



MITIGATION and FORENSICS

Professor Jules Epstein
And Christine Funk

Minnesota and the Death Penalty

- 1st White Woman – 1860



Minnesota and the Death Penalty

- Largest mass execution in the US
 - 38
 - 1862

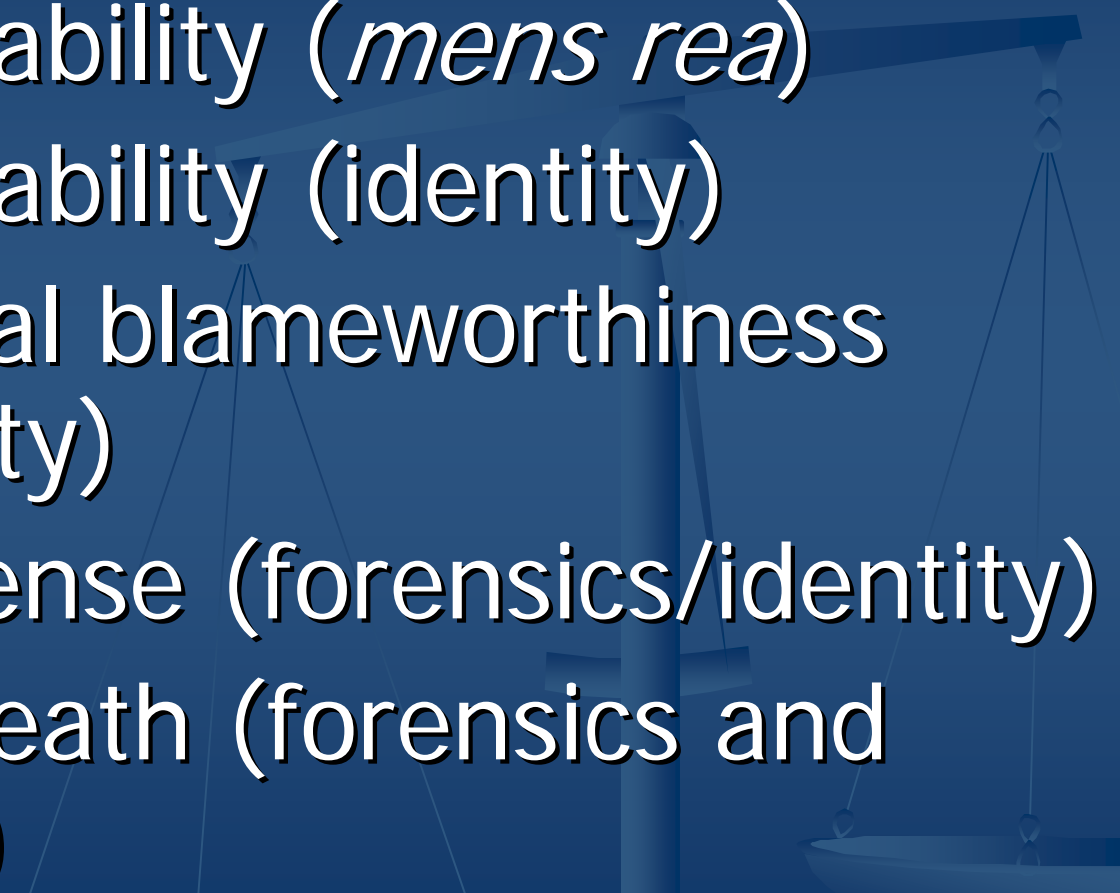


Minnesota and the Death Penalty

- 1906 – William Williams



Forensics as Mitigation

- Degree of culpability (*mens rea*)
 - Degree of culpability (identity)
 - Degree of moral blameworthiness (mental capacity)
 - Role in the offense (forensics/identity)
 - Deserving of death (forensics and residual doubt)
- 

Forensics as Mitigation in Context

- What moves jurors?



Mitigation: What Moves Jurors?

- If jurors do not think the crime is extremely vicious, then remorse can make a difference.



Mitigation: What Moves Jurors?

- Evidence that the defendant was under the influence of extreme emotional disturbance or mentally ill at the time of the crime is also mitigating to almost half of all jurors.



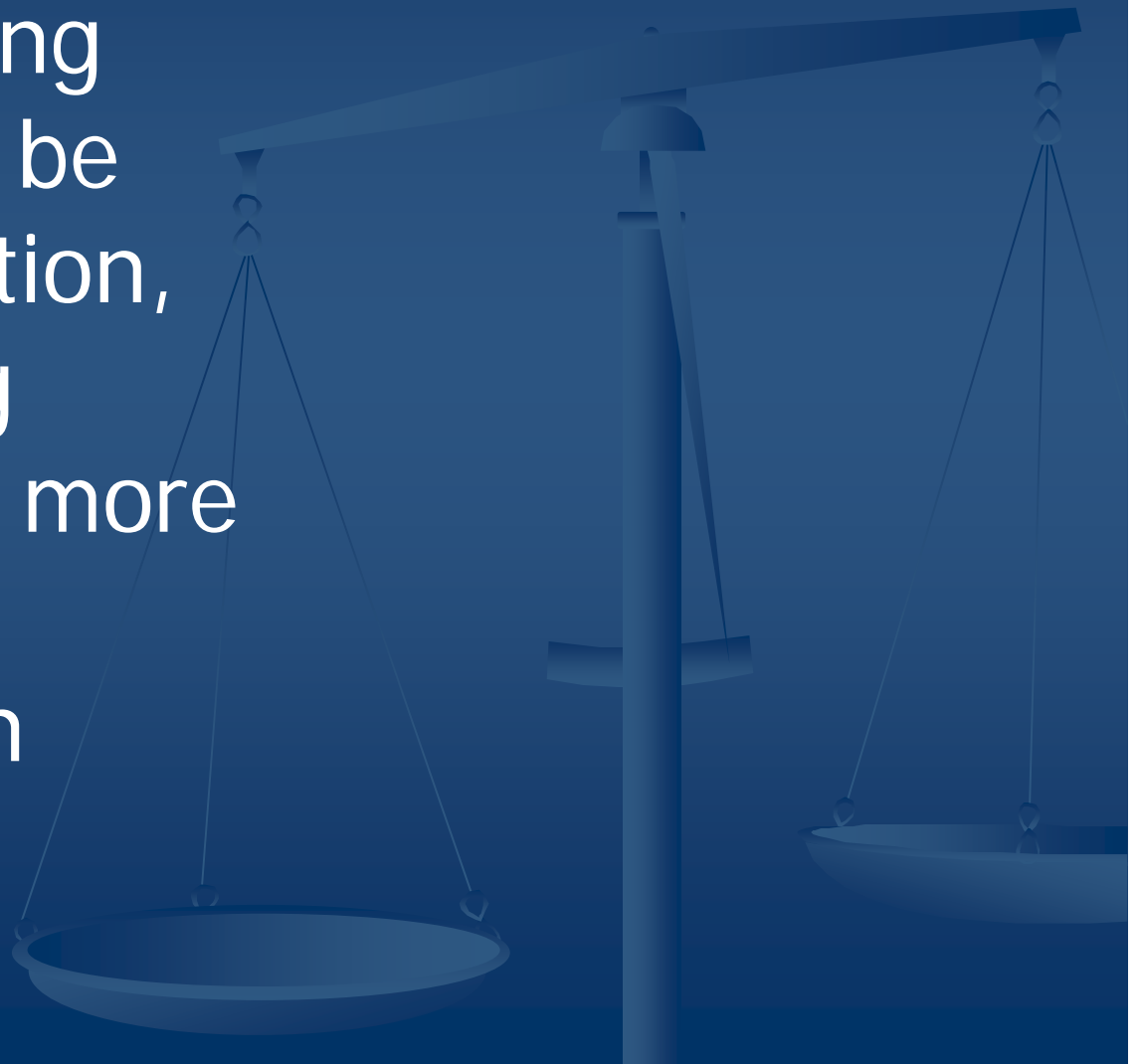
Mitigation: What Moves Jurors?

- Almost a third of jurors found exposure to serious child abuse mitigating,
- A like number found childhood poverty mitigating.



Mitigation: What Moves Jurors?

- The one mitigating factor that must be viewed with caution, however, is drug addiction, which more jurors found aggravating than mitigating.



Mitigation: What Moves Jurors?

Stu's Views

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"Testifying against another doctor would violate my ethics, so I'll have to charge double."

Mitigation: What Moves Jurors?

- Capital jurors often have a negative reaction to the defense's expert witnesses...



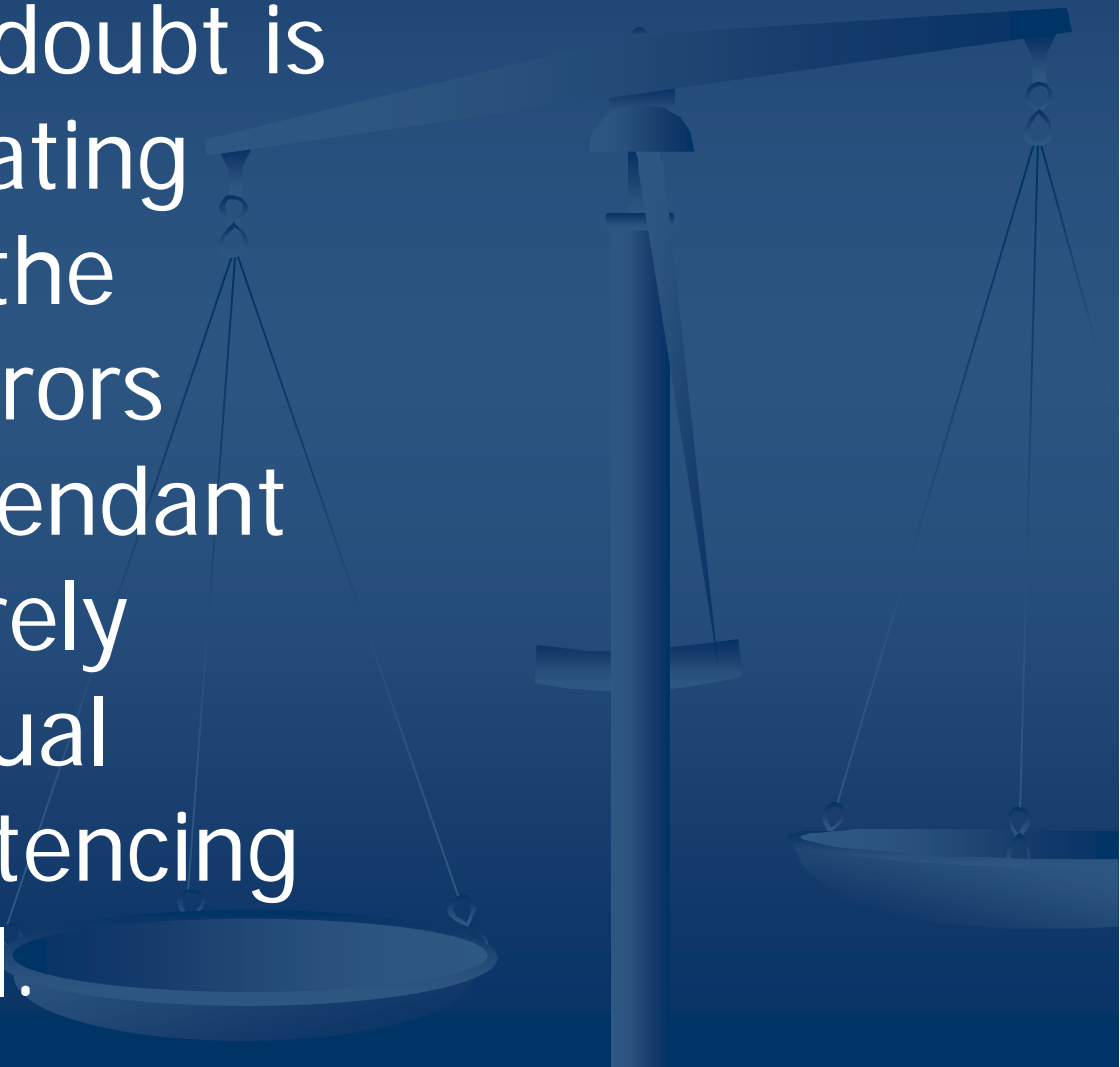
Mitigation: What Moves Jurors?

- On the other hand, when jurors did react favorably to a defense expert called in the penalty phase, a life sentence was substantially more likely.



What Moves Jurors?

- [W]hile residual doubt is a powerful mitigating circumstance in the abstract, once jurors conclude the defendant is guilty, they rarely harbor any residual doubt at the sentencing phase of the trial.



MITIGATION: THE LAW

Capital Punishment

BOOKS TO GO BY



by
Radio Pastor Perry F. Rockwood

Constitutional Test/Definition

- “any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death”.

■ Skipper v. South Carolina, 106 S. Ct. 1669, 1671 (U.S. 1986)

Constitutional Test/Definition

- "any mitigating evidence relevant to a defendant's background, character, or the circumstances of the crime."
- Penry v. Lynaugh, 492 U. S., 109 S. Ct. 2934, 2951 (1989).



Constitutional Test/Definition

- “evidence...the sentencer could reasonably find that it warrants a sentence less than death...”

