

Mitigation Investigation and Development

Representing Our Clients in the Context of Their Lives

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Introduction

[I]f there is a single area in which decades of death penalty law and practice might help noncapital defendants, it is by raising the bar and aligning noncapital mitigation practice with the highest standards of the legal profession developed by capital defense teams.

- Miriam S. Gohara, *Grace Notes: A Case for Making Mitigation the Heart of Noncapital Sentencing*, 41 Am. J. Crim. L. 1 (2013)

Mariam Gohara challenges us to consider the value of high caliber mitigation investigations not just in capital cases, but in noncapital cases as well. She persuasively argues that individualized sentencing is fairer than uniform offense-based sentencing, that information about a person's background is relevant to that person's culpability, and that a focus on our clients' life histories will, over time, "lead to effective crime reduction policy because mitigation will help identify the factors that influence people to engage in behavior that breaks the law." *Id* at 44. I agree, and further argue that a comprehensive life history investigation might also reveal information that informs the client's legal culpability. Perhaps most importantly, a focus on the humanity of our clients is a necessary anecdote to the racial bias that pervades our criminal legal system.

Capital mitigation work can provide a framework for understanding what mitigation is and why it is important. One framework - an understanding of competing narratives about criminal conduct - is drawn from an article by Craig Haney entitled, *Evolving Standards of Decency: Advancing the Nature and Logic of Capital Mitigation*. This article was published in 2008 in the HOFSTRA LAW REVIEW (vol. 36, no. 3), as part of the promulgation of the American Bar Association's SUPPLEMENTARY GUIDELINES FOR THE MITIGATION FUNCTION OF DEFENSE TEAMS IN DEATH PENALTY CASES. Defense attorneys and sentencing mitigation specialists should read it, available at: law.hofstra.edu/pdf/Academics/Journals/LawReview/lrv_issues_v36n03. This paper uses and quote from this article liberally, and unless otherwise stated, all page numbers refer to it.

United States Supreme Court decisions about mitigation in the death penalty cases provides yet another framework for understanding what mitigation is and why it matters.

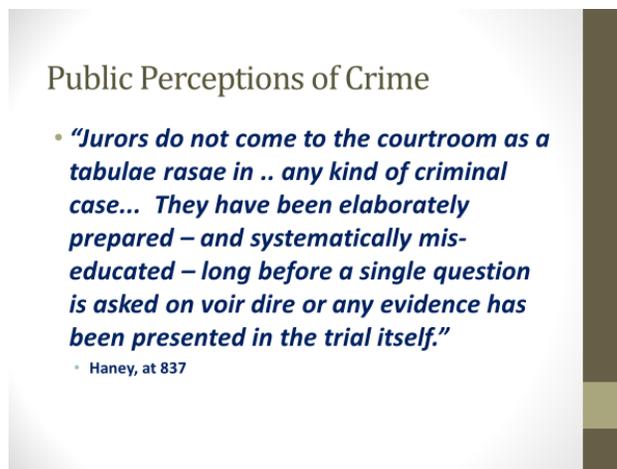
These frameworks for mitigation illustrate what can be gained by developing a defense strategy that is informed not simply by the facts of the charged crime but also by the realities of our clients' lives. Developing and using a thematic narrative that weaves in mitigating information about your client can prevent wrongful convictions, and when there is a conviction, can prevent wrongful punishment.

I. A Framework for Understanding Mitigation: The *Crime Master Narrative* versus the *Mitigation Counter Narrative*.

Dr. Craig Haney, a psychologist and lawyer, has proposed a helpful framework for understanding what mitigation is and why it matters. As he explains, the prosecution offers a simplistic, decontextualized version of the crime which he calls the *Crime Master Narrative*. It is our responsibility to offer a more complete, nuanced narrative that puts the crime in the context of the client's life and personal circumstances. Our more complete – and truer – narrative is the *Mitigation Counter Narrative*.

A. The Crime Master Narrative:

The Crime Master Narrative is influenced by the biases and preconceived notions held by nearly all people involved in the criminal justice system, including law enforcement, judges, prosecutors, and jurors. Haney describes how these bias results from the systemic miseducation of the public:

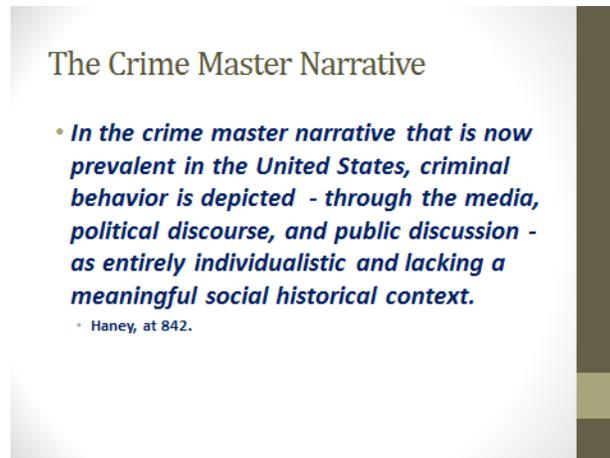


The sources of this miseducation are *everywhere*:

- It is in “the mass media’s agenda-setting” news accounts of crime, which sensationalize offenses and demonize alleged perpetrators “in characteristically simplistic ways.”
- It is in television crime dramas, which depict people who commit crime “without a personal history or set of interpersonal relationships that would humanize them,” and instead portray them as “animalistic and senseless.”
- And it is in the political and public discourse about crime in general, which focuses on the “human propensity for evil” and a concomitant fear-driven belief that harsh punishment is necessary to protecting society.

