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AUTISM IS NOT A TRAGEDY... IGNORANCE IS: SUPPRESSING EVIDENCE OF ASPERGER'S SYNDROME AND HIGH-FUNCTIONING AUTISM IN CAPITAL TRIALS PREJUDICES DEFENDANTS FOR A DEATH SENTENCE

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A jury is an unpredictable group. Each of the twelve jurors on a case could have a different and separate reason for reaching a verdict. The jury in each criminal case is asked to determine the guilt or innocence of a defendant, and in some cases that guilty verdict could lead to a death sentence for the accused. With a person's life at stake, the criminal justice system should take every possible precaution to make sure the jury is properly informed (while not misled) to make this decision. If a defendant suffers from mental deficiency or diminished capacity, relevant evidence in that regard must be presented to the jury for the twelve jurors to reach a properly informed decision. Evidence of mental deficiency or disability can be relevant to defendant's mental culpability - *mens rea* - for the crime, but these defects or disorders also explain a

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defendant's mannerisms and responses, both outside of court, and in full view of the judge and jury. For this reason, jurors should always be allowed to view or hear evidence that relates to a defendant's mental defect, disorder, or disability. Particularly in cases involving social disorders such as Asperger's Syndrome ("AS") and High-Functioning Autism ("HFA"), introducing the diagnosis to the jury could explain why the Defendant had particular reactions to other witnesses or victims before, during, or after the crime and why the defendant seems to lack remorse or normal social functioning in the courtroom. Without knowing and understanding a defendant's mental disorder, the jurors could misinterpret the defendant's social actions or lack of remorse as evidence of guilt.

I. MENTAL/SOCIAL DISORDERS

A number of mental/social disorders are closely related to and are parts of autistic spectrum disorders, including autism, HFA, AS, Deficits in Attention Motor Control and Perception ("DAMP") syndrome, and other disorders that are based purely on observable behaviors.¹ These disorders are complex and new research regarding these disorders is surfacing constantly. Many of these disorders are related; one disorder could be mistaken for another, or an individual could be suffering from more than one of these or related disorders at the same time.²

Asperger's Syndrome and HFA have been characterized as milder forms of autism, but each disorder varies widely in degree.³ Characteristics of AS include social isolation, oddness, obsessive special interests, eccentric or pedantic use of language, physical clumsiness, and sensory

¹ Maria Rhode, *Asperger's Syndrome: A Mixed Picture*, 31 PSYCHOANALYTIC INQUIRY 288, 288 (2011); Lotta Dellve, Lars Cernerud, and Lillemor R.-M. Hallberg, *Harmonizing Dilemmas: Siblings of Children with DAMP and Asperger Syndrome's Experiences of Coping with Their Life Situations*, 14 SCAND J CARING SCI 172, 172 (2000).

² Rhode, *supra* note 1, at 288.

³ *Id.*

hypersensitivity.⁴ For example, a coin collector who lives for his hobby, has no close friends, feels overwhelmed by bright lights and loud noises, has difficulties communicating with people, and is bewildered by social cues would fit the typical profile of a person suffering from AS or HFA.⁵

A problem arises in the court system when dealing with defendants who suffer from AS. First, the disorder is widely misunderstood by the general population and by most jury members. The disorder also varies in degree from person to person and there is no way to objectively measure such degrees as this disorder is based purely on observable behaviors.⁶ While low-functioning Autism will almost undoubtedly qualify a defendant as intellectually disabled and incompetent to stand trial, AS and HFA likely will not.⁷ The overlap between autism and mental retardation seems obvious, but courts in capital punishment states routinely hold there is no such correlation.⁸ The Supreme Court of Florida has held that while a diagnosis of AS serves purposes for mitigation, AS is considered a mere “mental illness [and] does not serve as a bar to execution.”⁹ The court’s decision was rendered in a case involving a defendant with AS, who was only eighteen years old and had the developmental and emotional age of twelve to thirteen.¹⁰ Louisiana has even included in its state law that a diagnosis of autism is not equivalent to a finding of mental retardation.¹¹ With courts making blanket decisions about AS and whether or not it rises to the level of mentally retarded, the need increases for the

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ Nita A. Farahany, *Cruel and Unequal Punishments*, 86 WASH. U. L. REV. 859, 896-97 (2009) (citing Eric Fombonne, *Epidemiology of Autistic disorder and Other Pervasive Developmental Disorders*, 66 J. CLIN. PSYCHIATRY 3, 4 (Supp. 10) (2005)) (Almost 70% of persons suffering from a disorder under the autistic spectrum meet the diagnostic medical criteria to be classified as mentally retarded, and 30% do not.).