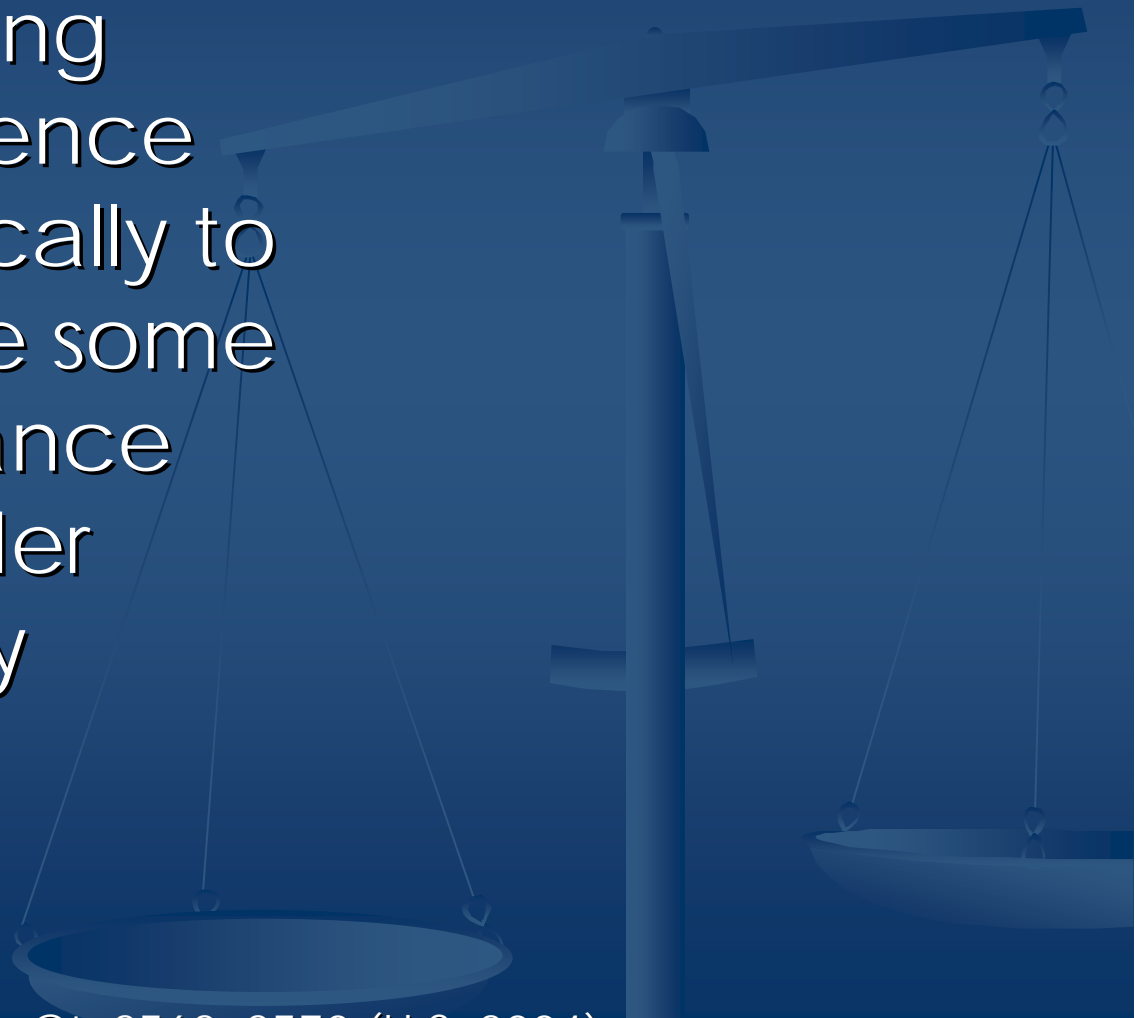
- Tennard v. Dretke, 124 S. Ct. 2562, 2570 (U.S. 2004)



Strength/relevancy measure:

- Relevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value.

■ Tennard v. Dretke, 124 S. Ct. 2562, 2570 (U.S. 2004)



Strength/relevancy measure:

- No need for “nexus” between mitigation and crime (*i.e.*, mitigation need not explain or excuse the crime to be relevant).

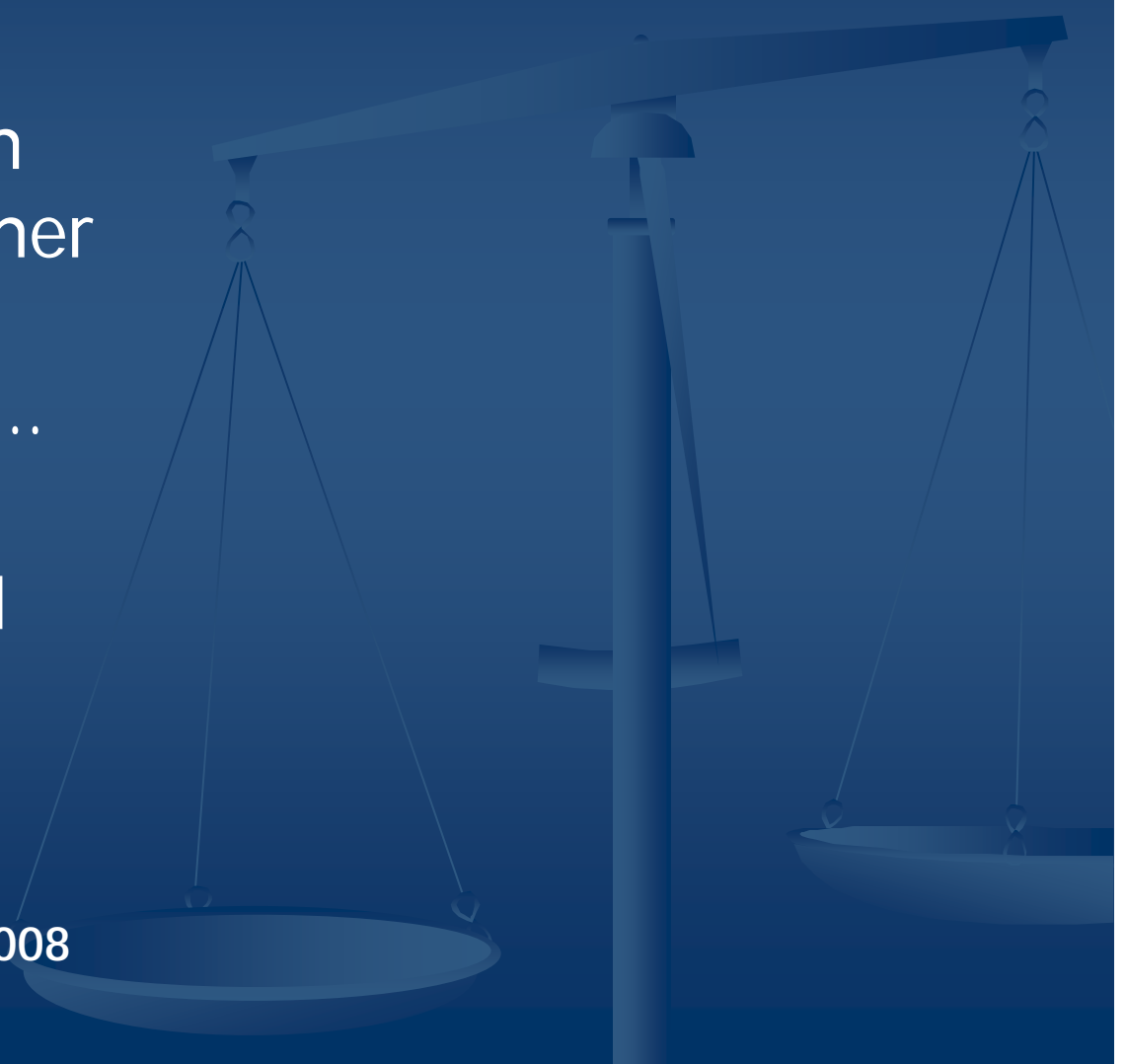


■ Tennard v. Dretke, 124 S. Ct. 2562, 2572-2573 (U.S. 2004)

Mitigation and “Nexus”

- [T]he prosecution questioned each of Payne's mental health witnesses as to whether his conditions caused the rape and murder...
- [W]e emphasize that such questions would be improper on remand.

State v. Payne, 199 P. 3d 123 -
Idaho: Supreme Court, Boise 2008



Right to present:

- “[V]irtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances”

■ Tennard v. Dretke, 124 S. Ct. 2562, 2570 (U.S. 2004)



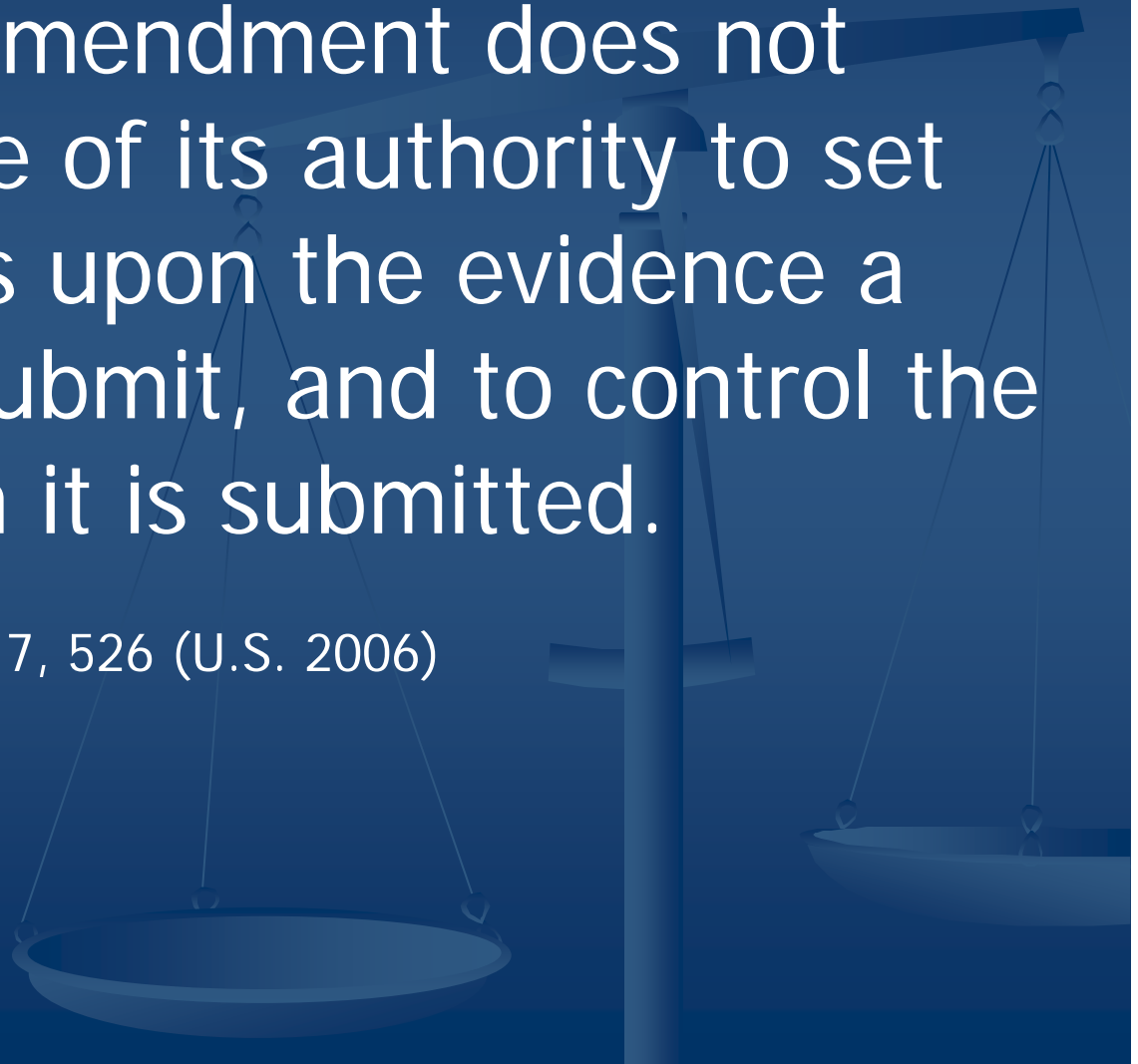
“No Limits?”

- Oregon v. Guzek
- New Sentencing Ordered
- Defendant wants
 - Alibi of Grandpa from trial
 - New testimony from mom re: alibi



No Limits?