See Haney, at 838-839.

The Crime Master Narrative is the prosecution's simplistic narrative of the crime. At its core, the Crime Master Narrative is a brief snap-shot of time that includes only a narrow set of facts about the crime itself. As Dr. Haney puts it:

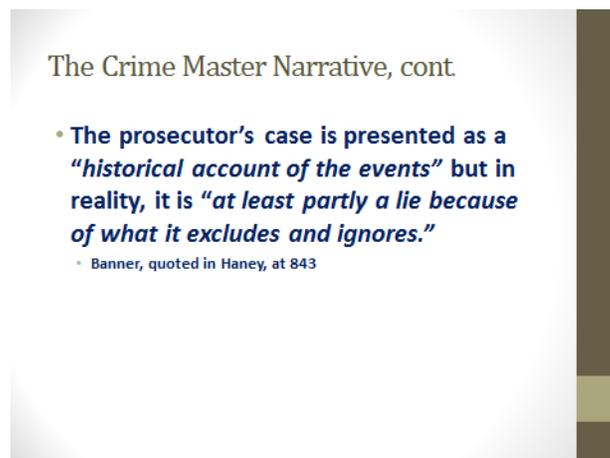


Thus, these are the essential features of the Crime Master Narrative:

- a snap-shot in time
- a *decontextualized* view of the crime and the defendant
- exclusion of background and potentially mitigating information about the defendant and the crime itself
- a simplistic morality play of good versus evil

The Crime Master Narrative makes it easier for decision-makers to not only assume that defendants are guilty, but that they acted out of malevolent intent and thus are deserving of harsh punishment.

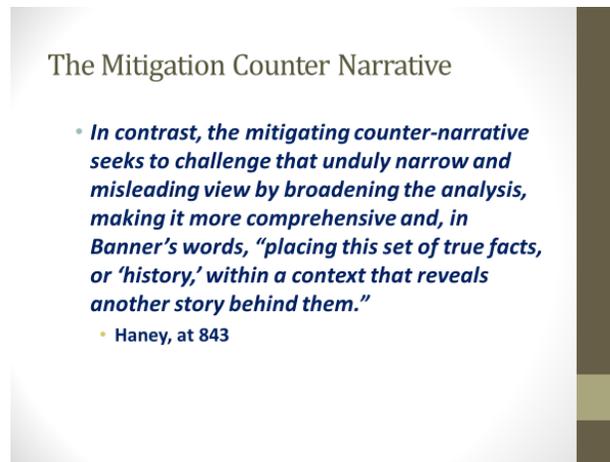
But because it includes only a narrow set of facts about the crime, the Crime Master Narrative is often deeply untrue:



The truth about the crime itself *and* the person alleged to have committed it is almost always much more complicated and nuanced than the Crime Master Narrative. This more nuanced truth is found in the Mitigation Counter Narrative.

B. The Mitigation Counter Narrative

The Mitigation Counter Narrative is the complete story of the defendant and the crime that honors the complexity of human nature and interpersonal relationships.



The Mitigation Counter Narrative recognizes that:

- we are the product of our backgrounds, experiences, and social histories
- we are shaped and influenced by our genetics *and* the events in our lives
- our immediate environment and circumstances often have a profound impact on our decisions and actions

The Mitigation Counter Narrative is a more nuanced, contextualized, and comprehensive view of the defendant and the circumstances of the crime.

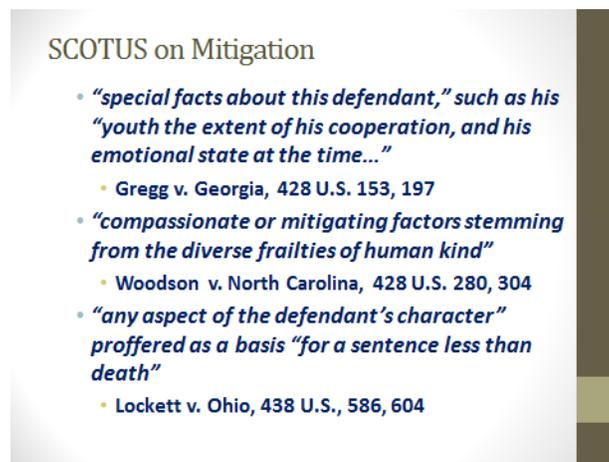
This more complete story should inform every aspect of the case, from decisions about possible legal defenses to decisions about sentencing. But before discussing how this works, it is important to identify what the United States Supreme Court has said about what mitigation is and why it matters.

C. SCOTUS on What Mitigation is and Why It Matters

The death penalty has forced the Supreme Court to grapple with an understanding of mitigation. Indeed, in the forty plus years since *Furman v. Georgia*, 408 U.S. 238 (1972) and *Gregg v. Georgia*, 428 U.S. 153 (1976) ushered in the modern era of capital punishment, the United States Supreme Court has struggled to come to terms with understanding *what* mitigation is and *why* it matters.

a. What is Mitigation?