⁸ Farahany, *supra* note 7, at 898.

⁹ *Schoenwetter v. State*, 46 So. 3d 535, 563 (Fla. 2010).

¹⁰ *Id.* at 543-44.

¹¹ LA. CODE CRIM. PROC. ANN. art. 905.5.1(H)(2)(a) (2008).

public, especially jurors, to be aware of AS, its symptoms, and how it affects behaviors and thoughts.

II. PSYCHIATRIC EXPERT TESTIMONY

Many courts have excluded evidence of psychiatric experts involving AS and HFA claiming any probative value would be substantially outweighed by the danger of confusing the jury causing members of the jury to speculate on how the disorder affected the defendant.¹² However, when the jury does not have this information, the jurors are left to assume the defendant has a normal brain which is socially functional. This situation actually creates a higher danger of juror confusion, because many social mannerisms exhibited by a person suffering from AS or HFA are very similar to reactions associated with a guilty mind.

If a defendant looks down at the table during the entire trial, jurors could interpret it to mean the defendant is ashamed and cannot bear to face the victims, witnesses, attorneys, or judge. In reality, looking down at the table may be something very common for persons with AS or HFA because isolation is a characteristic of both disorders.¹³ A jury lacking knowledge of the defendant's mental conditions is very dangerous for the accused, who could be unfairly viewed in a different light just because of the mannerisms that are symptoms of these mental conditions. There is no existing danger, as prosecutors argue, in equipping the jury with relevant facts about the defendant's mental conditions. The danger of prejudice lies with *not* introducing the evidence.

Reports have found persons suffering from AS or HFA have a greater history of violent behaviors¹⁴ and a greater tendency toward violent crime, including murder.¹⁵ Several different hypotheses have been suggested to explain the association of AS with violent crime, including "lack of

¹² *Minnesota v. Anderson*, 789 N.W.2d 227, 235 (Minn. 2010).

¹³ Rhode, *supra* note 1, at 288.

¹⁴ M. R. Woodbury-Smith, *High functioning autism spectrum disorders, offending and other law-breaking: findings from a community sample*, 17 J. FORENSIC PSYCHIATRY & PSYCHOL. 108 (2006).

¹⁵ D. M. Schwartz-Watts, *Asperger's disorder and murder*, 33 J. AM. ACAD. PSYCHIATRY & L. 390, 390 (2005).

empathy, social naiveté, excessive interests getting out of control,” and sexual preoccupations.¹⁶ However, this evidence does not prove having AS or HFA equates to a lack of intent. Expert psychiatric evidence would give the jury better insight into how the individual’s mind operates on a daily basis. The jury would still be free to determine, using the evidence presented, whether the defendant acted with the requisite intent. No expert can testify as to whether a person is guilty of a crime. This determination has always been and will be left to the jury.

Most states require the prosecution to prove intent to kill as an element of a murder conviction, and the jury must consider the defendant’s subjective state of mind to determine beyond a reasonable doubt whether that requisite intent existed at the time of the crime.¹⁷ In states that do not recognize the doctrine of diminished capacity, the jurors are left to speculate as to the mental state and brain functioning of a defendant whose mental state falls just shy of qualifying for an insanity defense. Minnesota courts, in particular, have held that psychiatric testimony cannot be used to disprove a defendant’s subjective state of mind – at the time of the crime – during the guilt phase of trial.¹⁸ “Without the doctrine of diminished capacity, an offender is either wholly sane or wholly insane, and criminal liability cannot be based on the degree of sanity an offender possesses.”¹⁹ However, as most psychiatrists would agree, mental health is not a black or white issue, but operates along a continuum,²⁰ yet this black or white/sane or insane decision is left up to a lay jury as it tries

¹⁶ Stewart S. Newman & Mohammad Ghaziuddin, *Violent Crime in Asperger Syndrome: The Role of Psychiatric Comorbidity*, 38 J. AUTISM & DEV. DISORDERS 1848, 1849 (Nov. 2008) (citing Y. Kohn, et. al., *Aggression and sexual offense in Asperger’s syndrome*, 35 ISRAEL J PSYCHIATRY 293 (1998)).

¹⁷ PAUL H. ROBINSON, CRIMINAL LAW 140-41 (1997).

