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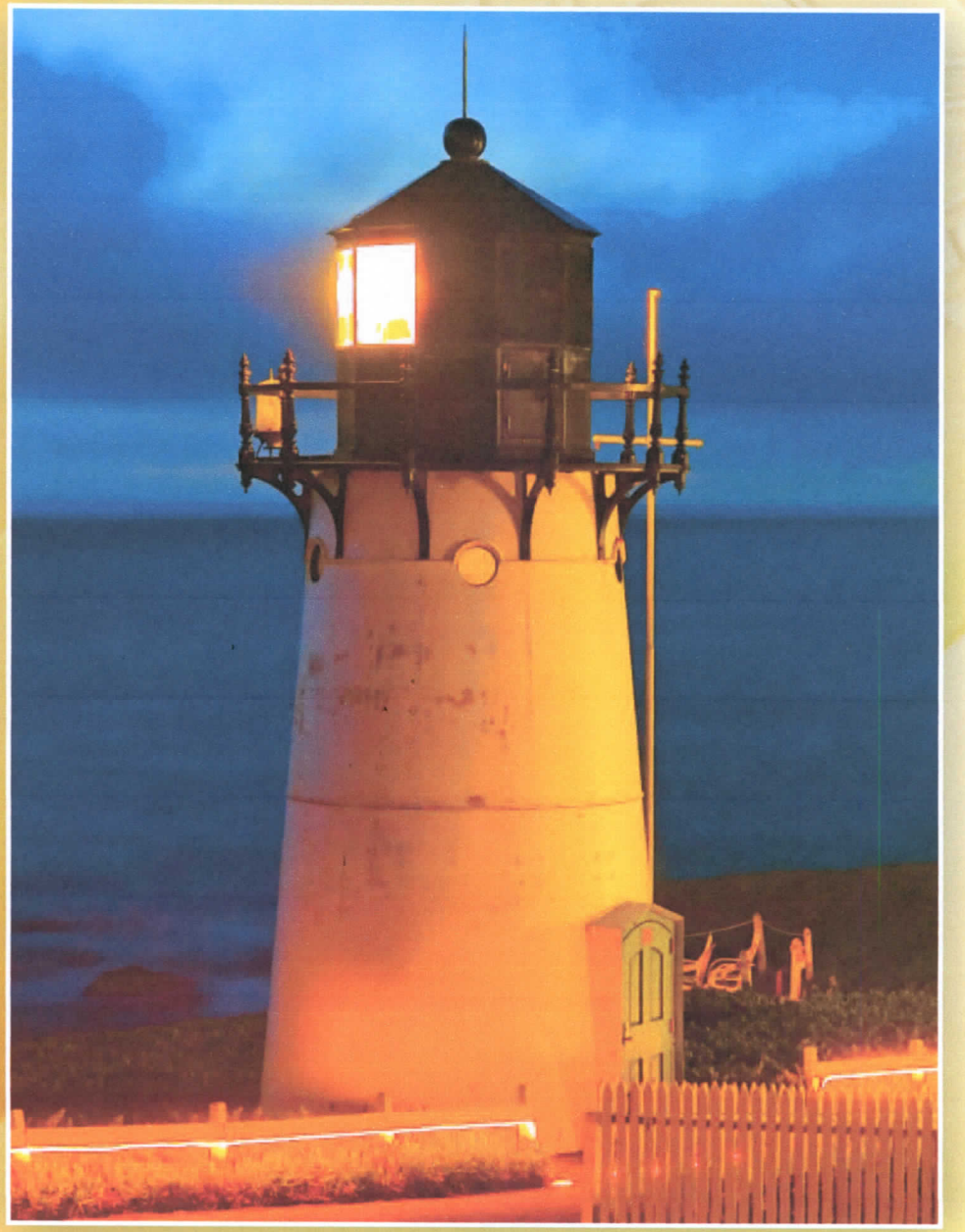

INSIDE THIS ISSUE:

EDITOR'S NOTE

Get ready for another exciting, fun-packed edition of California Defender magazine. In this issue we are proud to showcase Jason Cox's brilliant and extensive article on the law of confessions, including *Miranda* and voluntariness issues.

Of course, we have our regular coterie of columnists: Jim Bell on search and seizure, Grace Suarez on technology, Brad Bristow's update on dependency cases, and Bruce Kapsack's "Deuces Wild."

In addition, Alameda County Assistant Public Defender Chuck Denton presents an article on the rules governing factual bases for guilty pleas. Riverside County Deputy Public Defender R. Addison Steele II, and Dr. Stacey Wood, Ph.D., Claremont Clinical Neuropsychologist, write Integrating Neuropsychology Into Your Defense 101. Santa Clara County Deputy Public Defender Michael Ogul contributes a piece about dealing with the new, horrible *Kling* case. And, San Francisco Deputy Public Defender Matt Sotorosen discusses *Pitchess* and *Brady* and why you should be making motions relying on both cases. Professor William Thompson, Ph.D., writes about recent problems in forensic DNA testing. And Peter R. Thom and Ryan L. Devine from Peter R. Thom and Associates Inc., a national firm of consulting automotive engineers, contribute an article on black boxes in cars and how information from them might be usable in your cases.

We are again proud to include four "Nuts & Bolts" articles from Terri Towery, Deputy Public Defender, Los Angeles County. And Los Angeles County Deputy Public Defender Al Menaster tosses in four book reviews. Enjoy.

SPRING 2012

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INTEGRATING NEURO-PSYCHOLOGY INTO YOUR DEFENSE 101

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You pick up the discovery for the murder case, or any other specific intent crime, that was just assigned to you. You read the materials, talk to your client, and then say to yourself, "What now? There doesn't seem to be any defense. The whole case just doesn't add up. Why would this guy do this? It looks like my only option is to consider exploring my client's mental state."

But even so, there's nothing that stands out. The client doesn't have readily apparent mental health symptoms, such as delusions, or an obvious mental illness, such as schizophrenia. You sense that there's just something wrong with the way the client thinks, but you simply don't know what it is. You may very well have the perfect case in which to utilize a neuropsychologist.

Every defense attorney eventually has that case, the case that's a specific intent crime that doesn't have good facts, like a bad identification or a fantastic alibi, so the case ends up being primarily about mental state. It's that case where something is just not right about the client's ability to think and work with you. The next step is to think about consulting and perhaps hiring a neuropsychologist.

I. WHAT A NEURO-PSYCHOLOGIST DOES

A neuropsychologist is a clinical psychologist, who is a licensed Ph.D. level psychologist, with additional training in the assessment of brain functioning, cognition, and decision-making using specialized standardized assessment tools, like IQ tests. Most highly qualified neuropsychologists have completed a post-doctoral fellowship following their Ph.D. program, similar to a residency program, in order to gain the necessary skills to administer and interpret these tests.

