# PTSD and Trauma as Mitigating Factors in Sentencing in Capital Cases

Lee Hiromoto, MD, JD, Case Keltner, BA, MPH, William Frizzell, MD, Joseph Chien, DO, and Landy Sparr, MD

Posttraumatic stress disorder (PTSD) is commonly used as a mitigating sentencing factor, although how successfully it is used varies. In cases involving the death penalty, use of a PTSD diagnosis as a sentencing mitigating factor has been considered in the postconviction appeals process. This article analyzes a decade of American federal appellate case law regarding postconviction claims of ineffective assistance of counsel by capital defendants in regard to investigating and litigating trauma and PTSD. We found a high tolerance by the courts for deficient investigating, ruling against the petitioner in 20 of 23 (87%) of identified cases. The article discusses how these situations might be avoided and explores the critical role of forensic psychiatrists and mitigation specialists in investigating and presenting trauma to the court.

**J Am Acad Psychiatry Law 50:22–33, 2022. DOI:10.29158/JAAPL.210052-21**

**Key words:** death penalty; mitigation; posttraumatic stress disorder; trauma; stress

Posttraumatic stress disorder (PTSD) has been used in a variety of ways as a criminal defense.[1] Despite its range of applications in criminal defense, it can be a formidable task to establish a valid relationship between PTSD and criminal behavior. This difficulty arises because a causal connection must be established both between the traumatic stressor and the psychiatric symptoms and between the psychiatric symptoms and the criminal act.[2] Of the possible means by which PTSD can be used in criminal defenses, the diagnosis can be used as a sentencing mitigating factor in criminal defenses.[3] Even if an individual's PTSD cannot be compellingly shown to negate criminal liability, the severity of the defendant's trauma and suffering due to PTSD symptomology may support leniency at the sentencing stage.

PTSD can be treated with skepticism by courts for various reasons, with one central concern being feigning of the diagnosis to escape punishment by the legal system.[4] Conversely, individuals who do not identify with having the diagnosis or do not want to disclose the details of their mental health history or relive past trauma may not wish to raise the subject of PTSD. Hence, although forensic psychiatrists must always consider that PTSD symptomology is being malingered by a defendant, it may be just as likely that a defendant does not wish to disclose a background of trauma.

## PTSD, Mitigation, and the Death Penalty

For an individual facing the death penalty, it is important for the defense team to make a reasonable effort to ascertain whether their client has experienced severe trauma or received a diagnosis of PTSD. Ideally this should be done before the trial to allow mental health evidence to be used in the initial guilt phase. For example, evidence of poor executive function

Published online November 17, 2021.

Dr. Hiromoto is Resident Physician, Dr. Chien is Assistant Professor of Psychiatry, and Dr. Sparr is Forensic Psychiatry Fellowship Program Director, Department of Psychiatry, OR Health & Science University, Portland, OR. Mr. Keltner is Medical Student, School of Medicine, OR Health & Science University, Portland, OR. Dr. Frizzell is Staff Psychiatrist, Boise VA Medical Center, Boise, ID. Address correspondence to: William Frizzell, MD. E-mail: william.frizzell4@va.gov.

The views expressed in this article do not necessarily reflect the official policies of the DVA and OHSU.

Disclosures of financial or other potential conflicts of interest: None.

caused by PTSD might negate premeditation, a necessary element to convict for first-degree murder.

If the defendant is found guilty, diagnoses such as PTSD can then also be used as a mitigating factor during the sentencing stage. Mitigation is considered a critical part of capital trials; as a result, the American Bar Association advises the defense in death penalty cases to include a mitigation specialist who can investigate a defendant's background.[5]

For mitigation on the basis of a mental disorder or a defendant's background, Liebman and Shephard[6] analyzed how federal and state judicial decisions have spelled out mitigating circumstances:

> whether the offender's suffering evidences expiation or inspires compassion; whether the offender's cognitive and/or volitional impairment at the time he committed the crime affected his responsibility for his actions, and thereby diminished society's need for revenge; whether the offender, subjectively analyzed, was less affected than the mentally normal offender by the deterrent threat of capital punishment at the time he committed the crime; and whether the exemplary value of capitally punishing the offender, as objectively perceived by reasonable persons, would be attenuated by the difficulty those persons would have identifying with the executed offender (Ref. 6, p 818).

The U.S. Supreme Court has recognized the importance of mitigation in capital cases. In the 2003 case of *Wiggins v. Smith*,[7] the U.S. Supreme Court held that trial counsel's inadequate investigation of Mr. Wiggins' background in preparation for a mitigation case violated the Sixth Amendment. In 2005's *Rompilla v. Beard*, [8] the U.S. Supreme Court similarly ruled that failure to investigate and discover mitigating evidence at the sentencing phase was ineffective assistance of counsel. In *Rompilla*, the defendant's contributions to the mitigation investigation were deemed "minimal" and "there were times when Rompilla was even actively obstructive by sending counsel off on false leads" (*Rompilla*, p 381). Nevertheless, his counsel was found ineffective by the Court for failing to examine a file on Mr. Rompilla's prior conviction for rape and assault, which also contained mitigating evidence that no other source had described.

Additionally, the Court held in *Lockett v. Ohio* that all mitigating factors should be considered and may not be limited to a list of factors.[9] In another case, *Skipper v. South Carolina*, the Court held that mitigating evidence cannot be limited to the pre-offense time frame.[10] A mental health diagnosis like PTSD clearly fits into the expansive scope of mitigation evidence.

## PTSD and Capital Postconviction Appeals

For a defendant whose severe trauma or PTSD was not considered during the penalty phase of the trial, it may be raised during the appeals process, albeit with difficulty. It is well recognized that the capital appeals process is thorough to guarantee individuals on death row are accorded due process.[11] Of the states authorizing the death penalty, practically all mandate appellate review of all death sentences regardless of the defendant's wishes.[11] Without such extensive review, society risks putting to death people who do not deserve such punishment or may in fact be innocent.[11] The capital appeals process affords individuals further review of their background, providing the opportunity to present information about their life history (e.g., trauma) that may have changed the outcome of their sentencing.