¹⁸ *Minnesota v. Anderson*, 789 N.W.2d 227 (Minn. 2010) (citing *Minnesota v. Peterson*, 764 N.W.2d 816, 821-22 (Minn. 2009); *Minnesota v. Bird*, 734 N.W.2d 664, 677-678 (Minn. 2007); *State Minnesota v. Provost*, 490 N.W.2d 93, 104 (Minn. 1992); *Minnesota v. Brom*, 463 N.W.2d 758, 763-64 (Minn. 1990); *Minnesota v. Jackman*, 396 N.W.2d 24, 29 (Minn. 1986).

¹⁹ *Anderson*, 789 N.W.2d at 237.

²⁰ *Minnesota v. Bouwman*, 328 N.W.2d 703, 706 (Minn. 1982).

to decide the mental state of a defendant without proper expert evidence on the issue. Determining the subjective mental state of the defendant without the aid of an expert seems challenging at best. Add on the fact that the defendant might be exhibiting unexplained, odd, and guilty-looking mannerisms, and the task approaches impossibility.

III. THE M'NAGHTEN TEST FOR INSANITY

Most jurisdictions use some variation of the M'Naghten test to determine whether a defendant is insane for purposes of trial. This test comes from an English case in 1843 in which the House of Lords held that the defendant would be able to assert an insanity defense if, "at the time of committing the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it, [he] did not know he was doing what was wrong."²¹ Therefore, if the defendant failed to know that what he was doing was either wrong or illegal or did not know the nature and quality of his act, he should receive a verdict of not guilty by reason of insanity. This M'Naghten Rule addresses awareness, an essential component of *mens rea* or intent, but awareness alone cannot suffice to fully explain a defendant's mental state. The human mind is a complex system of many mechanisms a lay jury could not be expected to comprehend. What if the mechanism that separates the knowing from the acting, the feedback loop, is the mechanism impaired?²² Assessing a defendant's awareness is not enough to understand his mental state.²³

"For defendants whose mental illness manifests itself by an inability to self-govern, it is unjust that their knowledge of the act's guilty nature denies them reprieve."²⁴ Schwarz describes how intent formation, having the express purpose of committing the crime, and awareness of the illegality of the

²¹ ROBINSON, *supra* note 18, at 512 (citing M'Naghten's Case, 8 Eng. Rep. 718, 722 (1843)).

²² Charlotte Schwarz, *Irreconcilable Differences: Mens Rea and Mental Illness*, 20 WRITING IN & ABOUT MED. 41, 44 (Spring 2009).

²³ *Id.*

²⁴ *Id.*

crime, work in a feedback loop, but each is neurologically distinct.²⁵ This creates a fundamental asymmetry between law and medicine, as the law seeks to analyze guilt.²⁶ Situations that are more grey than black and white must be explained by an expert before any layperson on a jury can begin to understand the concepts at issue.

The underpinnings of such neurological and psychiatric diagnoses as AS and HFA are complex neural systems which remain at odds with M'Naghten's one-dimensional constraint to deliver an unequivocal verdict, and the gradients of mental illness are overlooked, resulting in a forced conformity.²⁷ In a society where death is still a viable punishment for crime, every level of mental illness must be examined during trial. The jury can still weigh the facts before them, but justice requires that the jury have *all* of the facts relevant to guilt. State prosecutors will argue that introducing evidence of mental illnesses that do not rise to the level of insanity might cause the jury to associate the mental illness with a lack of intent, but the jurors are left to weigh those facts. If our justice system leaves any room for error, that error should be on the side of life.

IV. IN MINNESOTA V. ANDERSON, A MINNESOTA COURT SUPPRESSED EVIDENCE OF ASPERGER'S SYNDROME

In *Minnesota v. Anderson*, Minnesota courts denied expert testimony which would have established that the defendant was suffering from AS and suppression of this testimony stripped Anderson of a fair trial.²⁸ Minnesota state courts have held that introduction of probative psychiatric testimony is overshadowed by the risk of confusing juries as to the legal elements of intent and premeditation, and that legal definitions of each are outside of a psychiatrist's practice.²⁹ However, in Anderson's case, and likely many

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Minnesota v. Anderson*, 789 N.W.2d 227, 234 (Minn. 2010).