A neuropsychological evaluation will allow for a thorough assessment of how an individual thinks, sees the world, comprehends language, communicates, processes information, solves problems, and makes decisions. Specifically, a neuropsychological assessment can provide an overall assessment of intelligence (IQ) and academic achievement. Additionally, it can quantify the cognitive domains of language, learning and memory including orientation, short-term and long-term memory, attention and concentration, fine motor control, visual-perception and decision-making abilities, including executive functioning and impulsivity. Motivation/malingering measures are often included to address concerns regarding effort.[1/]

Neuropsychologists use the term executive functioning to describe a set of skills related to good decision-making, such as the ability to generate options, think flexibly, plan, control impulses, and monitor behavior. These skills are controlled by the prefrontal cortex, the area of the brain above the eyes.[2/]

Cognitive disorders that impact the prefrontal cortex are common and include head-injury, sports concussions, Alzheimer's disease, stroke, medication effects, PTSD, substance use, schizophrenia, and mood disorders. Because there is extensive research linking prefrontal functional impairment to increased likelihood of impulsive behavior, poor decision-making, and violence, one is more likely to encounter individuals with deficits in executive functioning in criminal cases.[3/] Damage to areas of the prefrontal cortex have also been linked to increased aggression and poor problem-solving abilities. The temporal lobe plays host to both the ability to form new memories and the areas of the brain related to emotion and aggression. As such, individuals with a history of impulsive violence may demonstrate difficulties with learning and memory.

In contrast to other mental health experts, such as psychiatrists or clinical psychologists, neuropsychologists will use a standardized set of tests as part of their assessment. Typically, a psychiatrist or other psychologist will perform

a mental status examination, which ranges from an unstructured interview to a semi-structured clinical interview; both of these are essentially asking the client a bunch of questions that do not yield quantifiable data.

In contrast, a neuropsychologist uses tests that are administered using a standardized script and can be scored and compared to national averages corrected for certain demographics (education, ethnicity). These assessments are time intensive and can take anywhere from three to seven hours depending on the referral question, the question the lawyer needs answered for her case, and the level of functioning of the client. Following the assessment, the neuropsychologist will score the tests based on age and education-matched norms, so that it is possible to see how the client performs in contrast to the population as a whole across all testing areas.

Standardized quantified data means that interpretation is straightforward, and opinions are easier to support with data. It also allows for apples-to-apples comparisons with other experts and previous testing that the client may have had in the past, which are often found in the client's academic history. Typically, results are presented in a format that includes percentile ranks so that it is possible to compare the client to the population as a whole. For example, you may learn that the client has an IQ at the 40th percentile, which is average, and an 8th grade reading level, but that the client's executive functioning is at the 5th percentile, which is impaired, indicating a weakness in his ability to regulate his behavior.

II. HOW TO UTILIZE A NEUROPSYCHOLOGIST IN YOUR CASE

So you're back at your desk working on that murder case, looking at that new discovery, thinking about that interview that you just did with the client, but now you've already had neuropsychological testing done. Now you can consider the client's mental state at the time of the killing. So in this case of yours, the neuropsychological data indicate that the client has low average intelligence (IQ = 88; 20th percentile), but more importantly for you, has a specific impairment in the domain of executive functioning (5th percentile) impairing his ability to regulate behavior, read social cues, and control impulses. Now you're thinking, "My client is particularly impulsive, is not able to read social cues, or control impulses, all of which prevented him from acting like a reasonable person in the situation. I may have the perfect argument for imperfect self-defense, and I can get this case to a voluntary manslaughter. This client's objective perception of the situation that led to the killing is different than the reasonable person's, and therefore explains why this client reacted by killing, instead of the way the reasonable person would have reacted. Ta da! I get my voluntary manslaughter verdict, and the next round of drinks is on me."

Okay, so it may not be that easy, but the neuropsychologist may be able to link this score, not just to impulsivity, but perhaps also to a lack of executive functioning due to a history of traumatic brain injury, or any other number of conclusions that support an argument that the client did not form specific intent.

So in this murder that was just assigned to you, let's make it a bar fight; your client tells you that he did not know the decedent previously, and that he was responding to a threat that he perceived by wielding a pool cue. The problem is that the reasonable person just would not have reacted to the unarmed decedent by picking up a pool cue and hitting him over the head. In comes the neuropsychologist to explain the client's executive functioning deficit, and how it causes him to be less adept at reading social cues, control his impulses, and react more impulsively than the reasonable person. Perhaps the neuropsychologist can explain how substance abuse, prior trauma, or cognitive impairment made him react differently than the reasonable person. It's all admissible because it goes to the client's state of mind and explains his subjective perceptions of the situation, and you go on to win the case, walk him out the door, and you both live happily ever after. Okay, maybe not, but it certainly augments your defense.

In the past, neuropsychological data was sought out when there were questions regarding "organicity," which is neurological, versus a "functional disorder," which is psychological.[4] Advances in neuroscience have changed the state of the science in the field. The current understanding of major psychiatric disorders has resulted in a shift away from this false dichotomy of neurological versus psychological. There's now a realization in the field that psychiatric illnesses are brain-based and often result in cognitive impairment, as well. That is, these categories, neurologic versus psychiatric, are not mutually exclusive.

For example, individuals with a history of schizophrenia often show deficits in the area of decision-making and executive functioning, even when appropriately treated and non-psychotic. Similarly, individuals with even early dementia may become highly suspicious and paranoid. That means that when the district attorney's hired psychologist concludes that the client has Anti-Social Personality Disorder (ASPD) in an effort to explain the client's behavior, that diagnosis does not preclude cognitive impairment, and most importantly, does not preclude the inability to form specific intent. ASPD can co-exist with a history of cognitive impairment, and as such, the two are not mutually exclusive.

III. FINDING THE RIGHT NEUROPSYCHOLOGIST

At this point, you should now be convinced that it would be useful to develop a list of prospective neuropsychologists for consultation. The optimal choice should be a highly qualified clinician who is both credible and a good communicator.[5] Ideally, the clinician will have a practice that focuses on cognitive disorders and a demonstrated understanding of the law versus a more general practice that includes "some testing." Most neuropsychologists focus on either child or adult populations, although there are those who practice across the lifespan. You may want to ask the neuropsychologist what percentage of her practice is neuropsychological assessment and about her court experience.

