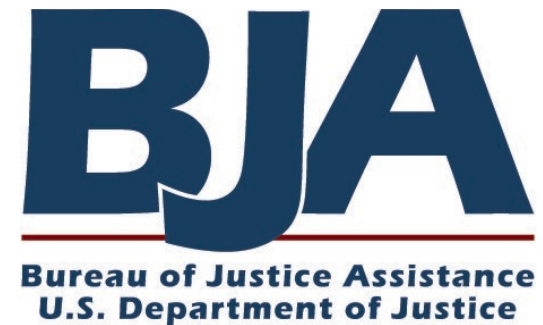


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UNDERSTANDING AND ANTICIPATING MENTAL HEALTH DEFENSES AND DEALING WITH MITIGATION EVIDENCE

Ed McCann
First Assistant District Attorney
Montgomery County, Pennsylvania District Attorney's Office

- “And I will ask you to do this, as you focus on the evidence, remember that this trial is about the murder of David Schultz. Insanity is just their defense. This case is about the murder of David Schultz. Don’t diminish his life by thinking it’s just about that defense. It’s about all the things that make up the evidence and demonstrate the defendant’s responsibility. Hear those things.”

—First Assistant District Attorney Joe McGettigan, *Commonwealth v. John Dupont*, Opening Statement

Focus on the Crime and the Victim

- Cases rarely rise and fall on whether a defendant has a mental illness.
- But the defense is going to try to make it about the mental disease or defect.
- In short, the mental infirmity defense or the mitigation evidence is used to provide an explanation for the defendant's behavior.

Focus on the Crime and the Victim (cont.)

- Defense attorney training: “You want to prove that the syndrome evidence that you advance explains your client’s conduct. You want to build a bridge from the mental disorder to the conduct which gave rise to the charged crime.”

Criminal Practice Report, Volume 12, No. 11 (6/3/98).

Focus on the Crime and the Victim (cont.)

- Defendant's physical capacity
- Evidence of planning and deliberation
- Evidence of calculation
- Evidence of concealment, flight
- Other evidence that the defendant knew what he or she did was wrong by society's standards (intact awareness of wrongfulness)

Anticipating the Defense

- Lack of apparent motive, seemingly random attacks
- Spree crimes
- Overkill
- Cases that sound crazy even to you (e.g., *Commonwealth v. Heidnik*, 587 A.2d 687 [Pa. 1990], *Commonwealth v. Graham*, 661 A.2d 1367 [Pa. 1995])
- Defendant's background

Anticipating Mitigation

- Circumstances of the offense
- Family history
- Organic brain disorder – childhood head injuries
- Post-traumatic stress disorder (PTSD)
- Drug/alcohol abuse

What Can Be Done During the Investigation?

- Eyewitness observations
- Suspect's behaviors as observed by those who interacted with the suspect
- Family and friends of the defendant
- Interaction with police
- Other aspects of suspect's life (showing that the suspect is cognitively intact)

Anticipating the Defense (cont.)

- When should you consult with an expert?
- Records

Obtaining Records

- School records
- Juvenile and Child Protective Services (CPS) records
- Employment and military records
- Criminal records (pre-sentence and psychiatric reports if possible)
- Probation/parole records
- Medical and psychiatric records
- Prison records

Confidentiality and Privileges

- Health Insurance Portability and Accountability Act (HIPAA)
- Psychotherapist-patient privilege (42 Pa. C.S. § 5944; most states have this codified)
- Proposed but never enacted Federal Rule of Evidence 504 (psychotherapist-patient privilege)

Confidentiality and Privileges (cont.)

- The privilege arguably doesn't apply to a defendant's prior records of treatment when he or she asserts a mental infirmity defense; placing one's mental status at issue should act as a waiver.
- "There is no privilege under this rule as to communications relevant to an issue of the mental or emotional condition of the patient in any proceeding in which he [or she] relies upon the condition as an element of his [or her] claim or defense..." (Proposed Rule of Evidence 504 (d)(3).
- Seek the trial court's approval (court order).

Confidentiality and Privileges (cont.)

