committed before he is fifteen that are caused by another mental disorder cannot lead to a diagnosis of CD or APD.<sup>220</sup> Many defendants have broken the law before age fifteen yet did not engage in repetitive antisocial conduct as either a youth or an adult. The psychologist must thoroughly investigate the defendant's history to explore mental health issues that may explain his conduct in order to avoid a diagnosis of CD.

In adulthood, some of the same diagnoses that mimic CD in childhood and adolescence may mimic APD; therefore, assessing for differential diagnoses is imperative.<sup>221</sup> Experts should be cautious of diagnosing APD if there is evidence of other mental disorders affecting the defendant's behaviors.<sup>222</sup> For example, individuals with Bipolar Disorder, manic phase, are more likely to be irresponsible, to not work, to be assaultive, to use illegal substances (including for self-medication), and to engage in reckless behavior.<sup>223</sup> One of the criteria of APD is that the antisocial acts do not occur exclusively during the course of Schizophrenia or a manic episode.<sup>224</sup> Borderline and narcissistic personality disorders are similar to APD and it may be difficult to distinguish the three personality disorders.<sup>225</sup> Antisocial Personality Disorder should not be diagnosed if the antisocial acts are caused more by organic brain disorders than by personality characteristics.<sup>226</sup> Antisocial acts that occur exclusively during an episode of another mental disorder, or are not typical of the individual's long-term functioning and behaviors may not be symptomatic of APD. Head injuries that may cause violence need to be considered and neuropsychological functioning should be assessed, if applicable.<sup>227</sup> It is important to obtain past records to determine if there were prior antisocial and violent acts before the head injury.

Similarly, individuals who use and abuse illegal substances often exhibit behaviors that mimic APD symptoms.<sup>228</sup> They may become so addicted to drugs that they rob, steal, con and manipulate to get their "fix."<sup>229</sup> Experts should be cautious when diagnosing both substance abuse or dependency and APD, as they must keep in mind that there must be signs of APD in childhood that persisted into adulthood.<sup>230</sup> Alcohol and drugs coupled with brain damage alter one's behavior and judgment, affecting the individual's ability to appreciate consequences, causing him to be more impulsive. Consequently, some antisocial conduct may be linked to use of substances. It may be difficult, if not impossible, to discern whether APD symptoms are causing the substance abuse behaviors or vice versa.

Cunningham and Reidy, forensic psychologists specializing in death penalty cases, addressed the weaknesses of the APD diagnosis in general and the aggravating consequence of a pejorative diagnosis at capital sentencing.<sup>231</sup> The authors first cite literature that indicates questionable reliability and validity of APD for forensic populations.<sup>232</sup> Next, they refer to the literature which addresses the fact that the APD diagnosis for the disorder listed in the DSM-III and DSM-III-R offer a multitude of possible symptom variations that result in an APD diagnosis, and as the total number of variations of symptoms increases, the likelihood that APD is a discrete diagnosis decreases.<sup>233</sup> Third, the DSM-IV criteria for APD do not weigh certain symptoms as being more important in the diagnosis than other symptoms, therefore there is no symptom weighting system.<sup>234</sup> Additionally, the word "pervasiveness [in the diagnosis] is not operationally defined."<sup>235</sup> The authors believe that while the interrater reliability of a diagnosis of APD between clinicians is poor, APD may not remain constant over time.<sup>236</sup>

The authors are concerned with diagnostic accuracy of APD, and note specifically the importance of considering the socioeconomic, cultural, historical, and social factors of an individual's environment.<sup>237</sup> Many youth and adults live in poor and impoverished areas, hallmarked by violence, drug trafficking and gang activities. Individuals living in such situations may exhibit similar behaviors that qualify as symptoms of APD, therefore the person may very well fit the diagnosis despite the widespread prevalence of such behaviors in his environment. One may ask how to distinguish anyone in such an environment from someone who truly has APD; if half of the young males in an inner city ghetto environment meet the criteria for APD, what is the diagnosis offering? Along these lines, these types of environments display horrific violence that causes stress, trauma, and often PTSD. A traumatized individual may be exhibiting symptoms of APD in an attempt to adapt to his environment.<sup>238</sup> Many individuals with APD who experience neglect or abuse as a child may exhibit antisocial behavior through coping behaviors centering around an immature personality structure.<sup>239</sup>

There may be different types of APD individuals who develop APD from different developmental pathways.<sup>240</sup> Cunningham and Reidy argue that APD is caused by a myriad of factors, which are different in every individual, and ". . . excessive focus on antisocial behavior while neglecting context and etiology may result in diagnostic inaccuracy."<sup>241</sup>

The prevalence of APD diagnoses in correctional institutions is an important issue to consider.<sup>242</sup> The diagnosis of APD by itself does little to describe an individual's prison behavior and predict recidivism rates; rather, it describes the offender as being similar to other prisoners.<sup>243</sup> As a result, APD cannot indicate whether an offender is more dangerous or more likely to recidivate than any other prisoner.<sup>244</sup> In fact, about 49 to 80% of offenders in medium security prisons qualify for APD, and the diagnosis may offer little in distinguishing offenders.<sup>245</sup> On the other hand, the DSM-IV is the "psychiatric bible" and disputing the APD criteria may leave the expert vulnerable on cross-examination.<sup>246</sup> Research on APD reveals that the diagnosis does not perform well in predicting ". . . criminality, institutional violence, and violent recidivism," issues that may be pertinent in capital sentencing.<sup>247</sup> Experts should be forthcoming by acknowledging the

defendant has the disorder so as not to appear biased or protective of the defendant, yet explain the shortcomings of the disorder and describe its causative factors. <sup>248</sup>

The expert should discuss the limitations of APD in order to meet the standards set in Daubert that will assist in informing the jury and preventing some pejorative misuse of the diagnosis. <sup>249</sup> The expert may also avoid the diagnosis entirely, and instead explain the behaviors, their etiology, using a "descriptive and explanatory approach," which may "provide the court with more useful information than is communicated by a flawed diagnostic label which has an associated misleading and prejudicial impact on the trier of fact." <sup>250</sup>

The relevancy of psychological assessment instruments that measure antisocial behavior is also important to consider. For example, Cunningham and Reidy question the use of the Hare Psychopathy Checklist-Revised (Hare PCL-R, an instrument that measures severe criminal personality or psychopathy) and the Minnesota Multiphasic Personality Inventory, 2nd Edition (MMPI-2, an objective personality and psychopathology inventory that offers information on antisocial beliefs and behaviors), as offering little evidence of differentiating APD defendants from other offenders. <sup>251</sup>

The most common misperception by a jury is that APD is the same as criminality, exhibiting a lack of conscience, propensity for violence, and untreatability, leaving little room for consideration of a punishment other than the death penalty. <sup>252</sup> If diagnosing an offender with APD, the expert must explain the diagnostic flaws to the jury. <sup>253</sup> The behavioral symptoms of the disorder must be explained based on their etiological factors even if the disorder is never mentioned through testimony. <sup>254</sup>

Finally, the harm of an APD diagnosis can be dispelled, by detailing the low rates of violence of capital defendants, while incarcerated and while on parole. <sup>255</sup> Life-with/ life-without parole, and death row defendants have been found to have low base rates of violence. <sup>256</sup> Base rates are the actual rates of offending within a certain population over a period of time. <sup>257</sup> Capital defendants have been found to be at a minimal risk for violence within institutions primarily because of factors including age burnout, higher security measures, some are hoping for overturns on appeal and do not want to risk antisocial conduct.

A diagnosis of APD is common in death penalty cases as the defendant often has a history of prior juvenile and adult offenses. The expert must describe the causation of antisocial conduct from a socio-economic and biopsychosocial perspective and must communicate to the jury that APD is not synonymous with evil and future dangerousness. Since APD is encountered in most death penalty cases, often as the primary diagnosis, it is imperative for the expert to divert attention away from the phrase APD and focus on sympathetic causative factors.

#### D. Mental Retardation

Another mental disorder that can cause conflict and confusion to jurors, attorneys, judges

and experts is mental retardation. Mentally retarded individuals are not rare in the criminal justice system or on death row; in fact, there is substantial data indicating that death row inmates are often intellectually impaired.<sup>258</sup> The assessment of mental retardation is relevant to legal issues throughout a court case including competency to waive Miranda rights, competency to stand trial and to plead guilty, insanity and diminished capacity.<sup>259</sup> Occasionally it may be difficult for an expert to substantiate a mental retardation diagnosis, which can have profound effects on the outcome of a death penalty case.<sup>260</sup>

The issue of mental retardation with regards to the death penalty has been addressed by the U.S. Supreme Court. In *Penry v. Lynaugh*,<sup>261</sup> the Court held that the defendant's Eighth Amendment rights were violated because his jury was not instructed adequately regarding mitigating evidence of his mental impairments, mental retardation, and abuse he endured as a child.<sup>262</sup> The Court held that the Eighth Amendment does not prohibit the execution of the mentally retarded.<sup>263</sup> More recently, however, the Court considered *Atkins v. Virginia*,<sup>264</sup> and held that executing the mentally retarded was in violation of the Eighth Amendment of the Constitution.<sup>265</sup> The Court reasoned that society does not support the execution of the mentally retarded.<sup>266</sup> In addition, the objectives of punishment, including retribution and deterrence, are not met with this group due to factors such as their inability to appreciate their actions and their problems with impulsivity.<sup>267</sup>

Prior to *Atkins*, there were a substantial number of defendants serving capital sentences in maximum-security general populations or death row units who were believed to have mental retardation. Therefore, in light of *Atkins*, it is imperative that when mental retardation is suspected, the defendant be evaluated for cognitive functioning to evaluate for IQ, information processing ability, decision-making ability, impulse control and adaptive functioning.<sup>268</sup>

Mental retardation is not mental illness.<sup>269</sup> Although in the past both disorders were associated with insanity, mental illness "includes some disturbance in emotional life, as in depression and schizophrenia."<sup>270</sup> Mental illness is related to the term mental disorder, which is described as an illness that psychologically and behaviorally impairs an individual and is caused by genetic, social, chemical, biological and environmental factors.<sup>271</sup> Mental illness is cyclical and episodic, often not permanent and can be sustained with medication, while mental retardation is long-term and permanent, and often untreatable.<sup>272</sup> Retardation is not incompatible with mental illness as some individuals with mental retardation also experience other mental disorders such as depression and schizophrenia.<sup>273</sup>

Mental retardation is defined in the DSM-IV.<sup>274</sup> Mental retardation is measured by the consideration of intellectual functioning (commonly referred to as intellectual quotient, IQ testing) and the assessment of impairments of present adaptive functioning, such as skills in self-care, communication, social and interpersonal skills.<sup>275</sup> There are four subtypes of mental retardation, including profound, severe, moderate, and mild, each requiring a different range of IQ scores.<sup>276</sup> Most mentally retarded individuals are

classified as mildly mentally retarded and generally have IQ's in the range of 50-55 to approximately 70.<sup>277</sup> Further, in order to qualify as mentally retarded, one has to have a history of the disorder since before age eighteen.<sup>278</sup> Experts can assist jurors in understanding the effects of mental disorders on cognitive functioning.

