

THE ILLINOIS LIFELINE

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Featured Article

NEUROIMAGING DEBUTS IN ILLINOIS COURT

fMRIs fail to persuade a DuPage Co. jury to spare Brian Dugan.

By [Tim Capps](#), Staff Attorney

The threads of the Jeanine Nicarico murder case are too tangled for any but the briefest summary here. In 1983 Jeanine was abducted from her DuPage County home, raped and murdered. Police developed suspicions about three men, two of whom — Rolando Cruz and Alejandro Hernandez — were convicted and sentenced to death in 1985.

Later that year a man named Brian Dugan, himself a murderer, confessed to the Nicarico murder. Nonetheless, the Cruz and

Hernandez cases wound their way through the courts over the next ten years. All this time police, prosecutors and even then-Attorney General Roland Burris resisted public pressure to investigate Dugan.

When the courts were done with the original cases in 1995, Cruz and Hernandez were free (sharing \$3.5 million settlement dollars with the third original defendant), police and prosecutors were charged with conspiracy, and groundwork had been laid for Governor Ryan’s death penalty moratorium.

Brian Dugan was finally indicted for the murder in

2005. He pled guilty and appeared before a death penalty jury in November of 2009. His lawyers then did something that had never before been done in a criminal trial.

Dr. Kent Kiehl is a New Mexico researcher who uses a portable fMRI device to study prisoners. It was the opinion of defense experts that Dugan was a psychopath. While this does not sound like a promising avenue for mitigation, Dugan’s lawyers had a new way to put it in perspective for the jury: neuroimaging.

On the team was CTAU lawyer Allan Sincox.

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Mitigation

VIOLENT CRIME LINKED TO LEAD PAINT

By [Shannon Keyes Woodward](#), Staff Mitigator

The adverse effects of lead exposure in children, including lower IQ levels and delayed development, have been well documented. Now, research has shown toxic exposure to lead as a

child can be directly linked to criminal behavior, especially violent crime.

Impulsivity is a common effect of lead exposure. “Impulsivity means you ignore the consequences of what you do,” says University of Pittsburgh professor

Herbert Needleman, an expert on lead exposure. “Lead decreases the ability to tell yourself ‘if I do this, I will go to jail.’” Risk factors include living in older or low-income housing, especially in certain zip codes. (A complete list of

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Psychopathy — a condition marked by a lack of empathy. Psychopaths have been described as “intraspecies predators,” and do not experience shame, guilt or remorse, even though they know what these are. “They know the words, but not the music,” according to Dr. Kiehl.

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Major New Cases

“Our Nation has a long tradition of according leniency to veterans in recognition of their service.”

By [Tim Capps](#), Staff Attorney

It seems every month some court finds counsel ineffective for failing to present adequate mitigation. The United States Supreme Court found counsel wanting in *Porter v.*

McCollum, handed down last November, for failing to present evidence of the defendant’s heroic war record.

During a two-day post conviction evidentiary hearing, Porter put on extensive mitigation.

In its *per curiam* decision, the Court said: “Unlike the evidence presented during Porter’s penalty hearing, which left the jury knowing hardly anything about him other than the facts of his crimes, the new evidence described his abusive childhood, his heroic military service and the trauma he suffered because of it, his long-term substance abuse, and his impaired mental health and mental capacity.”

His company commander from his Korean War service testified to two horrific battles Porter was involved in. Among the awards won by Porter were two purple hearts.

There was also testimony from a neuropsychologist who examined Porter and found substantial mental impairment.

“It was the first time this lawyer had represented a defendant during a penalty-phase proceeding,” the Court continued. “At the postconviction hearing, he testified that he had only one short meeting with Porter regarding the penalty phase. He did not obtain any of Porter’s school, medical, or military service records or interview any members of Porter’s family.” The Court was unimpressed that counsel described Porter as “fatalistic and uncooperative.”

In particular, the Court highlighted Porter’s military service. “Our Nation has a long tradition of according leniency to veterans in recognition of their service, especially for those who fought on the front lines as Porter did. Moreover, the relevance of Porter’s extensive combat experience is not only that he served honorably under extreme hardship and gruesome conditions, but also that the jury might find mitigating the intense stress and mental and emotional toll that combat took on Porter.”

While Korean War veterans will become increasingly uncommon as criminal defendants, wars in the Persian Gulf region and Afghanistan expose soldiers to “extreme hardship and gruesome conditions,” and they will suffer mental trauma from their military service.