- In Pennsylvania, a defendant is not entitled to the psychological counseling records of a victim or witness (even a dead victim).
- This is not the case everywhere; several states have allowed access to such records even in the face of an absolute privilege.

Confidentiality and Privileges (cont.)

- For example, the Kentucky Supreme Court found that the defendant's constitutional rights to confrontation prevail over an evidentiary privilege in allowing defense counsel access to a rape victim's psychotherapy records (*Commonwealth v. Barroso*, 122 S.W. 3d 554 [Ky. 2003]).
- Many states have allowed at least in camera inspection of such records upon a preliminary showing that the records may contain exculpatory material.

Examinations and Discovery

- The defendant must submit to an examination by the prosecution's expert when he or she raises a mental infirmity defense.
- The prosecution is entitled to reciprocal discovery of mental status examinations and expert reports of such examinations if the defendant is using a mental infirmity defense.

Examinations and Discovery (cont.)

- Some states have statutes that govern such examinations: “Validity and construction of statutes providing for psychiatric examination of accused to determine mental condition” (32 A.L.R. 2d 434).
- Other states allow for such examinations by court order: “Power of court, in absence of statute, to order psychiatric examination of accused for purpose of determining mental condition at time of alleged offense” (17 A.L.R. 4th 1274).

Examinations and Discovery (cont.)

- Who should be present at the psychiatric examination?
- Check your law concerning the presence of defense counsel.
- “Right of accused in criminal prosecution to presence of counsel at court-appointed or approved psychiatric examination” (3 A.L.R. 4th 910).
- Get the raw notes of the examination and any psychological testing.

Examinations and Discovery (cont.)

- Defendant must submit to independent psychiatric examination if he or she intends to introduce mental health expert testimony in mitigation.
- In Pennsylvania, results of such an examination are to be sealed until the penalty phase (*Commonwealth v. Sartin*, 751 A. 2d 1140 [Pa. 2000]).
- Georgia, South Carolina, and Tennessee Supreme Courts, and several district courts (e.g., *U.S. v. Edelin*, 134 F.Supp 2d 45 [D.C. 2001]) have approved this procedure.
- Arizona and California courts have found such a procedure need not be followed.

Competency to Stand Trial

- A person is incompetent to stand trial where he or she is “substantially unable to understand the nature or object of the proceedings against him [or her] or to participate and assist in his [or her] defense.”
- Stated another way, did the defendant have sufficient ability at the pertinent time to consult with his or her lawyers with a reasonable degree of rational understanding and have a rational as well as factual understanding of the proceedings against him or her?

Competency to Stand Trial (cont.)

- A defendant is presumed competent and must prove his or her incompetence by a preponderance of the evidence.
- The decision as to a defendant's competency rests within the discretion of the trial judge (in other words, the doctor's finding doesn't end the inquiry).

Competency Hearing

- Expert testimony is relevant but not dispositive.
- How is the defendant functioning in other areas of his or her life?
- *Commonwealth v. John Keosaian*

Insanity

- In Pennsylvania, notice is required for an insanity or mental infirmity defense under Rule 568.
- Check your state's notice requirements and what must be included.
- You may have to file reciprocal notice with witnesses you intend to call to disprove the mental infirmity defense.

Insanity (cont.)

- Pennsylvania uses the M’Naghten rule:
- “The defendant is absolved of responsibility if, at the time of committing the act, due to a defect of reason or disease of mind, the accused either did not know the nature and quality of his [or her] act or did not know that the act was wrong.”

Insanity (cont.)

- The defendant must prove mental disease or defect first.
- Incapable of knowing what he or she was doing refers to a defendant's ability to know the physical aspects of his or her act.
- “Even though a person believes that an act is right under his [or her] own individual moral code, he [or she] is not insane if he [or she] knows that the act is wrong under society's generally accepted moral standards.”

Insanity (cont.)

- Some states have abolished the M’Naghten rule in favor of the mens rea approach (Idaho and Kansas, for example).
- The mens rea approach allows evidence of mental disease or defect as it bears on the mental element of a crime but abandons lack of ability to know right from wrong as a defense.
- The U.S. Supreme Court accepted certiorari to consider this point in *State v. Kahler*, 410 P.3d 105 (Kan. 2018).

