

Diminished Capacity: Mitigating or Aggravating Factor in Sentencing?

Yan Xuan, MD
Fellow in Forensic Psychiatry

Kenneth J. Weiss, MD
Clinical Associate Professor of Psychiatry
Associate Director, Forensic Fellowship Program

Department of Psychiatry
Perelman School of Medicine, University of
Pennsylvania
Philadelphia, PA

Arguments of Diminished Capacity Based on Asperger Syndrome and Other Psychological Conditions Raised in Mitigation Do Not Necessarily Warrant a Lower Sentence

In *United States v. Lucas*, 670 F.3d 784 (7th Cir. 2012), the United States Court of Appeals for the Seventh Circuit considered whether the U.S. District Court for the Western District of Wisconsin erred in the sentencing of Trevor Lucas. On appeal, Mr. Lucas argued that several errors were made by the district court, including treating diminished capacity, due to his psychological conditions, including Asperger syndrome, as an aggravating factor, rather than as a mitigating factor that warranted a lower sentence.

Facts of the Case

On August 25, 2009, Trevor Lucas drove 20 hours from Massachusetts to the Wisconsin home of C. G., a minor living with his mother. Lucas was upset about “gold” he had given C. G. in an online video game, *World of Warcraft*. While playing the game, he began soliciting C. G. for naked pictures. As a result C. G. placed him on his ignore list, to block communication with him. He offered C. G. \$5,000 in online currency to be taken off the ignore list, to which C. G. agreed. However, soon afterward, the sexual messages resumed, and C. G. again placed him on the ignore list.

Mr. Lucas then began sending threatening messages to C. G. and telling others that he intended to kill him. He devised a plan to kidnap C. G., accumulated an arsenal of weapons, and outfitted his car to resemble a police vehicle. He also removed the

emergency-release latch from the trunk and lined it with a plastic cover.

When he arrived at C. G.’s house, he was met by the boy’s mother. He aroused her suspicions when he introduced himself as a National Security Recruiting Department agent. After she refused him entry, Mr. Lucas pointed a handgun at her face, and she quickly slammed the door. He fled the scene and was arrested in Massachusetts. The police later found a cave in the woods near his house where he had stockpiled weapons and had dug two large holes.

Mr. Lucas was charged with the federal offenses of unlawfully transporting a firearm with the intent to commit a felony, attempted kidnapping, and intentionally brandishing a gun during and in relation to a crime of violence. In addition, he had been on conditional release due to an April 2009 arrest for illegal possession of large-capacity firearms.

Mr. Lucas pleaded guilty to brandishing a firearm during a crime of violence, agreeing to a range of seven years to life imprisonment. Objecting to the presentencing investigation report, he filed a sentencing memorandum that included a report by a psychiatrist, Dr. Jeffrey Marcus. The doctor opined that Mr. Lucas did not possess the capacity to understand the significance of his behavior at the time of his offense, because of the conditions of Asperger syndrome, attention deficit hyperactive disorder, and bipolar disorder and that the criminal conduct was the result of a manic episode triggered by modafinil (Provigil). The district court sentenced him to 210 months, within the agreed range.

Mr. Lucas appealed his sentence, citing numerous errors, including the treatment of diminished capacity in his sentencing. He argued that the district court improperly treated it as aggravating rather than mitigating and that his psychological conditions prevented him from appreciating his behavior. He also cited Dr. Marcus’s opinion that the road trip was the result of a modafinil-induced manic episode. Because diminished capacity contributed to the commission of the crime, Mr. Lucas argued that it should have been treated as a mitigating factor in sentencing, but that it was instead treated as an aggravating factor. He cited statements made by the district court including, “[M]ost bipolar people don’t, even in a manic episode, don’t go off and endanger others. I mean, to me, it cuts at least the other way as much as it does that I should find it a mitigating circumstance” and “an incapacity to understand the signif-

icance of his actions fundamentally describes what led to this tragedy” as evidence that his purported diminished capacity was treated as aggravating (*Lucas*, p 793).

Ruling and Reasoning

The court of appeals did not agree with this characterization of the district court’s statements. The court pointed out that, because the district court did not believe individuals with Asperger syndrome were more likely to engage in criminal activities, there was no reason to believe that it was treated as an aggravating factor. Instead, the district court rejected Mr. Lucas’s argument that the presence of diminished capacity should necessarily result in a lesser sentence, citing *United States v. Portman*, 599 F.3d 633 (7th Cir. 2010), p 638: “Of course . . . a district court could find diminished capacity but choose not to reduce a sentence. For example, a court could find that the defendant would remain dangerous after treatment” (*Lucas*, p 794). The court of appeals agreed with the district court’s reasoning that, because Mr. Lucas had already received extensive parental and professional support before the attempted kidnapping, he would be likely to remain dangerous, even after further treatment, and a reduced sentence would therefore not be justified. His subsequent appeal to the U.S. Supreme Court was denied *certiorari* in 2013.

Discussion

This case highlights that an argument for mitigation based on psychological conditions is not necessarily accepted as a reason to hand down a reduced sentence. Courts are free to refuse sentence reduction, even when the condition contributes to the commission of the crime, if the defendant is likely to remain dangerous. The presence of sufficient prior treatment and support, which were nonetheless ineffective in preventing criminal behavior, may be used to support a finding of continued dangerousness. Such backfiring of mental health evidence offered in good faith is troubling, not only because the evidence is a double-edged sword, but because it could have a chilling effect on such proffers going forward. Although we appreciate that the sentencing calculus would include elements of deterrence as well as retribution, deterrence via enhanced mental health care is preferable to adding years of incarceration.

Mr. Lucas had documented conditions which, if properly explored and explained, could have placed

him in a better light before the court. A better use of the expert’s report may have been to characterize more fully the role and effect of Mr. Lucas’s autism spectrum disorder (ASD) on his appreciation of wrongfulness. Limitations in theory of mind in ASD can give rise to behaviors that appear odd, insensitive, or even frankly antisocial to judges, juries, and prosecutors. He had a hypertrophied interest in his online gaming, taking the currency too literally. Rigidity and impulsivity may be interpreted as intractability or callousness. Deficits in social cognition that result in a lack of an ability to understand another’s subjective, and particularly emotional, reality may directly contribute to significant misunderstandings and the commission of such ostensibly terrible acts. Although there is no guarantee of success, either in determinations of criminal responsibility or in sentencing, an expert opinion used to educate the trier of fact on these questions would be a step in the right direction.

Mr. Lucas did not receive the minimum sentence of 7 years; it was 17.5, but could have been life. Given the elements of child sexual predation and homicidal threats, one can understand the court’s concerns. It may have been overreaching, however, for him to argue that Provigil induced a manic episode that resulted in the commission of the crime, particularly since the district court could easily discount that justification on the basis of the timeline. Without clear evidence that Provigil was the inciting agent and a compelling explanation of how it would affect *mens rea* and criminal responsibility, such an argument is unlikely to be helpful.

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

Juror’s Willful Misconduct and Sentencing of a Juvenile Offender to Life Without Parole

Shobhit Negi, MD
Fellow in Forensic Psychiatry

Annie Steinberg, MD
Clinical Professor of Psychiatry

*Department of Psychiatry
Perelman School of Medicine
University of Pennsylvania
Philadelphia, PA*