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WHY'D HE DO THAT?

The case for mitigation investigation

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This is an article about Mitigation Investigation in criminal defense cases. It starts with two very true stories.

THE HOMELESS MAN

I live in an inner city environment. A homeless man has been around our neighborhood lately. He wears the same dirty clothing and can be identified by his odor a block away. He's non-violent (thus far); he just talks out loud to himself as he walks down the middle of the street. He talks very loud. I've stayed out of his way and basically ignored his ranting until earlier today when I heard the following: "And another thing we've got to talk about. This is important. Those new digital TVs aren't worth *^&%. You know, when you drop 'em they just don't work at all!"

THE GOOD FATHER

On April 18, 2009 a Maryland man shot and stabbed his wife and three young children to death before killing himself with a shotgun. He was allegedly having money problems. His five suicide notes indicated psychological issues. There was the mention of medication. There was an alluding to psychological trauma. He slashed some of his children with a knife and used a small-caliber handgun on others. The boys were 4 and 5 years old. His daughter was 2. His wife was 33. More will be determined over time. Neighbors said he was a lovely man; gentle. No one expected he was capable of this.

INVESTIGATING BEYOND THE CRIME

Outward physical appearances say nothing of the strange workings of the brain within the skull. All unusual behavior isn't predictable. Visual clues may not be present. The investigator must look beyond the obvious. As with these two true examples, no one can look at another human being and say: "I knew he had a criminal mind."

Smoking guns, physical evidence, crime scene analysis, document review, witness testimony, advanced forensic evaluation of data and exhaustive research are all used to determine IF an individual has committed a crime, caused an accident or defrauded another. That's called guilt phase investigation. It tells WHAT happened and often results in determining WHO was at fault. As defense investigators our job is to gather and examine all available evidence. From that evidence we are able to provide to attorneys a volume of information from which theories and defenses can be discussed and pursued.

There is a vital second part to a good investigation. Generally referred to as mitigation, this investigative phase also includes understanding the background of the client. Sometimes it is

the bailiwick of mitigation specialists. Sometimes the mitigation specialist is the investigator. Mitigation, by definition, means simply “alleviation.” It is a moderation or modification of something that makes it less intense. In the legal world it refers to surrounding factors that make a situation less aggravated or without criminal intent. In essence, mitigation is finding out the **WHY**. What caused a particular action? Was it an intentional act? Did the individual understand what he or she was doing? Was his understanding skewed by an inability to see the world according to socially accepted norms? Did the doer have a sufficient social or psychological background to know the difference between right and wrong? **WHY’D HE DO THAT?**

NATURE, NURTURE OR NEUROLOGY?

I have personally become more involved with mitigation in my role as an investigator of post conviction capital cases. In this job, I have come to realize that the client is never being served if he or she has not been fully investigated as an *element of the crime*.

I have the distinct advantage of being a Monday morning quarterback who can look back upon what has been done and benefit from hindsight. What I see in review is sometimes startling. Most attorneys request of their investigators that the guilt phase of a case is thoroughly examined. **WHERE** it took place, **WHEN** it occurred, **HOW** it happened, with **WHAT** weapon and upon **WHOM**, are all questions that are generally answered with some level of expertise. Unfortunately the all important **WHY** is regularly disregarded. What causes a person to do grievous harm to another? Is it simply evil? More likely it is because of the complex nature of the person who is not fully understood. He (or she) has never been considered as an element of the case itself. The investigator must consider the client as an integral piece of the crime (as important as a gun, knife or other weapon).

Not only should a thorough investigator look at the environment in which a client has been raised, but the nurturing persons in his or her life have to be examined as well. The whole individual must be considered. For this reason, it becomes vital that the mind of the client should be examined as well. Vital answers are needed to determine the path that brought the infant through childhood and eventually into a person capable of murder.

