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Presentence Investigation(PSI) Report Critique:

Mitigation as Counter Strategy in a Child-Pornography Cases

Seminar Outline

I. **Introduction**
II. **Why is this CLE important?**
III. **What is the PSI**
IV. **What is missing from the PSI?**
V. **Evaluation tools**
VI. **Mitigation Challenges**

I. Introduction: Mitigation Areas

- Sex Crimes (Adam Walsh Act CLE)
- White Collar Crime
- Complex Trauma
- Borderline Personality Disorder Diagnosis
- Criminal Immigration
- Difficult Client

Free Sample Report

Send an email to marksilver1@cs.com

- Put the word “CPsample” (child pornography sample mitigation case)
- Put the word “webcampornsample” (webcam pornography sample mitigation case)
- Put your name, address, etc. so I know it is not spam and so I know you are an attorney

BOOK RECOMMENDATIONS

Handbook of Mitigation in Criminal and Immigration Forensics: Humanizing the Client Towards a Better Legal Outcome.

SIXTH Edition. 2017

Criminal Mitigation Case Studies for Criminal Defense Lawyers: Strategies for Pre-plea and Pre-sentencing. 2018.

II. Why is this CLE Important?
Shift in Power

- There has been a major shift in power from the tripartite system of judge, prosecutor and defense lawyer to a unilateral system in which the prosecutor acts as prosecutor, judge, and jury while the judge twiddles his thumbs bored in an empty courtroom.
- This has had a major impact on evidence. Law school requires an entire course on evidence for good reason. However, today evidence cannot be fairly examined in a court of law because the cost and risk of going to court is just too high for the defendant.
- Paradoxically, *hearsay evidence* found in the PSI and mitigation reports have become crucial sources of information for determining sentencing.
- Understanding this shift in power is crucial in the advocacy process.

Trial Penalty

- The criminal justice system has been turned into a guilty plea factory
- So powerful is this penalty that even innocent persons will succumb to the threat of a worse outcome if they dare to risk the fundamental Sixth Amendment right to a trial
- The national Registry of exonerations has now identified 404 of 2200 cases in which individuals later determined to have been innocent had entered a guilty plea rather than face trial.
- www.law.umich.edu/special/exoneration/Pages/about.aspx
- Evidence is no longer important so discovery is unimportant so appeals are not possible

See -Norman L. Reimer. *The Trial Penalty: The Sixth Amendment on the Verge of Extinction and How to Save It.* The Champion May 2018 vol. XLII No. 4, p. 9-10.

III. What is a PSI?

After a defendant enters a plea of guilty to a federal offense or is convicted by trial, he or she will meet with a probation officer. Typically at the initial meeting, the probation officer from the Federal Bureau of Prisons will conduct an interview with the defendant to gather the follow information:

- family history,
- community ties,
- education background,
- employment history,
- physical health,
- mental and emotional health,
- history of substance abuse,
- financial condition, and
- willingness to accept responsibility for his or her offense(s).

PSI Supporting Evidence

During the presentence investigation, a probation officer will interview other persons who can provide pertinent information, including the prosecutor, law enforcement agents, victims, mental health and substance abuse treatment providers, and the defendant's family members, associates and employer. The officer will also review documents, which may include, court dockets, indictments, plea agreements, trial transcripts, investigative reports from other law enforcement agencies, criminal history records, counseling and substance abuse treatment records, scholastic records, employment records, and financial records.

Home Visit

When possible, the probation officer conducts a home visit to meet the defendant and the defendant's family at his/her residence. During the visit, the officer interviews the family and assesses the defendant's living conditions and suitability for potential supervision conditions, such as location monitoring.

Presentence Report

- It is the responsibility of the probation officer assigned to a presentence investigation to assist the court by verifying, evaluating, and interpreting the information gathered, and to present the information to the court in an organized, objective presentence report.
- Another important part of the preparation of a presentence report involves the probation officer's investigation into the offense of conviction including the defendant's involvement in any similar or uncharged criminal conduct, the impact of the offense on the victim(s), and the sentencing options under the applicable federal statutes and United States Sentencing Guidelines.
- The presentence report helps the Court fashion appropriate and fair sentences and is used by probation officers later assigned to supervise the offender. The supervision officer uses the information contained in the presentence report as part of a comprehensive approach to assess risks posed by, and the needs of, offenders under supervision.
- The report is also disclosed to the defendant, defense attorney and prosecutor, who have the opportunity to make objections or seek changes to the presentence report through a formal process established by the Federal Rules of Criminal Procedure.