²⁹ Brittany E. Bachman, CRIMINAL LAW: SUBJECTIVE INQUIRY INTO A DEFENDANT'S STATE OF MIND: SHOULD PSYCHIATRIC EXPERT TESTIMONY BE ALLOWED TO DISPROVE MENS REA?-- MINNESOTA V.

other similar cases, defense attorneys sought to introduce evidence of AS to help the jury understand how the disorder affected many parts of Anderson's life.³⁰

The suppressed expert testimony would have explained that AS impairs an individual's ability to socialize, communicate, empathize, or understand and respond properly to social cues,³¹ and persons with AS lack an understanding of what is socially acceptable.³² The court in *Anderson* believed that this was lay evidence, and that the jury could determine this type of general information without the help of an expert.³³ Both AS and HFA are rare, complex, and misunderstood disorders. Expert testimony would be absolutely necessary to avoid juror confusion, yet the state's attorney argued the evidence would lead to exactly that. As the jurors viewed Anderson's demeanor and facial expressions, they had no way of knowing these reactions were a result of his disorder. The judge even said to Anderson: "You have shown no remorse, no empathy, and I have no sympathy for you."³⁴ The jurors would have surely perceived Anderson differently if they had known of his inability to empathize and respond to social cues. Suppressing such evidence was clear error and unfairly prejudiced Anderson during his trial.

Persons affected by AS or HFA have an odd, pedantic manner of speaking³⁵ and poor nonverbal communication.³⁶ As Anderson's attorneys argued, although it fell upon deaf ears, these symptom-driven actions and mannerisms, both in the courtroom and in his behavior toward witnesses around the time of the event, can and will look negatively upon the defendant. Anderson's appearance was described as odd and

ANDERSON, 789 N.W.2d 227 (Minn. 2010), 38 WM. MITCHELL L. REV. 491, 503 (2011).

³⁰ *Anderson*, at 227.

³¹ *Id.* at 235.

³² *Id.* at 233.

³³ *Id.* at 233-34.

³⁴ Bachman, *supra* note 30, at 510-11.

³⁵ A. Klin, D. Pauls, R. Shultz & F. Volkmar, *Three diagnostic approaches to Asperger's syndrome: Implications for research*, 35 J. AUTISM & DEV. DISORDERS 221, 223 (2005).

³⁶ See L. Wing, *Asperger's Syndrome: A clinical account*, 11 Psychol. Med. 115 (1981).

scary, and this was unfairly prejudicial against him all because of his mental and social disorder. The expert testimony, if it had been admitted, would have allowed the jury to understand his appearance and actions.

V. A NON-TESTIFYING DEFENDANT IS STILL AT RISK WHEN EXPERT TESTIMONY IS SUPPRESSED

The argument for introduction of expert testimony remains even if the defendant does not take the witness stand to testify. The defendant sits at counsel table and is visible to the jury throughout the entire trial. Especially in cases where a death sentence could be imposed, juries are likely to observe the defendant closely in an attempt to find some type of justification in his behavior for the verdict they will render. Accordingly, first impressions are extremely important.

Just as a job applicant wants to put the best foot forward in the initial interview, a defendant needs to be free from a tainted first impression. The influences shaping a juror's thoughts and feelings about a particular case begin long before trial.³⁷ Indeed, "the decision-making process for a juror in any particular case begins as soon as the juror enters the courtroom and starts making assessments of the people and information that are presented."³⁸ Therefore, the defendant is being judged as soon as the jury members are walking through the door. This assessment will occur whether or not the defendant testifies.

Once the guilt phase of trial is completed, most states have much more lenient evidence rules with regard to mitigating factors. There is a lower burden of proof for mitigating factors, and relevance, as a hurdle to admissibility, in a capital case is lower in the sentencing phase than at any other time or any other type of trial. However, even when evidence of AS or related disorders is admitted during the sentencing phase of trial for mitigation purposes, the attempt to explain behavior is too little, too late. By the sentencing phase of trial, the jurors have already sat through many hours

³⁷ Richard C. Waites, *Are Jurors Equipped to Decide the Outcome of Complex Cases?*, 29 AM. J. TRIAL ADVOC. 19, 29 (2005) (citing Richard C. Waites, *COURTROOM PSYCHOL. & TRIAL ADVOC.* 535-37 (2003)).

³⁸ *Id.*

of trial, and they have already made up their minds as to the defendant's guilt. The picture of the defendant is firmly situated inside the jurors' minds, and any alternative explanation for the defendants' behavior is likely futile.

Another scholar of jury decision making conducted a study of capital trial jurors and premature decision making. What he found was quite telling. "One half of the capital jurors take a stand on the defendant's punishment before they even see the full inventory of evidence, of arguments, and of instructions for making the punishment decision."³⁹ Furthermore, those jurors who do take an early stand "are absolutely convinced of their early stands and stick with them consistently thereafter."⁴⁰ The same scholar also noted that even during the penalty phase deliberations, "the same inability, or unwillingness, to keep the decisions separate appears to allow jurors to justify a death sentence simply by pointing to the evidence of the defendant's guilt."⁴¹ Therefore, not only is it too late by the sentencing phase to change jurors' minds, but the jurors will also point back to the fact that he was guilty in order to justify their sentencing decisions. Thus, the defendant's uphill battle only steepens as the trial progresses. Opponents might argue juries are specifically told not to decide on punishment before the sentencing phase and are asked if they will keep an open mind throughout the trial, but studies show that regardless of how the jurors answer that question, one half have already made up their mind and will stick with that conclusion until the end.