- But the Eighth Amendment does not deprive the State of its authority to set reasonable limits upon the evidence a defendant can submit, and to control the manner in which it is submitted.
- *Oregon v. Guzek*, 546 U.S. 517, 526 (U.S. 2006)



Rupe v. Wood

- We talked about it
- He did it
- He left the money and gun at my house
- I spent some of the money
- I got rid of the gun



For the defendant - the right to
present reliable evidence

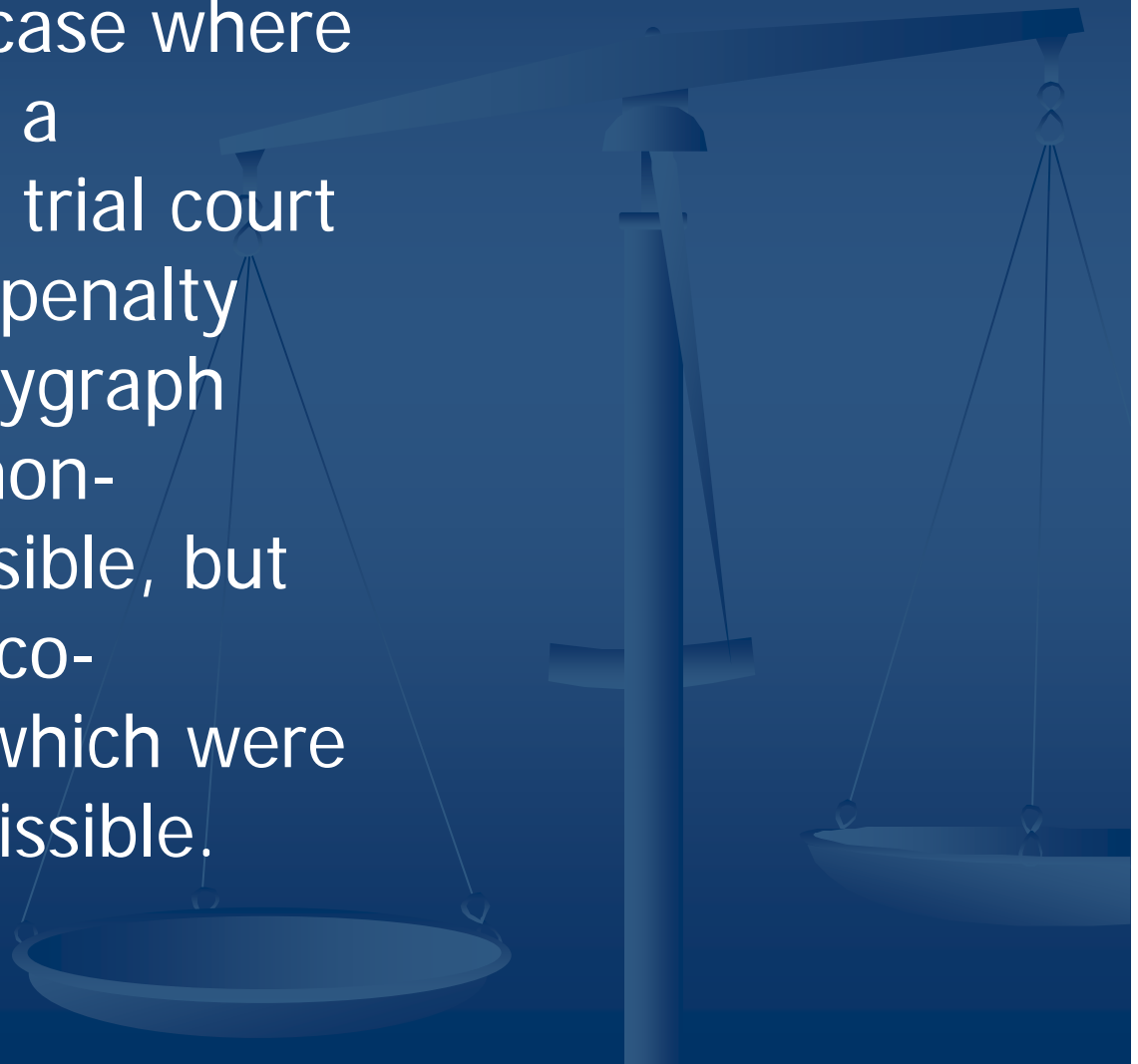
- Defendant
may introduce
polygraph
results *at
penalty phase*

■ Rupe v. Wood, 93 F.3d 1434, 1441 (9th Cir. 1996)



2009 – Reliable Evidence

- In a capital pre-trial case where minor participation is a compelling issue, the trial court has ruled that in the penalty phase the client's polygraph results, which were non-deceptive, are admissible, but the (state's witness) co-defendant's results, which were deceptive, are inadmissible.



Link to jury instructions - efficacy:

- "it is not enough simply to allow the defendant to present mitigating evidence to the sentencer.
- The sentencer must also be able to consider and give effect to that evidence in imposing sentence."

Mitigation, *Atkins* and Mental Retardation Evidence:

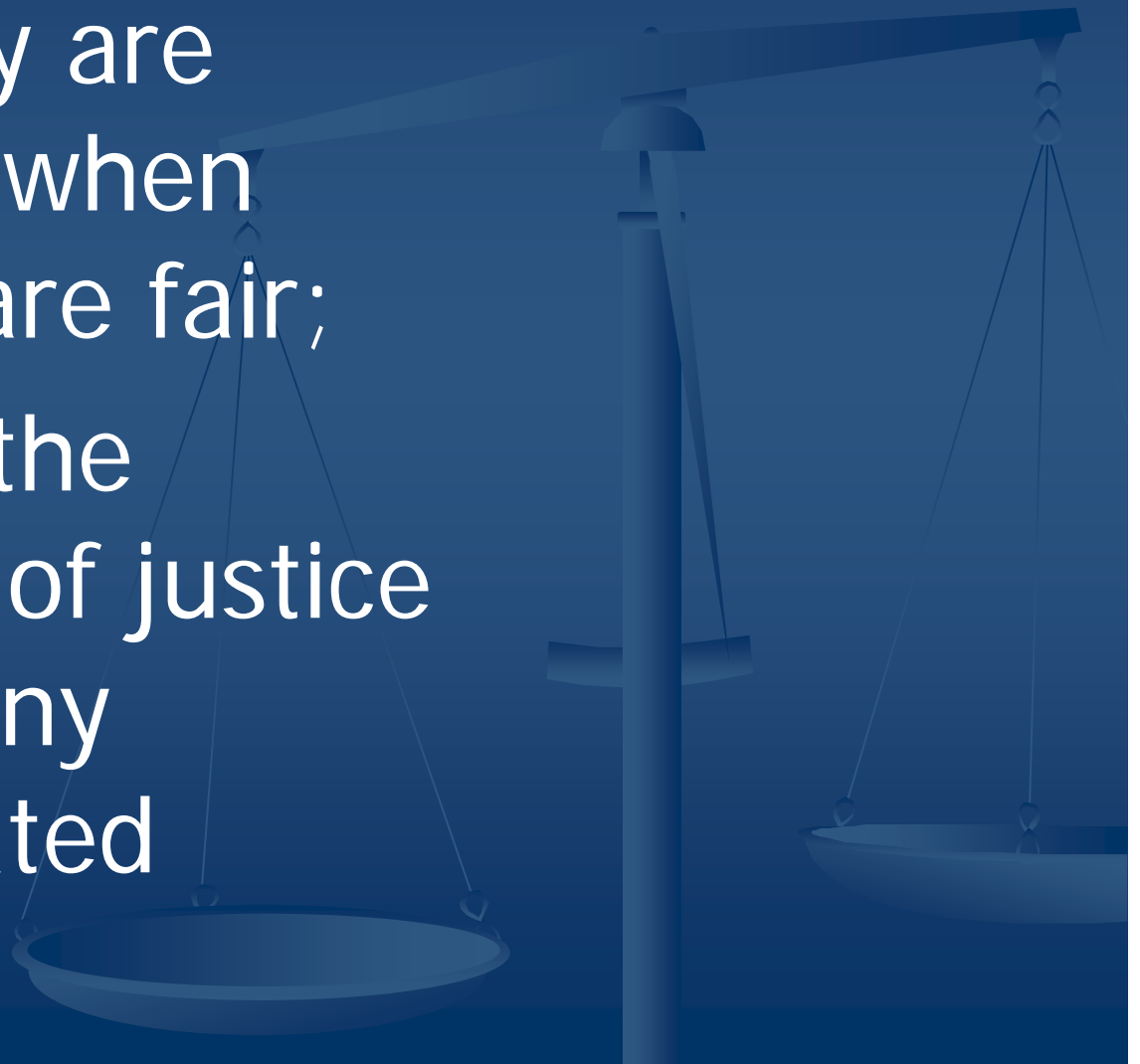
- Even if insufficient to establish *Atkins* mental retardation, any showing of mental retardation is mitigating evidence, and need not be linked to capacity to commit the crime.
- *Tennard v. Dretke*, 542 U.S. 274, 287 (U.S. 2004)

Jury Instructions and Nexus

- Court upholds jury instruction that jurors are also to consider "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime."

Mitigation and *Brady*

- Society wins not only when the guilty are convicted, but when criminal trials are fair;
- our system of the administration of justice suffers when any accused is treated unfairly.



Disclosure and Mitigation

- Mom and 2 Drs.
- “Roommate” and cop – no track marks



Disclosure and Mitigation

- “Roommate’s” description at time of arrest
- Cop’s approval of APB’s
- Others



Disclosure and Mitigation

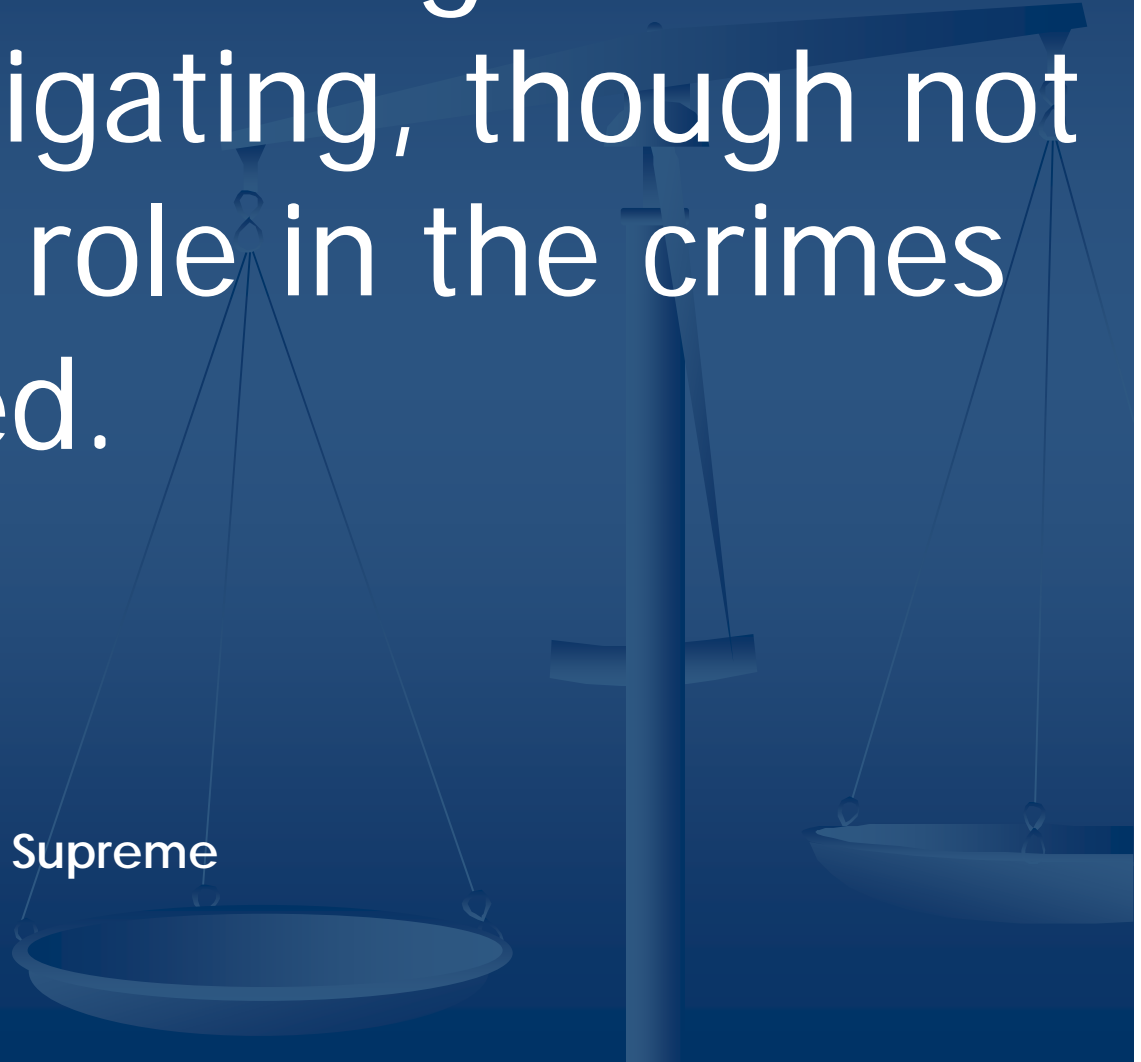
- It is possible that the suppressed evidence, viewed cumulatively, may have persuaded the jury that Cone had a far more serious drug problem than the prosecution was prepared to acknowledge,

Cone v. Bell, 129 S. Ct. 1769 - Supreme Court 2009
129 S.Ct. 1769 (2009)

Disclosure and Mitigation

- and that Cone's drug use played a mitigating, though not exculpatory, role in the crimes he committed.

Cone v. Bell, 129 S. Ct. 1769 - Supreme Court 2009
129 S.Ct. 1769 (2009)



Disclosure and Mitigation

- The evidence might also have rebutted the State's suggestion that Cone had manipulated his expert witnesses into falsely believing he was a drug addict when in fact he did not struggle with substance abuse.