The capital appeals process consists of the direct appeal, state postconviction appeal, and the final stage of federal *habeas corpus* review.[12] While review of these processes is beyond the scope of this article, federal *habeas corpus* law warrants brief discussion as it pertains to the cases discussed in this essay.

Congress explicitly authorized *habeas* relief to state prisoners if they were held in custody in violation of federal law. Because of this, federal *habeas corpus* is the final stage of the appeals process for capital defendants. In 1996, Congress narrowed the writ of *habeas corpus* used to challenge criminal convictions through the passage of the Antiterrorism and Effective Death Penalty Act (AEDPA).[13] AEDPA created a statute of limitations for *habeas corpus* cases and placed extremely stringent restrictions on a *habeas* petitioner's ability to file a second (or subsequent) *habeas* petition.[14] It also limited the circumstances under which a federal court can grant the writ of *habeas corpus*. Federal judges are unable to grant relief unless the state's conviction was contrary to clearly established federal law or an unreasonable determination of the facts in light of the evidence.[13]

## Ineffective Assistance of Counsel

In the capital appeals process, one of the most common concerns raised is ineffective assistance of counsel. Failure to investigate and present evidence of PTSD would fall under this rubric. The two-prong test for ineffective assistance of counsel was established in the landmark Supreme Court case of *Strickland v. Washington*:[15]

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable (Ref. 16, p 687).

Therefore, to succeed on an ineffective assistance claim, a convicted petitioner must prove both that counsel was seriously deficient and that this deficiency caused prejudice that calls into question a trial's reliability (i.e., that the trial could have turned out differently). Since the *Strickland* ruling, American courts have consistently applied this test.

### *Porter v. McCollum*

The November 2009 case of *Porter v. McCollum*[16] built upon *Wiggins* and *Rompilla*, ruling in favor of a petitioner who alleged failure to investigate or present mitigation evidence of PTSD. George Porter was a decorated Korean War Army veteran convicted of two counts of first-degree murder. In July 1986, he killed his ex-girlfriend and her boyfriend. After representing himself initially, he later pled guilty with standby counsel's assistance and was sentenced to death.

He then filed a petition for postconviction relief in state court on the basis of his legal counsel's failure to investigate and present appropriate mitigating evidence. The state court hearing revealed a difficult childhood, trauma suffered during his military service in Korea, and longstanding struggles with substance abuse and mental health. Mr. Porter's siblings recounted repetitive instances of physical abuse against him and their mother, including an episode in which Mr. Porter's father attempted to shoot him. While serving in the Army during the Korean War, Mr. Porter's unit engaged in two major battles with near-total sleep and food deprivation, with heavy casualties. A commander described battles Mr. Porter had been in as "trying, horrifying experiences" (*Porter*, p 35).

Following his military service, Mr. Porter began to suffer symptoms consistent with PTSD. He endured nightmares, engaged in repeated physical altercations, and underwent psychological assessments that suggested he had experienced brain changes that predisposed him to increasingly impulsive and violent behavior.

During his state *habeas* proceedings, a neuropsychology expert who examined Mr. Porter testified that he met two statutory mitigating circumstances at the time of the murders: his ability to conform his conduct to the law was impaired, and he had extreme mental or emotional disturbance. Nonetheless, the lower court *habeas* judge found that Mr. Porter had failed to establish any statutory mitigating circumstances, discredited his childhood trauma due to the time latency between his abuse as a youth and the murders he committed, and rendered his military service as inconsequential to his crimes. Eventually, this claim made its way to the U.S. Supreme Court.

The U.S. Supreme Court reviewed Mr. Porter's claim of ineffective assistance under the standard set forth in *Strickland v. Washington*. The Court found that Mr. Porter's counsel was deficient to the point where both prongs of the *Strickland* test were met. With regard to the first question of whether counsel's performance was inadequate, the Court noted that the lawyer "did not obtain any of Porter's school, medical, or military service records or interview any members of Porter's family" (*Porter*, p 39). This failure prevented other avenues of defense such as "mental health" (*Porter*, p 40).

Looking to the second prong of the *Strickland* test, the Court held that Mr. Porter was prejudiced by this poor defense. Had defense counsel followed up on his background, a case could have presented that showed: "(1) Porter's heroic military service in two of the most critical—and horrific—battles of the Korean War, (2) his struggles to regain normality upon his return from war, (3) his childhood history of physical abuse, and (4) his brain abnormality, difficulty reading and writing, and limited schooling" (*Porter*, p 41).

## Methods

This article reviews a body of case law identified through a systematic review using the legal databases Westlaw and Casetext. These databases were searched for federal appellate cases from 2010 through 2020. *Porter* was chosen as a starting point because it was the first identified U.S. Supreme Court case to apply the holdings of *Wiggins* (2003) and *Rompilla* (2005) to an ineffective assistance case on the basis of failure to investigate or present PTSD. The search was restricted to capital cases where the appellant claimed ineffective assistance of counsel because evidence of a diagnosis of PTSD or aspects of a history of trauma were not presented at sentencing.

**Table 1.** Cases Decided for Petitioner

| Case Name | Court and Year | Brief Summary |
|---|---|---|
| *Doe v. Ayers*[17] | 5th Circuit, 2015 | In *Doe*, trial counsel failed to follow up on the investigator's leads (did not listen to tapes of interviews or read the transcripts), did not ask for Mr. Doe's prison records, only interviewed him once, and only hired a psychologist to evaluate guilt phase defenses (and not at the penalty phase). If the lawyer had investigated, he would have turned up a history of brutal prison rape and subsequent PTSD. |
| *Andrews v. Davis*[18] | 9th Circuit, 2019 | Mr. Andrews was sentenced to death after being convicted of three murders. No mitigating evidence was presented during the penalty phase of his trial. Information about Mr. Andrews not presented at trial included pervasive emotional, physical, and sexual trauma from birth. The 9th Circuit stated this case was similar to *Porter* where there was too much mitigating evidence that was not presented to now be ignored. |
| *Andrus v. Texas*[19] | U.S. Supreme Court, 2020 | The U.S. Supreme Court noted counsel did not look into or present the myriad tragic circumstances that marked Mr. Andrus' life, including not meeting with family members other than his mother and father. The Court noted counsel performed virtually no investigation, and the untapped body of mitigating evidence revealed at the *habeas* hearing was too vast. |

## Results

Our search yielded 23 total cases that met inclusion criteria, 22 from federal circuit courts of appeal and one from the U.S. Supreme Court. The identified cases are listed in Table 1 and Table 2. Only three cases (13%) ruled in favor of the petitioner, while the other 20 (87%) ruled for the government.