Danger also exists in the defense looking like they are grasping at straws and trying to find any and every little thing to excuse the defendant's behavior. A juror might wonder why mental condition is even being raised, because if it was an important fact, then it would have been raised earlier during

³⁹ William J. Bowers, Marla Sandys, & Benjamin D. Steiner, *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, and Premature Decision Making*, 83 CORNELL L. REV. 1476, 1529 (1998).

⁴⁰ *Id.* at 1529.

⁴¹ Ursula Bentele & William J. Bowers, *How Jurors Decide on Death: Guilt Is Overwhelming; Aggravation Requires Death; and Mitigation Is No Excuse*, 66 BROOK. L. REV. 1011, 1019 (2001).

the guilt phase. They may assume, therefore, mental condition is unimportant.

VI. IN EDWARDS V. ROPER, THE DEFENDANT WAS
DIAGNOSED WITH ASPERGER'S SYNDROME ONLY AFTER
HIS TRIAL

For some, the diagnosis of AS or other developmental disorders comes too late. That was the case for Kimber Edwards, who is currently sitting on "death row."⁴² Edwards was convicted of the first-degree murder of his ex-wife, and the trial court entered a death sentence in accordance with the jury's recommendation.⁴³ Prior to trial, Edwards was evaluated by three medical experts to determine whether he was competent to stand trial, and whether he had a mental disease or defect that could provide a defense or significant mitigating evidence.⁴⁴

All three experts determined Edwards was competent to stand trial; however, one of the experts, Dr. Cross, alerted the defense team that Edwards had a 25-point difference between his verbal and performance IQ scales which was indicative of a developmental disability.⁴⁵ Another expert, Dr. Stacy, diagnosed Edwards with a pervasive developmental disorder (not otherwise specified).⁴⁶ Yet, all three experts reached the same conclusion; the defendant was competent to stand trial and free from any mental disease or defect that could provide a defense or mitigation evidence. The findings of the experts and their conclusions seem to be at odds. No complete social history was formed, nor was a specific diagnosis given prior to trial.⁴⁷ Edwards' case continued with no evidence introduced of AS in either the guilt or penalty phase. He was convicted and received a sentence of death.⁴⁸

⁴² Missouri v. Edwards, 116 S.W.3d 511 (Mo. 2003).

⁴³ *Id.* at 520.

⁴⁴ Edwards v. Roper, No. 4:06-CV-1419, 2009 WL 3164112, at *4 (E.D. Mo. Sept. 28, 2009).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at *1-3.

The post-conviction team began investigations and again three medical experts were retained. Dr. Cross had been on the team of three that had examined Edwards prior to trial. The team was finally able to compile a complete social history of the defendant and diagnose him with AS.⁴⁹ Dr. Logan, an on-board expert, opined that evidence of AS could have been offered to explain Edward's abnormal demeanor and his inability to reach an amicable agreement with his ex-wife regarding child support and custody issues,⁵⁰ yet this evidence was not even offered during the penalty phase for purposes of mitigation.

The defense attorneys for Edwards' trial even noted abnormal behaviors during their representation. The entire defense team found it extremely difficult to communicate with the defendant, and he demanded that his lawyers pursue irrelevant, time-wasting inquiries.⁵¹ Edwards also threatened to withhold exculpatory information from his attorneys unless they satisfied his demands.⁵² His attorneys had to spend many hours wasting time and going through boxes of irrelevant material just to try to regain the defendant's cooperation.⁵³ Edwards even asked the court to remove his lawyers at various times through his trial.⁵⁴ These behaviors are similar to characteristics of AS. Edwards's special interest became the trial, and he obsessed and needed to control it. This obsession prejudiced his opportunity to receive a fair trial, and the jury heard no mention of any mental or social disorder.

The need for introduction of AS evidence was clear in Edwards's case, but the appellate court was left with little discretion to do anything about it. Edwards's post-conviction team tried to allege ineffective assistance of counsel, but to win on such an argument they were required to prove the attorney's conduct fell below an objective standard of reasonableness, and Edwards was prejudiced because of the failure.⁵⁵ To get past the first prong of this test the post-

⁴⁹ *Id.* at *4.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at *4 n.6.