Sentencing

- Probation officers conducting the presentence investigation and preparing the presentence report play an integral role in the federal sentencing process.
- Although practices differ among the various districts, a probation officer may, at the conclusion of a presentence investigation, work with his or her supervisor to formulate an appropriate sentencing recommendation that will be provided to the court. The officer must be prepared to discuss the case with the sentencing judge, to answer questions about the report that may arise during the sentencing hearing, and on rare occasions to testify in court as to the basis for the factual findings and guideline applications set forth in the presentence report.
- After sentencing, these presentence reports are utilized by the Bureau of Prisons to designate the institutions appropriate for an offender to serve their sentences, to select prison programs to help the offenders, and to develop case plans for their custody and eventual release. A presentence report is also forwarded to the U.S. Sentencing Commission, which uses the report to monitor the application of the U.S. Sentencing Guidelines and to gather statistics about sentencing trends.

IV. Almost all PSI's miss out on crucial information

PSI's tend to appear professional and yet there is a dearth of missing information:

- Misleading, incomplete, insufficient sections / information
- Lack of empathy
- Good Deeds
- Psycho-social information
- General mental health information
- Family
- Environment / community ties
- Cultural sensitivity
- Willingness to accept responsibility
- **Mitigation**

Misleading, incomplete, insufficient sections / information

- Half truth is no truth at all
- I sometimes look back the PSI after the mitigation report is complete and just stare in disbelief that the two reports are about the same person

Lack of Empathy

- The omission of empathy is also the omission of humanization. That is, it is crucial to humanize the client to explain various aspects of the client's psychosocial background so that the judge or prosecutor will be able to identify with the major challenges, traumas, and stressors that that individual has encountered
- This is not easy to accomplish, and requires a combination of objective information, subjective perspective, and clinical know-how.

Good Deeds

- It is crucial to include all good deeds, and charity work, volunteer work, positive membership to churches and other organizations, in an effort to explain that the client's behavior in the community reflects good deeds in general.

Psycho-Social information

- Sometimes the PSI looks like a background check for a job interview rather than a psychosocial history.
- The psychosocial history is absolutely crucial in uncovering any and all background information that better explains how the client got to be in his or her current situation.
- In a sense, psychosocial information is mitigation in and of itself because it better explains the client's decision-making, thoughts, feelings, and so on.
- The psychosocial information is not supposed to be solely concrete in nature, but individual in nature.

General Mental Health Information

- I have never seen a criminal case without mental health issues.
- Mental health issues can be overt, subtle, chronic, acute, and the criteria and symptoms of each problem need to be explained.
- Emotional health, not just psychiatric diagnoses
- Clients often have a history of mental health problems that existed at one point and do not exist now, such as childhood trauma.
- Personality Disorders are almost always missed. See CLE on Borderline Personality Disorder.

Family

- Family development, context, familial contacts, dependence, and hardship issues remain crucial mitigating factors.
- Eg, second generation Holocaust survivors

Environment / Community

- So many of our clients have grown up in deprived socio-economic neighborhoods with violence, poverty, racism, and systemic abuses.
- Clients who have enjoyed a strong middle class background who do not have their environments investigated fully for the possibility of unseen trauma. See White Collar CLE.

Cultural Sensitivity

- Culture !!
- Family and community and ethnicity

Willingness to accept responsibility

- Remorse
- Regret
- contrition
- Fully and completely

Mitigation

- Separate CLE
- Absolutely crucial
- The new Gideon v. Wainwright

V. What evaluation tools are available?

- Neuro-psychological evaluation
- Psycho-sexual evaluation
- Psychological evaluation
- Psychiatric evaluation
- Social work evaluation
- Medical evaluation
- Psychodynamic evaluation
- **Mitigation evaluation**

Neuro-Psychological Evaluation

Advantages:

- May be based on a wide range of investigative tools that provide an objective sense of the issues.
- To possibly rule out organically based issues

Limitation:

- The questionnaires and research tools used to evaluate the client often miss nuanced mental health issues and psychosocial background subtleties.