### *Cases Decided against Petitioner*

The majority of cases identified ruled against the petitioner, finding that the *Strickland* test for ineffective assistance was not met. Some cases based their decision on *Strickland*'s first prong, finding that counsel's work was not deficient. This was seen in cases like *Nelson v. Davis* and *Anderson v. Secretary, Florida Department of Corrections*.[23,39] In other cases, the second prong of the *Strickland* test, prejudice, disfavored the petitioner (e.g., *Jones v. GDCP Warden*).[36] Some cases, like *Pike v. Gross*, based their holdings on both prongs, finding neither error nor prejudice.[26]

### *Cases Decided for Petitioner*

In the three cases decided for the petitioner, a small minority of the cases reviewed (13%), the petitioners share substantial histories of privation and trauma. Additionally, the courts identified specific ways in which trial counsel had been deficient.

#### *Andrews v. Davis*

*Andrews v. Davis* is similar to *Porter* in terms of the evidence not submitted. Mr. Andrews grew up in a segregated Alabama Industrial School for Negro Children, where he was subject to "beatings, brutality, inadequate conditions and sexual predators." (*Andrews*, p 1006, internal quotes omitted). The sentencing jury did not know this, however. A psychiatrist opined that Mr. Andrews had PTSD and organic brain impairment.[18] No psychological workup was performed prior to the penalty phase of the original trial.

Applying *Strickland*, the court found counsel's performance deficient. It noted "[w]hat little investigation did occur consisted of just three elements: (1) reviewing files at the courthouse in Mobile; (2) speaking with Andrews's mother during a layover in an airport; and (3) driving around Mobile" (*Andrews*, p 1109).

Likewise, the *Andrews* court found prejudice due to counsel's poor performance:

> [h]ad the jury heard that Andrews—at an "extremely vulnerable and sensitive age"—was subjected to brutal, inhumane, and degrading abuse by his state custodians at a segregated "penal colony" for African American children in Alabama in the 1960s . . . there is a reasonable probability that at least one juror would have been swayed to exercise mercy and spare Andrews's life (*Andrews*, p 1117, internal citation omitted).

#### *Andrus v. Texas*

In June 2020, the U.S. Supreme Court found trial counsel ineffective in *Andrus v. Texas*.[19] Petitioner Terence Andrus was convicted for two murders and sentenced to death. As a child, he was raised by a drug-addicted mother and forced to care for his siblings. He became involved in crime and spent time

**Table 2.** Cases Decided for the Government

| Case Name | Court and Year | Brief Summary |
|---|---|---|
| *Brawner v. Epps*[20] | 5th Circuit, 2011 | Mr. Brawner claimed that he was denied effective assistance of counsel per *Strickland*, and that a thorough investigation of mitigating evidence, including his prior diagnoses of PTSD and depression, could have altered the sentencing trial outcome. The U.S. Court of Appeals for the 5th Circuit did not find prejudice under *Strickland*. |
| *United States v. Fields*[21] | 5th Circuit, 2014 | Mr. Fields sought a Certificate of Appealability (COA) on multiple claims, including that he received ineffective assistance from counsel based on failure to conduct a competent penalty phase investigation. The 5th Circuit denied a COA for this claim and found his counsel detailed Mr. Fields' violent and tumultuous upbringing, including physical abuse at the hands of his mother's boyfriend, attempted suicide at age fourteen, his mother getting shot by her boyfriend, and witnessing the suicide of a friend and his grandfather being run over by a drunk driver. |
| *Jordan v. Epps*[22] | 5th Circuit, 2014 | Mr. Jordan claimed ineffective assistance of counsel, partially on the grounds that counsel failed to pursue a PTSD evaluation from a doctor other than one expert. Though no doctor ever diagnosed PTSD in Mr. Jordan, the attorney for the fourth sentencing trial obtained affidavits from a psychologist and psychiatrist who both believed that Mr. Jordan likely would have met the criteria for PTSD if evaluated, given his repeated combat experience in Vietnam. The 5th Circuit agreed with the district court's opinion that there was not a reasonable probability that a different doctor would have provided a more favorable evaluation. |
| *Nelson v. Davis*[23] | 5th Circuit, 2020 | Mr. Nelson argued that a thorough investigation of his past would have led to a postconviction expert's attributing his destructive behavior to PTSD stemming from an abusive childhood, rather than antisocial personality disorder and psychopathy as had been diagnosed previously by another expert. The 5th Circuit stated counsel's dependence on the prior expert testimony did not constitute ineffective assistance. |
| *Canales v. Davis*[24] | 5th Circuit, 2020 | The 5th Circuit found that the mitigating evidence for Mr. Canales was not sufficiently compelling that it would have established a substantial likelihood of a different result. |
| *Sheppard v. Davis*[25] | 5th Circuit, 2020 | Ms. Sheppard claimed her counsel's performance was deficient because he neglected to call her, her mother, or her brother to testify about her character and the struggles she had endured. The 5th Circuit opined Ms. Sheppard did not show that the result of the proceeding would have been different if not for her counsel's failure to present cumulative mitigating evidence. |
| *Pike v. Gross*[26] | 6th Circuit, 2019 | Ms. Pike filed a *habeas* petition on the grounds of her counsel's alleged ineffective assistance and failure to discover mitigating evidence, including diagnoses of organic brain damage, bipolar disorder, and PTSD offered by a psychiatrist during a postsentencing examination. The 6th Circuit denied the petition. |
| *Anderson v. Kelley*[27] | 8th Circuit, 2020 | Mr. Anderson claimed his counsel ineffectively failed to present evidence on the biological limitations of the teenage brain, identify PTSD despite ample evidence of childhood abuse, and identify a history of fetal alcohol spectrum disorder. The 8th Circuit found Mr. Anderson's counsel's performance was not constitutionally deficient. |
| *Kemp v. Kelley*[28] | 8th Circuit, 2019 | Mr. Kemp petitioned for a writ of *habeas corpus* due to counsel's alleged failure to investigate and present mitigating evidence about his childhood abuse, fetal alcohol exposure, and PTSD. The 8th Circuit concluded that counsel's mitigation investigation fulfilled its obligations under *Strickland*. |
| *Rhoades v. Henry*[29] | 9th Circuit, 2010 | The 9th Circuit determined that the mitigating value of one mental health expert's assessment that Mr. Rhoades experienced PTSD was lessened because his diagnosis did not satisfy the requirements of DSM-IV for this condition and there was no suggestion that Mr. Rhoades committed the acts while in any kind of PTSD-induced dissociative state. |
| *Payton v. Cullen*[30] | 9th Circuit, 2011 | Mr. Payton had no mitigation evidence presented during the penalty phase of his trial. Three mental health experts evaluated him before his trial and found that he had no evidence of organic brain pathology, had a serious personality disorder, and had abused drugs in the past, and they concluded he had no viable mental state defense. |
| *Zapien v. Davis*[31] | 9th Circuit, 2015 | Mr. Zapien was granted an evidentiary hearing on some of his ineffective assistance claims, in which he argued that trial counsel should have presented evidence of his psychiatric problems. It was unclear, however, whether Mr. Zapien actually had any form of psychiatric illness. The 9th Circuit did not consider it. Additionally, the court opined that there was no reason counsel should have known that Mr. Zapien had PTSD. As a result, counsel's failure to introduce evidence of psychiatric illness did not render the performance inadequate. |