Initially, the US Supreme Court treated mitigation much like Justice Potter Stewart treated pornography: “I know it when I see it.” *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964).¹ The Court did not substantively define mitigation so much as simply say that the evidence offered about the defendant was ... well, mitigating. In early post-*Furman* and *Gregg* decisions, the Court characterized mitigation in the following ways:



The Supreme Court’s definition of mitigation was generously broad (i.e., “any aspect of the defendant’s character”). Despite this broad definition, or perhaps because of it, lower courts continued to struggle with understanding what evidence is mitigating. Courts generally understood that evidence that tended to *excuse* the defendant’s conduct – that is, evidence that diminished the defendant’s *legal culpability* – was certainly mitigating. But many lower courts refused to admit or consider as mitigating information about the defendant that did not directly address the defendant’s legal culpability for the crime.

The Supreme Court confronted this situation in the 1982 case, *Eddings v. Oklahoma*, 455 U.S. 104. Monty Lee Eddings was 16 years old when alleged to have committed the crime of first degree murder in Oklahoma after shooting a police officer. He pleaded *nolo contendere*. During the capital penalty phase, Eddings’ lawyers presented “substantial evidence... of his troubled youth.” *Id.* at 107. The trial court, however, refused to consider this information as mitigating. The appellate court agreed, reasoning that though the information about Eddings’ troubled youth helped to “explain” Eddings’ behavior at the time of the crime, “it did not ‘excuse’ his behavior.” *Id.* at 110.

¹ In *Jacobellis*, Justice Potter refused to define what unprotected pornographic or obscene speech is, stating instead: “I shall not today attempt further to define the kinds of material I understand to be embraced... [b]ut I know it when I see it.” *Id.* at 197.

The Supreme Court reversed, stating:

SCOTUS on Mitigation, cont.

- *The evidence need not “suggest an absence of responsibility for the crime” to be “a relevant mitigating factor of great weight.”*
- *“There can be no doubt that evidence of a turbulent family history, of beatings by a harsh father, and of severe emotional disturbance is particularly relevant.”*
 - Eddings v. Oklahoma, 455 U.S. 104, 115-116

To be mitigating, the proffered evidence need not *excuse* the crime or suggest an absence of legal responsibility for it. Evidence is mitigating even if it just helps us to better understand the defendant and how and why the crime happened.

Eddings was a beginning of a more substantive understanding of mitigation, but it did not fully answer the question - so what? Why does this background information about the defendant matter?

b. Why does evidence about the defendant’s life matter?

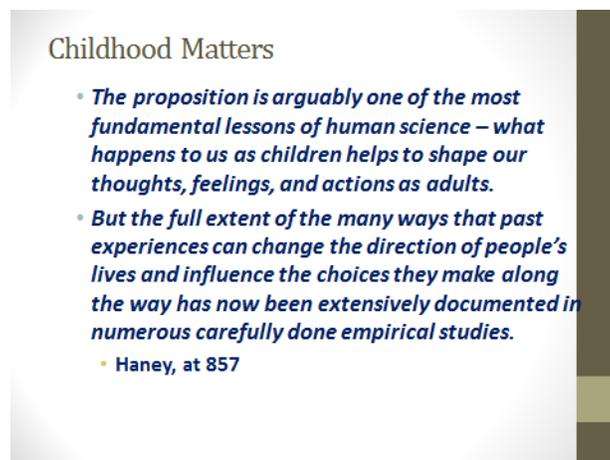
It was Justice O’Connor who finally shaped a more substantive understanding of mitigation that helps to answer the question: Why does the evidence about the defendant’s background and personal circumstances matter? Her understanding is set forth in a series of cases, beginning with *California v. Brown*:

O’Connor gets it

- *“Defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.”*
 - California v. Brown, 479 U.S. 538, 545
- Lockett and Eddings stand for “the principle that punishment should be directly related to the personal culpability of the defendant”
- Punishment must be a “reasoned moral response to the defendant’s background, character, and crime.”
 - Penry v. Lynaugh, 492 U.S. 302, 319

As Justice O'Connor frames it, evidence about the defendant's background and personal circumstances help us to better assess the defendant's true *moral culpability* for the crime. She opens the door to our assertion that our client's choices and actions were not made in isolation but were instead shaped and influenced by the events in their lives. In other words, we can assess the true legal *and* moral culpability of a person only if we place the crime in the context of their lives. A "reasoned moral response" can only be accomplished in the context of the Mitigation Counter Narrative.

As Dr. Haney explains in his article, there is no question that this more substantive understanding of mitigation was driven by the growing body of research about human behavior that paralleled the Supreme Court's evolving understanding of mitigation. Often referred to as "the study of lives," this research helps us to understand what shapes and drives people's actions and decisions. We have always intuited that childhood matters, but as Dr. Haney explains, the social science research explains *why* childhood matters:



Childhood Matters

- *The proposition is arguably one of the most fundamental lessons of human science – what happens to us as children helps to shape our thoughts, feelings, and actions as adults.*
- *But the full extent of the many ways that past experiences can change the direction of people's lives and influence the choices they make along the way has now been extensively documented in numerous carefully done empirical studies.*

• Haney, at 857

Make no mistake about it: The Supreme Court justices did not stumble upon this body of human behavior research on their own. It was presented to them repeatedly as part of capital defendants' life stories in the briefs, transcripts, and arguments submitted in death penalty appeals. Capital defense teams had long been struggling to explain to decision makers (including jurors) why their proffered life history information *must* matter in deciding the defendant's fate, and they had learned to do it quite well. With persistence, capital defense teams eventually helped the Supreme Court to develop a substantive understanding of mitigation.

