

SEXUAL TRAUMA AS CAPITAL MITIGATION

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Summary

The sentence of death versus life without parole often comes down to the extent and quality of mitigation evidence. Dr. Mendel has evaluated defendants in approximately 170 cases, most of which have been death penalty cases involving defendants with histories of childhood abuse or trauma. In his experience, mitigation is often minimally assessed or is presented in a haphazard manner. Dr. Mendel argues that assessment based on a thorough understanding of the life history of the defendant, rather than on results of psychological testing, provides the most comprehensive – and comprehensible to the jury – view of the person charged with the murder.

Mitigation

As a result of a series of Supreme Court cases culminating in the *Wiggins v. Smith* (2003), defendants in capital cases have a constitutional right to a thorough investigation of potentially mitigating factors. In order to provide adequate assistance, their attorneys are required to conduct (or hire someone to conduct) an investigation of the defendant's childhood background, to explore issues including physical, emotional and sexual abuse; poverty; domestic violence; violence in the environment; drug abuse in the home and environment; and anything else that could be considered mitigating.

Dr. Mendel primarily works on pre-trial cases. However, over the past several years, he has worked more and more on appellate cases because of the frequency of appeals on the basis of

Biography

Dr. Matthew Mendel is a clinical and forensic psychologist with a private practice in Raleigh, North Carolina. He is the author of *The Male Survivor: Impact of Sexual Abuse* (Sage Publications, 1995). He has been retained in over 170 criminal cases in seventeen states and in federal jurisdiction. Most of his forensic work is in death penalty cases in which it is known or suspected that the defendant was sexually abused or otherwise traumatized during his childhood. Dr. Mendel evaluates these defendants, with a focus on their childhood traumas, and then tells their story, helping those involved in the disposition of the case understand the individual accused of the crime. Dr. Mendel is a pioneer in "life-history" based forensic evaluations, as opposed to more traditional evaluations in the forensic field, which rely heavily upon psychological testing.

Inadequate Assistance of Counsel (IAC). IAC claims frequently stem from failure of the attorney to **adequately** present mitigating evidence. Common mistakes:

- Information is simply presented to the jury, or to the DA, in a matter-of-fact manner: “This defendant was sexually abused during his childhood.” Or, “this defendant’s parents both drank heavily during his childhood.” This may be presented by a layman – a friend, relative, pastor, or teacher of the defendant.
- Mitigating evidence may be presented by an expert, but without any personalization and specificity. This is often meaningless to a jury because evidence is presented using academic language that are not easily understandable by general audience.

Dr. Mendel’s Past Testimonies in Court

1. 2018 Texas v. Isidro Delacruz Cause No. B-14-1134-SA
2. 2018 Alabama v. Marcus Williams 12-14937
3. 2018 United States v. Christopher Cramer and Ricky Fackrell: 1:16-CR-00026
4. 2017 Texas v. Miguel Hernandez, 1379618D
5. 2017 North Carolina v. William Long 15CRS50302
6. 2017 Arkansas v. Karl D. Roberts CASE NO. CR 99.70
7. 2016 Arizona v. Dustin Kurt Coleman CR 2012-008340
8. 2016 Mississippi v. Alan Dale Walker 1:97-cv-00029-KS
9. 2015 Wyoming v. Daniel Guajardo CR2015-639 & CR2015-1226
10. 2014 Texas v. Harlem Lewis Cause Nos 1372134 & 1372135
11. 2014 North Carolina v. Jonathan Richardson 10 CRS 3981-83; 54369; 54426; 11 CRS 3021-22
12. 2014 Texas v. Juan Balderas Cause Nos 1050630 & 1064857
13. 2013 Arizona v. Kyle Loretto Alegria CR20092397
14. 2013 Texas v. Willie Ray Jenkins CR10-1063
15. 2013 Texas v. Stanley Robertson CR10-4337
16. 2011 North Carolina v. Danny Thomas 06CRS6250-67
17. 2011 Texas v. Travis Mullis CR08-0333
18. 2010 North Carolina v. Samuel Cooper 07CR82072
19. 2008 North Carolina v. Jakiem Wilson 07CRS11060
20. 2008 North Carolina v. Antonio Chance 06CRS74131
21. 2007 United States Air Force Court-Martial against Airman Darrin E. Jones, Jr.
22. 2005 California v. Alejandro Avila 02CF1862
23. 1999 North Carolina v. Clifton White 89CRS31887, 41217-18, 56389, 56391
24. 1997 North Carolina v. John Williams 97CRS8000-01, 8388, 17582-84, 17587-88, 17590-91, 88750

Demonstrate that childhood abuse is mitigating

To demonstrate that childhood abuse is mitigating, to convey to a jury that the experiences the defendant had during childhood are far beyond the “normal” traumas experienced by many or even most people, it is necessary to paint a clear picture of the severity, the duration, and the multitude of traumatic factors experienced by the defendant. Only by doing this will a jury be able to overcome their view of the presentation of trauma as use of “the abuse excuse.” That is why clear presentation of the life history of the defendant – with the plethora of traumas, deprivations, violence, and abuse, to which most of them have been subjected, is necessary.