**Table 2.** Continued

| Case Name | Court and Year | Brief Summary |
|---|---|---|
| *Mendoza v. Secretary*[32] | 11th Circuit Court, 2014 | Mr. Mendoza filed a federal *habeas* petition asserting he was denied effective assistance of counsel, alleging his attorneys failed to investigate his mental health and background. The 11th Circuit opined that Mr. Mendoza's trial counsel thoroughly investigated his mental health. |
| *Brannan v. GDCP Warden*[33] | 11th Circuit, 2013 | The 11th Circuit ruled it did not find a reasonable probability that the result of sentencing would have been different if Mr. Brannan's counsel had presented evidence his offense was related to his not being medicated, evidence regarding his PTSD diagnosis relating to his combat experience in Vietnam, and testimony from his treating psychiatrist. |
| *Gissendaner v. Seaboldt*[34] | 11th Circuit, 2013 | The 11th Circuit agreed with the district court's assessment that the social history composed by one expert during the state *habeas* trial was "biased towards uncritical acceptance of Ms. Gissendaner's self-reports of traumatic childhood experiences" despite conflicting accounts from her family members which undermined her diagnosis of PTSD (Ref. 34, p 1333). |
| *Pooler v. Sec'y*[35] | 11th Circuit, 2013 | The 11th Circuit affirmed the district court's denial of Mr. Pooler's petition. They deemed that the factual differences between this case and *Porter* were substantial and numerous. The 11th Circuit noted Mr. Porter's counsel called only one witness and presented no mitigating evidence, while Mr. Pooler's counsel called four mental health experts, a jail officer, one of his friends, and three of his family members. Much of the evidence presented to the jury would humanize Mr. Pooler, yet the jury still recommended he receive the death penalty. |
| *Jones v. GDCP Warden*[36] | 11th Circuit, 2014 | Mr. Jones's use of new mitigating evidence about his childhood and his mental health would have opened the door to a vast array of aggravating evidence that likely would have outweighed the mitigating evidence in this case. |
| *Pope v. Sec'y*[37] | 11th Circuit, 2014 | The 11th Circuit found that counsel presented all mitigating evidence on behalf of Mr. Pope and that there was no *Strickland* prejudice. |
| *Tanzi v. Sec'y*[38] | 11th Circuit, 2014 | Mr. Tanzi's counsel retained two experts who had opposing conclusions regarding his mental health diagnoses. Mr. Tanzi argued his counsel failed to present consistent mental health testimony. The 11th Circuit believed that although the two experts offered disparate diagnoses, they agreed that Mr. Tanzi met the requirements of both statutory mental health mitigators, and that there was substantial nonstatutory mitigation. |
| *Anderson v. Sec'y*[39] | 11th Circuit, 2014 | Mr. Anderson alleged counsel's penalty phase performance was deficient because of their failure to uncover evidence that he was sexually abused as a child and had brain damage, borderline personality disorder, and PTSD caused by the sexual abuse. After reviewing the case, the 11th Circuit held that counsel's failure to uncover and present evidence of sexual abuse was not deficient in the context of an otherwise thorough mitigation defense. |

PTSD = posttraumatic stress disorder
DSM-IV = Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV)

in juvenile detention, where he was administered medication, sent to solitary confinement, and became immersed in gang culture.

This information, however, did not make its way to the jury. During his trial, Mr. Andrus's attorney declined to offer an opening statement and rested immediately after the prosecution had rested its case against him. In its review, the Court found that trial counsel barely knew the witnesses he called in Mr. Andrus's defense.

Trial counsel represented that Mr. Andrus had no mental health problems. Yet a mitigation expert subsequently prepared a report stating that Mr. Andrus "had been diagnosed with affective psychosis, a mental health condition marked by symptoms such as depression, mood lability, and emotional dysregulation" (*Andrus*, p 1882, internal quotes omitted). A clinical psychologist also testified at the *habeas* hearing that Mr. Andrus experienced "very pronounced trauma and posttraumatic stress disorder symptoms from, among other things, severe neglect and exposure to domestic violence, substance abuse, and death in his childhood" (*Andrus*, p 1882, internal quotes omitted).

#### *Doe v. Ayers.*

Petitioner Mr. Doe (a pseudonym) experienced multiple rapes during a prior incarceration and had a history of childhood trauma, including being neglected by his mother and beaten by his uncle.

These experiences were not presented during the sentencing phase of his murder trial. The court noted that the transcript for the mitigation phase of the trial was only 35 pages (trial transcripts are frequently indented and double-spaced). Ruling for the petitioner, the Ninth Circuit found that the prison rapes, mental illness (including PTSD), and evidence of childhood trauma should have been introduced at mitigation.