As non-capital defense attorneys, we can also use this research on human behavior to make critical connections between the past and the present, and to provide a complete context for the crime - that is, to develop our own Mitigation Counter Narrative:

Explaining the Connections

- *Explaining the connections between childhood trauma and maltreatment and subsequent criminality places adult criminal behavior in a more meaningful and more mitigating context.*
 - *It undermines the simplistic view that everything a person does past a certain point in his life is the product of his free and autonomous choices.*
- Haney, at 857

This is our way to talk in meaningful terms about “personal choice.” Judges and prosecutors cling to the term “personal choice” to justify inhumane, sometimes nonsensical decisions, and harsh punishments. We have all heard it before:

- “Peter chose to use drugs.”
- “Wendy chose to stay with him despite the abuse.”
- “Juan chose to grab a knife instead of fleeing.”

Of course, what they are really saying is that Peter, Wendy, and Juan “chose to be evil.” Intuitively, we all know that this formulation of the Crime Master Narrative is a lie. The Mitigation Counter Narrative is the avenue by which we explain *how and why* it is a lie.

The life history investigation and the mitigating information we learn will help us to add context to these choices. It will also help us to explain in real terms how our clients’ choices are shaped (and often limited) by their:

- history of poverty
- lack of opportunity
- poor health
- development disabilities
- poor education
- mental health problems
- genetic predisposition for addiction
- experiences of trauma
- etc.

Ultimately, whether framed in the context of personal choice, as a discussion of the client’s strengths and vulnerabilities, or just simply as the client’s story, the Mitigation Counter Narrative integrates “the facts and circumstances of the defendant’s life and crime and present[s] a persuasive narrative of the events that encourages values of accountability over retribution, grace over vengeance, and life over death.” Dr. Richard G. Dudley Jr. and Pamela Blume, “Getting in Right: Life History Investigation as the Foundation for a Reliable Mental Health Assessment,” 36 HOFSTRA LAW REVIEW, 963, 965 (2008).

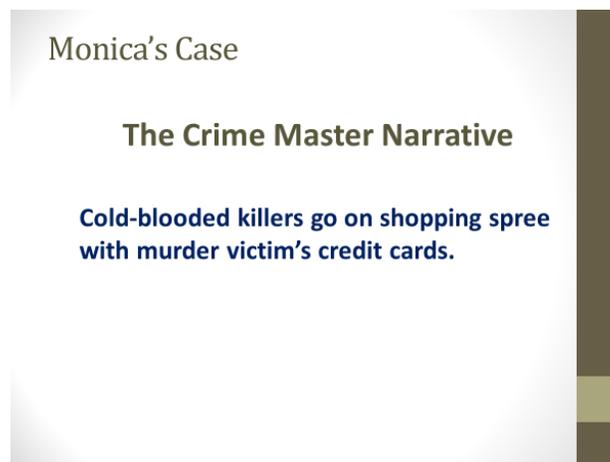
II. Case Examples

In *Eddings*, the U.S. Supreme Court held that, to be mitigating, evidence need not necessarily *excuse* the crime; it is enough if it helps to *explain* the crime. But it is possible that the life history investigation will yield information that can be successfully used as a defense. The Mitigation Counter Narrative that flows from the life history investigation will almost always address the defendant's *moral culpability* for the crime; but there are times that it can also address the defendant's *legal culpability*. That is why you should not wait until sentencing to gather information about your clients' lives; your life history investigation should begin with the first meeting you have with your client and should continue throughout the case. As you learn more about your client and the charged crime, your narrative will evolve until you have a compelling narrative for trial, or if trial is not the best option, for dismissal, participation in a diversion program, a plea to a reduced charge, etc.

Below are some illustrations of how successful use of a Mitigation Counter Narrative (i.e., a thematic narrative about the crime and the defendant) resulted in good case outcomes.

A. Monica's Case

Monica was charged with second degree murder, first degree robbery, and grand larceny after she and her boyfriend Hank, were arrested for going to John Perry's home, killing him, and then using his credit cards to go on a shopping spree. The Master Crime Narrative was predictably simplistic:



After meeting her, however, Monica's lawyer realized that this case was more complicated and nuanced. Monica had no prior arrests. At the time of the crime she was working two jobs – full-time as a teacher's assistant and part-time as a cashier at local grocery store. Monica's friends and loved ones called her lawyer to attest to her loving and calm demeanor; they urged him to look deeper into her relationship with Hank.

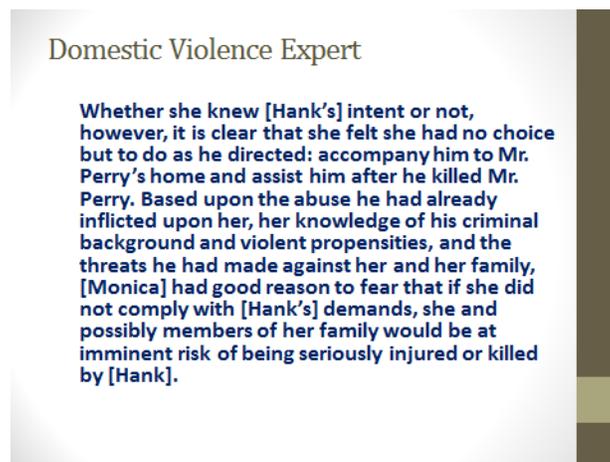
Monica's lawyer asked a sentencing advocate to conduct a comprehensive life history investigation, with the goal of driving a more favorable plea bargain. But the life history

investigation yielded unexpected information that led to a coercion defense. It revealed that Monica had been raised by her aunt and uncle, who provided her with a loving and religious childhood. She was particularly close to her uncle, who abruptly died when she was 16 years old. Soon after losing her father-figure, at age 17, she met her co-defendant, Hank, who was handsome and charming. A little less than a year after their relationship started, however, Hank was imprisoned for a drug charge. Monica visited him regularly, and when he was released, he moved in with her.