Our courts are recognizing that neuropathological functioning should be considered in understanding the actions of an individual during the commission of a crime. It seems reasonable, therefore, that this is an area which should be explored by an astute investigator. Investigators are not psychologists, neurologists or forensic brain experts. It is not the role of the investigator to understand all of the nuances of such specific medically related work. It is important that the investigator, as the finder of information, is familiar with the many ways of looking at a human being. It is the job of the investigator to gather and pass along all relevant data to the proper experts for examination. The “whole” client needs to be understood and explained to the jury. In fact, if the information is particularly valuable it becomes a part of the guilt phase as well. Under *Adkins v VA* it has been ruled that an individual who is mentally retarded cannot be executed. Thus, the finding of a sufficiently low IQ to qualify a client in this category becomes particularly valuable to the attorney in presenting the client to a jury.

As investigators we should be familiar with the term “mens rea”. This is Latin for the “guilty mind” or “intent” to do harm. The brain is the organ that controls all of our actions as the center of our nervous systems. It is the object that contains and transmits instructions to the rest of our body. Certain parts of the brain control certain functionings of our being. If the brain is damaged, or has not matured properly, or is in a state of disease, then the mind will perceive the world according to these maladies or abnormalities.

Traumatic brain injury would be the first and most obvious category of brain malfunction. We think immediately of head injury caused by an automobile accident or perhaps a particularly rough football game. There are also environmental and familial risk factors that can cause organic brain impairment. Take for example substance abuse, maternal alcohol syndrome, parental criminal and drug abuse, or deplorable home conditions that expose a child to toxic lead, parasites or rodents. Each of these elements can be causes for the lack of development of an individual’s brain. These are but a few of the numerous elements that can ultimately cause a client to develop a mind with seemingly unusual thought processes.

THE BRAIN:

The human brain is divided into several parts. There are two hemispheres (the right and the left) that occupy the corresponding parts of the skull. Thus the brain looks very much like two identical but separate gooey lumps of clay with ridges and wrinkles in the shape of a rather uneven crescent. While they appear almost identical they have slightly different functions. The right hemisphere is associated with creativity and the left with logical processes.

Each hemisphere is separated into four lobes. They have distinct roles which guide the life of a human being. Each controls a particular part of functioning and/or reasoning.

- 1. Frontal Lobe:** reasoning, planning, parts of speech, movement, emotions and problem solving.
- 2. Parietal Lobe:** movement, orientation, recognition, perception of stimuli.
- 3. Occipital Lobe:** visual processing.
- 4. Temporal Lobe:** perception and recognition of auditory stimuli, memory and speech.

Injury, illness or lack of maturation of the brain can all be causes of criminal actions. Unfortunately they are frequently identified as sociopathic or psychopathic by prosecutors using a broad brush to paint a picture of evil intent. In actuality, these are real issues that should and can be addressed by an attorney to better understand the rationale behind the actions of a client. Actual physical damage to the brain from alcohol and drug abuse can effect perception and memory. What is perceived as a non-threatening gesture by a healthy normal person might be perceived as a violent assault on the part of the impaired and unhealthy mind.

An individual with dementia in the frontal lobe may not have the ability to solve problems or express emotions like a “normal” person. As a result, extreme acting out (dysinhibition) due to frustration may appear to be aggressive or threatening, when it is actually a non-violent attempt to be understood.

THE ROLE OF THE INVESTIGATOR:

While all of this sounds complicated on the surface, the job of the investigator has not really changed. As in every good investigation the following steps need to be taken:

1. All available material must be gathered and read. (This includes police reports, autopsies, forensic expert evaluations, confessions, existing transcripts, etc. etc.)
2. The client should be thoroughly interviewed to understand not only his or her version of the crime, but to gather a family history as well.
3. A time line must be started. It is a living and growing document that will change as information is gathered and added to it. This time-line should begin NOT with the crime, but at least one generation prior to the birth of the accused.
4. The investigator must remain in constant contact with the attorney so that all information is transmitted in a timely manner. A theory of the case will be developed based upon the evidence gathered.
5. Interviews need to be conducted of all persons relevant to the crime itself (fact witnesses) and persons familiar with the client (family, friends, teachers, doctors) who can provide much needed insight into the accused.