## Discussion

On the basis of the cases reviewed, it is difficult to prove ineffective assistance of counsel for failure to investigate trauma. This conclusion emphasizes the importance of a thorough evaluation of a defendant's mental health and trauma history prior to trial, which may be the only venue to present that information. In our discussion, we consider the role of and interaction between the forensic psychiatrist and mitigation specialist in building the mitigation cases of defendants with a history of PTSD or severe trauma.

### *Case Law Analysis*

In the intervening decade since *Porter*, our research indicates that courts have been reluctant to expand scrutiny of trial counsel's investigations into mental health. When reviewing ineffective assistance claims, federal courts of appeals seem willing to accept a low bar for mental health investigations, even if they are rushed or contradicted by later examiners after conviction. Moreover, courts also seem skeptical that mental health evidence, even if it should have been looked into, would have made a difference in capital mitigation cases.

That said, the core holding of *Porter*, that very poor investigation of major trauma is ineffective assistance, remains good law. When trial counsel does minimal investigating of grave early trauma and its mental health ramifications, courts have followed *Porter's* lead and declared trial counsel ineffective. Read together, the reviewed cases paint a generally unfriendly landscape for capital *habeas* petitioners who base their claim around undiscovered mental health concerns like PTSD. At the same time, courts will take action against blatantly substandard performance.

A lesson from these cases is that it behooves capital defendants to research and present mitigation evidence of PTSD, trauma, and other mental illness at the trial stage. Appellate courts are much less likely to provide relief via *habeas corpus* after conviction and sentencing. This means that the trial defense attorney needs to be thorough in investigating and presenting mitigation evidence.

The need for a thorough investigation is especially critical to mitigation given the prosecution's ambiguous obligation to disclose potentially favorable information. Prosecutors have a duty under *Brady v. Maryland*[40] to disclose favorable or exculpatory evidence. This standard is difficult to apply to mitigation, however, given the subjectiveness of what information might conjure sympathy. Thus, the defense team cannot depend on the prosecution to disclose favorable mitigating information, as they would be obligated to do during the guilt phase of the trial.

Another lesson is that an expert opinion from a forensic psychiatrist might assist the courts in understanding PTSD and trauma. *Rhoades v. Henry*, which found for the state, is instructive on two points. First, expert opinion should be based on standardized diagnostic criteria. In *Rhoades*, an expert psychiatrist and neurologist opined that Mr. Rhoades' history of trauma was "suggestive" of PTSD although the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV) criteria were not met (*Rhoades*, p 1049). The court took notice of this distinction, finding that potential mitigating value was lessened without a diagnosis. Thus, forensic psychiatrists should take care to ground their analysis in standard diagnostic criteria. For example, in *Porter*, the expert testified that Mr. Porter "easily" met PTSD criteria (*Porter*, p 44 fn 4).

Additionally, an expert can help teach lay people about PTSD and its diverse symptomology. In *Rhoades*, the court noted "there also is no suggestion that Rhoades kidnapped, tried to rape, or murdered [the victim] while in any kind of PTSD-induced dissociative state" (*Rhoades*, p 1050). The court seemed to think that dissociation is the only possible way that trauma might influence a defendant's actions. Forensic psychiatrists and other experts can share other ways that PTSD might influence behavior such as hyperarousal, negative symptoms, and triggering. All of these could influence a defendant's actions and support a mitigating case.

### *The Importance of Mitigation Specialists*

Analysis of case law shows that pretrial investigation of mitigation evidence is critical in capital cases. As noted by Stetler, "mitigation is a means of

introducing evidence of disability or condition which inspires compassion, but which offers neither justification nor excuse for the capital crime" (Ref. 41, p 261). Because of this, the defendant's legal team should obtain a deep understanding of the defendant's lived experience and craft a narrative of the history that can elicit compassion at the sentencing phase. The U.S. Supreme Court emphasized the importance of mitigation in *Wiggins v. Smith*,[7] in which they rejected defense counsel's strategic decision to limit the mitigation investigation.

Conducting such an investigation is no simple task. Mitigation specialists take up this burden and coordinate a thorough investigation into the lives of capital defendants. They "identify issues requiring evaluation by psychologists, psychiatrists, or other medical professionals" (Ref. 41, p 250, internal citation omitted). Furthermore, mitigation specialists also guide the defense team in crafting a thorough, cogent, and persuasive story of the defendant's life.[41] Indeed, the American Bar Association advises inclusion of a mitigation specialist who can investigate a defendant's background as it pertains to these mitigating circumstances.[5]

Because of the mitigation specialist's crucial role in understanding the life history of the defendant, the specialist will orchestrate records collection upon which a mitigation narrative can be developed. For a forensic psychiatrist retained by defense counsel, a diagnosis of PTSD will almost certainly rely in part on the same type of data collected by the mitigation specialists. Matto and colleagues[4] have outlined data domains to be considered in the forensic evaluation of PTSD, and these domains overlap with records a mitigation specialist is tasked with finding. These include (but are not limited to) medical, educational, employment, incarceration, institutionalization, or military records.

Mitigation specialists also conduct interviews with a range of individuals involved in the life of the client. They may also possess the ability to elicit sensitive information regarding the defendant's background, whether from the defendant or from someone involved in the defendant's life. The totality of their duties makes it likely that mitigation specialists are the primary investigators of past emotional, sexual, or physical trauma of defendants.

Defense-retained forensic psychiatrists need to evaluate data domains that overlap with those identified by the mitigation specialist to determine if they fulfill criterion A of a PTSD diagnosis. The importance of evidence that corroborates a history of trauma reported by the defendant cannot be emphasized enough. As noted in some of the above cases (*Gissender v. Seaboldt*,[34] *Pike v. Gross*[26]), appeals were denied in part on the basis that courts found trauma reported by the defendants to be uncorroborated by witnesses or past records.

### *Forensic Experts versus Mitigation Specialists*

There are appreciable similarities between the role of the mitigation specialist and that of the forensic psychiatrist. Both are tasked with gathering information regarding the capital defendant's life history and showing how this informs their understanding of the individual. There may be an advantage in the mitigation specialist's ability to earn the trust of the defendant.[41] Conversely, a forensic expert ideally maintains an objective or neutral stance toward the defendant.