It was not long before Monica discovered he was cheating on her. When she confronted Hank about his infidelity, he pronounced: “I own you. You leave me and I will kill you.” This began many months of verbal, physical, and sexual abuse that included Hank:

- punching, slapping, shoving, and biting Monica
- forcing her to have sexual contact, and once, putting a gun in her vagina
- having sexual contact with other women in her presence
- monitoring her every move, including repeated calls to her at work and showing up unexpectedly
- killing her two pet ferrets by burning them
- beating her so badly early in her pregnancy that she miscarried
- threatening to harm her family members or kill her if she left him or reported the abuse

Monica’s lawyer realized that he likely had a triable defense – coercion. He retained a domestic violence expert, who reviewed the life history information that had been collected, interviewed Monica, and issued a report that explained how Hank coerced Monica into being involved in the crime:



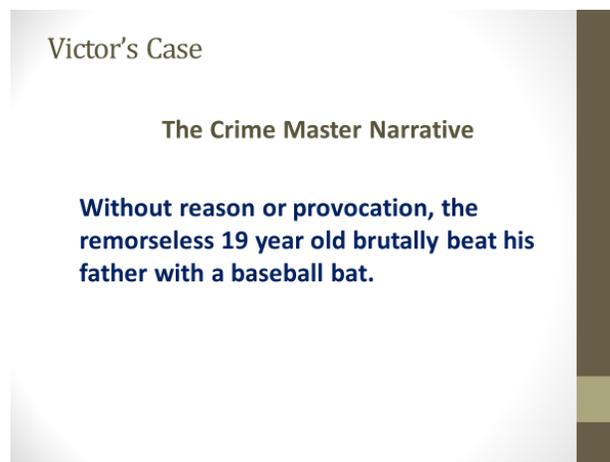
The information yielded from the life history investigation and the informed opinion of the expert resulted in persuasive Mitigation Counter Narrative that was used effectively at trial to persuade the jurors of the following: Monica was particularly susceptible to controlling relationships; her relationship with Hank was controlling and incredibly abusive; Monica reasonably feared for her own safety and her family’s safety if she tried to extricate herself from this relationship; and on the day of the homicide, Hank used his power over Monica to coerce her

into participating in the crime. Monica was acquitted on the robbery and murder charges and found guilty only of grand larceny and sentenced to 1 1/3 to 4 years in prison.

B. Victor's Case

In April 2013, Victor beat his father over the head with an aluminum baseball bat. The beating appeared to be entirely unprovoked: his father was lying on the couch, and Victor, who had just finished eating dinner, went upstairs to his bedroom and then came down to the front porch, grabbed the baseball bat, walked into the living room and proceeded to beat his father over the head. He stopped only after the family dog walked into the room. When questioned by the police, Victor was unapologetic for what he had done to his father, stating that he stopped the beating only because he did not want to harm the dog.

Victor was charged with attempted murder. The Crime Master Narrative was predictably simple:



The lack of provocation for this crime and Victor's apparent lack of remorse when questioned by the police naturally led to the conclusion that Victor must be evil.

Victor's lawyer got a sentencing advocate involved to conduct a life history investigation who learned the following about Victor and his family:

- This was an isolated incident of violence; Victor otherwise has no history of aggressive or violent behavior.
- Those who know Victor (family members, teachers, service providers) described him as quiet, respectful, polite, well mannered, and compliant. He had no history of challenging authority.
- Psychological evaluations conducted throughout Victor's childhood identified him as having a below average IQ and performing in the low-average range of functioning.
- Victor's mother home-schooled him during middle school, screaming at him when he could not successfully complete his work, and yet also falsifying test data to make him appear more academically competent than he was.
- A more recent evaluation revealed substantial cognitive deficits with limited ability to reason, form concepts, and solve problems.

- Victor's family situation was superficially normal, but just below the surface was an extremely bitter and acrimonious relationship between his parents.
- Victor witnessed frequent threats, arguing, yelling, and provocation in the home. Victor's father could be physically aggressive, while his mother would verbally taunt and abuse his father.
- Victor's mother actively engaged Victor in these conflicts, enlisting him as an ally against his father sharing her every negative thought and feeling with him, characterizing Victor's father as dangerous and constantly highlighting her own misery in their relationship. She typically portrayed herself as a helpless victim of her husband's aggression, and by her own admission, appealed to Victor to hate and fear his father and to protect and care for her emotionally and physically.
- Victor's family was socially isolated, leaving him with no positive adults to whom he could turn to for help.

The lawyer asked the court to assign a psychologist with an expertise in child development issues. This expert reviewed the life history information that had been gathered, interviewed Victor's family members, and evaluated Victor. She concluded as follows:

Victor's Case
The Child Development Expert

Victor was exposed to constant high levels of stress, almost exclusively at the hands of his parents. These included the unrelenting marital conflict and episodes of domestic violence, the father's criticisms and his mother's unceasing complaints and pleas to her children, putting them squarely in the middle. Under these chronic, high levels of emotional stress, maintained without respite for years, Victor withdrew for nineteen years and then, one day, literally lost his mind briefly and attacked what he saw as the source of threat to his sanity and physical safety – his father.