⁵⁴ *Edwards*, 2009 WL 3164112 at *4.

⁵⁵ *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

conviction team would have to “show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.”⁵⁶ This is a high burden, and the post-conviction team’s argument for ineffective assistance of counsel was unsuccessful.⁵⁷

The defense team did a reasonable job with the facts they were given and the medical records at hand, and it is almost impossible to speculate how a diagnosis of AS would have affected the outcome of the case. There are very few capital punishment cases nationwide involving similar issues and the medical studies surrounding AS are relatively new. Thus it is of utmost importance juries be properly informed as to the defendant’s medical condition so as to give an informed and unprejudiced decision regarding the defendant’s guilt and corresponding sentence.

VII. DEFENSE ATTORNEYS CAN CHOOSE NOT TO INTRODUCE PSYCHIATRIC EVIDENCE AND THIS WILL BE DEEMED PROPER TRIAL STRATEGY

With the growing complexity of scientific data to be introduced during a capital trial, the need for expert psychiatric testimony increases. However, some defense attorneys have chosen either not to elicit an expert diagnosis and analysis or completely leave out expert psychiatric testimony altogether. The following cases illustrate how the decision by the attorney can negatively affect the case, but the courts are unwilling to classify such an attorney’s conduct as ineffective assistance of counsel.

⁵⁶ *Id.* at 694.

⁵⁷ *Edwards*, 2009 WL 3164112 , at *12-13.

A. JACKSON V. UNITED STATES

A potentially autistic North Carolina man was convicted of murder and sentenced to death in 1995.⁵⁸ In preparation for trial, the government issued written notice to the defense that the government would only seek to introduce mental health experts in rebuttal to those introduced by the defense team.⁵⁹ Upon review of the government's potential rebuttal evidence, the defense team decided to withdraw its notice of intent to introduce mental health experts.⁶⁰ The defense team also failed to elicit any further mental health evaluations concerning Jackson's childhood and development.⁶¹ This trial strategy was deemed proper and in no way rising to the level of ineffective assistance of counsel.⁶² In other words, if a defendant does not receive the proper mental evaluations before trial, he is probably just out of luck.⁶³

However, denying expert testimony has not been the only problem for defendants and their assistance of counsel.⁶⁴ In some cases, the defense team introduces very damaging expert testimony, and this is still proper trial strategy.

B. MORTON V. SECRETARY, FLORIDA DEPT. OF CORRECTIONS

In a Florida case, Alvin Morton received a sentence of death for two 1992 murders.⁶⁵ Upon appeal, Morton received a new sentencing hearing.⁶⁶ During his first trial, Morton had a

⁵⁸ Jackson v. United States, No. 4:06-CV-1419, 2010 WL 2775402, at *1 (W.D.N.C. July 13, 2010).

⁵⁹ *Id.* at 6.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Jackson v. United States, 638 F.Supp.2d 514, 599-600 (W.D.N.C. 2009).

⁶³ *See id.*

⁶⁴ United States v. Cronin, 466 U.S. 648, 665 (1984) (discussing counsel's lack of criminal trial experience, "Every experienced criminal defense attorney once tried his first criminal case[. . .] but it does not justify a presumption of ineffectiveness. . . .").

⁶⁵ Morton v. Sec'y, Florida Dept. of Corr., 684 F.3d 1157, 1162 (11th Cir. 2012).

⁶⁶ *Id.* at 1164.

psychiatric expert testify for mitigation purposes.⁶⁷ This expert testified that Morton had a mixed personality disorder with emotional instability.⁶⁸ After giving the diagnosis, the expert seemed to totally undermine Morton's plea for mercy.⁶⁹ The expert said Morton's "ability to develop into a more fully functioning individual was extremely limited,"⁷⁰ and that "given the state of the art and what we know, I would have a difficult time saying we could cure [Morton's] disorder."⁷¹

The expert went on to compare Morton's situation with that of a serial killer, which only made Morton look even worse to the jury.⁷² During the new sentencing hearing, Morton's attorney decided that even though the expert testimony did more harm than good, they would have the expert testify again at the second sentencing hearing.⁷³ Morton was again sentenced to die.⁷⁴ The appellate courts subsequently held that offering damaging expert testimony as to Morton's mental condition was proper trial strategy.⁷⁵

Again, these cases illustrate the importance of a correct diagnosis and helpful expert testimony.⁷⁶ Without these two things, a defense attorney's case is at a great disadvantage.⁷⁷

VIII. IN *PEOPLE V. MACKLEM*, PROSECUTORS REBUTTED EVIDENCE OF ASPERGER'S SYNDROME WITH IRRELEVANT BUT PERSUASIVE NEUROLOGICAL EVIDENCE

In *People v. Macklem*, the State of California originally sought the death penalty, but subsequently dropped the

⁶⁷ *Id.* at 1163.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 1164.