Those abused during childhood are more likely to be victimized again, often repeatedly, later in life. Exposure to trauma has a cumulative effect, so the more someone is victimized – and the greater variety of traumatizing experiences an individual faces – the more damaged his or her emotional and behavioral health tends to be. Someone sexually abused one time by one person may be able to view this event as an anomalous event; someone sexually abused multiple times by multiple perpetrators over a long period of time will tend to view the world as a profoundly dangerous place, to view other people as untrustworthy, and to develop compensatory survival strategies for coping with these experiences. For male victims of childhood sexual abuse, a hyper-masculine, aggressive stance is a common reaction to these traumas.

Impact of childhood sexual abuse upon males

Common characteristics among childhood sexual abuse (CSA) victims and survivors include shame, powerlessness, betrayal, doubts about masculinity, and traumatic sexualization.

1. **SECRECY/SHAME:** Being able to disclose and then to obtain protection, support & treatment is central to being able to recover with relatively minimal long-term effects. Disclosure rate among males is way lower than for females for several reasons:
 - Less recognition/awareness of sexual abuse of male
 - Adults less likely to suspect sexual abuse of boy, who is more likely to be seen as just an angry kid with a behavior problem.
 - Boys who are sexually abused feel enormous dissonance and discomfort due to gap between abuse experience and sense of what it means to be a man
2. **FEELING WEAK/POWERLESS:** Abuse experience is one of helplessness and powerlessness. Males who are abused feel enormous dissonance between this and societal role expectations of being strong, tough, powerful, and able to protect and take care of oneself.
3. **DOUBTS ABOUT MASCULINITY:** Male victims tend to have great doubt about their masculinity; think that they are weak and effeminate; and worry about their sexual orientation.
4. **LACK OF TRUST:** Huge difficulty trusting, and often acting in untrustworthy ways, including infidelity.
5. **SELF-BLAME:** Male victims tend to blame themselves & feel that they should have been able to protect themselves. They see themselves as weak or effeminate etc. for “allowing” the abuse to occur. Victims may feel unable to tell others. As one defendant said, he

could not tell his father because his father would look at him “as a punk, a sissy, like he would disown me.”

6. **SUBSTANCE ABUSE/ADDICTION:** Very high rate of substance abuse and addiction among male survivors. Treatment for drug addiction is probably the most common way that male survivors end up getting help for their childhood abuse.
7. **ANGER/ PATTERN OF HOLDING IT IN & THEN DISPROPORTIONATE** response: One defendant was described as a very angry kid, as someone who would “take it and take it and take it and take it and then explode.” Defendants who were sexually abused may carry around enormous rage so that when they do react, it is far beyond and disproportionate to whatever the immediate trigger was. Because they are reacting not only to the immediate behavior but to the abuse, to not being protected, and so forth.
8. **ACTING IN A COMPENSATORY MANNER:** Many male survivors act in a compensatory, “hyper-masculine” way. Tough aggressive stance, apparent since early adolescence, tendency to get into fights and to act in an intimidating or dominating manner, involvement in gang, all likely stem in part from need to demonstrate that they are tough, strong and powerful, a man’s man, not one to be pushed around... In short, that they are the opposite of the boy who was repeatedly taken advantage of and who was unable to protect himself from recurrent, ongoing sexual assaults.

Risk Factors vs. Protective Factors

Obviously, most men sexually abused during childhood do not go on to a life of violence, much less to commit murder as there is enormous variation of experiences of victims/survivors of CSA. Need to look also at additional risk factors vs. protective factors:

RISK FACTORS	PROTECTIVE FACTORS
<ul style="list-style-type: none"> - Physical Abuse - Emotional Abuse - Poverty - Neglect - Substance Abuse/Addiction - Domestic Violence - Lack of positive, protective, benign adult figures 	<ul style="list-style-type: none"> - Able to disclose about abuse - Being believed and supported, further abuse prevented. - Receiving treatment for the abuse - Short duration and infrequent instances of abuse - Abuse by someone distant from victim, rather than a family member or close figure in whom trust would normally be expected - Generally positive family and environmental factors, other than the sexual abuse, i.e., lack of physical and emotional abuse, lack of violence in the family, lack of drug use; supportive, protective parental figures. - Strong skills in some areas which can serve as an outlet and escape from the abuse (academic, athletic, artistic, etc.)