Neuropsychologists can pursue board certification (ABPP) to demonstrate advanced clinical training in neuropsychology, although this is not yet required. However, you can ask if she has had formal training as a neuropsychologist, including post-doctoral training. Academic neuropsychologists should have publications relevant to the issues at hand. You can even ask for a work sample to get a sense of her ability

Domain	Test	Score	Percentile	Interpretation
Intellectual Functioning	Wechsler Adult Intelligence Scale-IV			
	Full Scale	82 (CI 79-87)	13th	Low Average
	Verbal-Comprehension Index (VCI)	71 (CI 67-77)	3rd	Borderline
	Perceptual-Reasoning Index (PRI)	100 (CI 93-107)	50th	Average
	Working Memory Index (WMI)	80 (CI 77-83)	10th	Borderline
	Processing Speed Index (PSI)	85 (CI 82-90)	15th	Low Average
Academic Achievement	Wide Range Achievement Test – IV (WRAT-IV)			
	READING	SS = 77	6th	6th Grade Equivalent
	SPELLING	SS = 80	6th	6th Grade Equivalent
	ARITHMETIC	SS = 72	3rd	4th Grade Equivalent
Attention				
	Digit Span	SS = 8	25th	Low Average
Language				
	Vocabulary	SS = 4	2nd	Impaired
	Comprehension	SS= 5	5th	Borderline
	FAS Fluency	37	50th	Average
	Animals	14	40th	Average
Memory:				
Working Memory	Letter-Number Sequencing	SS=7	16th	Low Average
	Orientation to time	5 / 5		Within Normal Limits
Verbal Memory	Logical Memory I	SS = 7	16th	Low Average
	Logical Memory II	SS = 8	25th	Low Average
	California Verbal Learning Test – II CVLT Trial 1- 5	T = 42		Low Average
	CVLT Trial 1	-2.5 SD	< 1	Impaired
	Immed. Free recall	.5 SD		Average
	Immed. Cued recall	0 SD		Average
	Long Delay Free Recall	.5 SD		Average
	Long Delay Cued Recall	0 SD		Average
	Recognition Hits	-2.5	< 1st	Impaired
	False Positives	.5 SD		Average
Visual Memory	Rey Figure Recall-Immediate	21 / 36	31st	Average
	Rey Figure Recall-Delay	15.5 / 36	4th	Mildly Impaired
Visual/ Spatial				
	Block Design	SS = 11	63rd	Average
	Picture Completion	SS = 12	75th	High Average
	Rey Figure: Copy	32/36	5th	Borderline
Executive Functioning				
	Trail Making Test A	20 s	80th	High Average
	Trail Making Test B	90 s	< 10th	Impaired
Wisconsin Category Test	Categories Completed	3	3rd	Impaired
	Trials to First Category	40	2nd	Impaired
	Failure to Maintain Set	6	< 1st	Impaired
Motivation/ Malingering	Test of Memory Malingering (TOMM)	T 1= 49 / 50		Within Normal Limits

to communicate in writing. Further, during your initial phone contact, you can assess her ability to convey complex ideas in real world terms by asking, for example, "How would substance abuse impact the client's decision-making?"

IV. WHAT TO EXPECT FROM A NEUROPSYCHOLOGIST

Once on board, the neuropsychologist will perform an assessment using a test battery that covers the cognitive domains discussed above. Ideally,the clinician will be using the most recent version of tests available and the best normative data. For example, the WAIS-IV is the most current version of the IQ test. Next, she will score the test battery by comparing your client's performance with normative data (matched for education, gender, and age) and potentially create a table that summarizes the scores.

In clinical practice, neuropsychologists always generate a report. If you do not want an initial report, that should be made clear to the clinician. Instead, the neuropsychologist could be asked for oral feedback regarding her findings. If desired, a written report can then be generated. A complete clinical report includes information regarding diagnosis, cognitive functioning, and behavioral functioning. Competent forensic neuropsychological reports should take this information one step further and integrate them with the specifics of the case in question, including the context of the person's life and the relevant legal standards. It is not appropriate for a clinician to submit a report that is simply a summary of test scores without an integration of relevant legal issues.[6]

Because of the extensive testing done in neuropsychological evaluations, it can be difficult to see the forest for the trees. To the left is an example of a data presentation you may get in a typical criminal case. The table is organized by five columns. The first column describes the general area that is being tested. The second column describes the specific test, which often has a non-intuitive acronym but is spelled out below. The third column has the actual raw data score which may be used by other professionals on the case, but is not meaningful in itself for the defense attorney, a percentile rank for apples-to-apples comparisons, and an interpretation of performance. The advantages of a table are that you can quickly read the percentile column to identify areas of strength and weakness and, can also make comparisons with other reports, if available.

In addition to a table, there will also be some text summarizing the findings and giving some interpretation. For the client above, Mr. Smith, a 24-year old male, the results may be summarized as follows: the results of the neuropsychological test battery revealed that Mr. Smith presents with significant neurocognitive deficits. Mr. Smith demonstrated significantly impaired performance across the domains of academic achievement (reading, spelling arithmetic), vocabulary, visual memory, and executive functioning. His attention was fluctuating. Performance on a measure of motivation indicated adequate motivation. There was no evidence of malingering. His general intellectual functioning (IQ) was found to be LOW AVERAGE, with a significant split between his verbal and nonverbal abilities. His performance on verbal subscales was at the 3rd percentile (Borderline Impaired range), and performance on non-verbal measures was at the 50th percentile, indicating average abilities.

Next, the etiology, or cause, of the neuropsychological impairment is discussed: when the findings of a Borderline Impaired verbal IQ and poor academic achievement are considered, in light of his family and social history, they suggest a long-standing developmental disorder consistent with an impoverished home environment, poor nutrition, disrupted school history, and a developmentally-based learning disability. In the area of non-verbal problem-solving, which is a measure designed to be relatively free of cultural bias and separate from academic learning, Mr. Smith performed in the average range. These results suggest that Mr. Smith's intelligence was not impaired overall, rather that his environment precluded optimization of the potential suggested by his non-verbal abilities.

The next section specifically integrates case specifics with the neuropsychological findings in the domain of executive functioning: poor performance was noted consistently across the domain of executive functioning. Poor performance on these measures is reflective of a difficulty with initiation, impulsivity, planning, and judgment. Mr. Smith had difficulty staying on track in conversations and on task. Consistently poor performance on these tasks is related to reduced frontal lobe integrity. When these findings are considered in light of his medical and substance abuse history, they are consistent with an extensive history of stimulant use. In real-world terms, these individuals are often impulsive and short-term (versus long-term) decision-makers. These patterns are especially true for late adolescence.

In summary, a neuropsychological evaluation can provide quantifiable data that will allow for a thorough assessment of how an individual thinks, sees the world, comprehends language, communicates, processes information, solves problems, and makes decisions. This data may be useful in a number of practice areas, including intent crimes, competency, insanity, and mitigation. This practical data may also assist you in your day-to-day work with the client. For example, if you know that your client has a 6th grade reading level, you can tailor your work to accommodate that weakness.

V. GIVING THE NEUROPSYCHOLOGIST THE APPROPRIATE DIAGNOSTIC QUESTION AND DIRECTION

The conversation you have with the neuropsychologist before the testing is one of the most important conversations you'll have in the case. The two of you must discuss and decide together what tests will be given. There is very little to be gained from personality testing such as the MMPI and a lot of risk. All the questions and answers from personality testing are discoverable to the district attorney. In exchange for a diagnosis such as bi-polar disorder, which doesn't offer much, if anything, for a defense, the district attorney will be able to troll through every question and answer the client gave and find several that can become the prosecution theme in the case. An example would be a client saying something like, "I think a person should get the most he can out of a situation." Then the prosecution theme becomes, "this guy wanted to get whatever he could out of the situation." The defense attorney really should limit the testing to cognitive instruments.