Cone v. Bell, 129 S. Ct. 1769 - Supreme Court 2009
129 S.Ct. 1769 (2009)

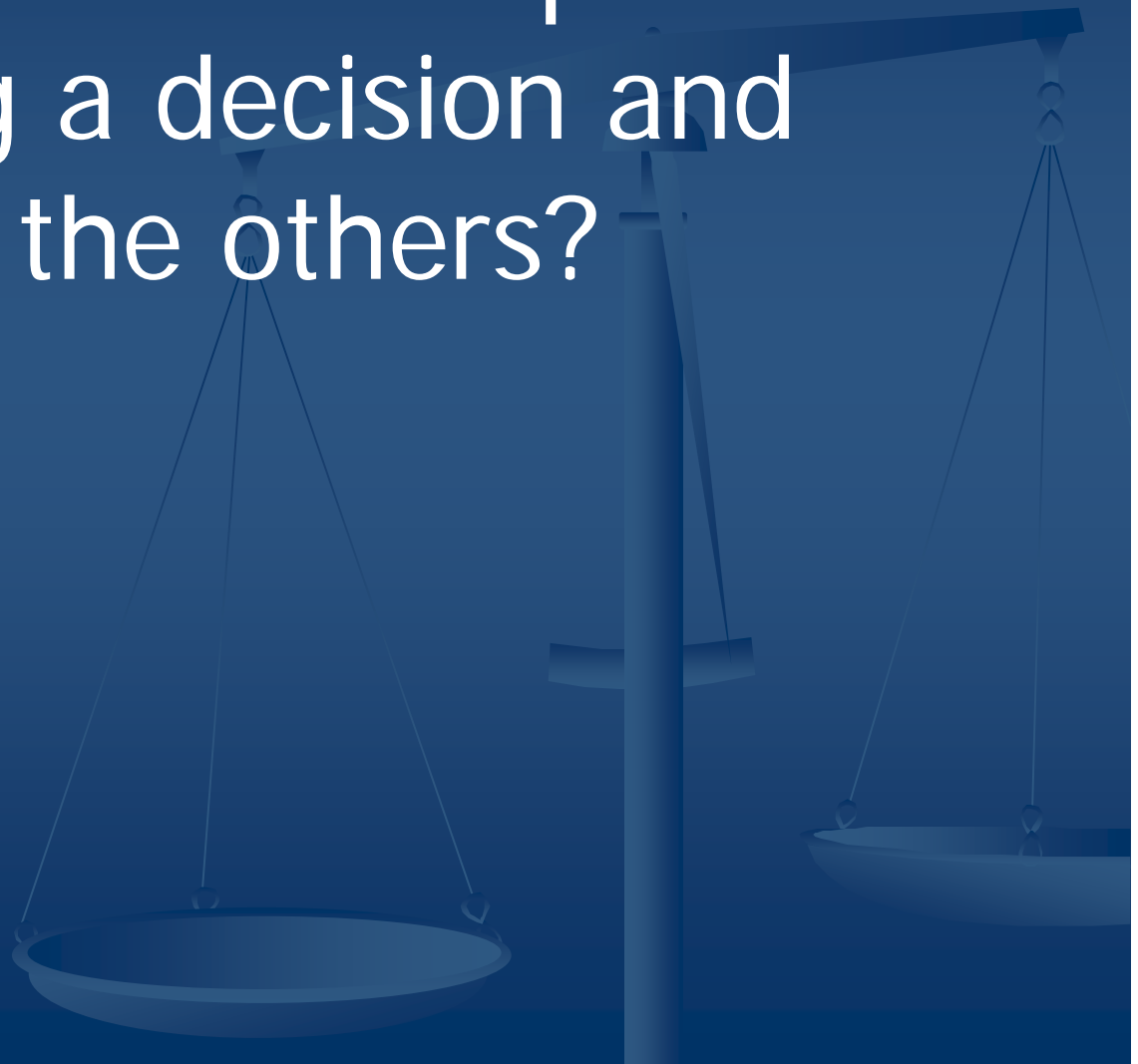
The Power of One



Jury Selection: The “Power of 1”

- Q: Have you ever been part of a group making a decision and differed from the others?

A Jury of One: Opinion Formation, Conformity, and Dissent on Juries: Nicole L. Waters & Valerie P. Hans (November, 2008)



Jury Selection: The “Power of 1”

- Q: Did you stand up or give in?

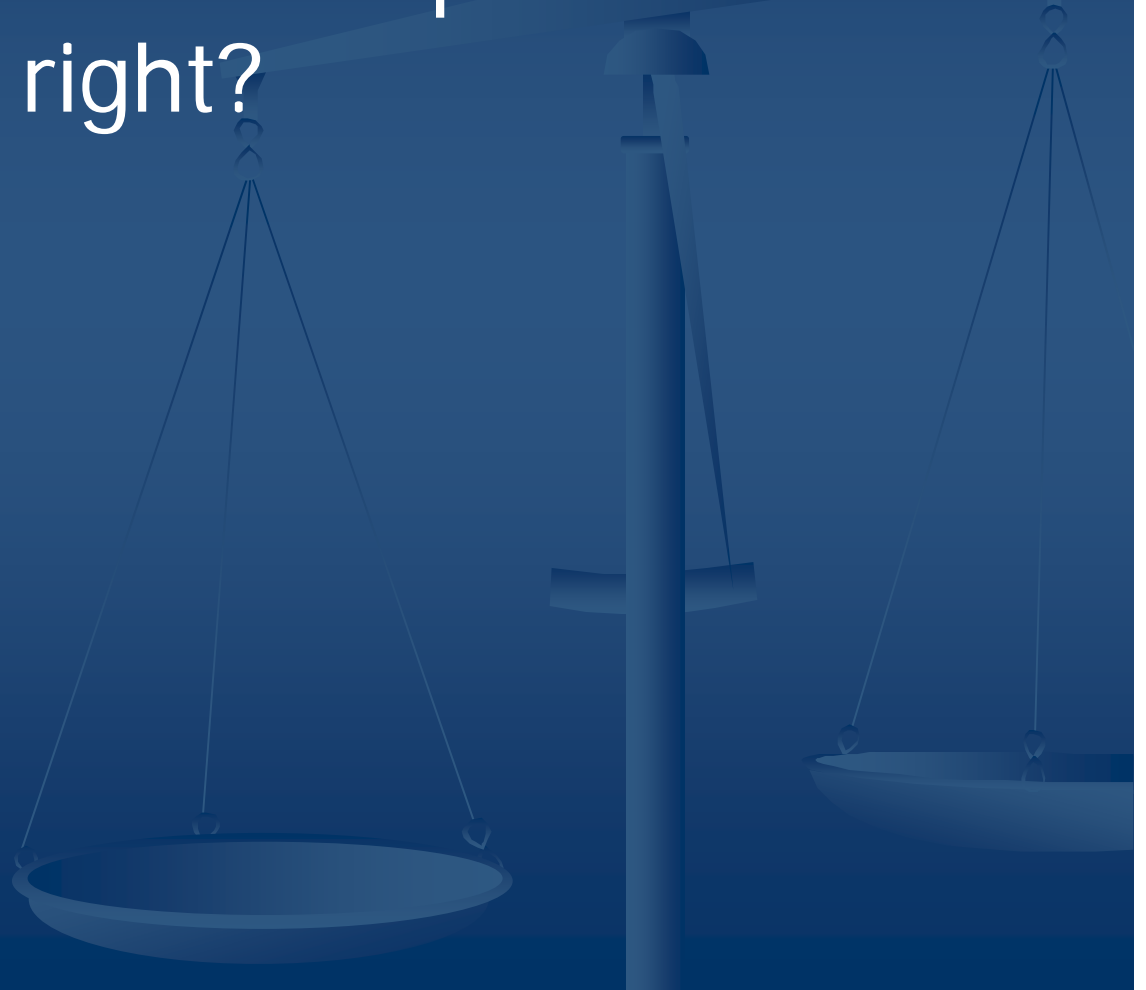
A Jury of One: Opinion
Formation, Conformity,
and Dissent on Juries:
Nicole L. Waters &
Valerie P. Hans
(November, 2008)



Jury Selection: The “Power of 1”

- Q: Are you able to stand up and do that if you feel you are right?

- A Jury of One: Opinion Formation, Conformity, and Dissent on Juries: Nicole L. Waters & Valerie P. Hans (November, 2008)



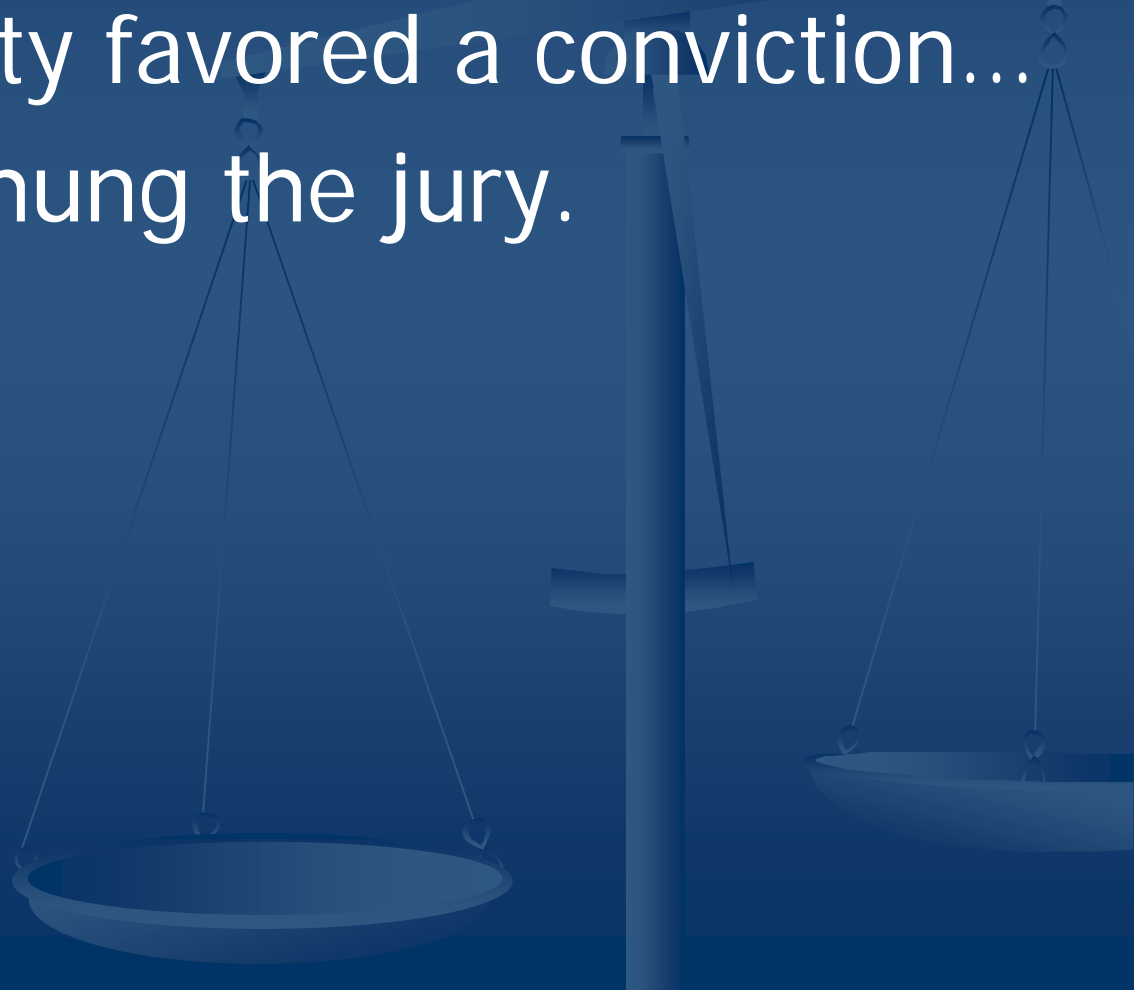
Poll of past jurors

- Over one-third of jurors, privately, would have voted against their jury's decision.

Juror Studies - Dissent

- Of the 167 jurors who said their one-person jury verdict was an acquittal but the jury's majority favored a conviction...
- 35% ultimately hung the jury.

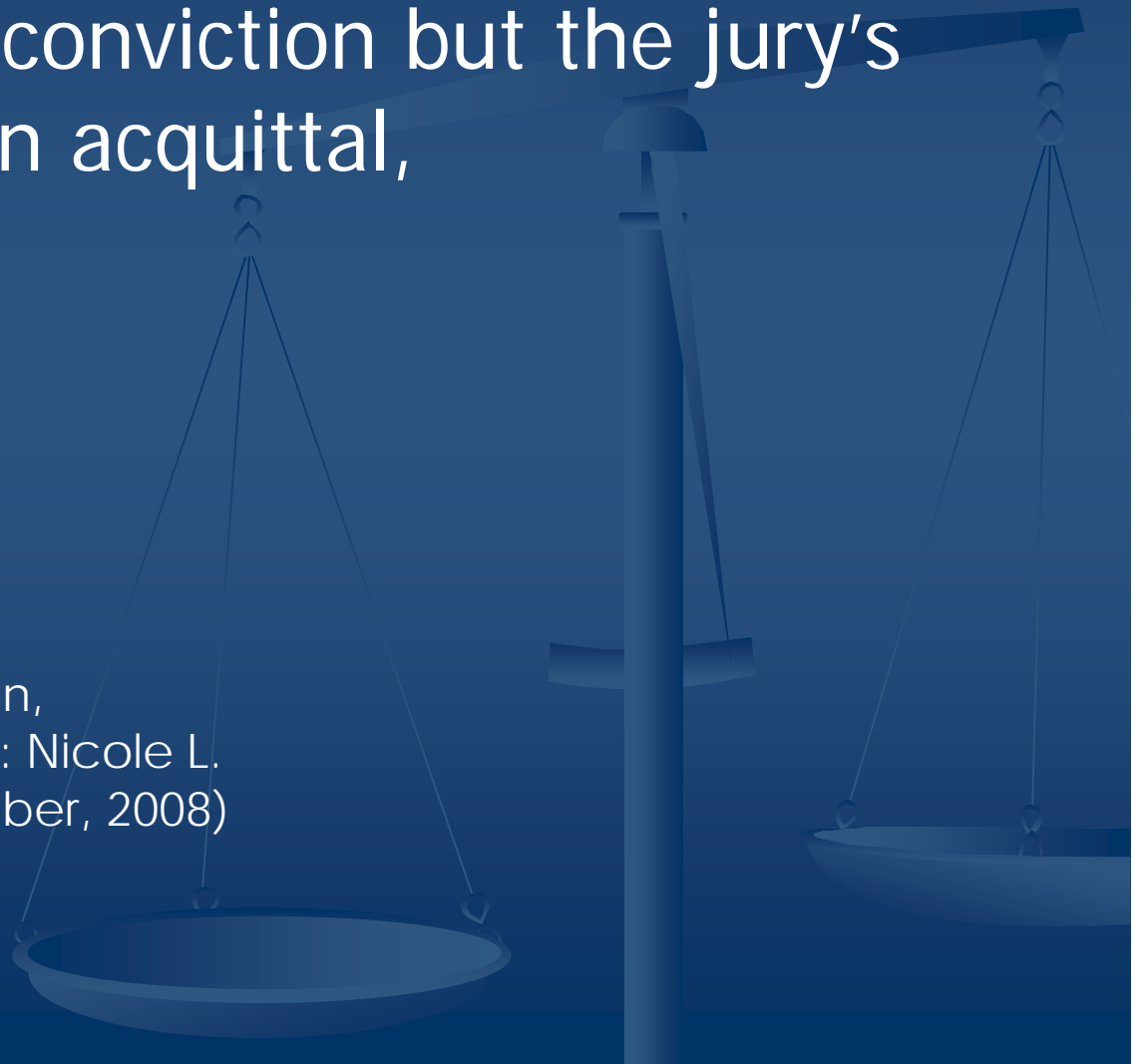
■ A Jury of One: Opinion Formation, Conformity, and Dissent on Juries:
Nicole L. Waters &
Valerie P. Hans
(November, 2008)



Juror Studies - Dissent

[O]f the 184 jurors who said their one-person jury verdict was a conviction but the jury's majority favored an acquittal, just 23, or 12.5%, hung the jury.