Victor's Case
The Child Development Expert, cont.

- *Victor is unlikely to be able to adapt to a state prison environment successfully. He is likely to become a victim of sexual and physical predation... It is very unlikely he could regain his psychological health there...*
- *Victor did not, in a premeditated and conventional way, intend to attack or injure his father. It was a momentary explosion over which he did not have control, and brought about by circumstances not of his own making. He is remorseful, with a well-developed conscience and a conventional sense of right and wrong.*
- *It is unlikely that he poses a future risk to others...*
- *[With the right supports] ... he could make a life and support himself.*

I want to comment in some important features of this expert's report:

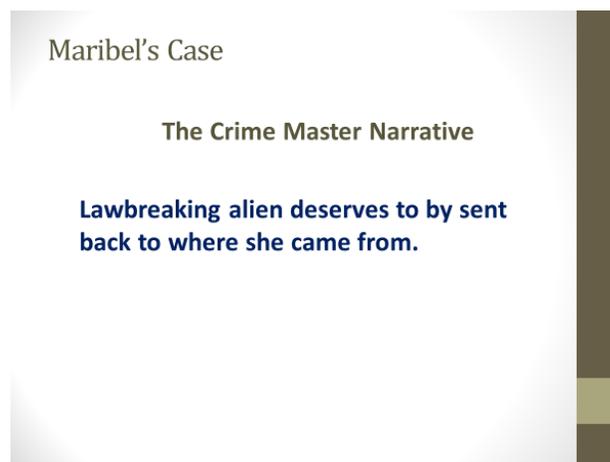
- It is not a diagnosis. Rather, it is a *persuasive narrative* about Victor and the charged crime.
- She compellingly describes Victor's vulnerabilities, the aspects of his life *over which he had no control*, but also his strengths.
- She also addressed the risk of Victor acting in this manner again, portraying this crime as an anomaly that is unlikely to re-occur.
- Finally, she spoke of how for Victor, a prison sentence would be counter-productive.

All of this is intentional – the expert addressed the specific referral questions the defense team provided her. The referral questions and the expert's conclusions were shaped by the information gleaned from a comprehensive life history narrative.

When the case began, Victor was facing attempted murder charges and a lengthy prison sentence; the case was resolved through an assault conviction and a two-year jail sentence.

C. Maribel's Case

Maribel, who was born in the Dominican Republic, entered the United States on a visitor's visa when she was 17 years old. She overstayed her visa and remained in the United States without documentation. In 1994, she and her boyfriend were arrested and jailed for a drug conspiracy charge. She pleaded guilty and was sentenced to five year' probation. By 2012, however, she faced a deportation order.



Maribel retained a lawyer to help her vacate the 1994 conviction, who quickly realized that because of the unique circumstances of her case the only hope was to convince the District Attorney to not oppose a motion to vacate her conviction and dismiss the charges in the interest of justice. Working with a sentencing advocate, the lawyer presented a letter to the District Attorney that revealed the following about Maribel:

- Maribel had steady employment and paid taxes
- She was the mother of 3 children who were all born in the United States; one child was beginning her first year at college and the other two were in middle and elementary school
- Her mother, father and siblings had all moved to the United States (legally); she had no relatives, friend, or even acquaintances left in the Dominican Republic
- Maribel was a caretaker not just to her children, but to her immediate family and her “work family.” Her parents and siblings, who did not speak English, relied on Maribel to help them navigate English-speaking systems
- Maribel was a religious hard-working woman who shared the best of what are traditionally considered “American values”

All this information was gleaned from interviews with Maribel, her relatives and her co-workers. Attached to the letter submitted to the District Attorney were pictures of Maribel with her children. The District Attorney agreed to not oppose the motion to vacate the conviction and dismiss the charges. The report was re-worked and submitted to the immigration court in support of advocacy to rescind the deportation order. The court did so, and Maribel continues to work and live in the United States with her family.

The letter issued in Maribel’s case relied on information obtained through a brief life history investigation that relied primarily on interviews. Though the life history investigation was not as comprehensive as the ones conducted in Victor and Monica’s cases, it was effective, nonetheless.

III. Developing the Mitigation Counter Narrative: Strategies for the Life History Investigation.

The Mitigation Counter Narrative is your persuasive narrative of the client and the crime that addresses your client’s true legal and moral culpability. A competent life history investigation reveals the mitigating information that is the foundation of every Mitigation Counter Narrative. Victor and Monica’s cases involved comprehensive life history investigations that included client interviews, collateral interviews, record gathering, and the use of forensic experts. Maribel’s case illustrates a far less comprehensive life history investigation that focused on a key period of her life and relied primarily on interviews. Her case illustrates that while all cases require some form of life history investigation, the scope and depth of the investigation necessary to be effective will vary from case to case. Sometimes, an interview with the defendant may be enough to yield important information that can result in a quick resolution of the case.

Below, I discuss various strategies for obtaining mitigating life history information.