The American Association for Mental Retardation (AAMR) also provides standards regarding mental retardation focusing on intellectual functioning and adaptive skills functioning. It should be noted that both the DSM-IV and the AAMR definitions include adaptive behavior/skill deficits, onset before eighteen years of age and IQ's between seventy and seventy-five. Mental retardation affects one's psychological, social, language, and communication, emotional and moral development.<sup>279</sup> Mental retardation involves cognitive deficits referring to problems with skills in reasoning, understanding, judging, and discriminating that affect one's ability to think about intended actions and to consider consequences of behavior and to exercise restraint.<sup>280</sup> Immaturity marked by childlike behaviors is a natural consequence of the relationship between intellectual development and emotional expression.<sup>281</sup> Mentally retarded individuals often suffer from poor communication skills and may be prone to "biased responding, or giving" affirmative responses to please authority figures that could impact statements and confession to their crimes.<sup>282</sup> Along these lines, the expert must attempt to discern the defendant's ability to understand his Miranda warnings and the consequences of waiving his rights.<sup>283</sup> They should consider how his cognitive impairments hindered his ability to understand his rights and how they affect his judgment in an interrogation setting.<sup>284</sup> Further, mentally retarded individuals often suffer from deficits in impulsivity and attention and have difficulty controlling their behavior, have low frustration tolerance and are often aggressive.<sup>285</sup> Along these lines, many also suffer from Attention Deficit/Hyperactivity Disorder, commonly known as ADHD.<sup>286</sup> They may suffer from repetitive behaviors, impaired short-term memory, require repetitive learning opportunities, and exhibit learning, reasoning, and judgment deficits.<sup>287</sup> Many individuals with mental retardation suffer from motivation deficits and are not interested in mastering and solving problems.<sup>288</sup> They are often dependent on others, gullible, naive, and easily led to follow others even if the consequences for their actions are negative or illegal.<sup>289</sup> Research indicates causative factors of mental retardation including biomedical, social, behavioral and educational risk factors that are interactive in nature and are impacted by hereditary factors.<sup>290</sup>

One key issue in light of Atkins is what is mental retardation? The Supreme Court in Atkins did not explicitly define mental retardation. However, many states and the federal government have provided definitions for mental retardation.<sup>291</sup> Defense attorneys will attempt to label a defendant as mentally retarded who scores an IQ of seventy-five, while prosecutors typically argue that only unquestionably mentally retarded defendants should be "spared" from the death penalty.<sup>292</sup> How will a jury link the mental retardation to the act committed? They might believe that the disorder caused them to act more impulsively without thinking about consequences or they may have been easily and naively coerced into crime and violence by others.

How will adaptive behaviors be measured?<sup>293</sup> There are different IQ tests and instruments

measuring adaptive functioning. There is a concern that different tests may display conflicting results? Although the Weschler Adult Intelligence Test, 3rd Edition, (WAIS-III) is the standard IQ test in the field of psychology, there are other IQ tests used by experts.<sup>294</sup> Objective adaptive functioning assessment instruments may not be available in the defendant's past records and it may be difficult to assess current adaptive functioning due to inability to contact family members and friends and obtain relevant information.

The expert must be thorough when assessing for mental retardation. He must consult school records, placement records, psychoeducational reports, individualized education plans, interviews with parents and teachers if possible, vocational, employment, and military records, criminal records, prison records, and probation and state agency records.<sup>295</sup> It is not uncommon to seek out an expert that specializes in mental retardation and works in the special education field.<sup>296</sup>

There are countless examples of dilemmas that an expert could encounter when assessing for mental retardation. What if records indicate the defendant had an IQ of sixty-nine at age nine, seventy-three at age fourteen, sixty-eight at age seventeen, seventy-six at age twenty-one and he is being evaluated at twentyfour years of age for **death penalty mitigation** purposes obtaining a current score of seventy-eight?<sup>297</sup>

It is uncertain why there are no adequate psychological tests that adequately measure malingering of mental retardation. Although I am not aware of research indicating such a problem, I speculate that this could be an issue in future capital cases. Obviously, there is an external gain or reward to malingering, the reward being life if a mental retardation diagnosis is achieved. An individual with an IQ of seventy may be sophisticated enough to miss questions if he knows the consequences of a lower score. This again emphasizes the importance of obtaining collateral mental health records containing the defendant's prior IQ data, focusing on consistency of records. Defense attorneys may be careless in explaining the consequences of an IQ test to the defendant. Further, how accurate is an IQ when it is difficult to quantify the effects of several factors, including the defendant's current situation of residing in jail, awaiting an upcoming trial, facing the death penalty, and dealing with feelings of remorse for killing someone, on his current test scores. He may have extreme difficulties focusing and paying attention during testing, as he experiences constant thoughts about his case and tries to discuss his case during testing.

It is likely that lawyers and mental health experts will never agree on what mental retardation is, as the Supreme Court did not consider this issue in *Atkins*, leaving it for lower courts, counsel and mental health professionals to debate. Although there is some objectivity in the diagnosis of mental retardation in the mental health field, the opinion will often entail significant subjectivity by the expert. In light of *Atkins*, it is vital for an expert to thoroughly assess for mental retardation. There will be a constant feud in the courts about what mental retardation is and how an expert measures it.

#### E. Miscellaneous Problems in Mitigation

Another problem in mitigation exists with hearsay testimony raised by the prosecution

regarding facts the expert testifies to about the defendant: facts he learned from other witnesses such as family and friends. The psychologist may interview some of the persons identified by the mitigation specialist and base his opinion in part on their report.<sup>298</sup> Defense counsel is often faced with the problem of deciding whether to admit a psychological report based on data they have gathered through note taking and test administration that is part of a confidential file.<sup>299</sup>

Further, issues of discoverability may dictate whether certain psychological tests should be employed. It is unwise for a psychologist to tailor his evaluation by choosing psychological tests that he believes will support his opinion. If a psychological test indicates a propensity for criminal conduct, it is likely part of the record and discoverable and the expert might be susceptible to cross-examination regarding the test findings. The expert should attempt to be consistent with his testing procedures in cases that are similar to one another.

Another issue is whether the defense must disclose the mitigation expert's findings to the prosecution.<sup>300</sup> In a jurisdiction that protects the expert's work prior to producing a mitigation report, once the defense counsel decides to use the report in court, counsel must provide discovery of the report to the prosecution.<sup>301</sup> In some jurisdictions, once the defense counsel gives notice to the state that there will be a mitigation report submitted as evidence, counsel must give the state the report and results of prior evaluations regarding the defendant's mental condition, life history, and even criminal background that were obtained during the mitigation investigation.<sup>302</sup>

**Death penalty mitigation** is a laborious process that often takes months of work. In addition to gathering records, the social worker and expert must locate and interview in person or via telephone the defendant's family members. These individuals may be difficult to locate. When found, they may present with distrusting attitudes, may believe their loved one is being treated unfairly by the criminal justice system and may not be eager to assist in providing sensitive and personal information. They may have had negative experiences with court proceedings in the past. Moreover, they simply might not care about the defendant. Presenting family witnesses, for example, that suffered from the same abuse may present as adjusted, or may normalize the abuse, lacking the dramatic display of how bad it really was growing up. This is often due to the fact that violence within the home, on the street, maltreatment and deprivation and poverty is all they know and all that they have ever seen in the neighborhood. This lack of affective response may not lead to sympathy within the jury. Therefore, these family members might not be used as witnesses or an expert might explain the family history instead. Family interviews are often sensitive because of cultural, psychological barriers within the family that the family uses to ensure their secrets are not revealed.<sup>303</sup> Family and lay witnesses are often difficult to find and when they are located, they are often very suspicious and guarded. The expert and social worker must thoroughly assess potential family witnesses concerning whether their testimony may assist the jury with understanding the negative childhood upbringing and experiences the defendant had. Often, the information provided by the family members is credible and extremely helpful.

Many judges and jurors have negative attitudes toward expert witnesses, as they may be cynical or feel threatened by experts, do not believe they are credible or think they are "hired guns" by their respective employers.<sup>304</sup> Concern about expert bias is an issue when the expert has been known to voice his displeasure and disagreement with the death penalty in general.<sup>305</sup> Along these lines, the expert should only present evidence that supports the presentation of mitigating factors and not present evidence that is false or misleading and not testify when results of investigation would only support execution.<sup>306</sup> The expert cannot commit perjury to save someone's life, no matter what he thinks the greater good is.<sup>307</sup>

When eliciting expert testimony, defense counsel must discuss at length the expert's credentials, education and academic degrees, articles or papers written (especially regarding subjects related to the referral question in the capital case), employment history and work related to capital cases, such as history of working with violent offenders, and whether they have worked for defense and or prosecution in the past on capital cases. While testifying, it is important for the expert to communicate to the jury in simple, concise language rather than complicated and empirically sophisticated jargon.<sup>308</sup> The expert's testimony regarding the life experiences of the defendant is the hub that connects everything, not a defense, but an explanation of what took place for a defendant to intentionally kill another.<sup>309</sup>

It is important for a defense attorney and his expert to be aware of problems common in mitigation. The expert should assess thoroughly for mental health issues and their connection to the homicide. While acknowledging the existence of antisocial personality traits, the etiological factors of these traits should be explained along with the problems associated with the diagnosis of APD. An expert should provide as much information as possible to assist the attorney in making the decision of whether or not to present mitigating evidence when the defendant has a consistent and severe antisocial history prior to the homicide. The expert must thoroughly assess for mental retardation by carefully conducting intellectual assessments, adaptive functioning, and gathering and interpreting past records of intellectual functioning.

## CONCLUSION

In my experience, most capital defendants I have been assigned to work with for mitigation purposes are eventually found guilty of the murder. However, they have usually been offered plea bargains with penalties less than the death penalty, in exchange for a guilty plea and a waiver of their right to appeal. They typically are offered a plea bargain before and or during the trial and they eventually agree to the plea bargain. Nonetheless, this is not always the case, and the sentencing/mitigation phase cannot be ignored. Not infrequently, I see defense counsel obtain only a social worker mitigation specialist instead of a full cast of experts, often to the detriment of the defendant's case.