* As distinct from a neurologist who can tell you very little without a scan, which is read by a radiologist.

Psycho-Sexual Evaluation

Advantages:

- Sexual development is often relegated to the backbench, so that a psychosexual evaluation to examine specific issues can be quite helpful. Particularly turmoil during adolescence.

Limitations:

- Normal developmental phenomenon is often mistakenly pathologized by the Judge or prosecutor.

Psychological Evaluation

Advantages:

- Psychological evaluations tend to focus on conscious behavior.

Limitations:

- Psychological evaluations may omit a fuller consideration of emotional issues as understood in the context of development, family, environment, and community, and below the level of consciousness.

Psychiatric Evaluation

Advantages:

- A mental health evaluation by a physician. Best when the psychiatrist has a forensic background.
- Patterns of pathology
- Personality Disorder Issues
- Paranoid conditions and delusional systems are often undetected bc subtle and well-guarded by the person

Limitations:

- Miss or under-value or neglect social / community issues.
- About two thirds of all psych medications are prescribed by non-psychiatrists.
- The vast majority of non-pharmaco-therapy is provided by non-psychiatrists.

Social Work Evaluation

Advantages:

- Holistic, systemic bio-psychosocial evaluation and integrative. Best to counter to the PSI history.
- Cultural sensitivity

Limitations:

- Psychopathology is regarded as secondary to the client's family and community context.

Medical Evaluation

Advantages:

- Medical evaluations are supposed to be holistic considering every aspect of healthcare.
- Endocrine and other systems that may cause aberrant behavior eg, hypothyroid, undetected brain tumor (neurological symptoms)

Limitations:

- There is a high rate of medical error in the United States, in a wide range of specialties.

Psychodynamic Evaluation

Advantages:

- systemic study of the psychological forces that underlie human behavior, feelings, and emotions and how they might relate to early experience. With special emphasis on the dynamic relations between conscious motivation and *unconscious motivation*.
- Can be extremely helpful in providing a humanistic understanding about feelings, privations and traumas, thoughts, aspirations, hopes, dreams, frustrations and life challenges, personal obstacles and stressors, ideals and values, confusion and disappointments, resentment and loss. Secure, safe, and stable in their lives
- Core insights and deeper, more comprehensive understanding
- Can tell us about judgment and decision-making

Limitations:

- Somewhat of a blur between normative and psychopathology.
- Generally not mainstream with psychiatrists.

Mitigation Evaluation

Advantages:

- In the memorandum of law presented by the lawyer for sentencing purposes it is crucial to interweave the criteria of 18 USC § 3553(a) into key mitigation factors outlined in the mitigation report. This will afford the prosecutor and judge to consider and understand the client's psychosocial issues as *legal mitigating factors*, rather than simply background information established for the sake of general argument.
- Criminal mitigation is not simply an effective tool for the sake of argument, but a necessary factual underpinning to support the factors in 18 USC § 3553(a) and other relevant case law.
- Post *Booker*, the Court now has unfettered discretion to consider any and all evidence at sentencing
- A wide range of arguments may now be considered and submitted at the sentencing phase
- With mitigation it is possible to show the signs, development, and even symptoms of psychopathology without the diagnosis itself or the label

Disadvantages:

- Rarely used

VI. Mitigation Challenges

Mitigation is a bio-psychosocial evaluation of the client's social and psychological history informed by the facts of the criminal case with appropriate recommendations as a means to minimize the negative legal outcome either in court **or with a prosecutor.**

Mitigating circumstances reduces the degree of moral culpability or blame which in fairness, sympathy, or mercy may lead to a more favorable outcome for the defendant.

Services Providers

- In 2012, the American Bar Association (ABA) House of Delegates adopted resolution 107C, which “formally urges criminal defense attorneys to address clients’ civil legal and nonlegal problems to linkages with other service providers.” The report accompanying the resolution “makes it clear that all defense lawyers are required to provide comprehensive representation,” including using “other service providers,” likes social workers, when appropriate.