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Mitigation

VIOLENT CRIME LINKED TO LEAD (CONTINUED)

at-risk Illinois zip codes is available on the Illinois Department of Health website.) The severity of long-lasting effects is correlated to the age at which children are exposed to lead. Exposure during their primary developmental years (ages 1-5) is especially dangerous.

The defendant’s pediatric and

school records, as well as the Illinois (or Chicago) Department of Health are starting points for investigation. If blood levels are available, a score of 10-20 µg/dL is considered to be moderate. Obviously the higher the µg/dL level is, the greater the effects will be. Levels over 20 µg/dL are alarming and very likely to have caused at least one

area of deficit. Chronic low levels (< 10 µg/dL) may still cause impairment, which can be supported with examples of deficits in adaptive functioning (i.e. stories or examples provided by mitigation witnesses). Even without blood levels, a theme of lead poisoning may be supported by social history witnesses and other records.

Featured Article

NEUROIMAGING DEBUTS IN ILLINOIS COURT (CONT.)

“Part of the reason he did the things he did was because he suffered from a bad brain,” said Sincox, “and that impairment goes to mitigation.” Dugan’s lawyers also wanted to explain why he appeared cold and unremorseful. “He just doesn’t feel emotion like the rest of the world,” Sincox said.

The court was originally resistant, but a quasi-Frye hearing was held — in the middle of the trial. Under the relaxed

standards of the sentencing phase, the judge decided to allow the evidence over the State’s objection. At first, he barred Dr. Kiehl’s images, fearful that “The Christmas Tree Effect” might dazzle the jurors, but eventually most of the images came in. “There isn’t a Christmas tree,” scoffs Sincox. “It’s no different from a map.”

What that map showed was the cold, dark world of the psychopathic brain — liter-

ally. Areas correlating to emotion that would light up in normal brains were less responsive in Dugan’s brain. Dr. Kiehl’s testing focused on the limbic system as a marker for psychopathy.

Evidence relating to Dugan’s psychopathy comprised a significant portion of the defense sentencing case. It took six weeks for both sides to present their cases to the jury.

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Limbic System — complex of organs beneath the cortex that are thought to relate to, among other things, emotions. In a psychopath, fMRI’s may show this less responsive than is typical.

Forensic News

JUDGE: CHALLENGE FORENSIC EVIDENCE OR ELSE

A Massachusetts U.S. District Judge has ordered defense counsel appearing before her to challenge hitherto routine forensic evidence or be prepared to explain why they aren’t.

Judge Nancy Gertner issued an order with the following language: “In the past, the admissibility of this kind of evidence was effectively pre-

sumed, largely because of its pedigree — the fact that it had been admitted for decades. As such, counsel rarely challenged it, and if it were challenged, it was rarely excluded or limited.”

The March 8 order stems largely from Judge Gertner’s reading of the National Academy of Sciences 2009 report that questioned the faith

courts, counsels and juries place in familiar forensic disciplines such as fingerprint analysis and handwriting comparison. Gertner says the validity of such evidence should not be presumed. Counsel who appear before her are on notice that she expects a challenge to such evidence or a good excuse for failing to do so.

The **National Academy of Sciences** report calling into question common forensic evidence may be found [here](#).

Personnel Profile

JOHN PRICE — MITIGATION SPECIALIST

John is an experienced mitigator who keeps busy developing forensic social histories out of the Belleville office. He has worked on no fewer than 33 capital cases. He is a licensed clinical social worker in both Illinois and Missouri.

John’s background and experience allows him to understand and communicate the nuances of human behavior,

cognitive processes, and personality development. His efforts culminate in a carefully prepared social history that accounts for the defendant’s life from prenatal care through childhood up to the time of sentencing. Elements include psychosocial history, education, employment, and any psychiatric and medical issues. Positive acts of self-

lessness and other accomplishments are also presented.

John describes the end result as “a picture of the defendant in the center of ever-widening concentric circles of influence that help convince the jury that factors outside his control contributed to the crime, thereby reducing the moral culpability.”



Psychopathy: Mitigation or Aggravation?

Your client is a lethal and self-satisfied intraspecies predator camouflaged as a human being. He is incapable of feeling empathy, remorse or guilt. There is no treatment, let alone cure. Your expert cannot even tell you what makes him like this, although there is a name for the condition: psychopathy.

Painting your client as a psychopath is a risky strategy, but if you are tempted to consider it, you probably don't have a better one.