Given the substantial evidence in clinical studies indicating neurological impairments, learning disabilities, mental disorders, and traumatic life experiences amongst capital defendants, there is no question forensic psychologists are needed at the sentencing

phase.<sup>310</sup> A psychologist expert should be appointed as a **death penalty mitigation** expert in all capital cases because he provides an opinion which thoroughly describes the defendant's background and associates psychiatric diagnoses and their bio-psychosocial and environmental etiological components to the homicide. He is an expert on psychiatric assessment, diagnosis, and treatment. It is imperative to humanize the defendant and develop sympathy towards the defendant in the jury's eyes.<sup>311</sup> The goal is not to excuse or justify their acts.<sup>312</sup> Although most abused children never commit murder, almost all killers have been abused. The expert must tie any abuse suffered by the defendant to the homicide if relevant, and convey to the jury facts about the defendant's background, character, and circumstances of the offense that lead the jury to vote for life or less than life.<sup>313</sup> The key to mitigation is describing how the defendant's history of abuse caused impairments in behavioral, volitional, and cognitive functioning, ultimately relating to the murder he committed.<sup>314</sup> By providing a psychological/mitigation report to the attorneys and judge and by testifying in front of the jury, the expert must explain both mitigating and in some jurisdictions potentially aggravating aspects about the defendant and his behavior. The evidence of long-term impairments from childhood abuse should demonstrate the link between the violence the defendant suffered as a child and the violence he committed as an adult.<sup>315</sup> The expert must also be knowledgeable about substance abuse and dependency issues, as well as mental disorders and personality disorders and their links to aggression. The expert must be able to thoroughly assess for mental retardation and consider issues of competency to waive Miranda rights, competency to stand trial, and insanity. He must be able to assess APD carefully and adequately, dispelling myths of elevated risks of future violence among capital defendants and presenting empirical literature about the low base rates of violence by capital offenders. It is often recommended to deal with the diagnosis of APD on direct examination and then explain the behaviors so not to surprise the jury on cross-examination. In rare cases, I believe the expert must assess whether mitigation is significant enough to overcome issues such as lack of remorse, psychopathic traits, violent juvenile and prior adult record which could set the expert witness up on crossexamination and result in a death sentence for the defendant.<sup>316</sup> Obtaining other experts to assist with evaluating specific issues such neurological deficits and organic brain damage that affect judgment and anticipation of consequences, impulse control, and aggression is vital to successful mitigation. Consideration of mental retardation and APD diagnoses by the expert and attorneys is also imperative.

The goal of mitigation is to lessen the penalty from death to life in prison, or life with the possibility of parole. The goal is to humanize the defendant in light of some negative history, often prior antisocial and violent acts. The defendant's life should be explained to the jury in a manner that elicits compassion, understanding, and sympathy for the defendant. The expert and attorney should not ask the jury to condone, accept or agree with the offense, but consider it in light of issues that may have been beyond the control of the defendant's life, and put him at risk for committing such an act. Simply put, the purpose of mitigation is to lessen the penalty in light of circumstances, not to negate punishment or offer excuses for the crime.

The forensic psychologist offers valuable expertise and should be utilized more

frequently by defense counsel in **death penalty mitigation** cases. The capital defendant has a constitutional right for a jury to hear mitigation evidence concerning his background and life circumstances. Mitigation evidence assists in explaining the causation of violence towards the victim and society in general and provides an account of the defendant's unique set of facts in his life; "mitigation is not a conclusory label ('abuse'), but a biography of disability and deficits, hardships and unchosen life experiences."<sup>317</sup>

### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
Criminal Law & Procedure  
Defenses  
Insanity  
Insanity Defense  
Criminal Law & Procedure  
Sentencing  
Capital Punishment  
General Overview  
Criminal Law & Procedure  
Guilty Pleas  
No Contest Pleas

### **FOOTNOTES:**

<sup>1</sup> Kenneth L. Appelbaum & Matt C. Zaitchik, Mental Health Professionals Play Critical Role in Presentencing Evaluations, 19 MPDLR 677, 677-82 (Sept./Oct., 1995).

<sup>2</sup> Id. at 677.

<sup>3</sup> Mark D. Cunningham, Ph.D. & Thomas J. Reidy, Ph.D., Integrating Base Rate Data in Violence Risk Assessments at Capital Sentencing, 16 BEHAV. SCI. & LAW 71, 71 (1998); Mark D. Cunningham & Thomas J. Reidy, Don't Confuse Me With The Facts: Common Errors in Violence Risk Assessment at Capital Sentencing, 26 CRIM. JUST. & BEHAV. 20, 20 (March, 1999). See *Barefoot v. Estelle*, 463 U.S. 880 (1983) (The U.S. Supreme Court held that although there was no doubt that psychiatric evidence by two psychiatrists regarding future dangerousness increased the likelihood that the defendant would get the death penalty, this fact did not make the evidence inadmissible. Id. at 905. The Court stated, "the suggestion that no psychiatrist's testimony may be presented with respect to a defendant's future dangerousness is somewhat like asking us to disinvent the wheel." Id. at 896. The Court cited *Jurek v. Texas*, 428 U.S. 262 (1976), in which the Court acknowledged it was difficult for mental health professionals to predict dangerousness, an aggravating element in Texas' death penalty statute, yet this prediction is an important element in the criminal justice system and should be considered by the jury when considering imposing the death penalty. Id. at 896-97). See Mark D. Cunningham & Thomas J.

Reidy, Violence Risk Assessment at Federal Capital Sentencing: Individualization, Generalization, Relevance, and Scientific Standards, 29 CRIM. JUST. & BEHAV. 512 (Oct., 2002). See Jonathan R.

Sorenson, Ph.D. & Rocky L. Pilgrim, An Actuarial Risk Assessment of Violence Posed By Capital Murder Defendants, 90 J. CRIM. L. & CRIMINOLOGY 1251 (2000).

<sup>4</sup> See Mark D. Cunningham, Ph.D. & Mark P. Vigen, Ph.D., *Death Row Inmate Characteristics, Adjustment, and Confinement: A Critical Review of the Literature*, 20 *BEHAV. SCI. & LAW* 191 (2002) (The authors cite studies that have found death row inmates generally serve their time in prison without major incident--without having committed violent acts. *Id.* at 203. The incidents of assault rates among death row inmates is comparable to assault rates amongst life sentenced murderers and rapists. *Id.* The authors attempt to explain the relatively low violence rates amongst capital defendants as contributed by the fact that the context/situation of violence during the homicide offense may not be replicated in a prison setting, many defendants exhibit good behavior in case of an appeal, death row inmates are influenced by similar incentives for good behavior as are other types of prisoners, and capital defendants are usually housed in more structured and secured settings that are designed to prohibit violence. *Id.* at 203-04.).

<sup>5</sup> *Woodson v. North Carolina*, 428 U.S. 280 (1976).

<sup>6</sup> *Id.* at 282.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 303.

<sup>9</sup> *Id.* at 304. (The consideration of the offender and the offense allows for a humanizing consideration).

<sup>10</sup> *Woodson*, 428 U.S. at 304. (The Court reversed the North Carolina Supreme Court's decision. In addition to mitigating issues as relevant under the Eighth Amendment, the Court believed the statute imposing mandatory death sentences for some offenses was not representative of the current values regarding mandatory death sentences at that time. *Id.* at 298. They cited a deficiency of the mandatory death penalty statute as its ". . . failure to provide a constitutionally tolerable response to Furman's rejection of unbridled jury discretion in the imposition of capital sentences." *Id.* at 302. They stated that the statute provided no standards to guide the jury in its decisionmaking process at sentencing when considering which capital defendants should live or die. *Id.* at 303. They further believed that there was no proper scheme under that law for the judiciary to monitor the arbitrary and capricious nature of those decisions when reviewing the death sentences. *Id.*)

<sup>11</sup> *Lockett v. Ohio*, 438 U.S. 586 (1978).

<sup>12</sup> *Id.* at 606.

<sup>13</sup> *Id.* at 589, 593.

<sup>14</sup> *Id.* at 593-94 (quoting OHIO REV. CODE ANN. § 2929.03-2929.04 (B) (West

1975) (emphasis added).

<sup>n15</sup> Id. at 597.

<sup>n16</sup> Lockett, 438 U.S. at 594.

<sup>n17</sup> Id. at 604.

<sup>n18</sup> Id. at 605.

<sup>n19</sup> Id.

<sup>n20</sup> Eddings v. Oklahoma, 455 U.S. 104 (1982).

<sup>n21</sup> Id. at 106.

<sup>n22</sup> Id.

<sup>n23</sup> Id. at 109-110.

<sup>n24</sup> Id. at 106 (citing OKLA. STAT. tit. 21, § 701.10 (1980)) (At the sentencing phase, the State presented three of the seven aggravating circumstances. The defense presented "substantial evidence . . . of his troubled youth." Id. at 107. This included testimony from his probation officer from juvenile court, testimony that his parents were divorced when he was five years of age, his mother provided no structure since she was an alcoholic and possibly a prostitute, and that excessive physical punishment was often used against the youth. Id. A psychologist testified on behalf of the defense that Eddings had antisocial personality. Id. A sociologist believed that he was treatable and a psychiatrist agreed that he could be treated with long-term intensive therapy. Id. The psychiatrist went on to suggest that "if treated, Eddings would no longer pose a serious threat to society." Id. at 108. The trial judge reviewed the evidence and concluded that the State had proved its three aggravating circumstances beyond a reasonable doubt; on the other hand, the judge concluded that the only mitigating factor he could enumerate was the defendant's young age. Id.)

<sup>n25</sup> Eddings, 455 U.S. at 113.

<sup>n26</sup> Id. at 110.

<sup>n27</sup> Id. at 112.

<sup>n28</sup> Id. at 113-114.

<sup>n29</sup> Id. at 114-115.

<sup>n30</sup> Eddings, 455 U.S. at 115 n.10.

¶31 WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 943 (2d ed. 1968).

¶32 State v. Langley, 839 P.2d 692 (Or. 1992).

¶33 Id. at 697.

¶34 Russell Stetler, Mental Disabilities and Mitigation, 23 CHAMPION 49, 50 (Apr. 1999).

¶35 OHIO REV. CODE ANN. § 2929.04 (B) (West 2002). In Buchanan v. Angelone, 522 U.S. 269 (1998), the U.S. Supreme Court held that the jury did not have to be explained the concept of mitigation or be offered instructions on specific statutorily defined mitigating factors by the trial court, "the entire context in which the instructions were given expressly informed the jury that it could consider mitigating evidence." Id. at 278.

¶36 David C. Stebbins & Scott P. Kenney, Zen and the Art of Mitigation Presentation or, the Use of Psycho-Social Experts in the Penalty Phase of a Capital Trial, 10 CHAMPION 14, 14 (AUG., 1986).

¶37 Sandra B. McPherson, Address at the 3rd European Conference of Law and Psychology (Sept. 1992). Conversely, crimes involving upstanding citizens and attractive victims are difficult for juries to accept. Further, ritualized initiation of gang murders, rape murders, and sadistic murders cause terror in juries.

¶38 Id.

¶39 Id.

¶40 Id.

¶41 Id.

¶42 See McPherson, supra note 37.

¶43 See Stebbins & Kenney, supra note 36, at 16.

¶44 Id. at 14-16.

¶45 Id.

¶46 Id. at 18.

¶47 Id.

¶n48 See Stebbins & Kenney, *supra* note 36, at 18.

¶n49 *Id.*

¶n50 *Id.* Without this specific focus, the jury can only speculate as to why any individual issues make any difference in why death should or should not be imposed.

¶n51 Lee Norton, *Mitigation Investigations*, 16 CHAMPION 43, 43 (May 1992).

¶n52 *Id.*

¶n53 *Id.*

¶n54 *Id.* "The primary reason for granting post conviction relief is ineffective assistance of counsel due either to a failure to investigate or to an improper or insufficient investigation." *Id.* at 43.

¶n55 It is not uncommon for a social history investigation to entail between two hundred and five hundred hours of intensive work depending on the complexity of issues, number of witnesses and records, the need to investigate generations of family members if possible and the extent of mental health issues; integrating massive amounts of data into an understandable form. *Id.* at 45.

¶n56 See Stebbins & Kenney, *supra* note 36, at 17.