The clinical experience and knowledge of forensic psychiatrists give them some advantages in building mitigation cases. They might better understand when a defendant's style of communication may be influenced by a mental health condition. Because of their medical and clinical training, psychiatrists may be better suited than mitigation specialists to gather, interpret, and draw conclusions from medical records. For example, in a case of an individual with a prior medical diagnosis and treatment for PTSD, a psychiatrist could reliably opine on questions of adequacy and duration of pharmacologic treatment, or the relative severity of symptoms on the basis of the level of past medical care received.

A defense-retained expert must be mindful to maintain an unbiased stance. In some cases, the forensic expert may be asked to assume a role beyond the scope of a psychiatric evaluation, such as providing therapeutic interventions. Experts must be careful not to conflate forensic and treatment roles.

While the history gathered by the mitigation specialist may be similar to that gathered by a psychiatrist, the expert may identify events within the defendant's lifetime that both elicit compassion and were not previously known to the legal team. Defense counsel may find such life events worthy of further investigation.

Although defense counsel may decide whether such investigation is warranted, the decision to limit the mitigation investigation despite a psychiatrist's findings may be the basis of appeal for a capital

defendant. For the forensic psychiatrist, lack of corroboration of any trauma reported by the defendant may undermine the expert's testimony and the mitigation strategy overall. Although limiting the scope of a mitigation evaluation may be the basis of appeal, a petitioner may be unsuccessful if the court determines that the proposed mitigating mental health evidence would have opened the door to strong aggravating evidence, as in *Jones v. GDCP Warden*.[36]

### *PTSD in the Mitigation Presentation*

Forensic psychiatrists may find providing testimony regarding the effects of trauma in the mitigation phase more palatable as they are not tasked with vehemently defending their conclusions, as in criminal responsibility testimony. Again, mitigation is meant to offer neither justification nor excuse for the capital crime but as a basis to shape the jurors' understanding of the individual.[41] Because of this, there may be increased freedom for an expert to discuss the current state of literature regarding a specific form of trauma, if it is applicable to the defendant. For example, for some of the defendants in the cases we reviewed, pervasive childhood trauma was noted, and an expert could tentatively discuss adverse childhood experiences (ACEs) at sentencing. There is an emerging large body of research around ACEs that correlate childhood trauma with both juvenile and adult criminality.[42–44] Thus, routine ACE scores might prove to be a highly useful tool that lends scientific weight to the narrative that a person's childhood trauma has contributed to worsened life outcomes, with the caveat that correlation does not equal causation.

### *Concerns about PTSD in Mitigation*

While the cases cited in this article point to an increasing awareness by the courts of the effects of trauma on a person's mental health and culpability in criminal proceedings, there are potential downsides to highlighting PTSD in this manner. Given the highly subjective nature of the symptoms of PTSD, there is a real concern that a focus on the traumatic backgrounds of individuals involved in criminal cases might open the floodgates for nearly every defendant to claim a traumatic history as a reason for leniency. As Matto and colleagues[4] have noted, from the first appearance of PTSD in the DSM-III to its current iteration in the DSM-5, the definition of what constitutes a traumatic stressor has broadened from an objective standard to a more subjective one, potentially increasing the number of individuals who could qualify for the diagnosis.

Concerns about overuse or exaggeration of traumatic backgrounds are heightened in mitigation more than in criminal responsibility cases because the purpose of mitigation is to elicit a more compassionate view of the defendant and therefore does not even necessitate a formal diagnosis of PTSD. Studies have shown that PTSD criterion A (stressor) events are neither necessary nor sometimes even sufficient to produce PTSD symptoms. Instead, they appear to represent high magnitude stressors that are otherwise indistinct from the full range of stressors that can have an impact on an individual and create risk of psychiatric morbidity.[45] There is concern, however, that if attention to trauma and PTSD were to be adopted more widely as a mitigating strategy, including in noncapital cases, the mere presence of trauma may come to be seen as synonymous with a diagnosis of PTSD, leading to further abuse of the diagnosis. Unlike the use of the insanity defense, which necessitates the presence of a mental disorder, almost every defendant could lay claim to being the victim of trauma in general due to the highly subjective nature of the experience of trauma.

Another concern is the potential for malingering of PTSD or symptoms of PTSD. As noted, PTSD is a diagnosis that primarily involves subjective symptoms that are difficult to validate objectively in clinical practice. The diagnosis has been criticized because it is thought to rely excessively on clinical judgment and patient report.[46,47] In other words, it is difficult to prove or disprove definitively symptoms such as having nightmares or flashbacks, or persistently avoiding stimuli associated with the trauma. Even the existence of an index traumatic event, which may have occurred years in the past, may be difficult to prove, and corroborating evidence may be difficult to find. Moreover, exposure to a traumatic event does not equate to the development of PTSD. The National Comorbidity Survey, which studied a sample of 5,877 people in the United States, estimated a lifetime prevalence of PTSD to be 7.8 percent despite 61 percent of men and 51 percent of women in the survey reporting being exposed to a traumatic event.[48] So, while many people will experience trauma in their lifetimes, most will not develop PTSD.

Psychological testing may be useful in detecting or disproving cases of suspected malingering of PTSD. Tests such as the Miller-Forensic Assessment of Symptoms (M-FAST),[49] the Structured Interview of Reported Symptoms-2 (SIRS-2), [50] the Infrequency-Posttraumatic Stress Disorder scale (Fptsd) of the Minnesota Multiphasic Personal Inventory-2 (MMPI-2), [51,52] and the Personality Assessment Inventory (PAI) [53,54] all may play a role in differentiating between genuine and malingered cases of PTSD, but none are definitive in themselves.

### Toward a Trauma-Informed Jurisprudence

By educating courts about the applied science of PTSD, forensic psychiatrists can help advance the U.S. judicial system toward a jurisprudence that both recognizes the effects of trauma and appropriately accounts for it in terms of criminal liability. In the shorter term, the jurisprudence may evolve to create a standard of care that expects forensic psychiatrists, psychologists, and social workers to take an active role in teaching judges and juries about PTSD at the penalty phase.

