Mitigating Factors and Mental Health:

Sentencing Considerations and Implications

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The Institute on Violence, Abuse, and Trauma

Overview

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Mitigation Evaluations

Why

Mitigation evaluations are conducted during the sentencing phase of a trial to present evidence that may argue for a reduced sentence based on other factors.

How

These evaluations involve assessing various factors related to the defendant's background, mental health, and circumstances of the offence.

(Barnett et al., 2011)

Of 835 cases

The results indicate that with the exception of

Only 1 Case

A capital jury does not accept that mental health related issues effectively mitigate against a capital sentence

(Miley et al., 2020; Herger & Ravven, 2022)

Mitigating Factors

(California Rules of Court, Rule 4.423. Circumstances in Mitigation)

MITIGATING FACTORS/CIRCUMSTANCES ARE CONSIDERED:

Any factor about the defendant's character or background, or any of the circumstances of the offense, which might support imposition of a sentence less than death. These are called Personal Mitigating Factors (PMFs).

MITIGATING FACTORS CAN INCLUDE:

Spontaneous offences, severe impact from punishment (e.g., harsh prison conditions), incidental punishment, restitution of property, and failed criminal defences (e.g., self-defense, necessity, duress, mental illness)

Mitigation Evaluators

- A survey of psychologists to identify who has expertise in conducting mitigation evaluations found that psychologists who conduct these evaluations are those that have significant experience, with an average of 17 years in practice and 10 years conducting mitigation evaluations.

- Interestingly, a sizable portion of all the survey participants (30%) reported they have never conducted a mitigation evaluation, highlighting the specialized nature of this work.

Mental Health Related Factors

MENTAL OR PHYSICAL CONDITION

The defendant was suffering from a mental or physical condition that significantly reduced culpability for the crime

HISTORICAL TRAUMA

The defendant experienced psychological, physical, or childhood trauma, including, but not limited to, abuse, neglect, exploitation, or sexual violence and it was a factor in the commission of the crime;

VICTIM AT TIME OF OFFENSE

The defendant is or was a victim of intimate partner violence or human trafficking at the time of the commission of the offense, and it was a factor in the commission of the offense;

Implications

COGNITIVE IMPAIRMENTS

The reluctance to significantly mitigate sentences based on cognitive impairments alone reflects broader philosophical questions about moral culpability and retributive justice.

CHILD MALTREATMENT

Child maltreatment has been clearly established to have life-long adverse consequences for the survivors, including implications for their health, social interaction, and behavioral problems

OVERLOOKED

At some point during the litigation process, the neuropsychological findings can be minimized or ignored

EDUCATING THE COURT

Additional information is required to inform attorneys and the court about how neuropsychological impairment influences the development of the brain and subsequent behavior

Mental Health & Trauma Considerations

- Current mental health mitigation evidence does not appear to significantly influence sentencing or the U.S. Attorney General's recommendations.
- Mental illness is prevalent among death row inmates, yet its mitigating impact on judicial outcomes is under-researched and inconsistent.
- Mitigation efforts are also often met with cynicism where the presentation of trauma and abuse in the context of a death penalty case can be viewed as nothing more than "the abuse excuse", a phrase coined by Alan Dershowitz

Lisa Montgomery, executed 2021. Reported to have had brain damage and severe mental illness that was exacerbated by a lifetime of significant abuse

(Butrus, 2018; Stites et al., 2015)

“Abuse Excuse”

It refers to the defendant’s inability to distinguish right from wrong or inability to control their impulses as a result of prolonged abuse

(Legal Information Institute, 2022)

Case Example: THE MENENDEZ BROTHERS

Understanding Community Perspectives

Capital Jury Project of 1991 (Bowers, W.J., 1995):

- Study found many of the 1198 jurors believed mitigating factors did not excuse the crime, and therefore should not be considered at sentencing.
- Jurors also misunderstood jury instructions regarding mitigating factors, believing all jurors must agree on considering them, when each individual could consider them on their own

In a 2010 study by Margaret Stevenson, PhD and colleagues, “jurors were more likely to argue that child abuse (and alcohol abuse) should not be used as mitigators, or to even use them against the defendant as aggravators, than they were to use them as mitigators”

International Approaches & Research:

Suggested Aggravated & Mitigating Factors

AGGRAVATING FACTORS

- Prior criminal record (50%)
- High degree of involvement in crime (10%)
- High degree of planning (10%)
- High level of harm (10%)

MITIGATING FACTORS

- Severe impact from punishment (50%)
- Plea of guilty (25%)
- Assistance to authorities (25%)
- Socio-economic deprivation (25%)
- Restitution of property (25%)
- Harm to dependents (20%)
- Incidental punishment (20%)
- Spontaneous offending (10%)
- Failed criminal defenses (10% each for self-defense, necessity, duress, mental illness)