Guilty but Mentally III

- Available for defendant who offers an insanity defense.
- A mentally ill person is one who “as a result of mental disease or defect, lacks substantial capacity either to appreciate the wrongfulness of his [or her] conduct or to conform his [or her] conduct to the requirements of the law” (American Law Institute Model Penal Code [ALI] rule).
- Not a potential verdict in a capital case.

Diminished Capacity

- The defendant concedes general criminal liability, but challenges his or her capacity to premeditate and deliberate at the time of the criminal act.
- “The psychiatric testimony is competent . . . on the issue of specific intent to kill if it speaks to mental disorders affecting the cognitive functions necessary to formulate a specific intent” (*Commonwealth v. Weinstein*, 451 A.2d 1344).

The Trial

- Don't forget that your first job is to prove the first-degree murder.
- Take advantage of the narrowed issues.
- Focus on the facts, not the illness, especially when cross-examining and presenting experts.







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First-Degree Murder

- “Now, I’m not going to start this closing talking about insanity because that’s just their defense, and they didn’t prove it. What I told you when I stood up in front of you at the beginning of this case is that I would prove that this was a first-degree murder. And that’s what I did prove. So that’s what we’re going to talk about first.”

Why This Case Is First-Degree Murder

- Planned crime and came with the tools
- Targeted/stalked the victim
- Wanted to harm (malice)
- Sneak attacked/outweighed her by 100 pounds
- Was up close and personal
- Used a severe amount of force
- Repeatedly used deadly weapon on vital part of the body
- Resulted in the victim's death

Evidence the Defendant Knew What He Did Was Wrong

- Wore a ski mask
- Attacked from behind
- Stopped the attack when approached
- Fled the scene
- Statement to Dr. Weiss (“dirty job”)
- Statements to Dr. O’Brien (“knew what I was doing was, or would be viewed by others, as wrong”)
- Controlled behavior

Preparing Cross-Examination of the Expert Witness

- Expert's background – Clinical practice? An ideologue?
- Does the expert testify for both sides?
- Prior testimony.
- What is the objective meaning of the conclusion (e.g., phencyclidine [PCP] intoxication)?
- Dissect the report – What is left out?
- Raw notes.

Cross-Examination of the Expert Witness

- Does the report comport with the testimony?
- Does the testimony conflict with testimony given in other cases?
- Concessions.
- Omissions.
- Common Sense v. The Great and Powerful Oz (this is an important point in the closing argument).

Cross-Examination of the Expert Witness — Concessions

- “You are not saying, Doctor, that every single person who engages in criminal conduct has a mental health disorder and requires treatment, are you?”
- Antisocial Personality Disorder “is essentially, I guess, a big word that you guys in the field use for people who do bad things?”
- In reading testimony that you have given in other cases, the essential symptom of Antisocial Personality Disorder is that the person can be deceitful, is that correct?”

Cross-Examination of the Expert Witness — Concessions (cont.)

- Defendant recalls details before and after the incident but his memory “falls out” right at the moment of the crime.
- “His behavior prior to the shooting appeared to be goal directed, purposeful, and while agitated, logical.”
- In the voluminous records in this case “is there any reference to his delusion about Ari Hakadosh and [the victim]? A. I didn’t see it. That was a product of my investigation.”

Presenting the Expert on Rebuttal

- Give your expert EVERYTHING.
- Know your expert's record (notes from other cases).
- Again, the key is the behavior at the time of the incident, not the defendant's illness.
- Illness as motivation is different than illness as an excuse.
- Did the defense open the door to questions about the disposition of the case?
- Sartin issues (in mitigation context).

Expert Testimony on Mitigation

- All death penalty states allow a defendant to present mitigating evidence of mental illness to a jury as a reason not to impose the sentence of death.
- Examples of statutory mitigating factors include “extreme mental or emotional disturbance”, “substantially impaired in his [or her] capacity to appreciate criminality or conform his [or her] conduct.”