In light of the range of effects PTSD can have on a defendant's liability, counsel who fail to investigate and mount a strategy that accounts for PTSD would be ineffective, potentially giving convicted offenders a second chance through re-trial or re-sentencing (i.e., even when a convicted offender prevails on an ineffective assistance claim, the remedy is usually re-hearing). Such a standard may have changed the result of many of the cases discussed here by holding counsel to a higher standard in investigating and advocating for leniency on the basis of trauma.

In the longer term, it is possible that advocacy could lead to the categorical barring of execution of groups or subgroups affected by PTSD or severe trauma. This would be through an Eighth Amendment argument similar to that advocated by the U.S. Supreme Court in *Roper v. Simmons*[55] and *Atkins v. Virginia*.[56] Giardino[57] has argued that veterans who have a diagnosis of service-related PTSD and traumatic brain injury should receive a categorical exemption from the death penalty. Wortzel and Arciniegas[58] in turn have suggested Giardino's proposed categorical exclusion is quite broad but considered it to be potentially worthwhile to avoid the injustice of executing a combat veteran with a diagnosis of PTSD or traumatic brain injury at the time of the crime relative to the ability to execute veterans whose crimes are unrelated to military service and injury.

In considering other forms of PTSD, it would be a formidable task for the law to define different groups who have each experienced a specific type of trauma that, in turn, could be categorically barred from receiving the death penalty. This is because, even if trauma is defined at the stage of life in which it occurred (childhood, adolescence, or adulthood), the nature of the trauma (physical, sexual, emotional, or neglect), and its duration (prolonged versus a specific point in time), the symptom clusters of PTSD are inconsistent among different populations. For example, Thorp and colleagues[59] reported that the prevalence of full-threshold PTSD appeared to be lower among older adults compared with the general population. Additionally, as noted earlier, many individuals experience horrific suffering yet do not go on to experience PTSD symptomology. It is also well recognized that childhood trauma may contribute to the development of personality disorders,[60] such as borderline and antisocial personality disorders, and PTSD symptoms can be difficult to differentiate from traits of these disorders (as noted in *Kemp v. Kelley*[28]), particularly if the diagnosis is Complex PTSD, a more severe variant.[61]

## Conclusion

We arrive at a similar dilemma noted by Wortzel and Arciniegas,[58] who considered the American Law Institute's (ALI) study of the application of the death penalty in 2009.[62] The ALI found the capital punishment system incapable of reconciling the twin goals of individual determinations regarding who should be executed and the need for systemic justice.[62] In our analysis, there was not a systemic approach to the evaluation of trauma in the defendants' backgrounds. The capital appeals process offered a mechanism by which further mitigating evidence regarding trauma could be introduced and weighed, but, on the basis of our findings, at the federal appellate court level defendants are only likely to receive relief in the most egregious instances of counsel ineffectiveness.

In 2008, after many of the original trials of these defendants, the American Bar Association released the Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases to create performance standards.[63] These standards instruct the capital defense team to obtain,

understand, and analyze all documentary and anecdotal information relevant to the client's life information.[63] The guidelines enumerate all domains relevant to an individual's life history, including but not limited to mental health history, history of maltreatment and neglect, trauma history, military experience, family history, and genetic disorders and vulnerabilities.[63]

Since the publication of these guidelines, it remains unclear whether their recommendations are aspirational or essential. *Andrus v. Texas* would suggest the former, although Mr. Andrus's case proceeded to trial around the time the guidelines were published.

Because of the considerable tasks defense teams face fulfilling these recommendations, the breadth of data collection and interpretation required of the defense teams for capital defendants may outweigh systemically the resources allotted to them, even with the assistance of a mitigation specialist.

Looking forward, one recommendation to strike a greater balance would to mandate a methodical approach to reviewing the trauma domains outlined in the guidelines. A second recommendation would be for courts to appoint consultants more readily to defense teams to interpret potentially mitigating evidence. In the case of defendants with suspected PTSD, a solution could be appointing a forensic psychiatrist or other mental health clinician to collaborate with defense counsel early in the mitigation investigation. Regardless of the feasibility of these recommendations, it is our belief that achieving systemic justice for capital defendants lies in ensuring an immensely thorough and thoughtful mitigation investigation regarding trauma history. Without this, concerns regarding the arbitrariness of the death penalty will persist.