(Bagaric, 2014)

International Approaches & Research:

Character Mitigation & Sentencing

Prevalence & Co-Occurence of PMFs

- Remorse is the most frequent
- Good character is common
- Addressing addiction is prevalent
- These often co-occur

Interactions Among PMFs

- There is evidence of underweighting in regard to multiple PMFs presence
- Significant reactions were found between all three

Impact on Sentencing

- Likely to receive immediate custodial sentence
- Addressing addiction is the strongest
- Good Character has a strong effect
- Similar impacts across both types

Sentencing Guidelines and Judicial Discretion

- Need for consistent and principled application of PMFs in sentencing
- Location of study possibly leads to variability in PMFs application

(Belton & Dhami, 2024)

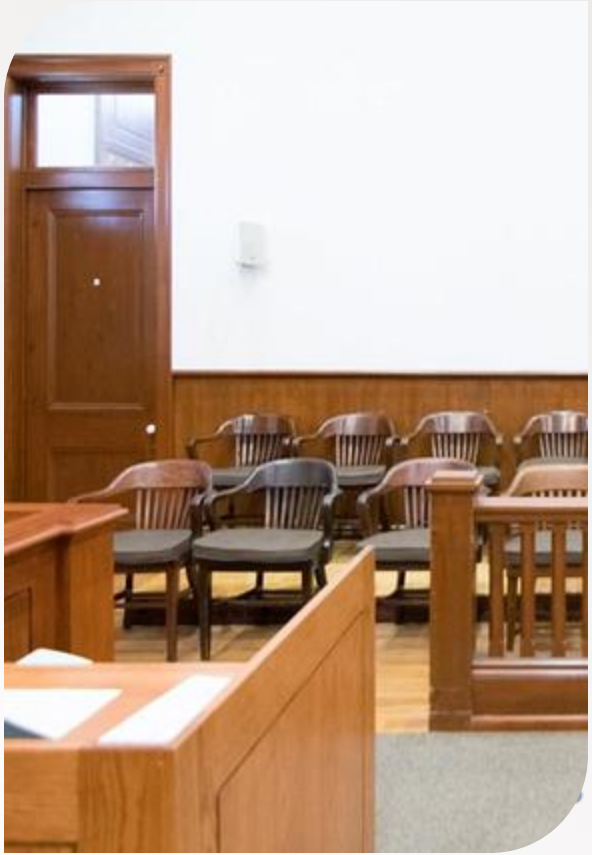
Juror Understanding of Mitigating and Aggravating Factors

FACTS OF THE CASE V. PERSONAL JURY DECISIONS

- Jurors are not blank slates, they bring their experiences and more that influence their understanding.

JUROR INFLUENCES

- Justification for the death penalty, retribution, deterrence, economics, errors, reaction to complexities of evidence and expert witnesses, feelings of responsibility for community protection, interpretations of defendant's intent



(Berryessa, 2017)

International Approaches & Research:

Neurocognitive Considerations

Impairment may make defendants less capable of being, and thus less likely to have been primary actor in the commission of the crime (where another defendant also participated).

However…

- Few studies on offenders sentenced with the death penalty
- Many capital murder offenders may have neuropsychological impairment, affecting competency
- Frontal and temporal lobe dysfunction may be a precursor for aggression.

(Verdun-Jones & Butler, 2013)

International Approaches & Research:

ASD/Disability Considerations

Remembering that Autism diagnoses are on a spectrum.

- Underresearched
- Atkins v. Virginia (2022) & Roper v. Simmons (2005) The supreme Court found the death penalty unconstitutional for “mentally retarded” individuals
- ASD recognition in courts has grown

(Farris & Chien, 2018)

International Approaches & Research:
ASD & Sentencing

In a study by Maras et al. (2019), those labeled with ASD rated the defendant's honesty and likeability higher, reduced blameworthiness, and resulted in fewer guilty verdicts, and more lenient sentencing, compared to someone experiencing the exact same behaviours but not reported to be diagnosed with ASD.

When participants knew the person had ASD, mock jurors felt more empathetic and would consider that a mitigating factor in sentencing.

(Maras et al., 2019)

International Approaches & Research:

Trauma and Violent Offenses

Jackson et al. (2021) investigates the relationship between trauma and violent offending, focusing on how trauma is recognized and addressed in sentencing decisions for homicide offenders in Victoria, Australia.