“WORST-CASE” FACTORS WITHIN SEXUAL ABUSE

- Early age of onset
- Long duration
- High frequency
- High severity of sexual acts
- Physical force and violence in conjunction with sexual abuse
- Closeness in relationship between perpetrator and victim

Effective communication between attorneys & experts

- Speak with your expert at the beginning of his/her involvement in your case. Even if most of the communication is between expert and mitigation specialist, it is important for there to be direct discussion between attorney and expert.
- Clarify with the expert the focus of evaluation and potential testimony:
 - Are you seeking an assessment of state of mind? diminished capacity? competence?
 - Are you looking for someone to tell the defendant’s story in such a way that a jury can understand how he developed into the adult he became?
- Discuss the limits and range of the expert’s evaluation:
 - Do you want an expert to meet with the defendant or to function as a “teaching witness”?
 - Do you want an expert to interview other people as well (relatives, friends, etc.) or to rely on interviews done by the mitigation specialist?
 - If the case goes to trial, do you anticipate calling an expert in the sentencing or guilt-innocence phase?

References

The Importance of Recognizing Trauma Throughout Capital Mitigation Investigations and Presentations

KATHLEEN WAYLAND

Wayland, Kathleen (2008) "The Importance of Recognizing Trauma Throughout Capital Mitigation Investigations and Presentations," Hofstra Law Review: Vol. 36 : Iss. 3 , Article 11. Available at: <https://scholarlycommons.law.hofstra.edu/hlr/vol36/iss3/11>

ABSTRACT

This article appears in the Hofstra Law Review symposium issue on the Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty cases.

A PhD. in psychology, the author formerly served on the faculty of Duke University Medical Center, where her primary emphasis was on traumatic stress syndromes and the psychological consequences of chronic exposure to interpersonal violence. For the last fifteen years she has been assisting capital defender organizations in integrating mental health themes into mitigation narratives. This article presents the current state of scientific knowledge about trauma, treating the subject from these dual perspectives.

The inevitable existence of trauma among all of those affected by a murder - including the client, his family members, survivors, and witnesses being interviewed about the crime or the client - is a critical barrier that the defense team must recognize as it investigates. On the other hand, the almost equally invariable presence of traumatic factors in the client's background frequently provides powerful mitigating material, as the Supreme Court has held several times in recent years. The defense team must accordingly gather and use this material effectively.

Adverse Childhood Experience studies

BY CDC & KAISER PERMANENTE

Reference: <https://www.cdc.gov/violenceprevention/acestudy/index.html>

The Adverse Childhood Experiences (ACE) studies conducted by the CDC and Kaiser Permanente clearly demonstrates that childhood traumas are strongly correlated with negative outcomes in adulthood. The more of these factors an individual has experienced, the more negative the prognosis. Childhood factors assessed by these studies include:

Childhood Factors Assessed

Abuse	Household Challenges	Neglect
A. Emotional	A. Mother treated violently	A. Emotional
B. Physical	B. Household substance abuse	B. Physical
C. Sexual	C. Mental illness in household	
	D. Parental separation or divorce	
	E. Criminal household member	

As the number of ACEs increases so does the risk for multiple types of problems, including medical illnesses, alcoholism, drug abuse, depression, poor work performance, poor academic performance, intimate partner violence, early initiation of sexual activity, multiple sexual partners, STD's, smoking, suicide attempts, unintended pregnancies, teen pregnancy, and sexual victimization.

Wiggins v. Smith Supreme Court Decision (2003)

Wiggins v. Smith, [539 U.S. 510](#) (2003) is a case in which the [United States Supreme Court](#) spelled out standards for "[effectiveness](#)" in the [constitutional right to legal counsel](#) guaranteed by the [Sixth Amendment](#). Previously the court had determined that the Sixth Amendment included the right to "effective assistance" of legal counsel, but it did not specify what constitutes "effective", thus leaving the standards for effectiveness vague. In *Wiggins v. Smith*, the court set forth the [American Bar Association](#) Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases Guideline 11.8.6.(1989), as a specific guideline by which to measure effectiveness and competence of legal counsel.^[1]

The Supreme Court attempted to improve on the vague and generalized language in *Strickland v. Washington* by adding an American Bar Association Guideline 11.8.6. This guideline suggests the content of counsel's investigative efforts should contain "medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences." This clarification allows for the presentation of psychological analysis without the presence of specific diagnosis.

After trial, Wiggins elected to have a [jury](#) decide the sentence on the murder conviction. Counsel's investigation of Wiggins' background was rudimentary and contained only a superficial knowledge of his history from a few sources, omitting the information in detailed social service reports of severe physical and sexual abuse. The record of the sentencing proceedings suggests that counsels' failure to investigate the defendant's background stemmed from inattention, not strategic judgment. Counsel failed to follow the [American Bar Association](#) guidelines in not gathering all such information. Counsel said they had been intent on proving the defendant did not kill the victim with his own hand and had not prepared for the sentencing phase.^[1]Counsel presented no [mitigating evidence](#) to the jury at the sentencing phase. The jury concluded that the defendant was a principal in the [first degree murder](#) of the victim and sentenced Wiggins to [death](#).^[4]

Wiggins obtained new counsel and sought post-conviction relief on the grounds that his trial counsel was ineffective by failing to investigate and present mitigating evidence of his

dysfunctional background. He presented expert testimony by a forensic mental health specialist who described his personal history including the severe physical and sexual abuse he had endured and its effect upon him.

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