Trauma-Focused Mitigation Testimony in Capital Sentencing Hearings

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When capital trials of convicted defendants reach the sentencing phase, forensic mental health experts often testify as part of mitigation evidence. Three aspects of such testimony hold particular promise. First, developmental traumas in the lives of the defendants are especially well conceptualized in terms of complex posttraumatic stress disorder, as described in the ICD-11. Second, Cunningham's framework, which critically examines the impact of harmful and protective factors over the course of a defendant's development, allows for an examination of moral culpability apart from legal culpability. Third, specific training on trauma and its effects on personality and psychopathology allows forensic mental health professionals to more skillfully complete trauma mitigation evaluations.

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Hiromoto *et al.*[1] make a compelling case that defense teams should bring forward mitigating factors before sentencing. They further describe specific death penalty appellate litigation that has turned on the question of whether counsel adequately explored areas of mitigation. Their review of American federal appellate case law related to postconviction claims of ineffective assistance of counsel by capital defendants specifically looks at the adequacy of counsels' investigation of trauma as a mitigating factor. Based on their review of appellate cases, they report that convictions were affirmed in 20 of 23 (87%) of studied cases.

Although we are aligned with the authors on many points, we suggest that their sample was truncated by reviewing appeals only; that is, cases in which the accused was convicted and sentenced to the death penalty. Their data did not allow them to sufficiently extrapolate to the general use and effectiveness of trauma-focused expert testimony in the sentencing phase. Their conclusions could have been made stronger if they included data on the number of capital murder trials held and the percentage of these that led to convictions. Within the conviction findings, we would want to know how many cases drew on expert testimony about trauma by a forensic mental health professional or mitigation expert during the sentencing phase. And of those, it would be meaningful to know the proportion of death penalty compared to other outcomes with and without trauma testimony during mitigation.

Although looking at such frequencies is beyond the scope of this commentary, one of the authors (SLB) has been involved in many dozens of capital cases in which attorneys routinely retain experts to examine just these questions. Our subjective impressions are that in most, but not all states, the state is willing to pay for mitigation experts. A search of the literature did not reveal empirical information to support this impression. Nevertheless, it appears that conscientious and dedicated defense attorneys present evidence in sentencing that addresses the dual concerns of trauma and psychopathology.

Although we see room for a broader analysis of trauma-based mitigation testimony, we agree with Hiromoto *et al.*'s concluding arguments related to the need for more trauma-informed jurisprudence and the benefit of retaining forensic mental health professionals (FMHPs) before trials. FMHPs can add incremental value beyond what can be achieved through mitigation specialists. From our perspective

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as FMHPs, we supplement Hiromoto *et al.*'s views with three related points:

> It is vital to understand the defendant's developmental history, including Adverse Childhood Experiences (ACE)[2] as well as additional variables not captured by the ACE Questionnaire.
>
> It is imperative to recognize the limitations of the *Diagnostic and Statistical Manual* (*DSM-5*)[3] diagnoses in terms of capturing complex presentations, cultural variability, and context.
>
> FMHPs trained specifically in the assessment of trauma offer distinct benefits with respect to evaluating threats to validity, detecting subtle manifestations of trauma, and contextualizing findings for the court context.

Development, ACEs, and Beyond

Over the course of childhood and adolescence, core interlocking developmental competencies are ideally nurtured by family, school, and engagement with the community. Gaining mastery of these competencies serves to prepare children and adolescents for functioning across a number of domains throughout the lifespan. These developmental tasks include learning how to regulate one's emotions and impulses, gaining attentional capacities, developing abstract reasoning abilities and problem-solving skills, and, more broadly, developing a sense of identity, self-worth, and positive personal values. In a stable childhood and adolescent trajectory, people form relational competencies, including the capacity for connection, intimacy, trust, and a sense of belonging. These foundations prepare youths to engage in adult responsibilities with respect to vocational, relational, familial, and community functioning.[4]

Substantial research findings consistently suggest that maltreatment can profoundly affect people on a neurobiological level.[5] Humans physiologically adapt to their environments. When prolonged and repeated trauma and stress are experienced during formative periods, the neural pathways in the brain that become the most developed are those geared toward detecting threat and ensuring basic survival.[6] This development can be at the expense of the formation of other neural pathways that are related to memory, learning, planning, and emotional regulation, all of which are prerequisites for success in adulthood.[7] Put simply, for some people, developing the biological mechanisms to become resilient and stable is a luxury. When people are exposed to chronic maltreatment, their focus is basic safety. When facing threat, such people are primed to protect themselves and survive. Sometimes this protection is with a gun; sometimes it is with gang affiliation.[8] These findings about the impact of maltreatment and neurobiology speak to the importance of understanding capital defendants' life contexts and experiences of adversity and trauma, the effects of which have often shaped their brains long before the alleged offense.