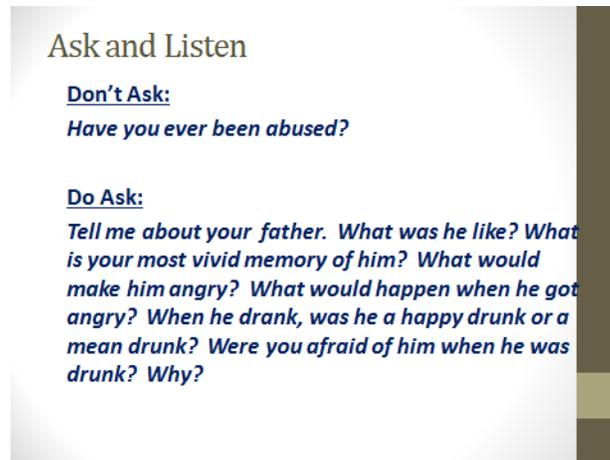
A. Develop a rapport with your client

A quality defense begins with a good rapport with your clients and a genuine interest in their lives. This allows you to obtain life history information that constitutes the basis of your mitigating case narrative. Sometimes this is the only source of life history information you will have, particularly if the client wants to resolve the case quickly. Thus, the relationship needed to

have thorough interviews with your client is the first and most critical step of a life history investigation and well worth your time and energy.

Getting to know clients requires a genuine interest in what they tell you. It is important to lean in, listen, and show interest. Reject check-list questions and instead engage in genuine conversations.

Examples:



Ask and Listen

Don't Ask:
Have you ever been abused?

Do Ask:
Tell me about your father. What was he like? What is your most vivid memory of him? What would make him angry? What would happen when he got angry? When he drank, was he a happy drunk or a mean drunk? Were you afraid of him when he was drunk? Why?



Ask and Listen

Don't Ask:
Were you in special education?

Do Ask:
Tell me about school. Who was your favorite teacher? Why did you like her? How many students were in your class? Were you ever teased in school? What would the other kids say to tease you?

Sometimes, just showing up without an agenda can create the space to learn unanticipated information about your client that can meaningfully impact on your case narrative. Never underestimate the power of presence.

B. Gather and review life history records.

Life history records are rich with information. Get your client to sign releases and ask for these records:

Records

- birth and medical
- educational
- employment
- treatment and other services
- SSI
- military
- family court and juvenile justice
- criminal justice (jail and prison)
- Etc.

It helps to hone in on information-rich records. Below are some tips:

- I generally try to get school records, even if I do not think that there was anything remarkable about my client's educational background. I am often surprised to find that the records contain information I had not anticipated; they are also rich in social information. Make sure to request special education records, even if you do not suspect your client was receiving special education services.
- For mental health and substance abuse records it may be helpful to start with just the admission and discharge evaluations/assessments, which often you can get faxed to you right way. If you have more time, or if a substance abuse or mental health issue is the foundation of your Mitigation Counter Narrative, then you should also request the treatment-related progress notes. They often include social information and narratives that help to create a humanizing picture of your client and her environment.
- For clients who served in the military, military records are absolutely must-haves.
- Medical records are challenging to read, but often rich with social information in addition to medical information. For example, it is not unusual for childhood medical records to reveal that your client was raised in a neglectful, filthy, unsafe, or even abusive environment.

C. Conduct collateral interviews

Talking to the key people in your clients' lives can reveal unanticipated information or a perspective that is different from that of your client. For example, your client may not want to admit to a history of learning disabilities or a classification of developmentally disabled, while family members are willing to disclose it. Take the time to return their phone calls and be patient with them when they seem not to fully grasp the seriousness of the allegations against your client.

Below are some of the people you should consider interviewing:

Interviews

- Family
- Foster family
- Teachers
- Coaches/mentors
- Doctors
- Employers
- Friends
- Treatment providers
- Etc.

As with records, you may want to hone in on the key people. Some strategies:

- Start with the people who are visiting your client because often they are amongst the most significant people in your client's life *or* know who those people are.
- Interviewing parents is important, but siblings and cousins (family members of the same generation) often have the most insightful and useful information because – by virtue of being in the same generation - they are most likely to share your client's perspective
- By training and inclination, teachers tend to provide the most humanizing and complete information about your client's strengths *and* vulnerabilities.
- Find the adult with whom your client had a special relationship, such as a coach, a grandparent, or a mentor. If there is no such adult, that is significant information.

D. Integrate the science of human behavior

The information you gather may still beg the question – so what? Maribel's case illustrates that sometimes the answer to this question is driven by common-sense and common decency. In Victor's and Monica's cases, however, the answer was more complex. These cases show that there are times that research on behavioral science can help you explain why your client's personal circumstances and life history drive a certain, less-punitive case outcome.

The Science

- **Addresses moral (and possibly legal) culpability**
- **Illuminates what your client truly experienced and how it affected and shaped her**
- **Imparts a more complete understanding of your client's vulnerabilities *and* strengths**

Cases involving young defendants illustrate how social science research has informed court decisions. See Shobha L. Mahadez, “*Youth Matters: Roper, Graham, J.D.B., Miller, and the New Juvenile Justice Jurisprudence*,” THE CHAMPION, March 2014 (“The last decade has given rise to an unprecedented series of decisions that relies upon common sense, science, and social science to require that youth be considered differently than adults in criminal procedure and sentencing matters.”). The behavioral sciences can be used effectively to inform decision-making in our cases.