Don't be afraid of cross examination, such as, "Well Dr. Neuropsych, you didn't perform any personality tests. Isn't it the standard in your profession to perform personality tests? But you in fact didn't perform personality tests because you knew Mr. Defendant is a sociopath!" After you finish your battery of objections, and they're overruled, the neuropsychologist will answer to the effect of, "Personality tests are not part of neuropsychological evaluation."

VI. THE PROS AND CONS OF NEUROIMAGING

Advances in neuroimaging provide an attorney with a number of options for obtaining high quality images of the brain that can be used to substantiate claims of brain injury. Neuroimaging data can be seen as complementing neuropsychological data. The neuroimaging can provide a physical representation of the brain and the neuropsychological testing provides the "functional" implications of the injury. For example, an MRI may reveal a left frontal brain tumor, and the neuropsychological data may document impaired impulse control and executive functioning.

However, there are clinical disorders with clear functional implications that may not show findings on CT or MRI (early dementia, mild traumatic brain injury, genetic disorders such Turners syndrome, mental retardation, epilepsy). Therefore, the use of either neuroimaging and/ or neuropsychological testing will depend upon the case specifics. However, there is a reality that neuroimaging is expensive and extremely difficult to get done with an in-custody client. The take-home lesson here is that neuroimaging is a complement to neuropsychological testing, not something that always needs to be done, and when conducted, it does not need to be done first.

VII. CONSIDERATIONS WHEN CHOOSING A NEUROPYSCHOLOGIST AS OPPOSED TO OTHER EXPERTS

There are a number of different mental health experts working in the courts these days including forensic psychiatrists, forensic psychologists, neuropsychiatrists and neuropsycholo-

gists. It can be confusing to ascertain which expert is the "best" one for your case. Unfortunately, each discipline has its strengths and weaknesses, and your best choice will depend on the case specifics. Psychiatrists and neuropsychiatrists are Medical Doctors (psychiatrists with a special interest in neurologic disorders) who are not trained in standardized psychological assessments as part of medical school and will not do psychological testing. It may make sense in some complex cases to include a psychiatrist to address a lifelong history of major mental illness and a neuropsychologist to complete the formal standardized testing to obtain an IQ, reading level, and performance in other cognitive domains like executive functioning measures. These experts can put together a more complete and sophisticated picture of the client's mental health and cognitive functioning.

Expert	Degree	Standardized Instruments	Special Training in Neurologic/ Cognitively Impaired Populations
Psychiatrist	MD	NO–Mental Status	Some–Emphasis is Mental Illness
Neuropsychiatrst	MD	NO–Mental status	Yes–Training in Mental Illness and Neurological Populations
Forensic Psychologist	Ph.D.	Yes–Personality Testing, Competency	Some –Training in Forensic Populations
Neuropsychologist	Ph.D.	Yes–Neuropsychological Assessment	Yes–Training in Cognitively Impaired / Neurologic Populations

VIII. WAYS TO OVERCOME DISTRICT ATTORNEY ADMISSIBILITY OBJECTIONS IN NON-CAPITAL CASES AND FACT PHASE OF CAPITAL CASES

The deputy district attorneys trying cases have one objective that must be met for them to win the case: They must dehumanize the defendant. They, therefore, are going to do everything in their power to prevent any evidence that humanizes the client or explains the client's mental state. Presenting neuropsychological evidence in a non-capital case or in the fact phase of a capital case is going to be done with a fight. However there is not just one formula, other than using every lawyering skill you have and being imaginative and thinking outside of the "this is the way it's always done" box. Every case is individual and needs an individual approach to getting neuropsychological evidence admitted. The first and easiest is imperfect self-defense in murder cases and attempted murder cases, because the client's subjective perceptions of a situation are at issue. For all the other cases where the client's subjective mental state is not directly at issue, start the argument at the beginning: Evidence Code section 351, all relevant evidence is admissible.

So one idea for making the data relevant is to explain the client's actions, such as using the IQ data or lack of ability for long-term planning to explain why the client had or held onto a weapon that was used in a homicide that he didn't have anything to do with. Another idea is that the low IQ, impulsivity, or lack of ability to see long-term consequences led to the client going along on the drive-by shooting and not considering or even realizing the natural probable consequence of the situation. The admissibility of neuropsychological data is only limited by the creative legal analysis of the lawyer trying to get it into evidence.

IX. TACTICAL DECISIONS AND ARGUMENTS WHEN USING A NEURO-PSYCHOLOGIST

The next factors that have to be assessed are the pros and cons of using neuropsychological testimony. The first and largest obstacle is Penal Code section (b)(1), which allows the court to order that the client be evaluated by a district attorney expert.

This is always a difficult situation, but it's not as daunting as it may seem at first blush. However, to battle the clearly horrible proposition of the client being interviewed by district attorney expert, it's necessary to understand the development of the statute the case law and fight to prevent, or at least limit a prosecution examination.

Starting with the constitutional objection and argument

Starting at least as early as 1973 with the holding in *People v. Danis* (1973) 31 Cal.App.3d 782, district attorneys in California have been getting court orders to have defendants evaluated by prosecution experts. This seems to have come about as a result of the federal courts creating a rule out of thin air allowing prosecution expert examinations of defendants.[7] *Danis* is a six-page case that manufactures a prosecution ability to interview a represented defendant out of prior, mostly federal, cases that for the most part concerned court-appointed experts who testified for the prosecution.[8] The case was just the first in a line of cases that either directly authorized a trial court to order a defendant to submit to a prosecution evaluation or supported the proposition.

Danis was followed by *People v. McPeters* (1992) 2 Cal.4th 1148, a case where a prosecution psychiatrist was allowed to testify about the defendant's refusal to participate in a forced evaluation; *People v. Carpenter* (1997) 15 Cal.4th 312, the Trailside Killer case, where the prosecution was also allowed to present evidence that the defendant refused to participate in a forced examination; *Baqleh v. Superior Court* (2002) 100 Cal. App.4th 478, a Penal Code section 1369 case; *Centeno v. Superior Court* (2004) 117 Cal.App.4th 30, a case where a prosecution evaluation was ordered for an *Atkins v. Virginia* (2002) 536 U.S. 304 determination of mental retardation; *In re Hawthorne* (2005) 35 Cal.4th 40, another *Atkins* determination case; and *People v. Sumahit* (2005) 128 Cal.App.4th, a sexually violent predator case.

With this line of cases, it was no

surprise that, prior to trial, Riverside County Judge Robert McIntyre accepted the deputy district attorney's request for a prosecution evaluation of the defendant as "well taken"[9] and ruled that the defendant, Jose Verdin, be made available to a district attorney expert for an evaluation.

However, after all the litigation played out in that case, the result was *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, in which the California Supreme Court put an end to it all. The court went through an extensive analysis where it concluded that, despite the district attorney's arguments to the contrary, (1) a prosecution evaluation of a client is, in fact, discovery, (2) that the prior line of cases was invalidated by Proposition 115 and the adoption of Penal Code section 1054 that resulted from that Proposition, (3) that Penal Code section 1054 is the exclusive governor of discovery, and (4) that Penal Code section1054 did not authorize the court to order a defendant to submit to an interview by a prosecution expert.