- A Jury of One: Opinion Formation, Conformity, and Dissent on Juries: Nicole L. Waters & Valerie P. Hans (November, 2008)



Mitigation, Jury Selection and Science



Constitutionally-Mandated Inquiries in Jury Selection

- The defendant and state are entitled to *voir dire* on juror attitudes regarding the death penalty (“death qualified” and “life qualified”).
 - Morgan v. Illinois, 112 S. Ct. 2222, 2232 (U.S. 1992). [The “right to challenge” and the “right to inquire.”]

Death and Life Qualification

- The general test of impairment":
“whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath...”

■ Wainwright v. Witt, 105 S. Ct. 844 (U.S. 1985)

Life Qualification

- Whether the juror is capable of applying the law and, in the appropriate case, returning a sentence of life imprisonment in a case of intentional murder.
- Morgan v. Illinois, 112 S. Ct. 2222, 2229 (U.S. 1992)

Life Qualification

- “A juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do.”
- Morgan v. Illinois, 112 S. Ct. 2222, 2229 (U.S. 1992)

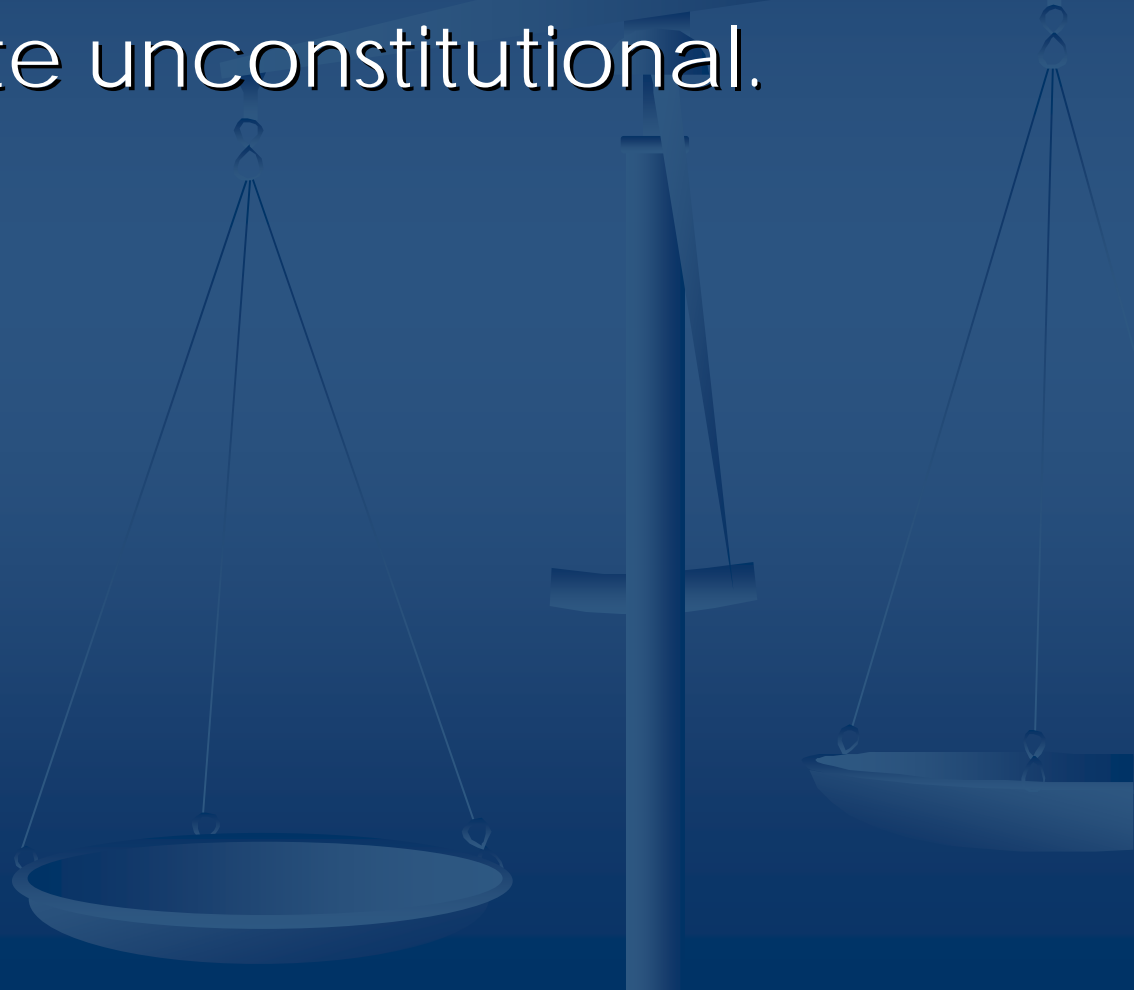
Jury Research

Capital Jury Project

Courts rely on social science studies of capital case jurors

- New York Supreme Court uses such data in holding DP statute unconstitutional.

People v. LaValle, 3
N.Y.3d 88, 117 (N.Y.
2004)



People v. LaValle

- Jurors had to pick life w/o parole or death.
- Had to be unanimous
- If they can't agree, Court will give life imprisonment with parole eligibility after serving a minimum of 20 to 25 years.

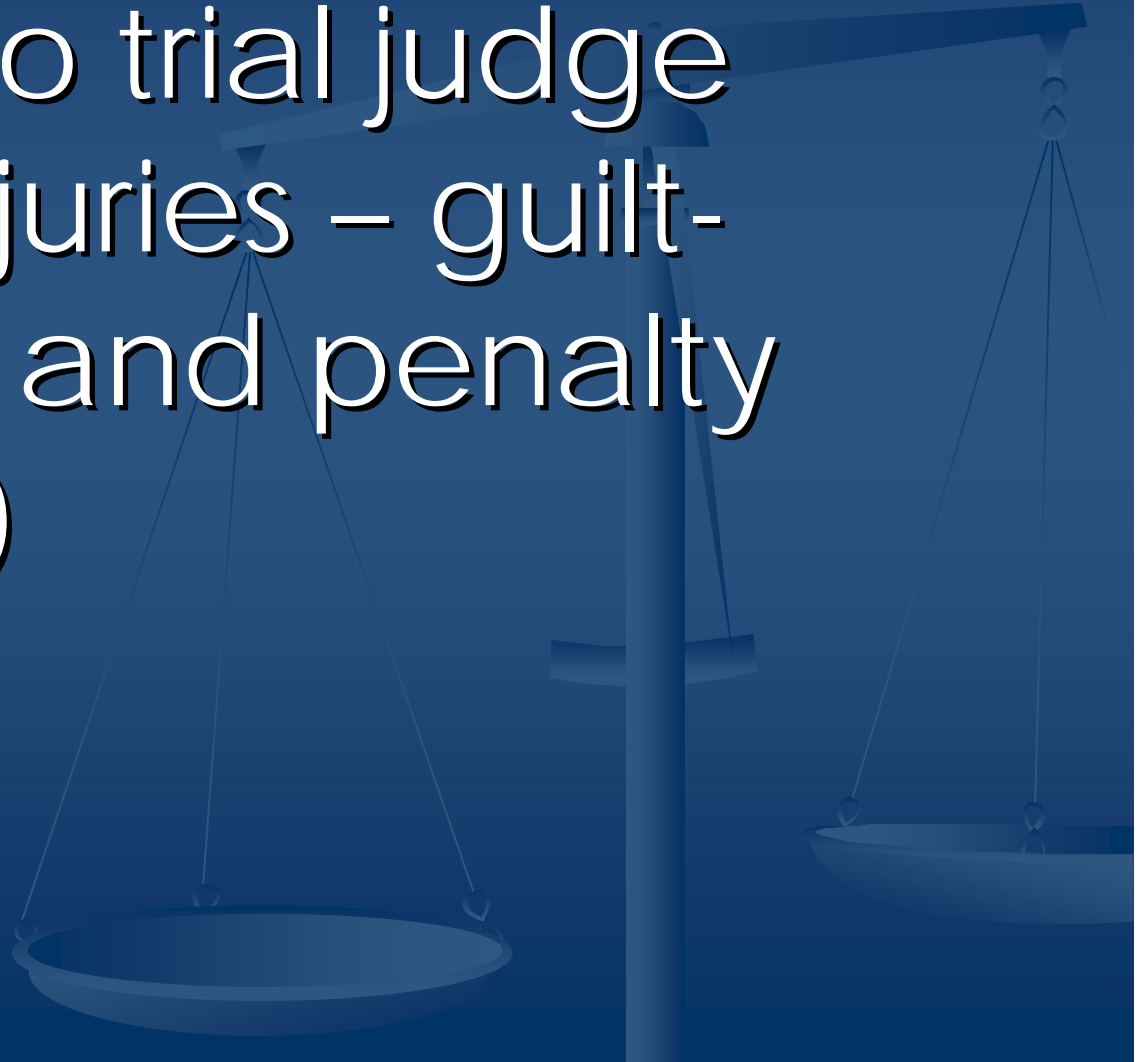
Using Social Science in Court

- Study established "sooner jurors think a defendant will be released from prison, the more likely they are to vote for death and the more likely they are to see the defendant as dangerous. . . ."

■ (Bowers and Steiner, *Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing*, 77 Tex L Rev 605, 648 [Feb. 1999])

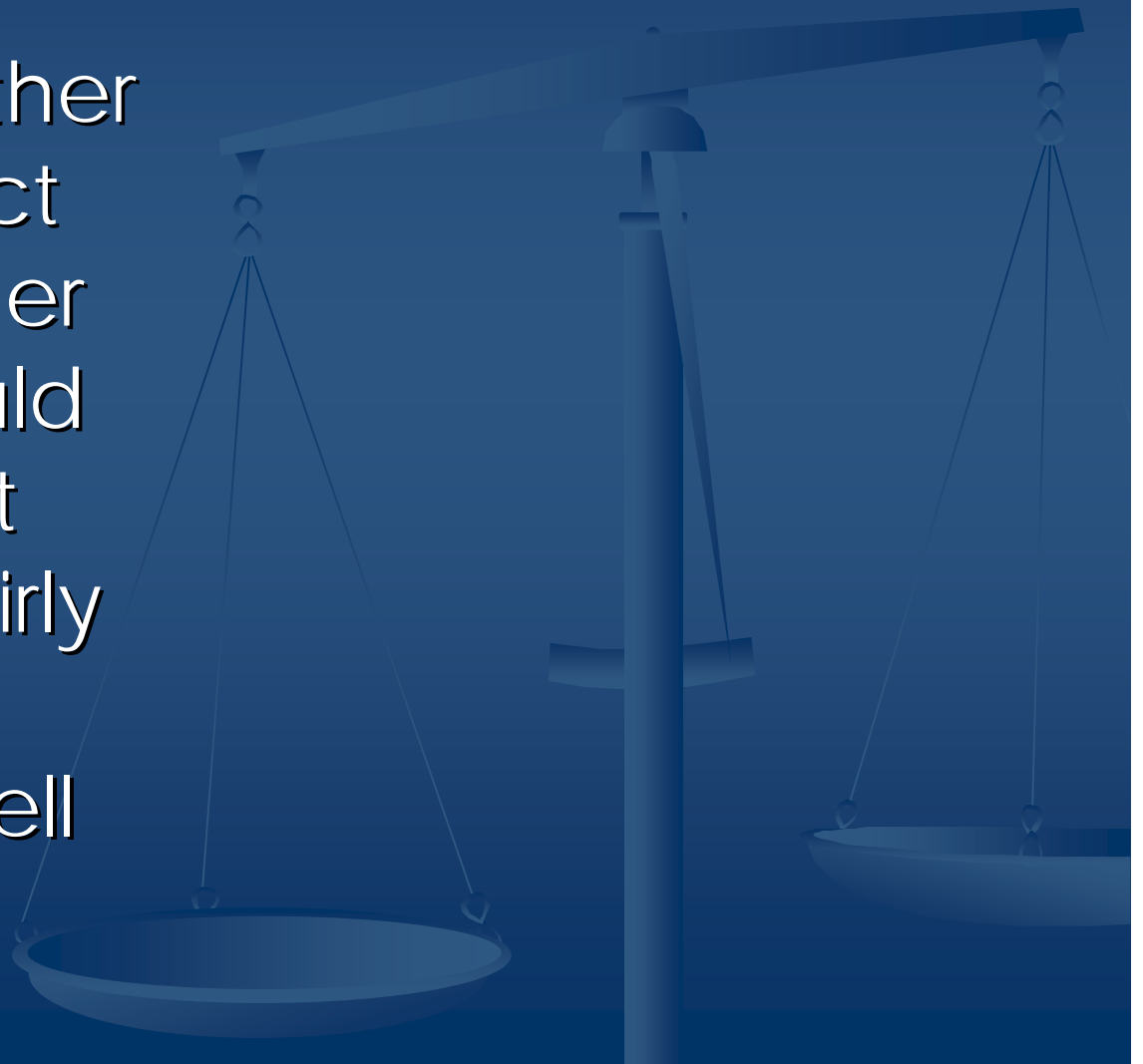
Courts rely on social science studies of capital case jurors

- New Mexico trial judge orders two juries – guilt-innocence and penalty (June 2007)



Impairment

- “Case-Specific” questions ascertain whether a particular fact (*e.g.*, the murder of a child) would make it difficult for a juror to fairly consider a life sentence as well as a death sentence.