Using Two Experts

- Consider bifurcation of tasks as a strategic tool. Eg, SV-20.
- Neuropsychological evaluations tend to be the most helpful for mitigation experts
- Experts can balance or complement one another

WHEN? Early - to avoid biases and to eliminate false assumptions

- Mitigation should be done as early as possible so that the report can precede the PSI and be available for review by the probation officer, as background information ***before*** the PSI is formulated.
- The same strategy can be employed with regard to the prosecutor. That is, before the prosecutor forms biases and prejudices against the client the prosecutor can read the mitigation report and become disabused of assumptions that may be false or not fully held by fact.
- It's never too early and it's never too late to use mitigation

Purpose of Mitigation

- Humanize client through a sympathetic narrative
- Induce empathy for the reader
- Document client's life history
- Contextualize client's conduct
- Stress family's physical, psychological, and financial hardships
- Illustrate client's community, educational, employment ties
- Express client's remorse & regret

Purpose of Mitigation Con’t

- Professional expression can replace self-expression
- Not just a mental health report
- Single document theory
- Disabuse parties of bias and prejudice
- Dispel nonexistent patterns
- Peace offering
- Counter the the government's presentence report
- Conceptual /strategic consult

PSI evaluators are not clinicians

- PSI evaluators are not clinicians and they are also not social workers
- Mitigation serves to integrate various reports, documents, and also serve as a clinical expert evaluation to counter the PSI.

Bias and Prejudice in Child Pornography Cases

- Similar to white collar case
- The client is a monster, false assumptions, “unforgivable”
- disabuse biases, anger, and hostility (mitigation as neutral third party offer)
- Animus towards others, Not evil, ie, not bad, but misunderstood or ill…
- Aberrant decision, rarely in these cases
- Misguided error in judgment / behavior… perhaps
- Diminished capacity due to life stressors
- Cumulative assessment

Prepare the Client

- Right frame of mind
- Eliminate anger and defensiveness
- Show contrition
- Allow for trust
- Be honest
- Have client see the mitigation expert early to prepare the client psychologically and emotionally for the PSI interview and get the jitters out of the way

Clients Who Most Benefit

- Mental health problems
- Extreme hardships
- Childhood traumas / abuses
- Inter-family dependence
- Poor language, communication, social, self-care, adaptive, or executive skills
- Fear of authority
- Confluence of mental health & social deficits
- Case development & strategies

Mitigation Considerations, which may be absent in the PSI

- What did the client's past look like?
- What role did the client play?
- Will the client likely repeat this behavior?
- Will incarceration promote deterrence?
- What will promote justice and promote respect for the law?
- What will the client's experience be like in prison?
- Does he require educational, vocational, medical, or psychiatric assistance?
- What kind of rehabilitation is needed and has it already started?

Mitigation Considerations Con't

- Has the client accepted responsibility for his wrongdoing (remorse and regret), and what to extent?
- Has restitution already started? Is it possible?
- What is a fit punishment? Has the client already been punished?
- What is the least harsh alternative?
- Are there alternatives to jail that would better serve the client, family, or community?
- Who will be harmed or protected by incarceration?
- What are the family's needs?
- What will the client's future look like?
- What are the cumulative Mitigation factors?

Issues Explored

- Family-Systems Analysis
- Childhood Development
- Social Skills & Peer Rejection
- Sexual Development
- Hobbies & Interests
- Community Ties, Friends
- Education & Employment
- Finances & Poverty
- Military Service
- Self-care (ADL's)
- Drug & Alcohol History
- Violence, Abuses, Trauma, War
- Volunteer Community & Charity
- Arrests & Criminal History
- Languages - spoken/written
- Role & Communication
- Legal Issues
- Religious Devotion
- Support System/Caregivers
- Cultural Issues & Role Models
- Mental (DSM) & Medical Health
- Racism & Prejudice

The Ten “R’s” of Mitigation

- Reality - facing a full narrative
- Rhea- mens rhea / intent / volition
- Recency- when did the crime occur
- Repetition - examine client's overall record
- Rung - what level of seriousness is involved
- Restorative - has the client righted the wrong
- Rehabilitation - client has, can, or will change
- Remorse / Regret - does the client understand and accept his actions
- Roles – community role and behavior in crime
- Recommendations - what can be fixed who can be helped

THANK YOU !