A series of compelling research studies consistently conclude that exposure to maltreatment can disrupt this developmental trajectory and lead to life-long deficits and impaired functioning across a number of domains.[9] Hiromoto *et al.* point to the body of research suggesting that ACEs correlate with both juvenile and adult criminality.[10,11,12]

Although screening for the 10 identified ACEs is certainly a good start, the original ACE 10-item questionnaire, as it is currently worded, has been criticized for not accounting for the frequency or severity of maltreatment.[13] It also fails to detect other important traumatic experiences such as being exposed to peer and community violence, traumatic stressors that are prevalent among those who are justice-involved.[14,15]

Cunningham has written extensively on capital mitigation in this context.[16,17,18] He provided a comprehensive conceptual structure for understanding adversity and impairing factors over a defendant's life course that extends beyond ACEs and he also presents protective factors. His framework addresses "moral culpability." In contrast to legal culpability of self-control, choice, and knowing right from wrong, moral culpability focuses on how the defendants were psychologically injured, what shaped their choices, what diminished their control, and what shaped their morality and value systems. His method of evaluation weighs damaging factors and protective factors. Protective factors include positive peer relationships, positive role models, caregiver consistency, adequate structure, stability, being in receipt of acceptance and affection, and coming from an intact family. Factors that contribute to psychological harm and potential reduced moral culpability include neurodevelopmental impairment, abuse experiences, community and peer violence, and intergenerational trauma. He pointed out that harmful experiences are always individualized and contextualized and never just about the person in isolation.

Cunningham observed,

> At the conclusion of a comprehensive mitigation evaluation, it is not uncommon to have identified 10–15+ adverse developmental factors for the jury's mitigation consideration . . . and that identification and anecdotal description of impairing factors and adverse formative events in the defendant's development are only the beginning of the task. Next the expert will need to become conversant with the scholarly literature describing the impact of such impairments and adverse factors on developmental trajectory (Ref. 16, p 218).

We agree with Cunningham about using such research and expertise to paint a picture of the impact of related risk and resilience factors of the capital defendant's life course, up until the present. In a psycholegal field in which diagnostic conclusions are often forced into a Procrustean bed, Cunningham's framework expands the possibility for mitigation conclusions and puts the capital defendant's developmental trajectory in context, allowing for formulation about moral culpability.

Diagnostic Complexity, Context, and Culture

Hiromoto and colleagues note that the mitigating value of the evidence was lessened without a formal and unequivocal PTSD diagnosis. This could pose a conundrum for assessing trauma-affected defendants whose presentation does not fall neatly into such a diagnostic category. Many of the cases cited by these authors reflect defendants who have experienced multiple forms of maltreatment (e.g., in the cases of *Porter v. McCollum*[19] and *Doe v. Ayers* [20]). Based on mounting evidence that exposure to ongoing trauma during early stages of development presents as distinct from later, more circumscribed exposure to trauma, the *International Statistical Classification of Diseases and Related Health Problems* (*ICD-11*)[21] added the diagnosis of complex posttraumatic stress disorder (CPTSD). CPTSD appears to capture the effects and symptomatology of cumulative, prolonged, and repetitive traumatic events and maltreatment that often occur at developmentally vulnerable times in a defendant's life. The CPTSD diagnosis covers not only the signature characteristics of PTSD (intrusion, hyperarousal, and avoidance), but it is also defined by somatization and alterations in these five domains: regulation of affect and impulses, attention or consciousness, self-perception, relations with others, and systems of meaning.