⁷⁵ *Id.* at 1163.

⁷⁶ See *Morton v. Sec'y, Florida Dept. of Corr*, 684 F.3d 1157 (11th Cir. 2012); *Jackson v. United States*, 2010 WL 2775402, at *1 (W.D.N.C. 2010).

⁷⁷ *Id.*

pursuit for a death sentence in the joinder motion to consolidate the murder of Macklem's ex-girlfriend and the assault upon his prison cellmate.⁷⁸ Macklem was diagnosed with AS as a juvenile.⁷⁹

At the age of 18, Macklem killed his ex-girlfriend, Sarah Beagle.⁸⁰ While awaiting trial, Macklem also attacked his cellmate with a PVC pipe.⁸¹ Luckily for Macklem, the trial court allowed expert testimony about AS in front of the jury.⁸² The expert was allowed to testify about Macklem's mental state and how AS affected a person's thinking and behaviors.⁸³ Unfortunately for Macklem, the prosecutors came up with a way to rebut this evidence and convince the jury that the AS evidence was, in essence, "hogwash."⁸⁴ The state offered psychological evidence that there were no neurological, structural, or functional abnormalities that would explain or affect the defendant's behavior.⁸⁵ Yet AS and similar disorders in the autistic spectrum are characterized and diagnosed purely by observable behaviors.⁸⁶ An absence of visible deformities or damage to the brain does not equate to the lack of mental disorder.

Medical scholar Charlotte Schwarz published an article in 2009 attempting to explain how jurors respond to different types of expert psychiatric testimony.⁸⁷ She noted that use of neuro-scientific data in courts is becoming more routine as psychiatry has shifted toward biological models.⁸⁸ New medical technology has produced functional magnetic resonance imaging (fMRI), an increasingly accessible scanning technique that measures changes in brain blood-oxygen levels

⁷⁸ California v. Macklem, 57 Cal.Rptr.3d 237, 243 (2007).

⁷⁹ *Id.* at 680.

⁸⁰ *Id.* at 679-81.

⁸¹ *Id.* at 681.

⁸² *Id.* at 684.

⁸³ *Id.*

⁸⁴ *Id.* at 685.

⁸⁵ *Id.*

⁸⁶ Rhode, *supra* note 1, at 288.

⁸⁷ Schwarz, *supra* note 22.

⁸⁸ *Id.* at 42.

to indirectly chart thought and behavior.⁸⁹ Despite these advances, Schwarz cautions, “the admissibility and immediacy of this data create a misleading aura of scientific infallibility,”⁹⁰ because “there is not and will never be a brain correlate for responsibility.”⁹¹ Schwarz’s article points out what most people already know: a jury is an unpredictable group who will make decision based on whatever they wish, regardless of law or science.

Included in Schwarz’s article was Jessica Gurley and David Marcus’s examination of 396 mock jurors and how they responded to various categories of psychiatric and psychological evidence.⁹² The subjects studied were significantly more likely to declare a defendant not guilty by reason of insanity when the mock attorneys presented neuro-images or brain injury testimony to the jury.⁹³ The fMRI scans give the jury a visual connection to testimony about brain functions, but the scans are too variable from person to person to serve as a means for identifying culpability; what one would classify as normal brain features have yet to be determined.⁹⁴

There are certain brain deficiencies and mental illnesses such as mood disorders caused by disease of the basal ganglia that have detectable physiological traits; however, they are the exception, not the rule.⁹⁵ Observable defects from neural images do not directly correspond to severity of a condition, but their vividness has a disproportionate effect on jurors who tend to discount less tangible chemical imbalances.⁹⁶ The mock jurors were four

⁸⁹ *Id.* at 42 (citing Seiji Ogawa, *Oxygenation-sensitive Contrast in Magnetic Resonance Image of Rodent Brain at High Magnetic Fields*, 14.1 MAGNETIC RESONANCE MED. 68-78 (1990)).

⁹⁰ Schwarz, *supra* note 22, at 42.