¶n57 *Id.*

¶n58 *Id.*

¶n59 *Id.*

¶n60 *Id.*

¶n61 See Diana McCoy, *Mitigation Strategies in Death Penalty Cases*, 21 THE ADVOCATE (Jan. 1999), available at <http://dpa.state.ky.us/library/advocate/jan99/mitigation.html> (For a detailed description of capital juror's attitudes and beliefs, see William J. Bowers et al., *Foreclosed Impartiality In Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, and Premature Decision Making*, 83 CORNELL L. REV. 1476 (1998); see also Stephen P. Garvey, *Essay: Aggravation and Mitigation In Capital Cases: What Do Jurors Think?* 98 COLUM. L. REV. 1538 (1998)).

¶n62 John H. Blume & Pamela Blume Leonard, *Principles of Developing and Presenting Mental Health Evidence in Criminal Cases*, 24 CHAMPION 63, 67 (Nov. 2000)

<sup>63</sup> Id.

<sup>64</sup> Id. at 66.

<sup>65</sup> See McPherson, *supra* note 37.

<sup>66</sup> Id.

<sup>67</sup> Id. (explaining that it is imperative for the attorney to consider how mental illness may affect legal issues at every level)

<sup>68</sup> Blume & Leonard, *supra* note 62, at 63.

<sup>69</sup> Id.

<sup>70</sup> Id.

<sup>71</sup> Id. at 68.

<sup>72</sup> See *id.*

<sup>73</sup> See Blume & Leonard, *supra* note 62, at 63.

<sup>74</sup> McCoy, *supra* note 61, at 57.

<sup>75</sup> Id.

<sup>76</sup> Id.

<sup>77</sup> Jonathon 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, 378 (1997).

<sup>78</sup> See Blume & Leonard, *supra* note 62, at 63.

<sup>79</sup> Id. at 66.

<sup>80</sup> Id. (For a detailed analysis on jury selection, juror attitudes and beliefs in capital cases, see Bowers et al., *supra* note 61; see also Daniel A. Krauss & Bruce D. Sales, *The Effects of Clinical and Scientific Expert Testimony on Juror Decision Making in Capital Sentencing*, 7 PSYCH. PUB. POL'Y & L. 267 (June, 2001)).

<sup>81</sup> See Blume & Leonard, *supra* note 62, at 69-70.

<sup>82</sup> Stebbins & Kenney, *supra* note 36, at 18.

<sup>83</sup> Id.

¶n84 Blume & Leonard, supra note 62, at 63.

¶n85 Stetler, supra note 34, at 51.

¶n86 Stebbins & Kenney, supra note 36, at 17.

¶n87 Id. at 17-18.

¶n88 Id. at 18.

¶n89 Id.

¶n90 See McPherson, supra note 37.

¶n91 Blume & Leonard, supra note 62, at 66.

¶n92 Id. (explaining that mentally retarded individuals are more likely to want to please authority figures and are prone to being coerced into confessing more often than other individuals not suffering from mental retardation).

¶n93 See McPherson, supra note 37.

¶n94 Deana Dorman Logan, Is it Mitigation or Aggravation? Troublesome Areas of Defense Evidence in Capital Sentencing, CACJ/FORUM, Sept./Oct., 1989, at 17-18. For example, a juror with a history of abuse may empathize with the defendant and understand his negative behavior. Conversely, the juror may have worked through his or her abuse to become a productive member of society.

¶n95 Stetler, supra note 34, at 50.

¶n96 Id. at 52.

¶n97 Id. at 50. For example, a neuropsychologist should be considered due to complex issues regarding brain injury that could affect impulse control and be a causative factor of violence. Id. at 53. Neuropsychologists offer data regarding the understanding of neural networks and neuropsychological testing provides information about localization of brain damage and how that impairment may have affected the defendant's behaviors and led to violence. Id. A neurologist may be helpful with adding information about brain damage and functioning, citing medical records and providing diagnostic procedures such as brain imaging techniques. Id. Psychiatrists could also be used to provide information on the causation of brain damage and effects of certain medications or the need for psychiatric medications. A developmental psychologist could assist with information about the various stages of human development. Blume, supra note 63, at 65. Further, a social psychologist or criminologist could provide an analysis of applicable social theories of crime such as the influence of peer delinquency on one's propensity for criminal conduct.

Unfortunately, funds are usually limited and often times only a clinical psychologist and social worker are employed.

¶n98 Id.

¶n99 Jeff Blum, Investigation in a Capital Case: Telling the Client's Story, 9 CHAMPION 27, 27 (Aug. 1985).

¶n100 Id.

¶n101 Id.

¶n102 Id. (suggesting the psychologist may have to explain some of the defendant's behaviors exhibited in the courtroom so jurors do not misinterpret them).

¶n103 Id.

¶n104 Russell Stetler, Mitigation Evidence in Death Penalty Cases, 23 CHAMPION 35, 37 (Jan./Feb., 1999), available at [www.criminaljustice.org/public.nsf/championarticles/99jan04?opendocument](http://www.criminaljustice.org/public.nsf/championarticles/99jan04?opendocument).

¶n105 Craig Haney, The Social Context of Capital Murder: Social Histories and the Logic of Mitigation, 35 SANTA CLARA L. REV. 547, 599-90 (1995); see Joshua N. Sondheimer, A Continuing Source of Aggravation: The Improper Consideration of Mitigating Factors in Death Penalty Sentencing, 41 HASTINGS L.J. 409, 410 (1990).

¶n106 See Cunningham & Vigen, *supra* note 4, at 203.

¶n107 Blume & Leonard, *supra* note 62, at 64-65.

¶n108 See Stebbins & Kenney, *supra* note 36, at 16.

¶n109 McCoy, *supra* note 61.

¶n110 Id.

¶n111 Blume & Leonard, *supra* note 62, at 64-65.

¶n112 A psychopath, or also known as sociopath, is described as having a severe antisocial personality, lacking remorse, empathy, guilt and a well-developed conscience. They are described as being more prone to general and violent criminal behavior. See PSYCHOPATHY: ANTISOCIAL, CRIMINAL AND VIOLENT BEHAVIOR, vii-viii (Theodore Millon et al. eds., 1998). For a review of psychopathy, see James F. Hemphill et al., Psychopathy and Recidivism: A Review. 3 LEGAL & CRIMINOLOGICAL PSYCHOL. 139 (1998); see also HERVEY CLECKLEY, THE MASK OF SANITY (1941).

¶113 See McPherson, *supra* note 37.

¶114 See *id.*

¶115 *Id.*

¶116 *Id.*

¶117 *Id.*

¶118 Deana Dorman Logan, *From Abused Child to Killer: Positing Links in the Chain*, 16 CHAMPION 36, 38 (Jan./Feb., 1992). Many murderers experience paranoid ideation, or unfounded beliefs that others intend you harm, and as a result are more likely to become aggressive. *Id.* Paranoid ideation is sometimes caused by child abuse, including head injuries and substance abuse. *Id.* Posttraumatic stress disorder (PTSD) may cause paranoid thinking. *Id.* Trauma of maltreatment may affect the biochemical makeup of the child leading him to overreact to perceived aggression. *Id.* High levels of aggression are also common with PTSD, and are seen as a common characteristic of murderers. *Id.* Murderers often have problem-solving difficulties, concentration problems, confusion, and poor judgment often linked to various types of child maltreatment. *Id.* Murderers also learn negative, dysfunctional, and violent problem-solving skills from their parents, learning to react to stress with aggression and brutality instead of appropriate alternative behaviors and solutions. *Id.* Finally, failure to receive proper treatment and intervention early in life only increases the likelihood that the maltreated child will turn to violence. *Id.* at 38-39.

¶119 See Logan, *supra* note 118, at 14-15.

¶120 See McCoy, *supra* note 61.

¶121 Sondheimer, *supra* note 105, 410.

¶122 *Id.* at 411. Implicit in state statutes outlining aggravating and mitigating factors and circumstances are that they are distinguishable and can be categorized. *Id.* at 410. However, jurors often see mitigating factors as aggravating and often improperly weigh mitigating factors as aggravating, depriving defendants of their constitutional rights of mitigating considerations. *Id.* If the sentencer treats a mitigating factor as an aggravating one, it has not followed the law in *Lockett*, 438 U.S. 586 (1978), as the sentencer has not given "independent mitigating weight" to that mitigating factor. *Id.* at 439. However, the consideration of that factor was not procedurally impaired, and statutes must therefore employ adequate guidelines for sentencing to prevent the improper use of mitigating evidence. *Id.* at 440.

¶123 Logan *supra* note 118, at 14. Evidence of the "Good Guy" includes lack of criminal record, caring deeds, good employment/military history, positive school history,

stable marriage and family history, involvement in religion, cooperation with law enforcement and activity with community. Id. at 16. Evidence of the "Positive Prisoner" includes lack of problems in jail or prison, positive deeds and accomplishments in jail, good institutional adjustment reports, family support, positive work and trade skills, continuing education, artistic potential, and interest in religion. Id. "Crime Related" evidence includes remorse, lingering doubt with the jury of culpability, subordinate role in the crime, incapacitation and inability to commit future violence in community, confession, lesser sentence for equally culpable co-defendant in the murder. Id. Elements of "Empathy" evidence include: childhood poverty and abuse, lack of mother and or father, poor parental bonding, neglect, emotional and economical deprivation, lack of interventions by institutions, gang compulsion, mental and emotional disorders and diagnoses, situational stresses, alienage/immigration. Id.

¶124 Id. at 15 (describing a defendant "so 'disturbed (or retarded, or scarred by child abuse) that he just couldn't contain his rage,'" and pointing out that although this evidence tends to negate the volitional nature of the act, it presents the jury with the problem of what to do with a defendant whose violence has been lethal, and is unable to control himself).

¶125 Id.

¶126 Id.

¶127 Sondheimer, supra note 105, at 410.

¶128 Logan, supra note 118, at 16.

¶129 Id. at 16. Abuse is easier to substantiate than neglect, and physical and sexual abuse is seen as more damaging than psychological or emotional abuse. Id. The fact that other siblings also suffer, even if not charged with significant crimes, helps mitigation, whereas if they had been productive, the abuse would be less meaningful as it applies to the defendant. Id. Substance abuse problems are viewed as less likely to be self-serving than post-offense self-reported problems. Id. In addition, it is beneficial for a defendant with an addiction to have led a productive life prior to the addiction. Id. at 1617. Finally, mental health problems that are agreed upon by experts, have an extensive and dated history of the problems, and which can be treated in the future are more likely to be used as mitigation by the jury. Id. at 17. See also Ellen Fels Berkman, *Mental Illness as an Aggravating Circumstance in Capital Sentencing*, 89 COLUM. L. REV. 291 (1989) (arguing that aggravating factors stemming from a defendant's mental illness may not be considered in a capital proceeding, even if it may add to the defendant's future dangerousness).

¶130 Logan, supra note 118, at 19. It is beneficial to provide an expert on prison adjustment, and/or provide a corrections officer as an expert to review the defendant's institutional record in order to offer an opinion on institutional risk factors. Id. The jury must understand the problems the defendant faces as a result of childhood background

problems, how those problems contributed to his criminal behavior, and how the law enables the defendant's background problems and handicaps to be utilized by jurors as mitigation in making their sentencing decision. *Id.* at 19-20.

¶131 See Logan, *supra* note 118, at 38.