Unfortunately, in footnote 9, on the penultimate page of the opinion, the court invited the California Legislature to change Penal Code section 1054 and "establish a rule within constitutional limits" to allow a trial court to order a defendant to participate in a prosecution evaluation.[10] Not surprisingly, the Legislature then did just that and enacted Penal Code section 1054.3(b)(1), effective January 1, 2010, which again authorized the court to order a client to submit to a prosecution evaluation.

But the fight isn't over; there still remain state and federal constitutional objections to the trial court ordering a client to submit to a prosecution evaluation. In *Verdin*, the court also said that there may be federal constitutional implications to allowing the prosecution access to a defendant and cited *Estelle v. Smith* (1981) 451 U.S. 454.[11] *Verdin* even discusses at length the problem with a court-ordered prosecution examination appearing to violate the Fifth Amendment and points out that the respondent did not address the constitutional issue presented by *Estelle v. Smith*, nor did it "cite any apposite authority."[12]

Estelle[13] focused on the Fifth Amendment problems involved in requiring a defendant to make a statement. In *Estelle*, the trial court, sua sponte, and without notice to the defense, ordered the prosecutor to arrange a competency evaluation of the defendant, Ernest Smith. The prosecutor hired Dr. James P. Grigson, who was known in defense circles as "Dr. Death" and was eventually expelled by the American Psychiatric Association and the Texas Association of Psychiatric Physicians for his testimony in capital cases.[14] Dr. Grigson decided that Smith was both competent and "a severe sociopath."[15] He testified as to his conclusions which to Smith getting sentenced to death, and in turn the United States Supreme Court reversing the death sentence because of Dr. Grigson's violation of Smith's Fifth Amendment rights.

Verdin further cites and quotes *Hubbard v. Superior Court* (1997) 66 Cal. App.4th 1163 that "prosecutorial discovery . . . 'often raises complex and serious constitutional questions.'"[16] *Hubbard* is an impeachment discovery case with strong language supporting a constitutional analysis of Penal Code section 1054. So even though in footnote 9, the court appears to have invited the Legislature to change Penal Code section 1054, the court was clearly weary of the federal constitutional implications of doing so.

Verdin cited *Estelle* and *Hubbard*, questioning the constitutionality of prosecution examinations of clients, but there are other cases which support an argument that the practice is simply unconstitutional. In *Fisher et al. v. United States et al.* (1976) 425 U.S. 391, the court found that there was not a Fifth Amendment privilege in private papers[17] and that such papers could be subpoenaed by the government; however, the court distinguished between a defendant's "oral testimony" and forcing a defendant to produce evidence, in this case tax documents, that could incriminate him. It got better in *United States v. Doe* (1984) 465 U.S. 605, where the Supreme Court ruled that the forced production of documents can, and in *Doe*, would violate the Fifth Amendment. This case is strong support for the proposition that any prosecution interview of a represented defendant is a far more egregious violation of the Fifth Amendment.

The California Supreme Court has not yet had the new law, Penal Code section 1054.3(b)(1), fully tested before it. *Sharp v. Superior Court* (2011) 191 Cal. App.4th 1280 appeared to be that pending test case. In *Sharp*, Ventura County Judge Kevin DeNoce ordered prosecution examination of Calvin Sharp pursuant to Penal Code section 1054.3(b)(1), after he had pled not guilty by reason of insanity.[18] The trial court's action was an expansion of prosecution examination of a defendant that hadn't existed prior to *Verdin* and its legislative child, Penal Code section 1054.3(b)(1). Before Penal Code section 1054.3(b)(1) there was no question that examinations in not guilty by reason of insanity cases were governed by Penal Code section 1027, where the trial court selected, usually by stipulation, and appointed two or three doctors.[19]

The Ventura County Public Defender filed a writ to prevent the examination of the client. The Second District Court of Appeal denied the writ, the Public Defender then petitioned the California Supreme Court. The Supreme Court then granted review and transferred the case back to the Appellate Court with instructions to vacate the Appellate Court's order denying Sharp's petition and direct the superior court to show cause why the writ should not be granted.[20] The result was the Second District Court of Appeal modified Opinion that is found at *Sharp v. Superior Court* (2011) 191 Cal.App.4th 1280, in which the Appellate Court found Penal Code section 1054.3(b)(1) to be constitutional. The Supreme Court, in turn, again granted review, and on April 27, 2011, ordered the Court of Appeal Opinion depublished. However, the constitutional issue was not the reason for the grant of review.

There is another case pending before the California Supreme Court that has the potential of directly resolving the constitutionality issue of compelled psychiatric examinations of a defendant. Review has been granted in *Maldonado v. Superior Court* (2010) 184 Cal.App.4th 739, a case from the period between the Supreme Court's holding in *Verdin* and the January 1, 2010 start date of Penal Code section1054.3(b)(1). The prosecutor in Reynaldo Maldonado's special circumstance murder case in San Mateo County tried a workaround, so as to avoid the state of the law at that time by asking the trial court to appoint doctors pursuant to Evidence Code section 730. Maldonado's objection to the Evidence Code section 730 examination was over-

ruled, his writ was denied, and the California Supreme Court denied review.

But Maldonado's attorney, Paul DeMeester, was not done fighting. He filed a motion "asking the [trial] court to implement protective measures he asserted were required to preserve [Maldonado's] Fifth and Sixth Amendment rights with respect to the examinations."[21] He also requested protective measures: (1) that neither the district attorney nor law enforcement be allowed to be present during the examination; (2) that the prosecution not have access to any reports or notes from the examination, until after the close of the defense case, and then only after an in camera hearing for the trial court to make a determination as to what the prosecution should get; (3) that the trial court determine the admissibility of any information from the examinations only after an in camera hearing after the close of the defense case; (4) that neither the district attorney nor law enforcement contact any of the court-appointed experts until after an in camera hearing, and only with the court's permission, (5) that the experts maintain confidentiality concerning the examinations with the exception of giving information directly to the court; (6) that any experts who had been contacted by the prosecution be excluded; and (7) that the prosecution be prohibited from contacting any more experts that the court may appoint. After a hearing the trial court granted some of the requested protective measures, but denied all of the protective measures listed above.