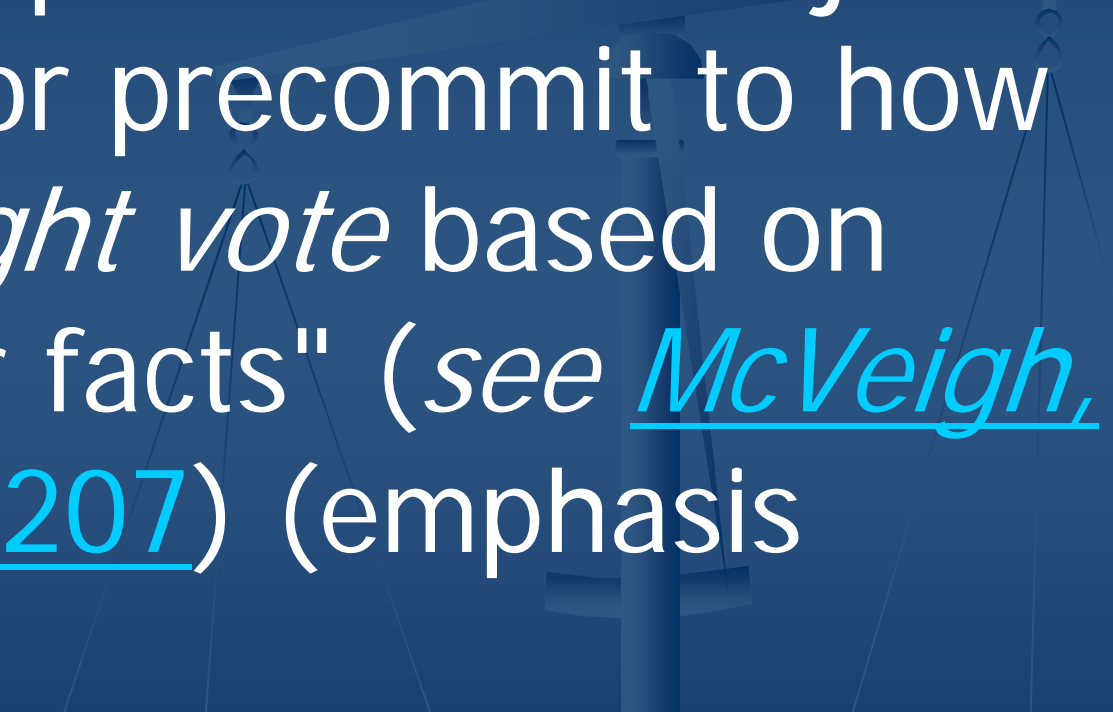
Impairment - Contrast

- “Stake-out” questions seek to ascertain *how* the person would vote if confronted with a specific fact or set of facts.

■ *See generally, United States v. Johnson, 366 F. Supp. 2d 822 (D. Iowa 2005) (analyzing distinction; allowing case-specific, but not stake-out, questions).*



Stakeout ? Proper test:

- (1) Does the question "ask a juror to speculate or precommit to how that juror *might vote* based on any particular facts" (*see [McVeigh, 153 F.3d at 1207](#)*) (emphasis added)? OR
- 

Stakeout ? Proper test:

- (2) Does it seek to `discover in advance *what a prospective juror's decision will be* under a certain state of the evidence" *Richmond*, 375 F.3d at 329 (quoting *State v. Richmond*, 347 N.C. 412, 495 S.E.2d 677, 683 (1998)) OR

Stakeout ? Proper test:

- (3) Does it "seek to cause prospective jurors to pledge themselves to a future course of action and indoctrinate [them] regarding potential issues before the evidence has been presented and [they] have been instructed on the law" *id.* at 330 (quoting [Richmond, 495 S.E.2d at 683](#))?

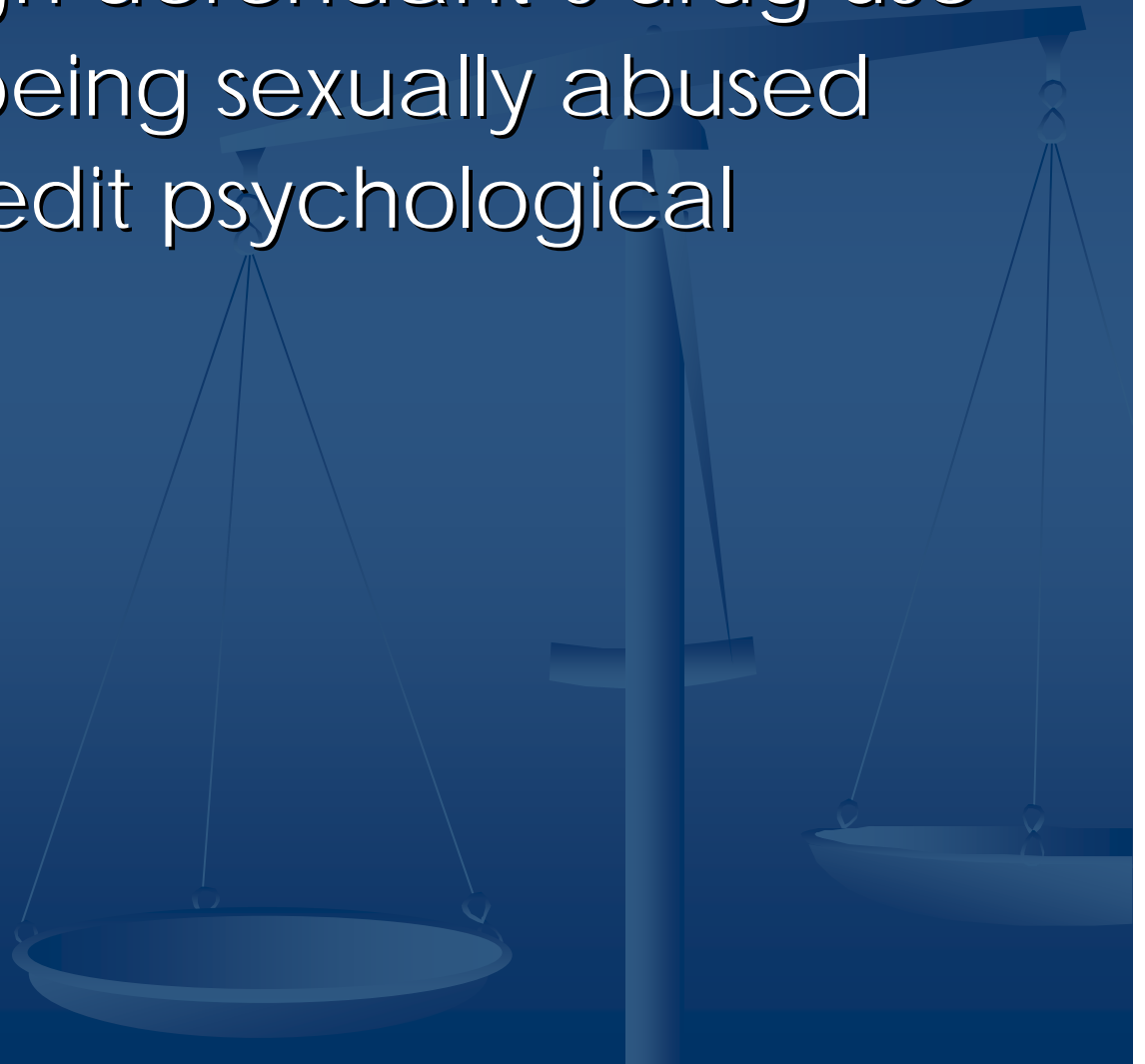
But wait!

- While any "case-specific" question that asks *how a prospective juror would vote* on life or death, if presented with proof of certain facts, *is* a "stake-out" question, and does attempt to "pre-commit" the juror to a certain position,
- a properly framed case-specific question does not necessarily do any of these things.

See generally, United States v. Johnson, 366 F. Supp. 2d 822 (D. Iowa 2005)

Mitigation “Impairment”

- [I]nability to weigh defendant’s drug use
- background of being sexually abused
- reluctance to credit psychological testimony



Mitigation “Impairment”

- establishes cause, as juror cannot “consider certain categories of mitigating evidence.”

United States v. Fell,
No. 2:01-CR-12-01,
United States District
Court of Vermont
(Memorandum Order,
June 8, 2005).

Mitigation in the Guilt-Innocence Trial



Where's The Money?



Ake and Forensics

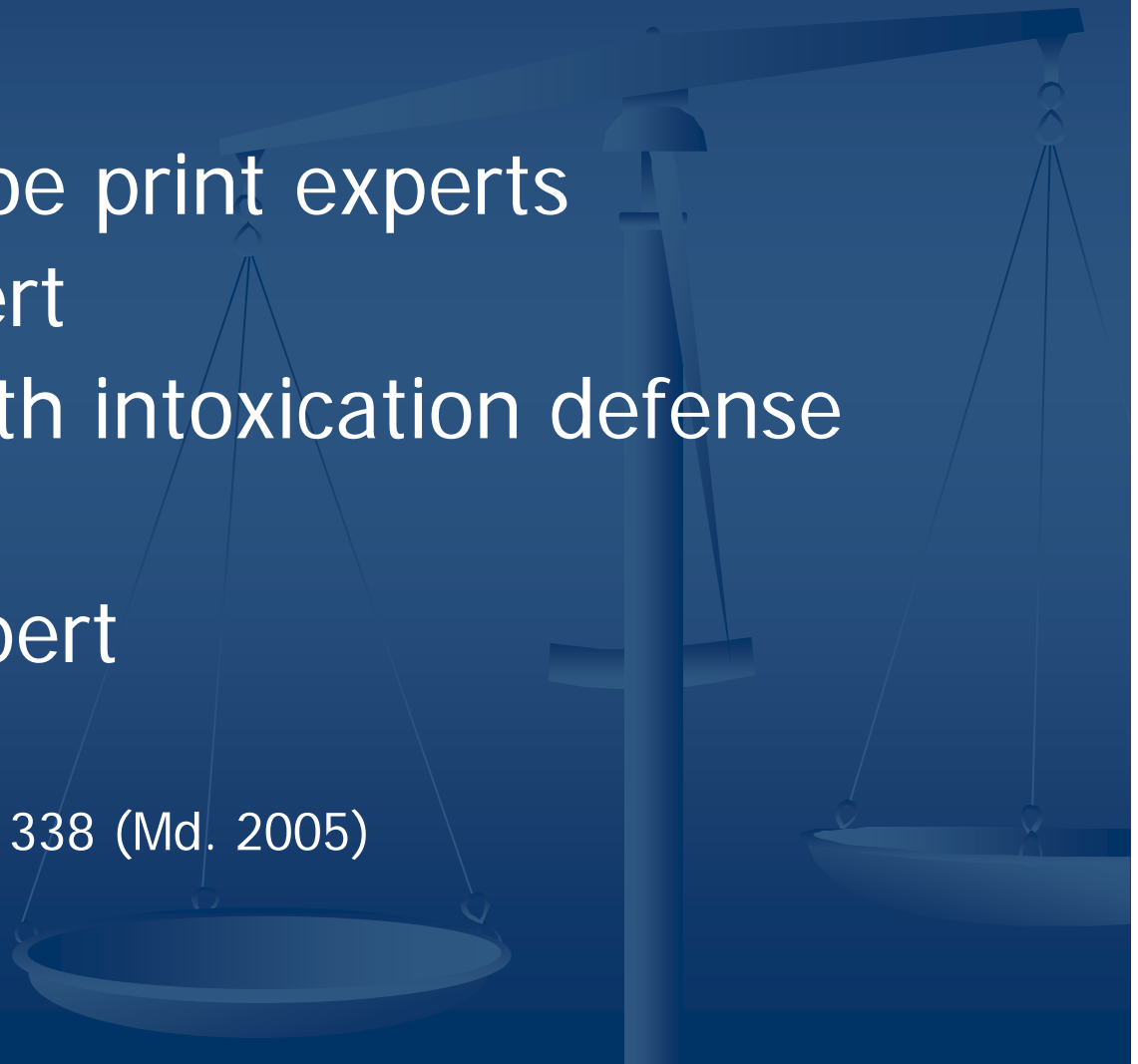
- The majority of courts have concluded that Ake extends beyond psychiatric experts.
- Pathologist
- battered-spouse syndrome expert
- ballistics expert
- hypnotism expert
- DNA expert
- Toxicologist
- Serologist



Ake and Forensics

- survey expert
- forensic dentist
- fingerprint and shoe print experts
- blood spatter expert
- expert to assist with intoxication defense
- voiceprint expert
- opinion polling expert

- Moore v. State, 390 Md. 343, 338 (Md. 2005)