¶132 *Id.*

¶133 See Cunningham & Vigen, *supra* note 4. The authors cite a lack of empirical data regarding death row inmate characteristics, their pattern of adjustment to incarceration, and their custody requirements in prison. *Id.* at 192-93. As of 2002, death row inmates populations were comprised of about 46% Caucasians, 43% African Americans, nine percent Latino. *Id.* at 195. In 2000, death row inmates in the U.S. included 64% as having prior felony convictions while 39% were involved with the criminal justice system at the time of the homicide. *Id.* About 8% of the offenders had prior murder convictions. *Id.* The median age for offenders at the time of homicide arrest was about twenty-seven years of age. *Id.* Substance abuse/dependence diagnoses are quite common in the lives of capital defendants and many of the homicides were committed while under the influence of substances. *Id.* at 201. In addition, there is a high documented incidence of psychological disorders amongst death row inmates. *Id.* at 200. Death row inmates in particular are likely to experience psychiatric disorders. *Id.* There is a wide variety of symptomatology amongst death row inmates, yet mental illness is quite more common than in the normal population. *Id.* Dysfunctional family histories marked by foster home placement, parental abuse, parental abandonment, institutionalization, parental substance abuse, pathological family interactions, and disruptive attachment to caregivers are common amongst capital offenders. *Id.* at 202.

¶134 See John H. Blume & David P. Voisin, *Avoiding or Challenging a Diagnosis of Antisocial Personality Disorder*, 24 CHAMPION 69 (2000).

¶135 See generally Blume & Voisin, *supra* note 134 (discussing problems and strategies in facing a diagnosis of Antisocial Personality Disorder).

¶136 *Id.*

¶137 *Id.*

¶138 *Id.*

¶139 *Id.*

¶140 DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 629 (American Psychiatry Assoc., 4th ed. 1994) (hereinafter referred to as DSM-IV). A personality disorder includes "an enduring pattern of inner experience and behavior that deviates markedly from the expectations of the individual's culture, is pervasive and inflexible, has an onset in adolescence or early adulthood, is stable over time, and leads to

distress or impairment." *Id.* A personality disorder should be diagnosed when the major characteristics appear by early adulthood, represent the individual's typical functioning, and do not occur exclusively during an episode of an Axis I mental disorder. *Id.* at 630.

¶141 *Id.* at 647. The criteria for APD include:

A. There is a pervasive pattern of disregard for and violation of the rights of others occurring since age 15 years, as indicated by three (or more) of the following: (1) failure to conform to social norms with respect to lawful behaviors as indicated by repeatedly performing acts that are grounds for arrest (2) deceitfulness, as indicated by repeated lying, use of aliases, or conning others for personal profit or pleasure (3) impulsivity or failure to plan ahead (4) irritability and aggressiveness, as indicated by repeated physical fights or assaults (5) reckless disregard for safety of self or others (6) consistent irresponsibility, as indicated by repeated failure to sustain consistent work behavior or honor financial obligations. (7) lack of remorse, as indicated by being indifferent to or rationalizing having hurt, mistreated, or stolen from another. B. The individual is at least age 18 years. C. There is evidence of Conduct Disorder with onset before age 15 years. D. The occurrence of antisocial behavior is not exclusively during the course of Schizophrenia or a Manic Episode.

*Id.* at 649-50. Conduct Disorder is indicated by a repetitive pattern of behavior in youth which the basic rights of others and rules are violated including evidence of aggression to people and animals, destruction of property, deceitfulness or theft, serious violations of rules. *Id.* at 90.

¶142 Blume & Voisin, *supra* note 134, at 71-72.

¶143 See Haney, *supra* note 105, at 562-589. Capital defendants have often lived without dependable attachment, protection, guidance, nurturance and stimulation. See *id.* at 562-68. Additionally, they may lack skills to cope with adversity. *Id.* at 562. Poverty, physical abuse and neglect are very common. *Id.* at 563. The effects of poverty include children growing up less hopeful, self-directed, and less confident. *Id.* Financial stress is related to children's emotional and behavioral problems including depression, antisocial behavior and impulsivity. *Id.* Links exist between childhood poverty and adult violence including the causation of despair, low self-esteem, poor socialization, increase in frustration, and goal-blocking, which can lead to anger and aggression. *Id.* at 565. Poverty leads to inconsistency and poor nurturance in parenting. *Id.*

¶144 Telephone interview with Mark D. Cunningham, forensic psychologist (Fall 2002).

¶145 *Id.*

¶146 *Id.*

¶147 Brock Mehler, *Antisocial Personality Disorder as Mitigating Evidence*, 14

CHAMPION 20, 22 (June, 1990).

<sup>148</sup> See Cathy Spatz Widom, Does Violence Beget Violence? A Critical Examination of the Literature, 106 PSYCHOL. BULL. 3, 3-28 (1989). See also Albert Bandura, The Social Learning Perspective: Mechanisms of Aggression, in PSYCHOLOGY OF CRIME & CRIMINAL JUSTICE 198 (Hans Toch ed., 1979). See also Marilyn Feldman et al., Filicidal Abuse in the Histories of 15 Condemned Murderers, 14 BULL. AM. ACAD. PSYCHIATRY L. 345, 346-351 (1986). The authors studied the childhood histories of fifteen adult murderers and found that eight had been victims of potentially filicidal assaults by parents, four had been victims of sex abuse, and one was only physically abused. Id. at 348. Violence in the families was directed both towards the children by parents and between parents. Id. at 348-49. Eleven subjects had parent figures that "threatened each other with extreme violence." Id. at 349. In ten cases, there was severe parental psychopathology. Id. The authors provided several theories to understanding parental behavior as contributing factors to violence in their children including: modeling as the children witnessed and modeled violence; organic consequences of abuse, where the individual suffered extreme abuse which resulted in brain injury leading to poor judgment and impulsivity; displaced rage, when irrational and life threatening abuse engenders rage that the offender is unable to direct properly because of immaturity and dependence on parents; and lack of parental attachment, demonstrated by children who did not know who their parents were, children who were reared outside of their homes, and children who were abandoned. Id. at 350-51. Some subjects were brutally abused, were never visited on death row by family or friends, and had family who assisted in the prosecution, and still the subjects would not admit to abusive behavior. Id. See also Dorothy Otnow Lewis et al., Biopsychosocial Characteristics of Children Who Later Murder: A Prospective Study, 142 AM. J. PSYCHIATRY 1161 (1985). The authors found that there was a strong relationship between early abuse and later murder: seventyeight percent of the sample suffered severe abuse by one or both parents compared to about sixty percent of the remaining offenders. Id. at 1165. See also Dorothy Otnow Lewis et al., Homicidally Aggressive Young Children: Neuropsychiatric and Experiential Correlates, 140 AM. J. PSYCHIATRY 148 (Feb., 1983). The authors studied fifty-five children admitted to a psychiatric unit and found twenty-one of them were homicidal. Id. at 148. The homicidal children, although no different from the other group psychiatrically, were more likely to: have a father who behaved violently and were often homicidal, have experienced a seizure, have had attempted suicide, and have had a mother who had been hospitalized for a psychiatric disorder. Id. These factors are hypothesized to lead to juvenile violence. Id. See also Dorothy Otnow Lewis et al., Psychiatric, Neurological, and Psychoeducational Characteristics of 15 Death Row Inmates in the United States, 143 AM. J. PSYCHIATRY 838 (1986). The authors studied fifteen death row inmates and found that "all had histories of severe head injury, five had major neurological impairment, and seven others had less serious neurological problems." Id. at 838. Six subjects suffered from psychoses, and two suffered from Bipolar Disorder. Id. Nine of the subjects suffered from psychiatric problems as youth, enough to obtain treatment and prevent them from performing in "normal" classroom settings. Id. at 840. Central nervous system dysfunction would affect judgment, reality testing, and self-control. See also Logan, *supra* note 94. The author discusses childhood

abuse and its relation to the later commission of murder. Psychological risk factors to homicide include increased aggression, poor problem-solving skills and paranoia. *Id.* at 36. Child maltreatment often causes neurological damage, psychiatric problems, and behavioral deficits, and includes: "physical abuse, physical neglect, sexual abuse, witnessing family violence and psychological maltreatment." *Id.* at 36. Two of the most common psychiatric disorders resulting from child maltreatment are substance abuse and dependence. *Id.* at 37. Young persons often use substances to deal with emotional pain stemming from abuse and are introduced to substances by caregivers. *Id.* Early use of substances can lead to impulse control problems and poor judgment. *Id.* Depression and PTSD are also common disorders of abused children. *Id.* In addition, abused children also often suffer from intellectual problems, social skills deficits and behavior disruptions. *Id.* Physically abused children are often more defiant, noncompliant and aggressive, whereas neglected children are often withdrawn, do poorly in school and have cognitive delays. *Id.* See also Joan McCord, *A Forty Year Perspective on Effects of Child Abuse and Neglect*, 7 *CHILD ABUSE & NEGLECT* 265 (1983). See also Robert Ressler & Ann W. Burgess, *The Men Who Murdered 54 FBI L. ENFORCEMENT BULL.* 2 (1985) (stating that significant early abuse in sexual murderers is common). See also LEE N. ROBINS, *DEVIANT CHILDREN GROWN UP* (1966). See also Cathy Spatz Widom, *The Cycle of Violence*, 244 *SCIENCE* 160, 160-166 (1989).

¶149 See R. Weeks & C.S. Widom, *NAT'L INST. OF JUST., U.S. DEP'T OF JUST., Early Childhood Victimization Among Incarcerated Adult Male Felons* (1998) (study of medium security inmates in New York State and finding 68% reported some form of childhood victimization before age twelve, and 23% reported multiple forms of abuse and neglect, including physical and sexual abuse).

¶150 Cathy Spatz Widom, *NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUST., Childhood Victimization: Early Adversity, Later Psychopathology* 7 (2000) (finding 18.4% of abuse/neglect inmates suffered from APD, while 11.2% of the other non-abuse/neglect group qualified for APD and about 54.5% of the abuse/neglect group qualified for alcohol abuse/dependence, while 51% of the other group qualified for the same).

¶151 See Widom, *The Cycle of Violence*, *supra* note 148.

¶152 *Id.*

¶153 *Id.* See Lewis, *Biopsychosocial Characteristics of Children Who Later Murder: A Prospective Study*, *supra* note 148.

¶154 See Logan, *supra* note 94, at 37. See also McCord, *supra* note 148, at 268.

¶155 See McCord, *supra* note 148.

¶156 *Id.* at 268.

¶157 Id. at 269.

¶158 See Logan, *supra* note 94.

¶159 ROBINS, *supra* note 148, 167-71.

¶160 BANDURA, *supra* note 148, 205-08. See Haney, *supra* note 105. Abused children who become violent often identify with the aggressor, learning to model violent behavior from the parent who abused them. Id. at 570. Exposure to parental violence validates violence as a legitimate way to interact with other people. Id. The author argues that many capital offenders were involved in juvenile institutional placement and never obtained proper intervention since the institutions may have been poorly staffed and funded. Id. at 574. "The nexus between poverty, childhood abuse and neglect, social and emotional dysfunction, alcohol and drug abuse, and crime is so tight in the lives of many capital defendants as to form a kind of social historical 'profile.'" Id. at 580. He also argues,

gang members grew up and live in communities in which the socioeconomic environment has produced a great deal of aggressive and violent behavior; thus a given gang member's display of aggressive traits or his involvement in violent exchanges is not necessarily pathological; rather it is appropriate behavior in an environment whose socioeconomic conditions are pathological.