The Appellate Court appeared to take an interest in the constitutional aspect of the case with its discussion of the propriety of writ review for a discovery order that implicates Fifth and Sixth Amendment rights. However, it limited the questions it would consider to "(1) when, and under what circumstances, are the examination results to be disclosed to the prosecution, and (2) whether the prosecution may properly have any role in the selection of court-appointed experts to conduct the examinations."[22]

The Appellate Court did weigh in on the subset constitutional issues involved in *how* having clients examined by a prosecution expert would be done within constitutional limits, however, as to the larger more important question of *if* a prosecution examination of a client is constitutional was not considered, or more accurately, was considered with a finding against defendants. The court's position on the big picture question was, "The only meaningful way to rebut a defendant's anticipated psychiatric evidence on his own mental health condition is to subject the defendant to a psychiatric examination by independent or prosecution experts." As in *Sharp*, the Appellate Court in *Maldonado* did not even address the big picture constitutionality of a client being subjected to a prosecution interrogation in the guise of mental health evaluation, or the concerns expressed by the California Supreme Court in *Verdin* with its discussion of *Estelle v. Smith* and *Hubbard*.[23] Both Court of Appeal opinions addressed very narrow issues and assumed the constitutionality of a client being examined by prosecution expert, so it seems unlikely that the Supreme Court will go beyond the narrow questions presented in *Sharp* and *Maldonado* and address the larger constitutional question.

So, after having made the constitutional objections, if the trial court is still inclined to subject the client to a prosecution evaluation, the next step is to motion to limit the examination. The minimal goals are to have the trial court order that the prosecution evaluator not ask questions about, or discuss, the alleged facts of the case that's at bar and that safeguards are in place to protect the client's constitutional rights. The authority for these two goals often intermingles them, so many of the same cases need to be cited to achieve both goals.

The place to start is right in the statute. Penal Code section 1054.3(b)(1)(B) states in part: "The prosecuting attorney shall submit a list of tests proposed to be administered by the prosecution expert to the defendant." So demand the list, and when the proposed prosecution tests are something different than what your neuropsychologist has done, object and keep objecting. If your neuropsychologist did IQ testing and used instruments, that measure executive functioning and did not discuss the case,[24] there is no reason whatsoever that a prosecution expert should be let loose upon the client to conduct personality tests, such as the MMPI, much less discuss the case with the client.

The statute goes on with: "at the request of the defendant . . . a hearing shall be held to consider any objections raised to the proposed tests before any test is administered." Demand the hearing and move beyond objecting to any test other than those already given by your neuropsychologist. Also demand safeguards, such as videotaping of the prosecution examination and you observing and being able to have your client refuse to answer inappropriate questions and even being able to stop the examination.[25]

The statute continues: "The trial court must make a threshold determination that the proposed tests bear some reasonable relation to the mental state placed in issue by the defendant." Do everything possible to have the judge state how the tests have a "reasonable relation" to the mental state at issue. Point out and argue long and loudly that the statute clearly contemplates testing or a clinical interview, not an interrogation about the case.

There's strong support for this in the case law. Many of the cases cited to support prosecution examinations of clients also clearly defend the practice with a claim that the case at hand isn't addressed by the examiner. These cases start with *Alexander v. United States* (1967) 380 F.2d 33, where the court pointed out that there was "no suggestion that [the prosecution examiner] testified as to any incriminating statements by appellant."[26]

The analysis continues with *United States v. Doe* (1984) 465 U.S. 605. If the government-compelled act of turning over business records is testimonial and violates the Fifth Amendment, as the court found it was in *Doe*, it is difficult to imagine how a government-compelled discussion of the facts of a case with a represented client is not even more repugnant to the Fifth Amendment.

Next is *Doe v. United States* (1988) 487 U.S. 201, which is discussed and extensively quoted in *Verdin*, which again clarifies that forcing a defendant to make statements is qualitatively different than having a defendant give a blood sample, provide a writing exemplar, provide a voice exemplar, stand in a lineup, or wear particular clothes.[27] *Verdin* states that, "the statements petitioner would make in a court-ordered mental examination would unquestionably be testimonial."[28] Even *Sharp*, which

has clearly set out to eviscerate the Fifth Amendment, acknowledges that a waiver of Fifth Amendment rights for the purposes of a not guilty by reason of insanity evaluation "is only to the extent necessary to permit useful mental examinations."[29]

X. DEALING WITH THE PROSECUTION EXPERT'S INEVITABLE DIAGNOSIS OF ANTI-SOCIAL PERSONALITY DISORDER

Neuropsychological data can be useful in helping defense attorneys when the issue of the presence of Anti-Social Personality Disorder (ASPD) and associated symptoms is raised by the district attorney. First, neuropsychological data and subsequent interpretation can provide another framework for understanding a particular behavior. For example, a client may have a history of an impulsive act of violence. The deputy district attorney's expert may note this history as "evidence" for the diagnostic criteria of "impulsivity." However, the neuropsychologist can note that the impulsive behavior is secondary to executive functioning impairment that emerged only after a motorcycle accident. So while both experts concede that the client is impulsive, the neuropsychologist can explain that the behavior is not related to a personality disorder, but is secondary to a brain injury.

Further, the DSM-IV TR states that a diagnosis of ASPD is not appropriate if the behavior is due to the physiological effects of a substance or a general medical condition, such as head trauma.[30] Thus, in order to generate a valid differential diagnosis of ASPD, a clinician must demonstrate that the antisocial behaviors, such as irritability, deceitfulness, and aggression, were present at a time when an individual was not experiencing co-occurring conditions, such as PTSD, drug addiction, and cognitive disorders.

The table below illustrates how much diagnostic overlap exists between cognitive disorders, substance abuse, and ASPD. If the defense can demonstrate that substance use and cognitive impairment predated the onset of ASPD-type symptoms, or that they only co-occur, then the defense can successfully challenge the diagnosis.

Symptom	Substance Use	Antisocial	Cognitive Disorder / (Executive Function)
Sleep Problems	X		
Irritability/Outbursts of Anger	X	X	X
Difficulty Concentrating	X		X
Aggressive Behavior	X	X	X
Craving	X		
Anxiety	X		
Paranoia	X		
Legal Problems	X	X	
Deceitfulness	X	X	
Impulsivity	X	X	X
Reckless Disregard for Safety	X	X	X
Irresponsibility, Including Lack of Job	X	X	X
Lack of Remorse		X	

XI. USING A NEUROPSYCHOLOGIST FOR CAPITAL MITIGATION

In terms of capital mitigation, neuropsychological data and testimony can be used to support statutory mitigating factors. The all-encompassing Penal Code section 190.3(k) allows any testimony that tends to be mitigating, which allows for the admission of all the findings from neuropsychological testing.[31] Neuropsychological statutory mitigating factors include findings regarding mental state at the time of the offense; however, Penal Code section 190.3(k), often referred to as the "(k) factor," allows for evidence of mental health issues or brain function issues that are not related directly to the capital crime.[32]

For example, the client's drug or alcohol use lessened his ability to control his impulses, which can also take some of the sting out the prosecution's presentation of Penal Code section 190.3(b) and (c) factors in aggravation (Heilbronner & Waller, 2008; see *Lockett v. Ohio* (1978) 438 U.S. 586).

Capital teams are now required by *Wiggins v. Smith* (2003) 539 U.S. 510 to utilize a full social history to help the jury understand the often excruciating life histories of defendants that may include a history of child abuse, poverty, and psychiatric disorders. A neuropsychologist can add a life history of cognitive development and explain poor school performance, low intelligence, impulsive behavior, and impaired decision-making in a manner that can help to contextualize and explain certain choices and behaviors in the defendant's past.