A starting point to identifying the behavioral science research and how to effectively use it is Part IV of Dr. Haney’s article, in which he offers an overview of the “science of mitigation” and Part V, in which he uses poverty as a case in point. In both sections, he concisely explains how many aspects of our clients’ lives – poverty being foremost among them – help to shape their behavior and choices. I encourage you to read at least this portion of his article.

An additional way to integrate the science of human behavior is to effectively use experts. There will be times when you decide that your Mitigation Counter Narrative is not complete without the opinion of an expert. If not done thoughtfully, however, involving an expert can result in a disaster. Below I talk about two types of experts: the forensic mental health expert and the historical fact expert.

i. The Forensic Mental Health Expert

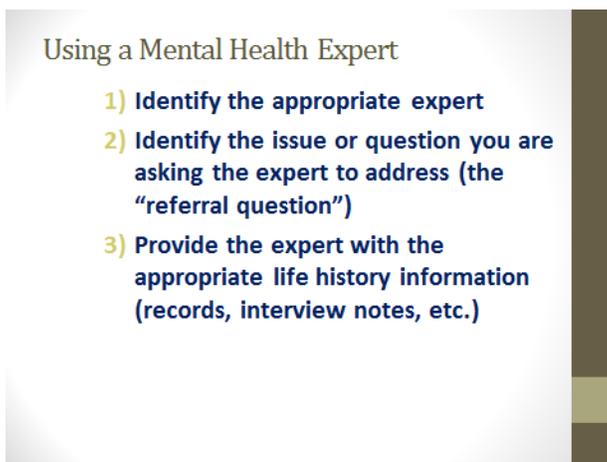
An effective Mitigation Counter Narrative may utilize a forensic mental health evaluation. But using a forensic mental health expert must be done with care and knowledge. It is tempting to utilize the “go to” local defense expert without really thinking through these questions: why do I want an expert? How will the expert inform my Mitigation Counter Narrative? Failure to use a mental health expert with care and forethought can be more harmful than helpful, as Dr. Richard Dudley and Pamela Blume discussed in their article, “*Getting it Right: Life History Investigation as the Foundation for a Reliable Mental Health Assessment*,” 36 HOFSTRA LAW REVIEW, 963 (2008).

Experts

Psychological testing of any kind must always be approached with caution – never unless needed, always with the full knowledge of its limitations, and in any event only after the mental health professional who has been carefully selected by counsel to do the testing has been thoroughly prepared with the background information necessary to make the testing meaningful.

R. Dudley & P. Blume, at 975

There are three basic steps to effectively using a mental health expert.



These steps are discussed briefly below.

1) *Identify the appropriate expert:*

Not every mental health expert is appropriate in every case. If the life history investigation yields information that gives rise to the need for an evaluation, then it will also dictate the type of expertise needed. It is critical to identify an expert who has the specific qualifications and expertise to address the unique issues raised in the case. The case examples at the end of this program illustrate this point.

2) *Identify the issue or question you are asking the expert to explore and provide your expert a well-considered referral question:*

All experts - even mental health experts - need guidance on the issues they are being asked to address. Without the guidance of a thoughtful, well-considered referral question, a mental health expert will simply provide a mental health diagnosis. Often, a mental health diagnosis will do little to inform the Mitigation Counter Narrative. In developing the referral question, focus on the information you want from the expert to inform your Mitigation Counter Narrative.

3) *Provide the expert with the appropriate life history information (records, interview notes, etc.):*

A quality mental health expert will not rely solely on his or her interview with the defendant to address the referral question but will instead look to life history records and information from collateral sources. Indeed, use of this information is critical if the expert is to produce a thoughtful and credible evaluation. The defense team has the duty to identify the information to be provided to the expert and to ensure that the expert has this information well in advance of meeting with the client.

ii. *The historical fact expert*

There are times when a historical fact expert can be far more effective than a retained expert. By "historical fact" experts, I mean non-retained treatment or service providers who were involved

in treating and/or evaluating our clients at certain points in their lives. These historical fact experts convey the facts of their past or current treatment experience with the defendant and, where appropriate, the informed opinions they have developed about the defendant over the course of treatment.

The potential value of historical fact experts is illustrated in the case *People v. DeYoung*, 95 A.D.3d 71 (2nd Dept. 2012), in which defendant successfully appealed the trial court's denial of his admission into the Judicial Diversion Program. Essential to the court's decision was testimony during the hearing (conducted pursuant to NYS Criminal Procedure Law § 216.05) from the defendant's VA substance abuse treatment counselor, who testified about Mr. DeYoung's full engagement in and compliance with treatment.

In the right case, non-retained, historical fact experts can be extremely valuable because they establish their relationship with the defendant outside the context of litigation and are therefore not perceived as "hired guns" or "conclusion driven." Rather, their neutral, personal observations of the defendant – which often occur over a longer period and are more extensive than those of retained experts – can provide invaluable insight into the defendant, and thus prove critical to the Mitigation Counter Narrative.

Conclusion

John Blume once stated that our primary job as members of the defense team is to "change the picture." Our job is to challenge the prosecution's (and society's) simplistic snapshot of the crime through a more complete narrative that humanizes our clients and fully addresses their legal and moral culpability for the crime.

I also believe that if we insist on placing the crime in the context of our client's lives – if we insist on honoring the humanity of our clients – we can also change our current system. Our current "criminal *processing* system" views defendants as "cases" and not as whole human beings with relationships, past experiences, strengths and vulnerabilities. We will have a criminal justice system – one that is truly *just* – only when we have a system that respects the humanity of all people.