Id. at 587. Finally, the author discusses the myth of "free choice" and that human behavior varies, and people differ in their coping skills, biological makeup, risk factors, and traumatic life experiences such as poverty and childhood abuse. Id. at 592. "The logic of mitigation requires us to consider whether--if we praise those who have overcome such barriers despite this potentially destructive presence in their lives--we should not also adopt a more merciful and compassionate posture towards those who could not." Id. at 597. Society tends to believe that the people who survived and did not commit violence were more moral, had a conscience, and tried harder, whereas capital defendants were lazy, were bad at birth and had no morals. Id. One must consider dynamics of adaptation and survival. Id. For example, many capital defendants were the "black sheep" of the family and took the brunt of abuse and punishment. Id. at 597-98. Some children in the same family may turn to capital murder, develop psychiatric disorders and substance abuse problems, may commit suicide or be homeless; all may be affected and scathed. Id. at 599.

¶161 See DAVID T. LYKKEN, *THE ANTISOCIAL PERSONALITIES* 7 (1995).

¶162 Id. at 8-9.

¶163 Id.

¶164 Id. at 207-12. Lykken postulates that conscientiousness, prosociality, and acceptance of adult responsibility all combat antisocial tendencies. Id. at 8. See

PSYCHOPATHY, *supra* note 112.

¶165 PSYCHOPATHY, *supra* note 112, at 181.

¶166 *Id.* at 182.

¶167 LYKKEN, *supra* note 161, at 186.

¶168 PSYCHOPATHY, *supra* note 112, at 24. Murderers usually have personality characteristics such as rebelliousness and aggressivity, entitlement, social isolation, hatred and impulsivity, ragefulness and periodic outbursts of violent behavior against others. *Id.* See also OTTO KERNBERG, SEVERE PERSONALITY DISORDERS (1984).

¶169 See Diam S. Rosenstein & Harvey A. Horowitz, Adolescent Attachment and Psychopathology, 64 J. CONSULTING & CLINICAL PSYCHOL. 244 (1996). The authors found that adolescents experiencing poor attachment to mothers "were more likely to have a conduct or substance abuse disorder, narcissistic or antisocial personality disorder, and self-reported narcissistic, antisocial, and paranoid personality traits." *Id.* at 244.

¶170 J. REID MELOY, THE PSYCHOPATHIC MIND: ORIGINS, DYNAMICS, AND TREATMENT 54 (1988).

¶171 *Id.* at 54. A child must have a capacity to feel the mother being there even when she is not: a psychological presence of the mother has to be instilled in a youth for the child to be properly socialized. *Id.* at 55. When the primary parent is physically or emotionally sadistic, the child will usually create a sadomasochistic primary attachment. *Id.* at 56.

¶172 *Id.* at 19-20. Meloy also theorizes that criminal behavior is related to heredity and neuropsychological problems such as low cortical and autonomic arousal when precipitating a negative event. *Id.* at 31.

¶173 See CURT R. BARTOL, CRIMINAL BEHAVIOR: A PSYCHOSOCIAL APPROACH, (4th ed. 1995) (providing a thorough analysis of the causes of crime including biological factors, learning factors, and the causation of juvenile delinquency). See also Cunningham & Vigen, *supra* note 4. See also Lewis et al., Biopsychosocial Characters of Children Who Later Murder, *supra* note 148.

¶174 Meloy, *supra* note 170, at 122.

¶175 *Id.* at 121.

¶176 See Logan, *supra* note 94.

¶n177 See PSYCHOPATHY, supra note 112, at 27.

¶n178 Id.

¶n179 Id. (indicating that other studies of an adoption sample show both genetic and environmental components to crime).

¶n180 Id. at 27. The genetic component is most likely linked to personality traits, poor cognitive skills, impulsivity, sensation seeking behaviors, hyperactivity, and aggressiveness. Id.

¶n181 PSYCHOPATHY, supra note 112, at 44 (citing ADRIAN RAINE, THE PSYCHOPATHOLOGY OF CRIME (1993)) (summarizing data from thirteen twin studies and finding that 51.5% of the monozygotic twins are concordant for crime compared to about 20.5% for dizygotic twins, indicating a significant finding for the genetic link in crime, suggesting that psychopathic crime is reliably related to heredity).

¶n182 Id. at 44.

¶n183 PSYCHOPATHY, supra note 112, at 44.

¶n184 Id.

n185 Id. There is evidence that damage to orbitofrontal and dorsolateral regions of the prefrontal cortex may characterize antisocial individuals and there is evidence that damage to the frontal-temporallimbic systems of the brain causes antisocial behavior. Id. at 127.

¶n186 Id. There is evidence of the following: institutionalized adult offenders do not show differences in heart rate, and EEG studies indicate antisocials have slow-wave activity indicating underarousal. See H.C. Quay, Psychopathic Personality as Pathological Stimulation-seeking, AM. J. PSYCH. 122, 180-183, (1965), quoted in Mark D. Cunningham & Thomas J. Reidy, Antisocial Personality Disorder and Psychopathy: Diagnostic Dilemmas in Classifying Patterns of Antisocial Behavior in Sentencing Evaluations, 16 BEHAV. SCI. & L. 333 (1998).

¶n187 See Raine, supra note 180, at 240-241. Psychopaths, often with a lower IQ, are more likely to have avoidance learning deficits, low arousal, low motivation, poor verbal skills and language processing, left hemisphere dysfunction, poor development in moral reasoning, and may lack social informational processing skills. Id. at 241.

¶n188 See PSYCHOPATHY, supra note 112, at 171.

¶n189 PSYCHOPATHY, supra note 112, at 41. See H.J. Eysenck, Dimensions of Personality: 16, 5 or 3: Criteria for a Taxonomic Paradigm, 12 PERSONALITY AND INDIVIDUAL DIFFERENCES 773 (1991).

¶n190 PSYCHOPATHY, supra note 112, at 41.

¶n191 Id. at 44.

¶n192 Id. at 45.

¶n193 Id. at 45-46.

¶n194 Id.

¶n195 PSYCHOPATHY, supra note 112, at 45-46.

¶n196 Id.

¶n197 Id.

¶n198 Id. at 43.

¶n199 Id.

¶n200 PSYCHOPATHY, supra note 112, at 44.

¶n201 Id. at 46.

¶n202 Id. at 56.

¶n203 Blume & Voison, supra note 134, at 69.

¶n204 Id. at 73. Experts may prematurely believe that APD is relevant in the absence of further information including facts that mitigate the offense or prior offenses. Id. Once the expert believes the defendant may have APD, this belief may be resistant to change. Id. Tests such as the MMPI-2 should not be used as they are not designed for defendants with a history of capital offenses. Id. They will often score high on antisocial traits and will often score high on other disorders such as anxiety, paranoia, and depression due to their court case. They also may be presenting as malingering due to the nature of the court case and the tendency to "fake bad" in fear of the consequences of sentencing. Id.

They may have poor reading levels and thus, may not be able to understand the questions on the tests, which will affect their answers to questions and the validity of the test. Id. The authors believe that before an expert evaluates the defendant, they should obtain accurate medical history and social history, obtain reliable historical data from other sources than the defendant, the defendant should undergo a physical and neurological examination, and consideration of neuropsychological testing and neuroimaging procedures. Id. Such history will allow for the expert to decide if a diagnosis of APD is appropriate, or if another diagnosis, such as organicity or psychosis, are applicable. The

authors caution against insufficient facts, inadequate investigation and inattention to specific diagnostic criteria, focusing on the fact that there should be no short cuts in order for there to be a reliable diagnosis. Id.

¶205 Id.

¶206 William H. Reid, *Antisocial Personality, Psychopathy, and Forensic Psychiatry*. J. PSYCHIATRIC PRAC. 55 (Jan., 2001).

¶207 For example, an individual who steals to support a drug habit may be displaying antisocial behavior, but not qualify for APD. Similarly, an individual who is a gang member and has to assault someone for initiation to the gang but is not inherently violent and lacks a significant history of aggression may be said to qualify for APD. An expert needs to focus on patterns and contexts of the behaviors and relate them specifically to the APD diagnostic criteria.

¶208 Mehler, *supra* note 147, at 20.

¶209 Id. The diagnosis has been controversial in nature as it is an "unspecified mental abnormality inferred from social deviance; it has been called 'a moral judgment masquerading as a clinical diagnosis.'" Id.

¶210 See DSM-IV, *supra* note 140, at 650.

¶211 Id. at 85.

¶212 Id.

¶213 Id. at 650.

¶214 Id. at 645-50.

¶215 DSM-IV, *supra* note 140, at 91.

¶216 Id. at 87-91.

¶217 See Reid, *supra* note 208, at 55.

¶218 See DSM-IV, *supra* note 140, at 87-89.

¶219 Id. at 91-94.

¶220 Id. at 90-91, 650.

¶221 Id. at 89, 648-49.

¶n222 Id. at 648-49.

¶n223 See DSM-IV, supra note 140, at 350-63. Unfortunately, in some cases in which there are several mental health problems such as a mood disorder or psychosis, there is also a history of criminal behavior, often violent and non-violent. It is difficult for the expert to "tease" out the mental illnesses and the etiology of each crime committed. In these cases, mental health and police report records are imperative.

¶n224 See DSM-IV, supra note 105, at 650. Some schizophrenics have been diagnosed with APD. Some are psychotic psychopaths, a lethal combination. At times, it is difficult to determine etiology of criminal behavior.

¶n225 Id. Distinguishing APD from other personality disorders is difficult, especially since many personality disorders have similar criteria. Id. For instance, narcissistic individuals are often superficial in relationships, arrogant, lack empathy and remorse. Id. at 649. However, they do not tend to be impulsive and aggressive or qualify for CD as do individuals with APD. Id. On the other hand, individuals with APD may not desire admiration and envy. Id. Those with Borderline Personality Disorder are often manipulative, as are those with APD. Id. Persons with Borderline Personality Disorder seek nurturance and may fear abandonment, suffer from low self-esteem and have problems with their mood, at times displaying aggression; whereas those with APD tend to be manipulative for profit and power and are more emotionally stable, but at times are similarly aggressive. Id. at 649.

¶n226 See Reid, supra note 208, at 55.

¶n227 Mehler, supra note 147, at 21-22.

¶n228 DSM-IV, supra note 140, at 648.

¶n229 See id. at 648-49.

¶n230 See id. An individual who has ten charges of theft, drug possession and assault in adulthood with a lack of CD diagnosis would not qualify for APD. "When substance use and antisocial behavior both began in childhood and continued into adulthood, both a Substance-Related Disorder and APD should be diagnosed if the criteria for both are met, even though some antisocial acts may be a consequence of the Substance-Related Disorder, e.g., illegal selling of drugs or thefts to obtain money for drugs." Id.

¶n231 Cunningham & Reidy, supra note 186, 333 (explaining that the APD diagnosis may be viewed by some experts, judges, and juries as dominating over any mitigation in a capital case).