Expert Testimony on Mitigation (cont.)

- In Pennsylvania, evidence of mental or emotional disturbance must relate to the time of the offense (*Commonwealth v. Rice*, 795 A.2d 340 [Pa. 2002]).
- Under the “substantially impaired in his [or her] capacity to appreciate criminality or conform his [or her] conduct” mitigator, the standard for proving a claim of voluntary intoxication is the same in both the guilty and penalty phases (*Commonwealth v. Marinelli*, 810 A.2d 1257 [Pa. 2002]).

Expert Testimony on Mitigation (cont.)

- Mental health expert testimony may be relevant even if it does not establish mitigating circumstances (e)(2) or (e)(3).
- Such testimony may be relevant to establish the “catch-all” mitigator (*Commonwealth v. Gibson*, 19 A.3d 512 [2011]).

Expert Testimony on Mitigation (cont.)

- Does the expert's report/testimony meet the diagnostic criteria in the Diagnostic and Statistical Manual of Mental Disorders (DSM-5) (e.g., PCP intoxication, PTSD)?
- Is the defense evidence mitigation or a road map as to how we got here?

Presenting the Expert on Mitigation Evidence

- Does the defendant's evidence meet the statutory test, i.e., under the influence of extreme mental or emotional disturbance?
- Does the defendant's evidence prove the capacity to “appreciate the criminality of his [or her] conduct or to conform his [or her] conduct to the requirements of law was substantially impaired” (ALI rule)?
- Is there corroboration of the defendant's history?
- Does the defendant's behavior fit the defense expert's diagnosis?

Presenting the Expert on Rebuttal of Mitigation

- Again, relate the circumstances of the crime, defendant's background, and his or her words and actions before, during, and after the crime to the proffered mitigating circumstance(s).
- There "is nothing about the events as documented . . . that he was an individual incapable of functioning, because he was intoxicated, and that was consistent with what he told me himself, that he was not intoxicated like that."

Presenting the Expert on Rebuttal of Mitigation

- Defendant's note inquiring into the condition of the police officer "reflects the awareness that he did the shooting and he is in big trouble" and that "his reported lack of memory of the offense is not accurate."
- Defendant is "an individual who provides different versions of things, at different points in time, to different people."

Atkins Claims

- There is no statute governing such claims in Pennsylvania.
- The Pennsylvania Supreme Court has decided that bench hearings are appropriate to determine Atkins claims on Post Conviction Relief Act (PCRA) petitions (*Commonwealth v. Miller*, 585 Pa. 144, 888 A.2d 624 [2005]; *Commonwealth v. Bracey*, 604 Pa. 459, 986 A.2d 128 [2009] [defendant not entitled to jury determination of Atkins claim at PCRA hearing]).
- See if your state has a statutory or judicially created way to handle these claims.

Atkins Claims (cont.)

- The burden is on the defendant to prove mental retardation by a preponderance of the evidence, and a finding of mental retardation should be unanimous.
- The jury should pass on the Atkins claim before proceeding to aggravators/mitigators.
- The state decides the definition of mental retardation and procedures to be used in hearings.

Atkins Claims (cont.)

- The definition of mental retardation is the key issue.
- Definitions of mental retardation incorporate three concepts: 1) limited intellectual functioning, 2) significant adaptive limitations, and 3) age of onset (appearance of disability prior to age 18).
- Pennsylvania Supreme Court has found that the defendant needs to prove this by preponderance of the evidence.
- DSM-5 – Neurodevelopment Disorders

Preparing for the Atkins Hearing

- School records are crucial (especially any IQ testing).
- Juvenile records and CPS records.
- Employment records.
- Supplemental Security Income (SSI) records.
- People who knew the defendant.
- Again, facts of the crime are key (planning, deliberation, flight, etc.).

Common Defense Arguments

- Structured setting of the prison makes our client look smarter (the G.E.D. in prison).
- Blame lack of evidence on the school system: my client “fell through the cracks.”
- Practice effect and Flynn effect to explain scores over 70.
- Adaptive deficit testing is used retrospectively and shouldn't be.