- Prevalence of Trauma
- Recognition of Trauma
- Impact on Sentencing
- Gender Differences
- Trauma-informed Recommendations
- Judicial and Clinical Collaboration

(Jackson et al., 2021)

International Approaches & Research:

Trauma and Violent Offenses

- Previous research has established a link between child maltreatment and adult criminality and violent behaviour 1
- One study suggesting that “being abused or neglected as a child increased the likelihood of arrest as a juvenile by 59%, as an adult by 28%, and for a violent crime by 30%” 2
- Importantly, CSA victims, both male and female, were almost five times more likely to be charged with all types of offences, with the strongest correlations being for sexual offences and violent offences 3
- Mental illness was found to increase offending rates by more than three times. The magnitude of the effects on the general populace cannot be overestimated, as the CSA victims in this study were also more likely to commit murder3
- The criminal justice system in Australia already recognises that child maltreatment and other forms of trauma do affect later behaviours, which can be taken in to consideration at the time of sentencing once someone has been found guilty

(1 Fang & Corso, 2007; 2 Widom & Maxfield, 2001; 3 Cutajar et al., 2011; 4 Mallet & Schall, 2019)

PTSD & Trauma

- Offenders need to be carefully diagnosed to R/O disorders such as PTSD.
- Abuse and maltreatment, even without PTSD, maybe associated with chemical and structural brain changes.
- While these changes are still under investigation, they appear to have real-life consequences for affect regulation, impulsivity, etc.
- Assessment can assist with diagnosis, prognosis, and intervention recommendations.

Common Principles Linking Trauma and Brain Impairment to Violence

- Affect and impulse dysregulation – Aggression
- High levels of anxiety
- Rapid shifts in psychological state
- Disturbances in sense of self: low self-esteem,
- Body image distortion
- Identity diffusion/fragmentation
- Attachment issues
- Lack of self-awareness
- Self-destructive behaviors
- Attention, concentration, and memory problems

The Impact of Mental Health on the Brain

When someone experiences a traumatic event or experiences extreme fear, brain chemistry is altered and the brain begins to function differently--this is called the "Fear Circuitry" and it is a protective mechanism which we all have inside of us.

Center for Substance Abuse Treatment (2014)