¶n232 Id. at 334. The authors argue that APD lacks descriptive validity and good reliability, stating the "DSM-IV criteria neglect the interpersonal/affective symptoms which emerged from the prototypical analysis and from the PCL-R." Id. They further cite

that the APD criteria on the DSM-IV were not field-tested, but were logically derived from the preceding DSM-III-R, and there was no field trial conducted on the CD diagnosis in consideration for the DSM-IV. Id. at 335.

¶n233 Id. at 335.

¶n234 Id. Due to a lack of symptom weighting and the innumeracy problem, distinct clinical constructs may be applied.

¶n235 Id. The authors suggest that the relationship with APD and future violence or crime may be related to the frequency and severity of the symptoms rather than the diagnosis. Id.

¶n236 See Cunningham & Reidy, *supra* note 231, at 335-336. APD is not stable across the lifespan. Interrater reliability of APD amongst clinicians measures to what extent their diagnoses are consistent with one another. Id.

¶n237 Id. at 337. The authors ask "if a behavior pattern represents a widespread social phenomenon, i.e., criminality, is it appropriate to diagnose the individual expression of these traits as a personality disorder?" Id.

¶n238 Id. "These trauma or survival effects may include problems with affect modulation and behavioral control which may rise to delinquency or frankly criminal acts, substance abuse, interpersonal alienation and reduced community identification, deficient moral reasoning, and other cognitive distortions." Id.

¶n239 Mehler, *supra* note 147, at 25.

¶n240 Cunningham & Reidy, *supra* note 231, at 338.

¶n241 Id.

¶n242 Id. at 340. Estimates from different studies in prison populations indicate that the prevalence of APD is 49 to 80% (citing other studies). Id.

¶n243 Id.

¶n244 Id.

¶n245 Cunningham & Reidy, *supra* note 231.

¶n246 See *id.*

¶n247 Id.

¶n248 Id.

¶249 Id. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) (holding that the Frye "general acceptance" test should be superseded by the Federal Rules of Evidence, specifically Rule 702, governing expert testimony. Id. at 587. The Court stated that "scientific knowledge" must be derived by the scientific method and testimony must be supported by validation and reliability. Id. at 590. For a theory or technique to be qualified as scientific knowledge it must satisfy different elements, including whether it can be tested, whether it has been subjected to peer review and publication, and whether there is a known or potential rate of error. Id. at 593-94. The Court stated that "general acceptance" is not necessary for evidence to be admissible in court, but the Rule 702 of the Federal Rules of Evidence allow the trial judge the responsibility of deciding whether the expert testimony is reliable and relevant to the issue being considered. Id. at 594-95.

¶250 *Cunningham & Reidy*, supra note 186, at 347.

¶251 Id. at 339. The authors also question the uses of psychological tests citing that the use of the Hare Psychopathy Checklist and the Minnesota Multiphasic Personality Inventory (MMPI) offer little evidence differentiating APD,  $r=.29$  and  $.26$  respectively for the two instruments. Id.

¶252 *Mehler*, supra note 147, at 25.

¶253 See *Cunningham & Reidy*, supra note 186, at 346-48.

¶254 Id.

¶255 *Cunningham & Reidy*, Don't Confuse Me With the Facts: Common Errors in Violence Risk Assessment at Capital Sentencing, supra note 3, at 23.

¶256 Id. at 25.

¶257 Id. at 23.

¶258 *Cunningham & Vigen*, supra note 4, at 199. Studies indicate that mean IQ scores of death row inmates often fall in the average to low average range, however, a significant minority of individuals experience substantial intellectual impairments. Id. Nearly twenty-seven percent of death row inmates in Mississippi have verbal IQ scores of seventy-four or below, which is in the mild mental retardationborderline intelligent ranges. Id. In addition, most death row inmates have lower levels of formal education, having reached only the ninth grade. Id. Further, their functional reading abilities are well below what would be expected for their respective levels of education. Id. at 199200.

¶259 *James W. Ellis & Ruth A. Luckasson*, Mentally Retarded Criminal Defendants, 53 *GEO. WASH. L. REV.* 414, 444-66 (1985). Mentally retarded defendants are common within the criminal justice system, however, they have received little attention from the

courts and scholars. *Id.* at 414. Mentally retarded individuals are often overlooked in the courts and are not recognized as being mentally retarded during court proceedings. *Id.* at 415. Legal rules for the mentally retarded have not traditionally been a focus in the criminal justice system. *Id.*

¶n260 *Id.* at 414-15.

¶n261 492 U.S. 302 (1989).

¶n262 *Id.* at 318-19. Penry argued that his mental retardation and history of abuse should question his moral culpability, and the jury was unable to express its "reasoned moral response" to that evidence in their decision. *Id.* at 322. The Court agreed stating that his mental retardation was relevant to whether he acted deliberately and had relevance to his moral culpability. *Id.* The Court believed that jury instructions needed to be specific in its definition of "deliberately" in a way that the juror could consider mitigating evidence as it bears on his responsibility. The Court was uncertain whether the jury could give proper consideration to the mitigating evidence. *Id.*

¶n263 *Id.* at 334-40. Penry argued that it was cruel and unusual under the Eighth Amendment to put him to death with the reasoning of a 7-year-old. *Id.* at 336. He argued that his abilities were impaired and he did not present with the moral responsibility to justify a death sentence. *Id.* He further argued that society does not support executing the mentally retarded. *Id.* at 334-35. The State argued that there is insufficient evidence to support this societal view and that there are procedural safeguards protecting Penry. *Id.* at 328-329. The Court cited the facts that he was competent to stand trial and the jury rejected the insanity defense. *Id.* at 333. They stated that Penry did not offer support regarding a national consensus against the death penalty for retarded individuals nor evidence that juries or prosecutors behave in certain ways regarding these cases. *Id.* at 333-334. "Penry argued that the mentally retarded . . . do not have the judgment, perspective, and self-control of a person of normal intelligence." *Id.* at 336. As a result, he was not able to consider long-term consequences of his acts and should not be found morally accountable for his crime. *Id.* While the Court considered this argument, they cited that states allow for mitigation of mental retardation at capital sentencing and that all mentally retarded individuals are different from one another. *Id.* at 337. Although mental retardation may lessen a defendant's culpability for a crime, they argued that it alone cannot prohibit the death penalty. *Id.* at 337-340.

¶n264 536 U.S. 304 (2002).

¶n265 *Id.* at 350.

¶n266 *Id.* at 345-47.

¶n267 *Id.* at 349-50. The Court stated that the death penalty does not serve the purposes of punishment such as retribution and deterrence due to the individuals' lesser culpability as a result of their impairments. *Id.* at 348-49. They stated that mentally retarded

offenders may make false confessions and there is a lessened ability to be persuasive in mitigation versus the state's evidence of aggravating factors. *Id.* at 350. Further, many states have changed their death penalty statutes to exclude the mentally retarded, representing a change in societal views on the issue. *Id.* at 346-47. Mentally retarded individuals' cognitive and behavioral impairments make them less culpable in that they have a diminished capacity in understanding information, controlling impulses, learning from experience, considering consequences of behavior and controlling their conduct. *Id.* at 349.

¶268 DSM-IV, *supra* note 140, at 46.

¶269 George S. Baroff, Why Mental Retardation is "Mitigating," 22 CHAMPION 33, 33 (1998).

¶270 *Id.* Schizophrenia is a psychotic disorder in which an individual may be suffering from psychotic features such as auditory or visual hallucinations or experiencing delusions, unrealistic thoughts. DSM-IV, *supra* note 140, at 274-86. Psychotic individuals are frequently not in touch with reality and require antipsychotic medication that assists with chemical imbalances in the brain. *Id.* Depression is a mood disorder in which an individual may experience suicidal thoughts, feelings of worthlessness, and hopelessness that often requires antidepressant medication to assist with his biochemical imbalances. *Id.* at 284.

¶271 See Ellis & Luckasson, *supra* note 259, at 423. Mental illness is usually more temporary and episodic while mental retardation is more permanent. *Id.* at 424. It is not uncommon for mental illness or mental retardation to coexist with criminal behavior. *Id.* at 425-426. On one hand, mental illness and crime may coexist, mental illness may predispose one to criminality, and mental illness may inhibit individuals to commit crimes. *Id.* at 426. Whereas mental retardation may inhibit and disable criminal behavior, it may coexist with criminality, but rarely causes criminal behavior. *Id.* Mental retardation is a learning and cognitive disorder rather than a thinking disorder (like a psychosis). *Id.* at 427. There are indirect consequences of mental retardation such as effects on personality and behavior due to living in dehumanizing and abusive institutions for example. *Id.*

¶272 *Id.* at 424.

¶273 *Id.* at 425.

¶274 DSM-IV, *supra* note 140, at 39-46.

¶275 *Id.* at 39.

¶276 *Id.* at 40.

¶277 *Id.* at 41.

¶n278 Id. at 39. The mental retardation diagnosis includes "significantly subaverage intellectual functioning: an IQ of approximately 70 or below on an individually administered IQ test." Id. at 46. Deficits or impairments in present adaptive functioning "refers to how effectively individuals cope with common life demands and how well they meet the standards of personal independence expected of someone in their particular age group, sociocultural background, and community setting." Id. at 40. Adaptive deficits affect "communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety." Id. at 46. "Adaptive functioning is affected by child rearing, motivation, personality characteristics, social and vocational opportunities, and the mental disorders and general medical conditions that may coexist with mental retardation." Stetler, *supra* note 34, at 51.

¶n279 See American Association of Mental Retardation (AAMR), at <http://www.aamr.org> (providing a mental retardation fact sheet and definition of mental retardation. AAMR defines mental retardation by considering the following:

1. Limitations in present functioning must be considered within the context of community environments typical of the individual's age, peers, and culture.
2. Valid assessment considers cultural and linguistic diversity as well as differences in communication, sensory, motor, and behavioral factors.
3. Within an individual, limitations often coexist with strengths.
4. An important purpose of describing limitations is to develop a profile of needed supports.
5. With appropriate personalized supports over a sustained period, the life functioning of the person with mental retardation generally will improve.

See Mental Retardation Fact Sheet, American Assoc. of Mental Retardation, at <http://www.Aamr.org/Policies/faqmentalretardation.shtm2>. Mental retardation refers to a state of functioning that begins in childhood, and is affected by individualized supports. Id. It includes the contexts and the environment in which the individual functions focusing on the manner in which he interacts within the environment. Id. There is consideration of the outcomes of this interaction focusing on "independence, relationships, societal contributions, participation in school and community, and personal wellbeing." Id. The disability must represent a "substantial disadvantage when attempting to function" in the environment. Id. The disadvantage is measured "within the context of the environment, personal factors, and the need for individualized supports." Id. The intellectual functioning measuring general mental capability is usually 70 or below. Id. Since there is a standard error of about 5, then one can be classified as mildly mentally retarded if they score between 65 and 75 on IQ testing. Id. However, an IQ is only one aspect in determining if a person has mental retardation. Id. The adaptive functioning of the person is important to assess. Id. Adaptive behavior includes conceptual skills, social skills, and practical skills. Id.).

¶n280 See Baroff, *supra* note 269, at 33.

¶n281 Id.