⁹¹ *Id.* at 42 (citing Eyal Aharoni, *Can Neurological Evidence Help Courts Assess Criminal Responsibility? Lessons from Law and Neuroscience*, 1124.1 *Annals of the New York Academy of Sciences*, 145-160, 145 (2008)).

⁹² Jessica Gurley & David Marcus, *The Effects of Neuroimaging and Brain Injury on Insanity Defenses*, 26.1 BEHAV. SCI. & L., 85-97 (2008).

⁹³ Schwarz, *supra* note 22, at 42.

⁹⁴ Gurley & Marcus, *supra* note 92, at 86.

⁹⁵ Schwarz, *supra* note 22, at 42.

⁹⁶ *Id.*

times more likely to convict a psychopath than a defendant with visible damage from head trauma.⁹⁷ There is no rational explanation for this result. A psychopath's condition could render him or her insane, and the person with visible damage from head trauma could reasonably have little or no mental effect from the damage. It seems unjust that the lack of visible damage or visible charting of blood-oxygen levels could keep some defendants from receiving a fair trial.

The inherent problems of mixing the medical and legal fields as described by Schwarz seem to be a big part of Macklem's problems. Even though the defense was able to introduce the evidence of AS, the prosecution had no problem rebutting the evidence by pointing out no neurological or structural abnormalities existed.⁹⁸ Macklem had a number of circumstances working against him. He had no visible damages or defects for the expert to show, his mental condition exists purely through observable behaviors, and there already exists a certain stigma around disorders in the autistic spectrum. Autism and its milder forms are highly complex and greatly misunderstood by most of society. Hollywood movies feature characters with autism, and some of these characters are extremely smart.⁹⁹ Many people assume that someone with AS or HFA is highly intelligent, has an excellent memory, and is good with numbers. It is quite difficult to fit this stereotype with any lesser form of culpability. In general, people believe that intelligent persons should be held responsible for their actions.

Macklem was found to have an average IQ even though he tested below average in areas of memory, thought processing, and academic skills.¹⁰⁰ Luckily for him, the trial judge allowed expert testimony of how AS affects persons with the disorder. The expert was able to testify that AS is demonstrated by "impaired social interaction, attention problems, rigid behaviors, and fantasy thoughts."¹⁰¹ The expert also explained that persons with AS generally have few

⁹⁷ Gurley & Marcus, *supra* note 92, at 93.

⁹⁸ Macklem, 57 Cal.Rptr.3d 237 at 245.

⁹⁹ See e.g., RAIN MAN (MGM 1988); TEMPLE GRANDIN (HBO Films 2010).

¹⁰⁰ *Id.* at 684.

¹⁰¹ *Id.*

friends, struggle with romantic relationships, go into rages and act out, and cannot explain or understand their behavior.¹⁰² He also noted that persons with AS are capable of manipulating situations to get what they want and generally do not care about how their behavior impacts or affects others.¹⁰³

This information was helpful considering that Macklem, before the crime, had conversations with his ex-girlfriend where she asked him to kill her to put her out of her misery.¹⁰⁴ Macklem often fantasized about killing her because he thought he would be helping her.¹⁰⁵ Sarah was also depressed about the death of a family member, and Macklem thought that by killing Sarah, she would be with that family member again.¹⁰⁶ The expert testimony likely helped connect the dots and explain part of Macklem's thought process and also why Macklem would have lacked remorse or sympathy for Sarah or her family.

Surely, the expert testimony did not fall upon deaf ears because Macklem only received a sentence of 25 years to life. He was eligible for the death penalty, and the state of California is not shy about pursuing it, but after discovery had begun, the prosecutors chose not to pursue it. The record does not reflect the state's reason for dropping pursuit of a death sentence, but if prosecutors knew what the expert testimony was going to entail, then it was a smart move on their part. Macklem's case stands for the proposition that evidence of AS should be introduced in every criminal trial, especially when death is a possible sentence. Competent psychiatric testimony/evidence may have saved Macklem's life.

IX. CONCLUSION

Being diagnosed with a disorder in the autism spectrum does not equate to a lack of intent to commit a crime, but it does have a direct effect on a person's mind and how the

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 679.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

mind perceives things. Not all persons with AS are automatically incompetent to stand trial or not guilty by reason of insanity. Evidence of AS is needed merely to help the jury make an informed decision. Suppressing such evidence denies the jury of highly relevant and crucial information. By hearing/viewing evidence of how AS affects persons, the jury is able to connect all the dots and properly decide whether the defendant had the subjective intent to commit the crime. Persons with AS do not deserve a “get out of jail free card,” but they deserve to offer before the jury all evidence relevant to culpability and mitigation.