Some defendants with a high trauma loading meet criteria for neither PTSD nor CPTSD. Arguably though, many of these individuals have been, and continue to be deeply affected by adversity and maltreatment. In fact, much psychopathology is thought to develop as a result of maladaptive methods to cope with ongoing trauma.[22]

Symptom presentation can also vary considerably among people of diverse cultural backgrounds and even within people of the same minority group. This variability can affect the validity of psychological testing and of the diagnosis, more broadly, when applied to minority samples.[23] The potential for diagnostic uncertainty among capital defendants who have complex symptom presentations and are from minority backgrounds could leave these individuals particularly disadvantaged when it comes to the mobilization of effective mitigation during the sentencing phase.

The Role of FMHPs

Hiromoto *et al.* point out two challenges in terms of assessing PTSD that fall on the opposite ends of the validity continuum: the potential for PTSD symptoms to be malingered or overreported, especially in cases where the consequences are as dire as capital punishment, and, conversely, the potential for underreporting trauma and related symptomatology. We add a third challenge here, which is that some trauma symptoms can be missed, or misunderstood by lawyers, judges, jurors, and sometimes even by forensic mental health experts.

Hiromoto and colleagues highlight how the subjective nature of PTSD symptoms make these easy to malinger. This is arguably true of many other psychological disorders, as well. With specialized training in psychiatric disorders and the assessment of symptom validity, the forensic evaluator is well-positioned to critically compare information across sources and to examine the consistency of the defendant's presentation across time and situation.[24] The use of a multimethod approach enhances evaluators' ability to triangulate or cross reference data and can assist in strengthening and supporting their conclusions.[25]

Despite the high stakes related to capital cases, some defendants fall on the other end of the spectrum and might fail to recapitulate their experiences of trauma.[26] Even after describing events that sound truly horrific, some defendants will add, "that was just the way it was." Further, some defendants might fail to report experiences of sexual abuse due to embarrassment. It is also common for people to actively avoid talking about and thinking about

traumatic memories. Avoidance is one of the signature symptoms of trauma, and it is also this avoidance that contributes to the maintenance of the PTSD.

Posttraumatic reactions affect the nervous system and evolutionarily trigger alterations in autonomic arousal.[27] Such symptomatology can affect defendants' ability to remember and narrate their lives, cogently answer questions, and engage meaningfully in providing information related to mitigation. Trauma-informed FMHPs know how to ask questions related to historical abuse. They can also observe nuanced shifts in arousal, and pace interviews to help manage this arousal so that the defendant can remain sufficiently regulated to effectively engage in the process. Finally, a skilled forensic mental health professional can also effectively explain these symptoms to the court. Educating the court is essential because the effects of changes in arousal (e.g., lack of eye contact, disfluent speech, blank gaze, agitation), and poor capacity to recall details could be easily misinterpreted by a layperson or legal professional as a lack of remorse or poor credibility.[28]

We wish to add that the study of trauma is a specialty area unto itself. Concern appears in the literature that even FMHPs sometimes fail to appropriately assess for trauma-related symptoms such as dissociation.[29] This speaks to the need to use forensic mental health professionals who have further speciality in the assessment of trauma-related disorders.

Conclusions

Hiromoto and colleagues note a concern that if PTSD became more widely adopted as a mitigation strategy, floodgates could open and that simply having experienced a trauma or hardship would be argued to be synonymous with experiencing PTSD. This concern about the opening of floodgates is neither new nor founded. Blume [30] stated that this floodgate fear also arose in relation to *Atkins v. Virgina*[31] when the death penalty was purportedly abolished for persons with intellectual disabilities. Further, the opening of floodgates is not a concern for the assessing expert, who would continue to be expected to diligently assess capital defendants. We agree that a FMHP well-trained in the assessment of trauma can play a vital role in evaluating capital defendants. Such professionals can of course assess response styles and render diagnoses. They can also take a more nuanced contextualized approach and assist the courts in understanding biological, psychological, social, and cultural influences and the impact these have on a defendant's lived experience. In keeping with Cunningham's framework, they can carefully assess harmful and protective factors as these affect a defendant's developmental trajectory and life course and speak to moral culpability. Ensuring careful assessment of trauma as a mitigating factor is imperative, given the adversity so many capital defendants have faced and the stakes involved.

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