¶n282 Ellis & Luckasson, supra note 259, at 428-29. Confessions by mentally retarded individuals are sometimes suspect, and at times found inadmissible. Id. at 448. Mentally retarded individuals may be more susceptible to coerced confessions and pressure by law enforcement personnel; or on the other hand, they may be prone to give into friendliness and kindness as manipulation. Id. at 446. They also may make confessions to please the interrogator/authority figure. Id. Further, the individual may not understand the consequences of making a confession and his right not to confess. Id. The individual may have not understood his Miranda warnings and the warning may have been read to him in a quick and summary fashion without explanation. Id. at 448-49. Further, a mentally retarded individual may often not be identified by law enforcement as mentally retarded at the time of the confession. Id. at 449.

¶n283 Id. at 448-49.

¶n284 See Blume & Leonard, supra note 51, at 66. The expert should review police notes, the defendant's statements, any audio or video recording of the confession and statements, whether the interrogators knew of his mental condition, whether the defendant was under the influence of alcohol or drugs at the time of the statements, and whether authorities exploited him during the confession.

¶n285 Ellis & Luckasson, supra note 259, at 429.

¶n286 See DSM-IV, supra note 140, at 82-85.

¶n287 Id. at 78-85.

¶n288 See Ellis & Luckasson, supra note 259, at 429.

¶n289 See Mental Retardation Fact Sheet, supra note 279.

¶n290 Id. Biomedical factors are linked to biological processes, genetic disorders and nutrition practices, while social factors are associated with social and family relations and interactions, and adult responses to their interactions with their offspring. Id. Behavioral factors include maternal substance abuse, and educational factors relate to education provided to children by family and community resources. Id. These factors may be transmitted from one generation to the next. Id. See Introduction to Mental Retardation, The Arc, at <http://www.thearc.org/faqs/mrqa.html> (mental retardation can be caused by three major factors including Down Syndrome, fetal alcohol syndrome, and fragile X syndrome. Id. Many causes remain unknown, but usually the etiological factors impair the development of the brain prior to birth, during birth, or during a child's developmental years. Id. In fact, some researchers indicate in most cases of mental retardation the cause is unknown. Id.).

¶n291 E.g., WASH. REV. CODE ANN. § 10.95.030 (West 1993) (defining mental retardation as "the individual has: (i) significantly subaverage general intellectual

functioning; (ii) existing concurrently with deficits in adaptive behavior; and (iii) both significantly subaverage general intellectual functioning and deficits in adaptive behavior were manifested during the developmental period." *Id.* The age of onset is 18 years of age, and the required IQ level is 70 or below. *Id.* A court-appointed licensed psychiatrist or psychologist experienced in the diagnosis and evaluation of mental retardation must diagnose the defendant. *Id.* This leaves open the issue of whether or not the defendant may hire his own expert.). See *State of Ohio v. Lott*, 779 N.E.2d 1011, 1014-15 (Ohio 2002) (holding that the defendant bears the burden of proving that he is mentally retarded by the preponderance of the evidence, and citing the AAMR and APA definitions of mental retardation and specifically indicated that the defendant needed to suffer from two adaptive functioning deficits).

¶292 See Denis W. Keyes et al., *Mitigating Mental Retardation in Capital Cases: Finding the "Invisible" Defendant*, 22 *MENTAL & PHYSICAL DISABILITY L. REP.* 529, 534-37 (Aug. 1998). The authors focus on defendants that are or may be mentally retarded and consider information and strategies relevant to the assessment of mental retardation. Defense attorneys must understand mental retardation and how it affects the defendant's ability to obtain fair representation in court. There is a measurement of error of about five points on standardized IQ tests so it is possible that an individual with an IQ score of 75 and has deficits in adaptive functioning, may qualify for mild mental retardation. *Id.* at 529-530.

¶293 When mental retardation is a specific referral issue in clinical and/or forensic psychological cases, formal adaptive functioning instruments such as the Vineland Adaptive Behavior Scales (VABS), designed to assess both handicapped and nonhandicapped individuals from birth through adulthood regarding personal and social functioning abilities and deficits, and/or the AAMR's Adaptive Behavior Scale Residential and Community, 2nd Edition, (ABS-RC:2) are helpful. On the ABS-RC:2, the instruction manual indicates that an informant, such as a parent, guardian, work supervisor or someone who has known the individual for a long period of time, is necessary to provide data about the individual's life, specifically issues that address adaptive behaviors and functioning in his environment. Further, the Wide Range Achievement Test, 3rd Edition, (WRAT-3) is often administered to assess for functional learning deficits regarding adaptive functioning.

¶294 Most psychologists administer the WAIS-III for IQ assessment purposes.

¶295 Keyes et al., *supra* note 292, at 533-535.

¶296 *Id.* at 535.

¶297 I recently was confronted with the difficulty of whether a capital defendant qualified for mental retardation. The attorneys also wanted me to address the defendant's competency to waive Miranda rights, competency to stand trial, sanity at the time of the act, and **death penalty mitigation**. The defendant had a history of about seven IQ tests that were administered between the ages of twelve and twentytwo, ranging from

fiftyseven to seventy-four. About five of the seven IQ tests, including two current IQ procedures indicated IQ scores of seventy or below. He experienced adaptive functioning deficits beginning at an early age but there were no objective adaptive functioning tests performed when he was a youth. He was never diagnosed as mentally retarded in any of the records, even when he scored a fiftyseven IQ at age twelve. The clinician reported that the IQ score of fifty-seven was a low estimate of his current intellectual functioning due to his other behavioral problems and stressors in his life. He qualified for severe behavioral handicapped classes, had diagnoses including PTSD, learning disabilities, depression, substance abuse, and antisocial personality throughout adolescence and adulthood. During psychological testing as a youth and adult, he was consistently distracted. When I assessed him he was residing in jail and charged with rape, kidnapping, and murder, facing the death penalty. He had the murder on his mind during testing and would discuss it, and at times cry and express remorse and had to be redirected. He obtained an IQ score of fifty-eight. In a second opinion evaluation, he also scored a fifty-eight. It is likely his current score was adversely affected by the distraction about his court case. He was not formally diagnosed in the past with mental retardation, yet he could have been. There was no mention of mental retardation, yet I had to address why there was no diagnosis in the past. One major dilemma in this case is that some of the other disorders he was diagnosed with may have impacted his IQ scores as well as his adaptive functioning skills. For example, his behavioral problems, antisocial personality, past exposure to trauma and history of depression, substance abuse likely affected his quality of interpersonal relationships. His ability to take care of his health and safety needs can be affected by antisocial personality features as he may place himself at risk of harm to self and others. Family members were not available to assist in providing information needed to adequately assess adaptive functioning. Finally, the attorney had addressed with the defendant the fact that the testing could affect whether the death penalty specification could still be imposed. He was aware of the consequences of the testing when he was administered the IQ test a second time with another expert. This example highlights the difficulties with diagnosing mental retardation and questions the common belief that mental retardation is satisfied with a number, an IQ score of seventy or less.

¶298 Stebbins & Kenney, *supra* note 36, at 18.

¶299 McPherson, *supra* note 37.

¶300 Tomes, *supra* note 77, at 379.

¶301 *Id.*

¶302 *Id.*

¶303 See Stetler, *supra* note 34, at 38.

¶304 McPherson, *supra* note 37. The expert might decide that it is appropriate to voice his belief on direct testimony about his opposition and position on the death penalty.

¶n305 Id.

¶n306 Id.

¶n307 Id.

¶n308 Stebbins & Kenney, *supra* note 36, at 18. Simple language will aid in humanizing the defendant.

¶n309 Id.

¶n310 See Cunningham & Vigen, *supra* note 4, at 206.

¶n311 See Haney, *supra* note 105. The author believes that there is a myth that most people who commit capital offenses are less than human and should be removed from the earth through social means. *Id.* at 548-49. Some of these myths are created by the state and the media, or "the so-called 'agenda setting' function of the state and the media have catapulted the death penalty to the forefront of public concern." *Id.* at 549. He theorizes that despite widespread media mystifications about killers, a meaningful explanation for capital violence must begin by explaining the lives of the defendants by emphasizing mitigation evidence. *Id.* at 559. Mitigation is not offered to excuse, justify or lessen the significance of the crime, but to explain it to the jury in a relevant manner to their sentencing task. *Id.* at 560.

¶n312 *Id.* at 560.

¶n313 See Phyllis L. Crocker, *Childhood Abuse And Adult Murder: Implications For The Death Penalty*, 77 N.C. L. REV. 1143 (1999). Murderers are likely to have "poor" judgment, inability to appreciate consequences, control impulses, overreact to stressful situations, and be impulsive and aggressive. *Id.* at 1174-77.

¶n314 *Id.* at 1184.

¶n315 *Id.* at 1176. The author believes that presenting evidence of the effects of longterm child abuse on the defendant's behavior may explain circumstances of the crime. *Id.* at 1177. She distinguishes between jury empathy with the defendant's inability to judge situations and control responses in a non-violent manner, and jury sympathy, feelings of sorrow and pity for the defendant, "sympathy may be less compelling than an explanation for the murder based on the defendant's experience of childhood abuse, but it is no less relevant." *Id.* at 1178. Childhood abuse may sober the jury to the horrific background causing jury sympathy and empathy, but may also lead to discussions of violence risk with the prosecution. *Id.* at 1179. The author explains barriers that hinder the "presentation and consideration of childhood abuse as mitigating evidence." *Id.* at 1180. Courts often misunderstand, minimize, misinterpret, and ignore the relevance of child abuse and its consequences to the jury's sentencing decision. *Id.*

Many defense attorneys do not properly investigate and present evidence of the long-term effects of abuse and often fail to consider the aggravating factors of this abuse that the state can argue. *Id.* Often, jury instructions do not properly consider childhood abuse and consequential impairments as mitigating issues. *Id.*

¶316 *Id.* at 1199-1202. The author argues,

unfortunately, courts and defense attorneys themselves, often say that the aggravating potential was a reason not to present the mitigating evidence of abuse. This attitude is an attempt to excuse the failure to investigate or present evidence of childhood abuse rather than confront the complexity and strength of childhood abuse as a mitigating circumstance.

*Id.* at 1201-1202. The potential for introducing prior violent bad acts should not deter the defense team from investigating and presenting mitigation at sentencing based on evidence of child abuse. *Id.* at 1200. If the case proceeding occurs in a state allowing introduction of unadjudicated crimes, the prosecution will be allowed to present evidence of prior violent acts whether the defense opens the door to such evidence. *Id.* The defense may defend against the state's discussion of future dangerousness, by placing the prior violence in context presenting evidence about his lack of future dangerousness and refocusing the jury's attention to the causation of violence, his prior child abuse and any mental health impairments. *Id.* at 1200-01. Defense counsel must argue about irrelevant abuse because other abused children in and out of the same family of the defendant's have not killed. *Id.* See *Burger v. Kemp*, 483 U.S. 776 (1987). The defense attorney did not present evidence about the defendant's abusive childhood because he thought it would reveal his violent behavior that was inconsistent with his punishment phase strategy of showing the defendant as a follower. *Id.* at 789-95.

¶317 *Stetler*, supra note 104, at 40. A mitigation "investigation is not complete until the information uncovered becomes redundant and provides no new insight" about the defendant. *Id.* at 38. See *Norton*, supra note 51.

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