During the course of this process, the investigator will begin to find clues as to the possibility of neurological damage or environmental impacts upon the actions of the client. If a sufficient number of indicators point to the likelihood of actual physical injury which might have resulted in brain damage, this information can be used by the attorney in the hiring of appropriate experts. In lieu of such actual physical injury it is possible that there are adequate indicators to direct the attorney to look at neuropsychological evaluation. This can all be done simultaneously as many of the people who are alibi or fact witnesses might just be those persons who can supply mitigation evidence as well.

The best way to identify problems in a client is to ask detailed questions of family and associates that would help to identify such behavior. NEVER ask the question: "Is he normal?" Normal is about as broad a concept as one could ever imagine. Normal may be common to a particular environment. In a household where it is "normal" to beat the children, then child beating is an accepted behavior. In the rest of our culture it is considered abuse. "Normal" in the household of pedophiles is to become sexually involved with children under the age of 16. These are actions eschewed by the majority of our society.

Questions which can be asked are those regarding chronological history and adaptive deficits. These refer to the manner in which an individual has adapted to his or her environment in spite of a lack of normal functioning skills. A client may be perceived as "normal" in the particular environment in which he or she lives, but in actuality are quite deviant when viewed in the broader spectrum of humanity.

In an effort to assist the investigator in obtaining a full and functional client profile, I have attached a sample questionnaire. This is a guide only and does not constitute the totality of questions one might ask during an interview. While not complete, it provides categories and areas for discussion with the client, his family and friends. (See Chart A)

IS THERE MORE?

The topic of mitigation is obviously lengthy and complex. It is impossible to address it all in a single article. The overview that has been provided is to alert the investigator (at both trial level and post conviction) to the vital function of mitigation in a thorough criminal investigation. There is much more to be explored. When it comes to the brain, there is much hidden beneath the surface of the human skull. Obviously, in the case of mitigation, there is always more than meets the eye.

(picture of a brain inside a skull on crutches)

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i mit-i-gate

To moderate (a quality or condition) in force or intensity; alleviate. See Synonyms at [relieve](#).

To become milder.

The Free Dictionary by Farlex.

dictionary.reference.com/browse/mitigation

ii Neurology: The medical specialty concerned with the diagnosis and treatment of disorders of the [nervous system](#) -- the brain, the spinal cord, and the nerves. 1996-2009 MedicineNet, Inc.

iii Neuropathology: The study of diseases of the nervous system. (Neuro: nervous system and brain. Pathology: the study of diseases). Definition by author.

iv **Error! Main Document Only.** *Atkins v. Virginia*, 536 [U.S. 304](#) (2002), is a case in which the [Supreme Court of the United States](#) ruled 6-3 that executing the [mentally retarded](#) violates the [Eighth Amendment](#)'s ban on cruel and unusual [punishments](#).

Also, the "relationship between mental retardation and the penological purposes served by the death penalty" justifies a conclusion that executing the mentally retarded is cruel and unusual punishment that the Eighth Amendment should forbid. In other words, unless it can be shown that executing the mentally retarded promotes the goals of retribution and deterrence, doing so is nothing more than "purposeless and needless imposition of pain and suffering", making the death penalty cruel and unusual in those cases. Being mentally retarded means that a person not only has substandard intellectual functioning but also significant limitations in adaptive skills such as communication, self-care, and self-direction. These deficiencies typically manifest before the age of eighteen. Although they can know the difference between right and wrong, these deficiencies mean they have a lesser ability to learn from experience, engage in logical reasoning, and understand the reactions of others. This means that inflicting the death penalty on one mentally retarded individual is less likely to deter other mentally retarded individuals from committing crimes. As for retribution, society's interest in seeing that a criminal get his "just deserts" means that the death penalty must be confined to the "most serious" of murders, not simply the average murder. The goal of retribution is not served by imposing the death penalty on a group of people who have a significantly lesser capacity to understand why they are being executed.

v Wikipedia, The free encyclopedia, www.wikipedia.com .

Sociopathic –*noun* a person, as a psychopathic personality, whose behavior is antisocial and who lacks a sense of moral responsibility or social conscience. Dictionary.com, LLC.

vi Psychopathy is a [psychological construct](#) that describes chronic immoral and [antisocial](#) behavior. The term is often used interchangeably with *sociopathy*. Wikipedia, the free encyclopedia. www.wikipedia.com.

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