For example, a neuropsychologist can start presenting her own findings that may include impaired executive functioning, and explain that 95% of the population scores better on these measures than the client. Next, the neuropsychologist should explain how that relates to real-world behaviors in the client's past. For example, the client may have a criminal history that included violent and impulsive behaviors. By explaining that the client is much less able to control impulses and less able to use verbal strategies to respond to provocation, in other words talk his way out of a situation instead of responding with violence, may help to mitigate these

previous offenses.

This type of testimony will be significantly stronger with third party records, such as medical records documenting a history of a medical diagnosis, such as a head-injury and/or school records documenting poor school histories, special education placement, intelligence scores, and impulsive decision-making. A neuropsychologist may be able to provide an alternative narrative for understanding the decision-making of the client across his life span development that challenges the typical prosecution narrative related to free will and ASPD.

XII. USING A NEUROPSYCHOLOGIST FOR OTHER SITUATIONS SUCH AS PENAL CODE SECTION 1368 OR NOT GUILTY BY REASON OF INSANITY TRIALS

Beyond specific intent crimes, neuropsychological data is frequently used in cases with issues of competency and insanity. Although a thorough review of these large practice areas is beyond the scope of the current article, it can provide some examples of how neuropsychology can be useful.

In issues of competency to stand trial, the usual reasons for a defendant to be deemed incompetent are specific delusions that preclude the defendant's ability to act rationally, and cognitive issues that impair his ability to comprehend the legal system and work with his attorney. In cases where the client is presenting primarily with cognitive impairment versus psychosis, neuropsychological testing may be useful. Standardized forensic instruments such as the MacArthur Competence Assessment Tool–Criminal Adjudication[33] are available to provide quantifiable data for competency evaluations that complement the neuropsychological data.

In an evaluation for insanity, neuropsychological testing may be used to complement testimony provided by a psychiatrist and specifically address cognitive issues at hand, like impulsivity and decision-making. Or, in cases where the mental health issue is directly related to cognitive disorders, such as head-injury and dementia, the clinician may take the lead role in explaining how these illnesses impact the defendant's ability to judge right from wrong.

XIII. GETTING THE FUNDING FOR NEUROPSYCHOLOGICAL TESTING AND TESTIMONY

Whether you are a deputy public defender who has to convince a supervisor to authorize the funds, or any attorney who has to file a Penal Code section 987.9 petition, or a private attorney who has to convince a family to fund it, someone with control over purse strings has to be convinced that neuropsychological testing and testimony is needed to have a fighting chance to win the case, or get a life verdict in a capital case. The lawyer has to focus on the kind of data that the testing can yield and a plan for getting it admitted into evidence. Neuropsychological data is powerful evidence that explains why a client did what he did; it gets right to the client's mental state and humanizes him for the jury. It can take creativity and dogged determination to get the funds, but it can be done, and it is worth the effort.

XIV. CONCLUDING REMARKS

Now, when you are faced with that case of a client who just does not seem to be able think right, and is free of major mental illness, you may consider the potential impact of cognitive impairment and consider consulting with a neuropsychologist. A neuropsychologist can provide you with quantified data regarding your client's mental state and practical advice regarding how to best work with your client.

ENDNOTES

1/ Strauss, Sherman, Spreen (2006). A Compendium of Neuropsychological Tests, 3rd Edition. Oxford.

2/ Zillmer, Spiers, & Culbertson (2008). Principles of Neuropsychology, 2nd Edition. Thompson-Wadsworth.

3/ Barr. W. (2008) Neuropsychological Approaches to Criminality and Violence. *In Clinical Neuropsychology in the Criminal Forensic Setting* (Eds. Denney, R.L. & Sullivan, J.P.). Guilford Press.

4/ Martel, D.A. (1992). Forensic Neuropsychology and the Law. *Law and Human Behavior* (16)3, pp313-336.

5/ Heilbronner, R.L. & Waller, D. (2008). Neuropsychological Consultation in the Sentencing Phase of Capital Cases. *In Clinical Neuropsychology in the Criminal Forensic Setting* (Eds. Denney, R.L. & Sullivan, J.P.). Guilford Press.

6/ American Bar Association Commission on Law and Aging and American Psychological Association, 2005.

7/ In *Pope v. United States* (1967) 372 F.2d 710, the Eighth Circuit Court of Appeals affirmed a not guilty by reason of insanity case where the prosecution's motion to have its psychiatrist examine the defendant was granted. The psychiatrist testified and opined as to the defendant's motive for the triple homicide, when one of the defense's arguments that the defendant was insane was that there was no motive for the killings. The defense objected to the prosecution examination having no basis in statute or case law. The court acknowledged that there was "no federal case precisely on point in the area." The court cited *Early v. Tinsley* (1960) 286 F.2d 1, a case where the district attorney brought in two psychiatrists to interview the defendant after his arrest and before his arraignment as part of the initial investigation (the facts of the case are found in *Early v. People* (1960) 142 Colo. 462, 466) which was clearly different than granting a prosecution motion to have a prosecution psychiatrist examine a represented defendant. The court also cited *Fouquette v. Bernard* (1952) 198 F.2d 860, another case where the prosecutor sent in a doctor to conduct an interview before the defendant was arraigned, as part of the initial investigation (the facts of the case are found at *Nevada v. Fouquette* (1950) 67 Nev. 505, 537). The court also cited *Sibbach v. Wilson & Co.* (1941) 312 U.S. 1, a civil case regarding a *physical* examination by a *court-appointed* physician in a car crash injury case (the facts of the case are found at *Sibbach v. Wilson & Co.* (1939) 108 F.2d 415, 415). The court's analysis starts with the Rules Enabling Act of 1934, 28 U.S.C.A. § 723b, which gave the Supreme Court power to write rules of federal civil procedure. From that came Rule 35 which allowed

the court to order civil litigants to physical or mental examinations where physical or mental status was at issue. *Sibbach* upheld the rule "on a procedural-versus-substantive approach," *Pope v. United States, supra*, at 719. The question was whether Rule 35 was merely procedural, and therefore, within the purview of the Rules Enabling Act, or if it was a rule that affected substantive rights, and therefore, needed specific congressional action to enact it. The court ruled that a court order for a civil litigant submit to an examination was merely procedural, and Rule 35 passed its first test. The court then cited *Schlagenhauf v. Holder* (1964) 379 U.S. 104, another car crash civil case where a petition was filed to have the bus driver examined by *court-appointed* doctors, that found Rule 35 constitutional. None of the cited cases dealt with a criminal defendant being subjected to prosecution mental examination where the case at bar would be discussed. The California courts were less intellectually dishonest when developing an ability for prosecutors to examine a represented defendant than the federal courts, declining to cite *Harabedian v. Superior Court* (1961) 195 Cal. App.2d 26, which found that court examinations in civil cases are authorized by civil statute pursuant to Code of Civil Procedure section 2032.