## References


1. Berger O, McNiel DE, Binder RL. PTSD as a criminal defense: A review of case law. J Am Acad Psychiatry Law. 2012; 40(4):509–21
2. Sparr LF. Forensic issues associated with post-traumatic stress disorder: 25 years later. In Schlesinger LB, editor. Explorations in Criminal Psychopathology: Clinical Syndromes with Forensic Implications, 2nd edition. Springfield, IL: Charles C Thomas; 2007. p. 297–327
3. Grey B. Neuroscience, PTSD, and sentencing mitigation. Cardozo L Rev. 2012; 34:53–101
4. Matto M, McNiel DM, Binder RL. A systematic approach to the detection of false PTSD. J Am Acad Psychiatry Law. 2019 Aug; 47(3):325–34
5. American Bar Association. ABA Guidelines for the appointment and performance of defense counsel in death penalty cases. Hofstra L Rev. 2003; 31(4):913–1090
6. Liebman JS, Shepard MS. Guiding the capital sentencing discretion beyond the "boiler plate": Mental disorder as a mitigating factor. Georgetown L Rev. 1978 Feb; 66(3):757–836
7. Wiggins v. Smith, 539 U.S. 510 (2003)
8. Rompilla v. Beard, 545 U.S. 375 (2005)
9. Lockett v. Ohio, 438 U.S. 586 (1978)
10. Skipper v. South Carolina, 476 U.S. 1 (1986)
11. Cauthen JNG, Latzer B. Why so long? Explaining processing time in capital appeals. Just Sys J. 2008; 29(3):299–311
12. Costanzo M, White L. An overview of the death penalty and capital trials: History, current status, legal procedures, and cost. J Soc Iss. 1994 Summer; 50(2):1–18
13. Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (1996)
14. Blume JH. AEDPA: The "hype" and the "bite". Cornell L Rev. 2006; 91(2):259–302
15. Strickland v. Washington, 466 U.S. 668 (1984)
16. Porter v. McCollum, 558 U.S. 30 (2009)
17. Doe v. Ayers,782 F.3d 425 (9th Cir. 2015)
18. Andrews v. Davis, 944 F.3d 1092 (9th Cir. 2019)
19. Andrus v. Texas, 140 S. Ct 1875 (2020)
20. Brawner v. Epps, 439 F. App'x 396 (5th Cir. 2011)
21. United States v. Fields, 761 F.3d 443 (5th Cir. 2014)
22. Jordan v. Epps, 756 F.3d 395 (5th Cir. 2014)
23. Nelson v. Davis, 952 F.3d 651 (5th Cir. 2020)
24. Canales v. Davis, 966 F.3d 409 (5th Cir. 2020)
25. Sheppard v. Davis, 967 F.3d 458, 476 (5th Cir. 2020)
26. Pike v. Gross, 936 F.3d 372 (6th Cir. 2019)
27. Anderson v. Kelley, 938 F.3d 949 (8th Cir. 2019)
28. Kemp v. Kelley, 924 F.3d 489 (8th Cir. 2019)
29. Rhoades v. Henry, 638 F.3d 1027 (9th Cir. 2011)
30. Payton v. Cullen, 658 F.3d 890 (9th Cir. 2011)
31. Zapien v. Davis, 849 F.3d 787 (9th Cir. 2015)
32. Mendoza v. Secretary, 761 F.3d 1213 (11th Cir. 2014)
33. Brannan v. GDCP Warden, 541 F. App'x 901 (11th Cir. 2013)
34. Gissendaner v. Seaboldt, 735 F.3d 1311 (11th Cir. 2013)
35. Pooler v. Sec'y, 702 F.3d 1252 (11th Cir. 2013)
36. Jones v. GDCP Warden, 753 F.3d 1171 (11th Cir. 2014)
37. Pope v. Sec'y, 752 F.3d 1254 (11th Cir. 2014)
38. Tanzi v. Sec'y, 772 F.3d 644 (11th Cir. 2014)
39. Anderson v. Sec'y, 752 F.3d 881 (11th Cir. 2014)
40. Brady v. Maryland, 373 U.S. 83 (1963)
41. Stetler R. The mystery of mitigation: What jurors need to make a reasoned moral response in capital sentencing. U Pa J L & Soc Change. 2007; 11(2):237–64
42. Baglivio MT, Epps N, Swartz K, *et al.* The prevalence of adverse childhood experiences (ACE) in the lives of juvenile offenders. J Juv Just. 2014 Spring; 3(2):1–23
43. Reavis JA, Looman J, Franco KA, Rojas B. Adverse childhood experiences and adult criminality: How long must we live before we possess our own lives? Perm J. 2013 Spring; 17(2):44–8
44. Fox BH, Perez N, Cass E, *et al.* Trauma changes everything: Examining the relationship between adverse childhood experiences and serious, violent and chronic juvenile offenders. Child Abuse Negl. 2015 Aug; 46:163–73
45. Rosen GM, Spitzer RL, McHugh PR. Problems with the post-traumatic stress disorder diagnosis and its future in DSM V. Br J Psychiatry. 2008 Jan; 192(1):3–4
46. Nielssen O, Large M. Post-traumatic stress disorder's future. Br J Psychiatry. 2008 May; 192(5):394–5
47. Stradling MJ, Stradling SG. Post-traumatic stress disorder without the trauma. Br J Clin Psychology. 1994 Feb; 33(1):71–4
48. Kessler RC, Sonnega A, Bromet E, Nelson CB. Posttraumatic stress disorder in the National Comorbidity Survey. Arch Gen Psychiatry. 1995 Dec; 52(12):1048–60

49. Miller HA. Miller Forensic Assessment of Symptoms Test (M-FAST). Lutz, FL: Psychological Assessment Resources; 2001
50. Rogers R, Bagby RM, Dickens SE. Structured Interview of Reported Symptoms (SIRS) and Professional Manual. Odessa, FL: Psychological Assessment Resources; 2010
51. Butcher JN, Graham JR, Ben-Porath YS, *et al*. MMPI-2: Manual for Administration and Scoring (revised). Minneapolis: University of Minnesota Press; 2001
52. Elhai JD, Gold SN, Sellers AH, Dorfman WI. The detection of malingered posttraumatic stress disorder with MMPI-2 fake bad indices. Assessment. 2001 Jun; 8(2):221–36
53. Morey LC. The Personality Assessment Inventory (PAI): Professional Manual, 2nd Edition. Lutz, FL: Psychological Assessment Resources; 2007
54. Wooley CN, Rogers R. The effectiveness of the personality assessment inventory with feigned PTSD: An initial investigation of Resnick's model of malingering. Assessment. 2015 Aug; 22 (4):449–58
55. Roper v. Simmons, 543 U.S. 551 (2005)
56. Atkins v. Virginia, 536 U.S. 304 (2002)
57. Giardino AE. Combat veterans, mental health issues, and the death penalty: Addressing the impact of post-traumatic stress disorder and traumatic brain injury. Fordham L Rev. 2009 May; 77(6):2955–95
58. Wortzel HS, Arciniegas DB. Combat veterans and the death penalty: A forensic neuropsychiatric perspective. J Am Acad Psychiatry Law. 2010; 83(3):407–14
59. Thorp SR, Sones HM, Cook JM. Posttraumatic stress disorder among older adults. In Sorocco KH, Lauderdale S, editors. Cognitive Behavior Therapy With Older Adults: Innovations Across Care Settings, 1st Edition. New York; Springer; 2011. p. 189–217
60. American Psychiatric Association. Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition. Washington, DC: American Psychiatric Association, 2013
61. Van der Kolk B. Assessment and treatment of complex PTSD. In Yehuda R, editor. Treating Trauma Survivors of PTSD. Washington DC: American Psychiatric Press; 2002. p. 127–56
62. The American Law Institute. Report of the Council to the membership of the American Law Institute on the matter of the death penalty [Internet]; 2009 Apr 15. Available from: http://www.ali.org/doc/Capital%20Punishment_web.pdf. Accessed November 18, 2020
63. American Bar Association. Supplementary guidelines for the mitigation function of capital defense teams in death penalty cases. Hofstra L Rev. 2008 Jan; 36:677–92