Ake – a Dissenting View

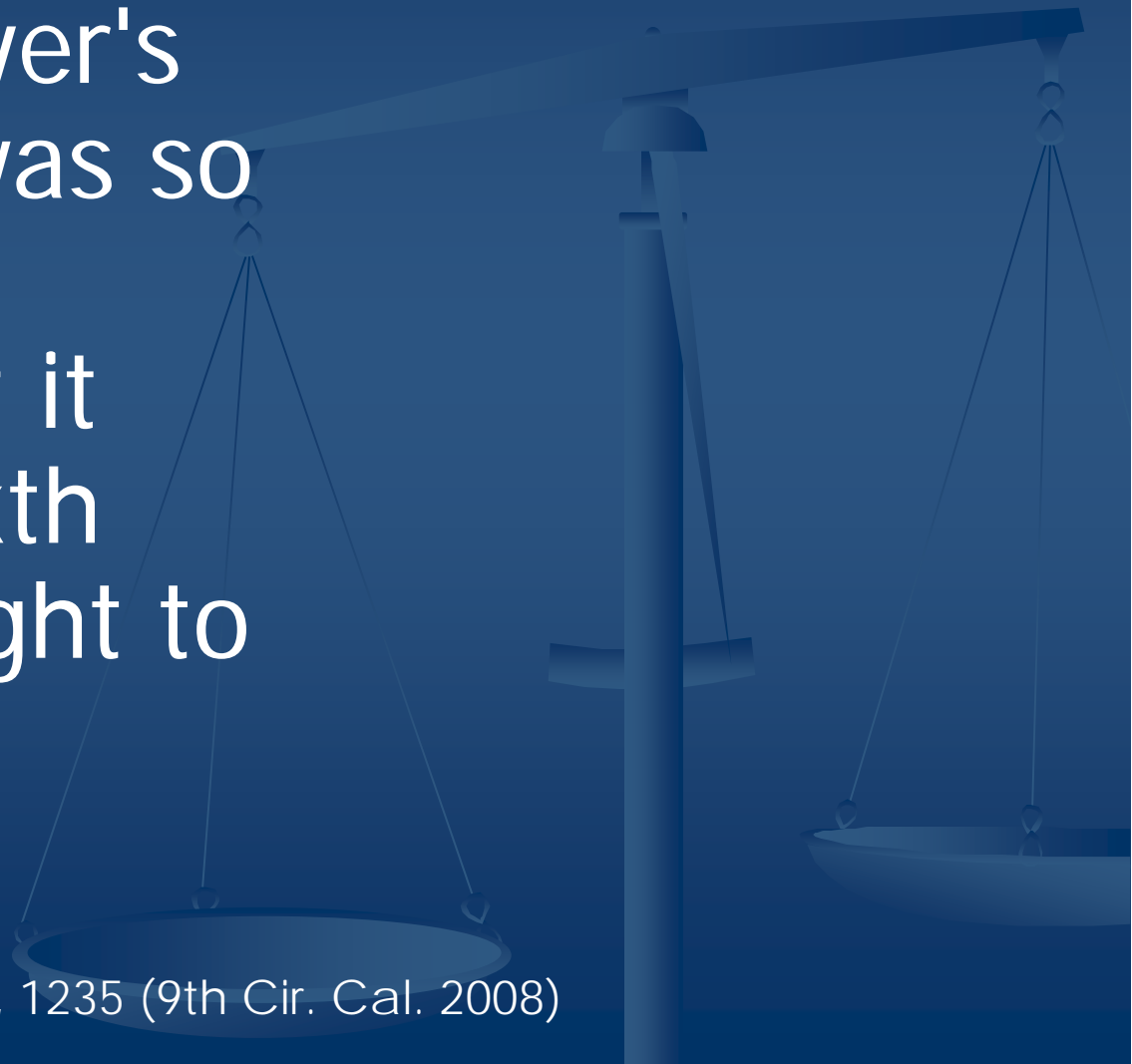
- [A]t the time Gary's conviction became final on August 4, 1997, the Supreme Court had not extended Ake's holding beyond the provision of psychiatric assistance. Accordingly, the state trial court was not bound...to apply Ake in ruling on defense counsel's request for funds to hire a forensic serologist.

Must An Expert Be Hired?



- Once again, we consider whether a capital defendant's appointed lawyer's performance was so deficient and prejudicial that it violated his Sixth Amendment right to counsel.

Duncan v. Ornoski, 528 F.3d 1222, 1235 (9th Cir. Cal. 2008)



When Must Lawyers Learn Science?

- Felony murder/
- Robbery
- Unexplained blood

■ Duncan v. Ornoski, 528 F.3d 1222, 1235 (9th Cir. Cal. 2008)



When Must Lawyers Learn Science?

- Although it may not be necessary in every instance to consult with or present...an expert,

■ Duncan v. Ornoski, 528 F.3d 1222, 1235 (9th Cir. Cal. 2008)

When Must Lawyers Learn Science?

- when the prosecutor's expert witness testifies about pivotal evidence
- or directly contradicts the defense theory,

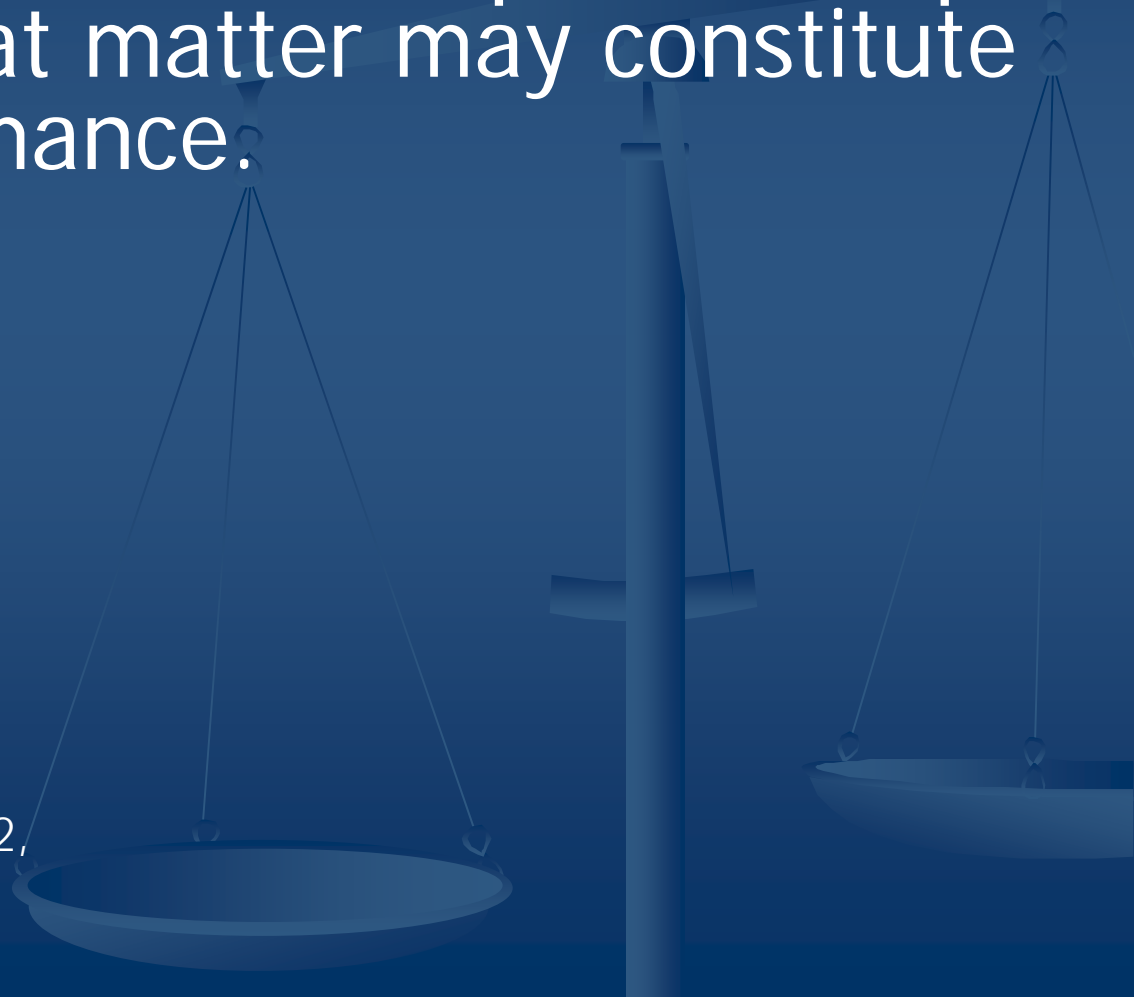


■ Duncan v. Ornoski, 528 F.3d 1222, 1235 (9th Cir. Cal. 2008)

When Must Lawyers Learn Science?

- defense counsel's failure to present expert testimony on that matter may constitute deficient performance.

■ Duncan v. Ornoski, 528 F.3d 1222, 1235 (9th Cir. Cal. 2008)



Helpful Safety Tip

- It is especially important for counsel to seek the advice of an expert when he has no knowledge or expertise about the field.
- Pop Quiz!
- Fingerprints. . .

■ Duncan v. Ornoski, 528 F.3d 1222, 1235 (9th Cir. Cal. 2008) (evidence relevant to role in offense/mitigation)

Take Fingerprints. . .

"Uniqueness does not guarantee that prints from two different people are always sufficiently different that they cannot be confused. . ."

"... or that two impressions made by the same finger will also be sufficiently similar to be discerned as coming from the same source."



When must lawyers learn science?

- Counsel's first failing lay in his inadequate investigation *prior* to settling on a trial strategy



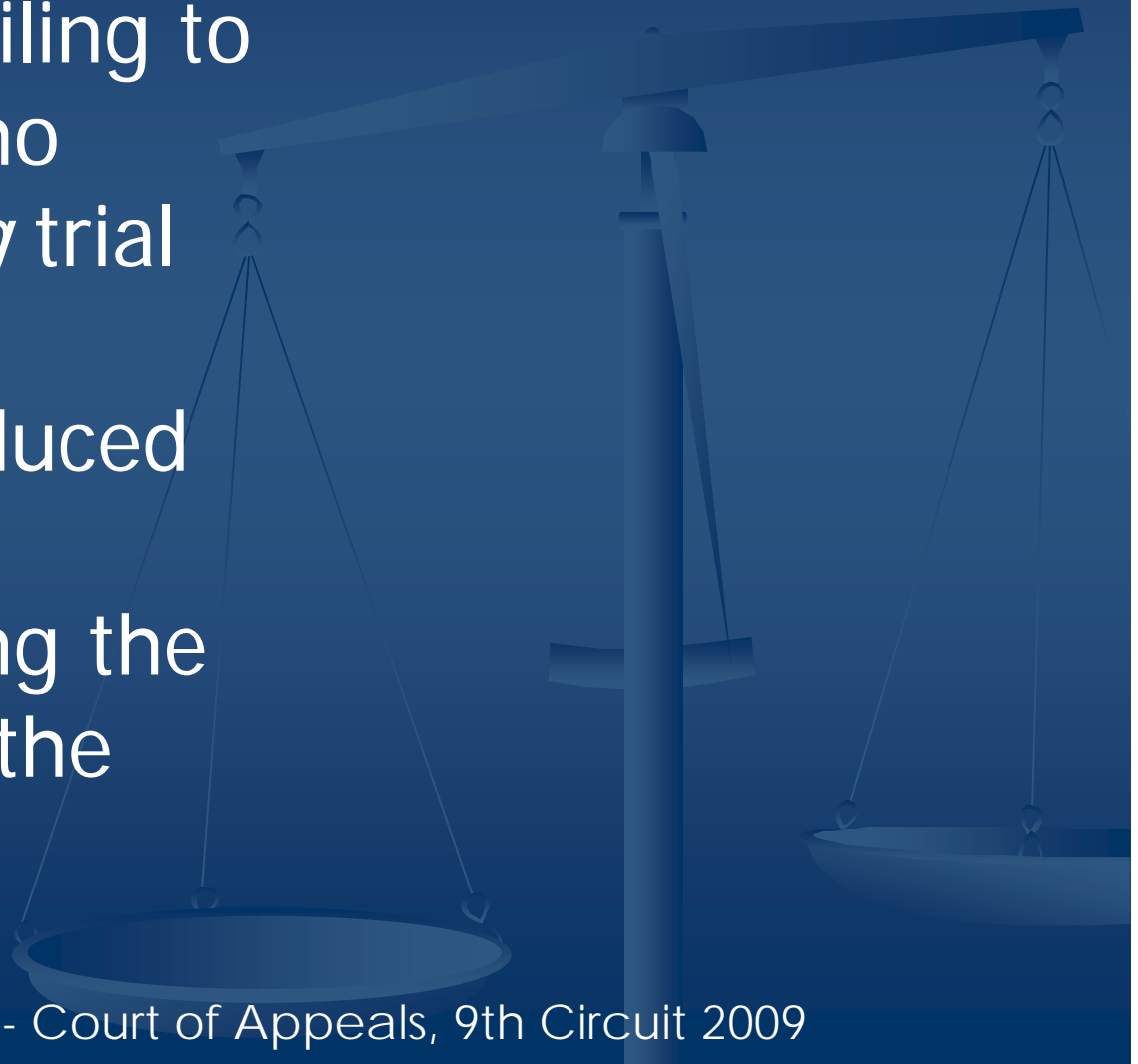
When must lawyers learn science?

- his second, in failing to conduct the necessary investigation before trial to determine what forensic evidence might be available for him to introduce or how expert testimony might support the theory he had chosen;

Richter v. Hickman, 578 F. 3d 944 –
Court of Appeals, 9th Circuit 2009

When must lawyers learn science?

- and his third, in failing to consult experts who could assist *during* trial when the State, foreseeably, introduced damaging expert testimony regarding the blood evidence in the case.