8/ All the prior cases cited by *Danis*, with two federal case exceptions, were ones where the expert was a court-ordered expert selected by the prosecution. The prior cases were *In re Spencer* (1965) 63 Cal.2d 400, a case about the admissibility of testimony from a *court-appointed* expert which established a three-pronged set of rules for such testimony: *Alexander v. United States* (1967) 380 F.2d 33, a case where the federal equivalent of a Penal Code section 1368 proceeding, pursuant to 18 U.S.C.A. 4244, was followed and, at trial, the prosecution hired one of the competency examiners and then motioned to have the court-ordered competency examiner allowed a second interview of the defendant; *United States v. Albright* (1968) 388 F.2d 719, also an examination pursuant to 18 U.S.C.A. 4244 case, where presumably the expert that the prosecutor used was appointed by the court, although it's not absolutely clear in the opinion; *United States v. Weiser* (1969) 428 F.2d 932, a six-page case that expanded a federal prosecutor's ability to have its own hired examiner interview the defendant, where there was no reasoning given for the expansion of the plaintiff's abilities; and *United States v. Bohle* (1971) 445 F.2d 54, which followed up on the expansion of the prosecutor's ability to examine a defendant that was established in *Weiser*.

9/ *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1102.

10/ *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1116.

11/ *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1102.

12/ *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1113.

13/ This case really should be referred to as the *Smith* case, because the original litigation was the defendant Ernest Smith as the petitioner against W.J. Estelle, the director of the Texas Department of Corrections; however, in later cases, it is referred to as *Estelle*.

14/ Brakel, Samuel Jan & Brooks, Alexander D. (2001), Law and Psychiatry in the Criminal Justice System, William S. Hein Publishing. p. 272.

15/ *Estelle v. Smith* (1981) 451 U.S. 454, 457-459.

16/ *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1103.

17/ In a really amazing display of intellectual dishonesty, the Court in *Fisher* claimed that a person's tax records that were in his lawyer's hands were not "private papers," because they were not in the person's possession. *Fisher et al. v. United States et al.* (1976) 425 U.S. 391, 414.

18/ The obvious question is, "Why didn't the trial court appoint an expert pursuant to Penal Code section 1027, a statute specifically designed for a not guilty by reason of insanity plea?" That was done and two presumably neutral doctors were appointed. However, that wasn't good enough for deputy district attorney, and feeling the perceived power of Penal Code section 1054(b)(1), in January 2010, shortly after the enactment of Penal Code section 1054(b)(1), the deputy district attorney filed a motion to subject Mr. Sharp to an examination by a prosecution expert. *Sharp v. Superior Court* (2011) 191 Cal.App.4th 1280, 1285-1286.

19/ The *Sharp* court discusses the objective of Penal Code section 1027 as being to have neutral doctors, citing *People v. Carskaddon* (1932) 123 Cal.App. 177 and *People v. Lines* (1975) 13 Cal.3d 500 to support the proposition. *Sharp v. Superior Court* (2011) 191 Cal.App.4th 1280, 1291.

20/ *Sharp v. Superior Court* (2011) 191 Cal.App.4th 1280, 1286.

21/ *Maldonado v. Superior Court* (2010) 184 Cal.App.4th 739, 749, REMEMBER THIS CASE IS UNDER REVIEW AND CANNOT CURRENTLY BE CITED.

22/ *Maldonado v. Superior Court* (2010) 184 Cal.App.4th 739, 760.

23/ *Maldonado* provides an example of smart thorough lawyering on the part of the trial lawyer litigating to limit Penal Code section 1054.3(b)(1). That attorney, Paul DeMeester, is also the appellate attorney on the case. After objecting to and losing the issue of the examination pursuant to Evidence Code section 730, he then filed a pleading to limit the examination and safeguard the procedure for the examination. Among other thoughtful and creative restrictions, DeMeester moved for specific constitutional safeguards, such as the examination being videotaped and the lawyer being in the next room and watching the examination as it happened.

24/ In order for this limiting strategy to work, you must direct your neuropsychologist to not discuss the case or give personality tests such as the MMPI. There is no need for either, in order to obtain neuropsychological data.

25/ These are very reasonable safeguards. In a capital case in Riverside County, *People v. Cebreros* RIF120947, William Dittmann, my *Keenan* counsel on the case, persuaded Judge Michele Levine to order that our client's examinations (despite our efforts, there were

two) be videotaped with us outside the room watching it on a monitor with the ability to object to any questions and have such questions not answered or stop the examination. However, the judge made clear that if she did not agree with our reasoning for having our client refuse to answer a question or continue the examination, that she would strongly consider letting it come before the jury that questions were not answered or that the examination was halted by us before it was finished. We did object to, and in turn, our client refused to answer, some questions and Judge Levine did determine that they were all appropriate objections and refusals, based on her orders limiting the examinations.

26/ *Alexander v. United States* (1967) 380 F.2d 33, 38.

27/ *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1110-1111, citing *Doe v. United States* (1988) 487 U.S. 201, 209-211, in turn citing *Schmerber v. California* (1966) 384 U.S. 757, 765 (forcing a defendant to give a blood sample held to be constitutional); *Gilbert v. California* (1967) 388 U.S. 263, 266-267 (forcing a defendant to give a handwriting exemplar held to be constitutional); *United States v. Dionisio* (1973) 410 U.S. 1, 7 (forcing a defendant to give a voice exemplar held to be constitutional); *United States v. Wade* (1967) 388 U.S. 218, 221-222 (forcing a defendant to stand in a lineup held to be constitutional); and *Holt v. United States* (1910) 218 U.S. 245, 252-253 (forcing a defendant to wear particular clothing held to be constitutional).

28/ *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1112.

29/ Sharp v. Superior Court (2011) 191 Cal.App.4th 1280, 1993, REMEMBER THIS CASE IS UNDER REVIEW AND CANNOT CURRENTLY BE CITED.

30/ Diagnostic and Statistical Manual of Mental Disorders–IV Test Revision (TR). (1994). American Psychiatric Association.

31/ Penal Code section 190.3(k) reads as follow: "Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." In *Boyde v. California* (1990) 494 U.S. 370 (citing the analysis of *Blystone v. Pennsylvania* (1990) 494 U.S. 299) the United States Supreme Court found that it is this portion of the California capital punishment law that in part makes the death penalty constitutional, because it allows for any mitigating factors to be presented to the jury.

32/ *People v. Mickle* (1991) 54 Cal.3d 140 is the California Supreme Court case on point, but this is also supported by federal constitutional authority in *Mills v. Maryland* (1988) 486 U.S. 367 and *Eddings v. Oklahoma* (1982) 455 U.S. 104.

33/ MacCat–CA; Poythress et al., 1999.

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Sections I, II, III, IV, VI, VII, X, XI and XII were written entirely or in part by Dr. Wood. Sections V, XIII, IX and XIII were written entirely by Deputy Public Defender Addison Steele as a training and strategy tool for criminal defense attorneys only. Should a defense attorney hire Dr. Wood and the prosecutor demand a copy of all articles written by her, only sections I, II, III, IV, VI, VII, X, XI and XII should be turned over.

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