CONS OF TRAUMA-INFORMED SENTENCING

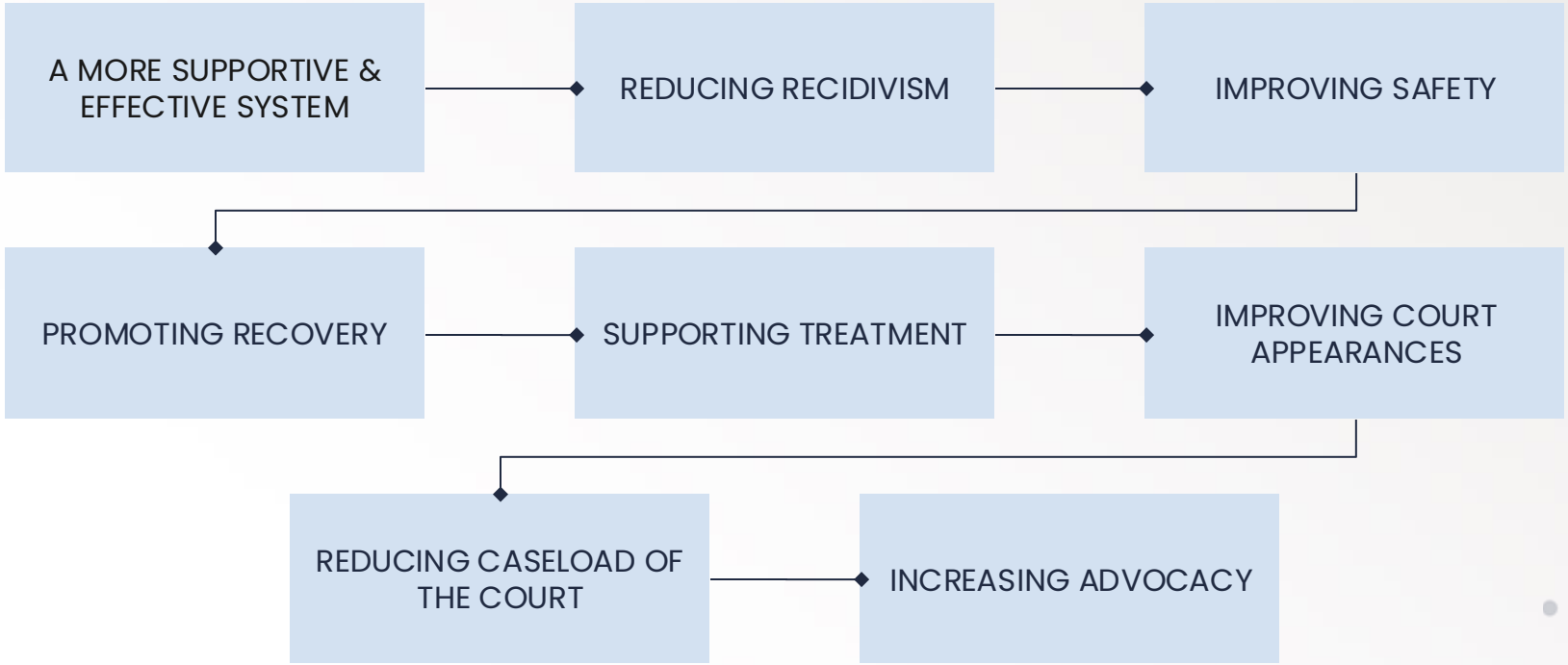
SAFETY CONCERNS → LACK OF CONSISTENCY → THE EVIDENCE IS INCONCLUSIVE

(*Illinois Criminal Justice Information Authority*, 2024)

(Senker, et al., 2023)

McLachlan, K.J. (2024).

PROS OF TRAUMA-INFORMED SENTENCING



(Paley, 2021)

Future Research

The Relationship Between Mental Health & Evidence

The project team is responsible for the successful execution of the project. Our team is composed of experienced professionals with the necessary skills and expertise to complete the project on time and within budget

Judicial Outcomes When Appropriate Research is Provided

Our project budget is $100,000. This budget includes all expenses associated with the project, including salaries and equipment. We have allocated these resources to ensure that we are able to complete the project within budget

The potential for Re-Traumatization of Offenders.

Our project requires a number of specialized pieces of equipment. We will be using [insert equipment and their functions]. All equipment is in good working condition and has been tested and calibrated prior to use

THANK YOU

Do you have any questions?

If you would like to reach out to the speakers
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References

Bowers, William J. (1995) "The Capital Jury Project: Rationale, Design, and Preview of Early Findings,"Indiana Law Journal: Vol. 70: Iss. 4, Article 2., Available at: https://www.repository.law.indiana.edu/ilj/vol70/iss4/2

Jackson, V., Sullivan, D. H., Mawren, D., Freiberg, A., Kulkarni, J., & Darjee, R. (2021). Trauma-informed sentencing of serious violent offenders: an exploration of judicial dispositions with a gendered perspective. *Psychiatry, Psychology and Law*, *28*(5), 748–773. https://doi.org/10.1080/13218719.2020.1855267

Herger, M., & Ravven, S. (2022). Psychiatric history as a factor in sentencing. *Journal of the American Academy of Psychiatry and the Law*, *50*(1), 156–158.

Hiromoto, L., Keltner, C., Frizzell, W., Chien, J., & Sparr, L. (2021, November 17). *PTSD and trauma as mitigating factors in sentencing in capital cases*. Journal of the American Academy of Psychiatry and the Law. https://jaapl.org/content/early/2021/11/17/jaapl.210052-21

Illinois Criminal Justice Information Authority (ICJIA). (2024). https://icjia.illinois.gov/researchhub/articles/trauma-informed-and-evidence-based-practices-and-programs-to-address-trauma-in-correctional-settings

McLachlan, K.J. (2024). Trauma-Informed Sentencing. In: Trauma-informed Criminal Justice. Palgrave Macmillan, Cham. https://doi.org/10.1007/978-3-031-59290-4_8

Miley, L. N., Heiss-Moses, E., Cochran, J. K., Heide, K. M., Fogel, S. J., Smith, M. D., & Bejerregaard, B. J. (2020). An examination of the effects of mental disorders as mitigating factors on capital sentencing outcomes. *Behavioral Sciences & the Law*, *38*(4), 381–405. https://doi.org/10.1002/bsl.2477

Paley, E. (2021, December 21). *Promoting access to justice through trauma-informed courts*. Policy Research Associates. https://www.prainc.com/gains-promoting-justice-trauma-informed-courts/

Senker, S., Eason, A., Pawson, C., McCartan, K. (2023). Issues, challenges, and opportunities for trauma-informed practice. *HM Inspectorate of Probation Academic Insights. https://www.justiceinspectorates.gov.uk/hmiprobation/wp-content/uploads/sites/5/2023/11/Academic-Insights-Senker-et-al-FINAL.pdf*

Stevenson, M. C., Bottoms, B. L., & Diamond, S. S. S. (2010). Jurors' discussions of a defendant's history of child abuse and alcohol abuse in capital sentencing deliberations. *Psychology, Public Policy, and Law*, *16*(1), 1–38. https://doi.org/10.1037/a0018404

Taking trauma seriously: How trauma-informed practices can help people heal. Center for Justice Innovation. (2024, January 24). https://www.innovatingjustice.org/articles/trauma-informed-courts