Neuroimaging has the advantage of tying it to a demonstrable, physical issue. Anyone who has seen *Frankenstein* (or *Young Frankenstein*) knows the dangers an abnormal brain presents. It hardly seems fair to hold someone who was dealt the bad brain card through no fault of his own to the same standard as a mentally sound person, does it?

This is a familiar mitigation tune. Here's hoping your jury likes the new arrangement.

—The Editors

Autism and the Capital Defendant

By [Mary Ann Campbell](#), *Paralegal*

Since 2002, *Atkins* has spared the lives of mentally retarded defendants who would otherwise face the death penalty. The U.S. Supreme Court reasoned that "although the retarded know the difference between right and wrong and are competent to stand trial," they find it difficult to process information, communicate, understand the reactions of others or give their counsel meaningful assistance. Their demeanor may create an unwarranted impression of lack of remorse for their crimes.

Autistic individuals share many of the same problems: severe, sustained impairments in social interaction, restricted, repetitive patterns of behavior, interests and activities. While some autistic persons are mentally retarded, those with Asperger's are of normal or even high intelligence. Yet "the mind and brain of the person with

Asperger's is different from the mind/brain of an ordinary person and not so different from the person with autism." Uta Frith, *Emanuel Miller Lecture: Confusions and Controversies About Asperger's Syndrome*, 45 J. Child Psychology and Psychiatry 672, 683 (2004). Researchers have discovered structural and functional differences in specific areas of the brain of persons with autism spectrum disorder.

Much of the rationale that led the Supreme Court to outlaw the execution of the mentally retarded applies equally to those with autism or Asperger's. They, too, may appear remorseless, may find it difficult to meaningfully assist counsel and impossible to gauge the effect of evidence on others. As *Atkins* reasoned about the mentally retarded, while their autism or Asperger's does not warrant an exemption from criminal sanctions, it would seem to

diminish personal culpability.

Despite the appeal to *Atkin's* rationale, autistic persons remain on death row. See e.g. *Schoenwetter v. Florida*, 931 So.2d 857 (2006); *North Carolina v. Lynch*, 459 S.E.2d 679 (1995); *Court of Criminal Appeals of Texas Ex Parte Lucas*, 877 S.W.2d 315 (1994).

It has been held to be reversible error to exclude evidence of Asperger's in mitigation, however. See *Missouri v. Boyd*, 143 S.W.3d 36 (Mo.App.W.D., 2004) While *Atkins* may not provide the same protection as it does to the mentally retarded, it can inform your mitigation strategy.

The surest way to save the life of a defendant suffering from autism or Asperger's is to present it as a disability requiring special assistance under 725 ILCS 5/104-22. If you can accomplish that, the death penalty is barred under 725 ILCS 5/104(b).

AUTISTIC DEFENDANT SPARED DEATH PENALTY

By [Tim Capps](#), *Staff Attorney*

Neil Barrall is still facing murder charges out of Marion County, but he is no longer facing the possibility of a death penalty. To understand why, you need to know about the Illinois special provisions statute and autism.

725 ILCS 5/104(b) says: "A defendant convicted follow-

ing a trial under Section 104-22 shall not be subject to the death penalty." The Section reference is to 725 ILCS 5/104-22 "Trial with special provisions and assistance."

"Special provisions and assistance" allow an otherwise unfit defendant to meaningfully participate in his trial. They therefore must follow a

determination of unfit for trial. Unlike the typical case with an unfit defendant, however, the trial may go on so long as the court determines "that such provisions or assistance compensate for a defendant's disabilities so as to render the defendant fit." There can be no death penalty, though.

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Major New Cases

In *Bobby v. Van Horn* the U.S. Supreme Court overturned the Sixth Circuit's ruling that the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* are requirements for effective assistance of counsel. Although the narrow holding rested on the misapplication of the 2003 guidelines to a 1986 case, the Court left in doubt whether those guidelines would be controlling in post-2003 cases.

It is considered good strategy to gain credibility by conceding some unfortunate facts. In *Smith v. Spisak* the U.S. Supreme Court held that the defendant's case was so bad a defense closing argument that conceded too much was nevertheless not prejudicial.

"You can smell almost the blood," defense counsel had

argued. "You can smell, if you will, the urine. You are in a bathroom and you can smell the death... and you can feel the loneliness... and we can all know the terror that [the victim] felt..."

After highlighting his client's affection for Hitler, he went on to argue that his client deserved no sympathy.

"When you turn and look at Frank Spisak, don't look for good deeds, because he has done none. Don't look for good thoughts, because he has none. He is sick, he is twisted. He is demented and he is never going to be any different."

Counsel never requested a life sentence in lieu of the death penalty, but did tell the jury "whatever you do, we are going to be proud of you."

What happens when jurors

follow a vote for the death penalty with a gift to the judge of some chocolate treats in the shape of genitals? In *Wellons v. Hall*, decided January 10, 2010, the U.S. Supreme Court said "from beginning to end, judicial proceedings conducted for the purpose of deciding whether a defendant should be put to death must be conducted with dignity and respect." The court granted relief to the *habeas* petitioner.

Finally, in *Maryland v. Shatzer*, SCOTUS decided that interrogation may be renewed by police after a break-in-custody of 14 days. The court further held that the return of a prisoner to general population was the equivalent of a break-in-custody. The court reasoned that 14 days was sufficient to eliminate any coercive effect of the interrogative custody.

"When you turn and look at Frank Spisak, don't look for good deeds, because he has done none. Don't look for good thoughts, because he has none. He is sick, he is twisted. He is demented and he is never going to be any different."

AUTISTIC DEFENDANT SPARED (CONTINUED)

The significance of Neil's autism was not immediately apparent to his lawyers. Interaction with counsel and his history were manifestly odd, but it was not until he was evaluated by an expert that the extent of his deficits were revealed. John O'Gara, one of his attorneys, said, "The lesson I learned from this case is you can't always trust your

instincts when it comes to unfitness. You have to get your defendant evaluated."

Austim Spectrum Disorder embraces "classic Autism," Asperger Syndrome and Pervasive Developmental Disorder Not Otherwise Specified. It is characterized by problems with social interaction and communication. Typi-

cally, an autistic person will have difficulties with non-verbal communication and understanding how others think and feel. In Neil Baral's case, an expert was retained to ensure effective communication with counsel, and also to sit with the defendant throughout trial to make sure he understands the evidence presented.

"The lesson I learned from this case is you can't always trust your instincts when it comes to unfitness. You have to get your defendant evaluated."



Office *of the*
State
Appellate
Defender

Capital Trial Assistance Unit

Chicago Office

20 North Clark St., 28th Floor
Chicago, IL 60602
Phone: 312-793-2056

Springfield Office

400 West Monroe Street, Suite 303
P.O. Box 5420
Springfield, IL 62705
Phone: 217-557-6400

Belleville Office

300 West Main Street, Suite 500
Belleville, IL 62220
Phone: 618-236-8680

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Mike Pelletier, State Appellate Defender

Cheryl Bormann, Deputy Defender, CTAU

John Hanlon, Assistant Deputy Defender, CTAU, *Editor*

Timothy Capps, Staff Attorney, *Assistant Editor*

Please email your comments, queries or requests for future articles to author or:

John.Hanlon@OSAD.state.il.us

REMEMBER: print for handy reading, come back to click on links.

Next Seminar

FALL DEATH PENALTY SEMINAR IN COLLINSVILLE

Now that we just finished putting on the Spring Seminar with IICLE, it's time to start thinking about the next one. The date is October 14th and 15th, 2010, and the place is Collinsville, Illinois, across the river from St. Louis.

While the list of speakers has not been finalized, here are

some examples of the kind of talent OSAD and IICLE bring to these events. The last seminar in Chicago featured:

- Henderson Hill, defender of Atlanta courthouse shooter Brian Nichols (who was spared the death penalty)
- Dr. Kent Kiehl, leading
- Simon A. Cole, University of California, Irvine, on effectively challenging fingerprint evidence.

researcher into the relation between functional brain anomalies and psychopathy among prison populations.

Meets requirements for admission or readmission to Illinois Capital Litigation Trial Bar under Supreme Court Rule 714. Two ethics hours. For registration contact IICLE at 800-252-8062 or www.iicle.com.

Featured Article

NEUROIMAGING DEBUTS IN ILLINOIS COURT (CONTINUED)

After five hours of deliberation, the jury announced they had reached a verdict. While the court waited for the victim's family to arrive before delivering the verdict, the jury made a surprising announcement: they wanted to continue deliberating. The next morning, the jury reached a second verdict. They sentenced Brian Dugan, broken brain and all, to death.

Sincox thinks the Dugan case may be unique, and does not foresee fMRIs to be common in courtrooms anytime soon. "It's like any other evidence," Sincox said. "It depends on what you're trying to prove with it, and you don't try to prove too much." In this case, it had the most explanative power, and the defense team had Dr. Kiehl's images to back it up.