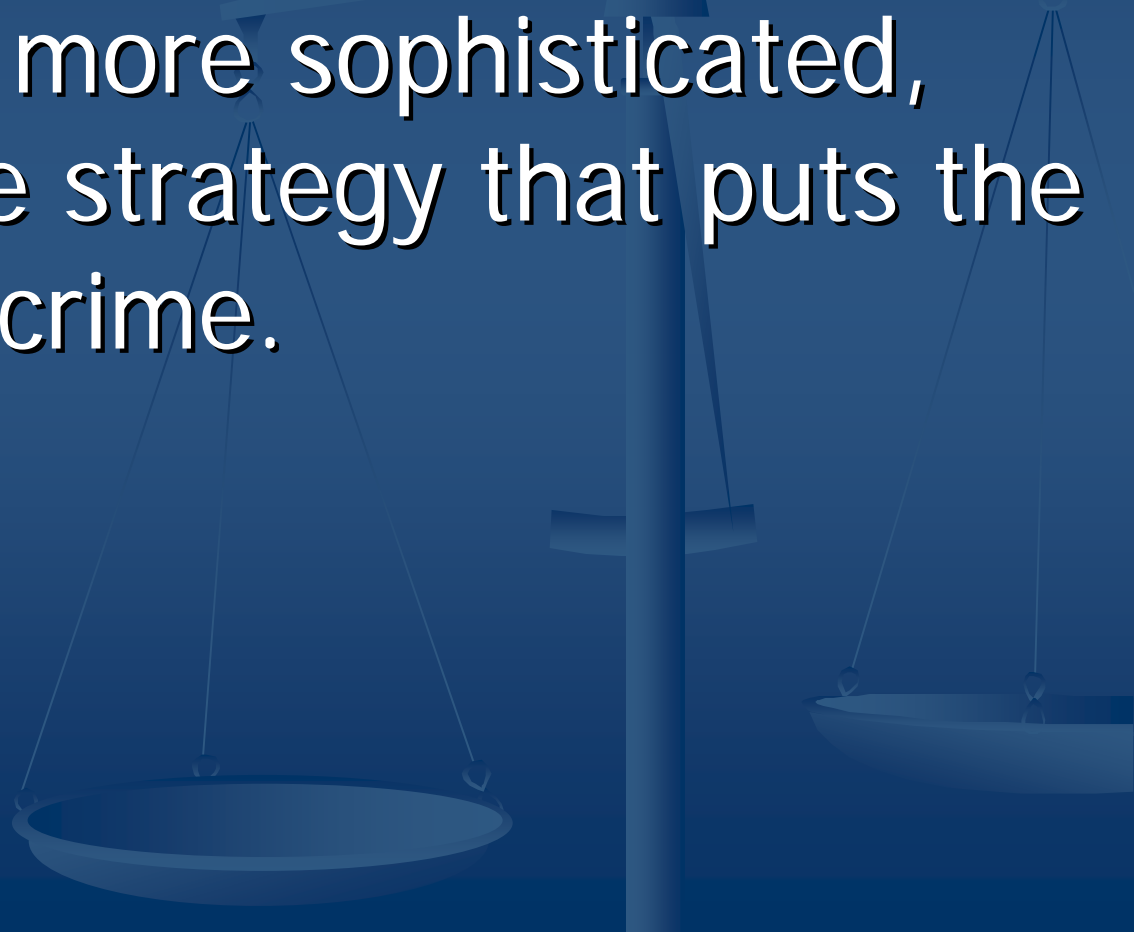


Front-Loading



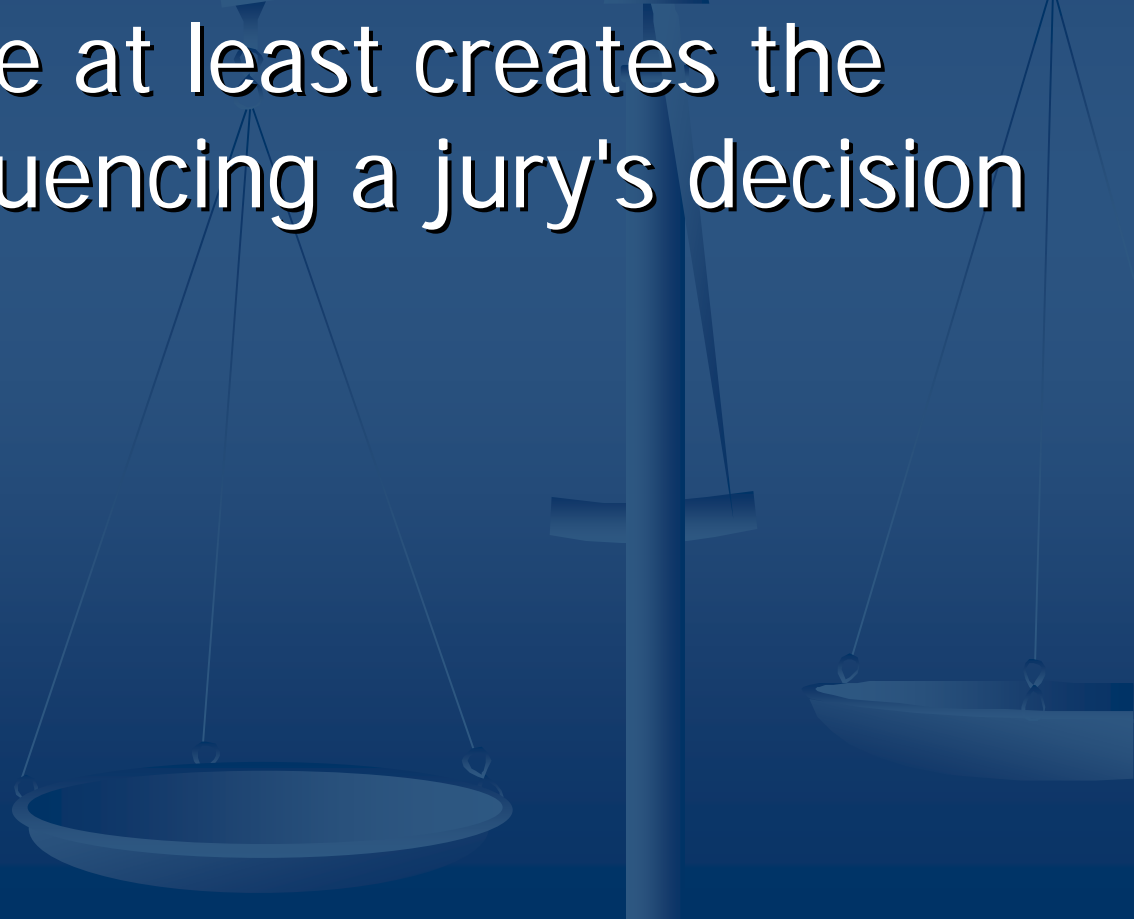
Definition

- [I]ncorporating such evidence into the guilt phase of the trial, "front-loading" mitigation in a more sophisticated, holistic defense strategy that puts the life before the crime.



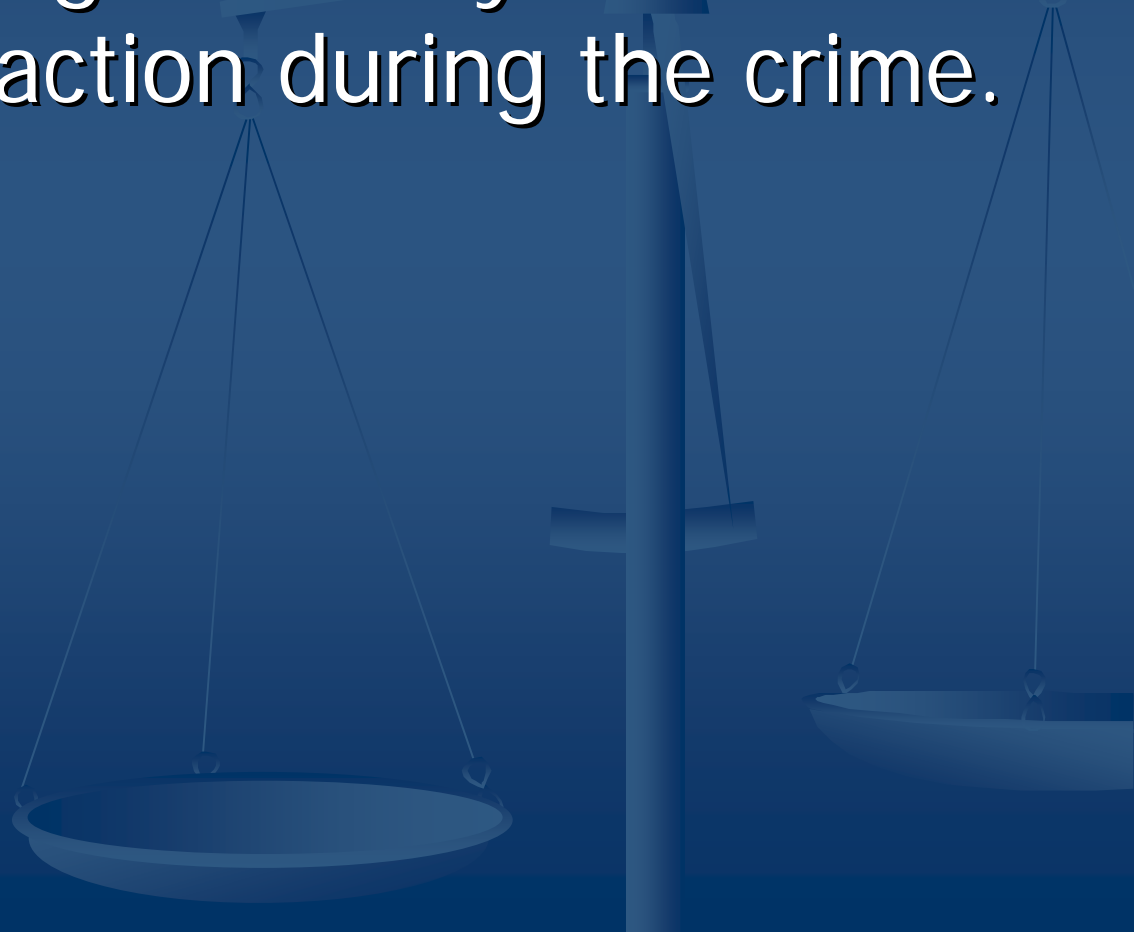
Impact

- The introduction of mitigation evidence in the guilt phase and reintroduction in the sentencing phase at least creates the possibility of influencing a jury's decision for life....



Impact

- That jury will...have the opportunity to mull over how the mitigation may have affected the defendant's action during the crime.



Perceived Need

- Capital Jury Project Data:
 - 65% discussed the “right punishment” in stage 1 deliberations.

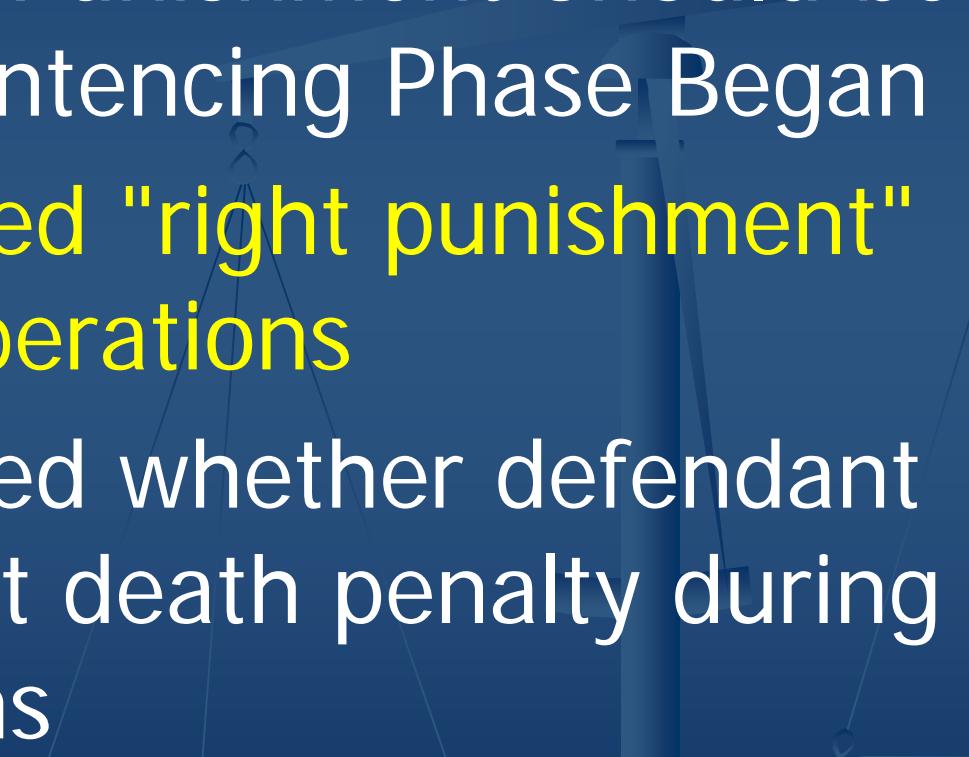


Perceived Need

- Capital Jury Project Data:
- 37% discussed whether the defendant should get the death penalty in stage 1 deliberations.



Capital Jury Project – Pa. Data

- 34.3 % Decided Punishment Should be Death Before Sentencing Phase Began
 - 83.3 % Discussed "right punishment" during guilt deliberations
 - 50.7 % Discussed whether defendant would/should get death penalty during guilt deliberations
- 
- A faint, stylized illustration of a pair of scales of justice is visible in the background of the slide, positioned on the right side. The scales are rendered in a light blue color, matching the overall theme of the slide. The background is a dark blue gradient.

Front-Loading: an Illustration

Legal issues at trial

Human issues at
mitigation



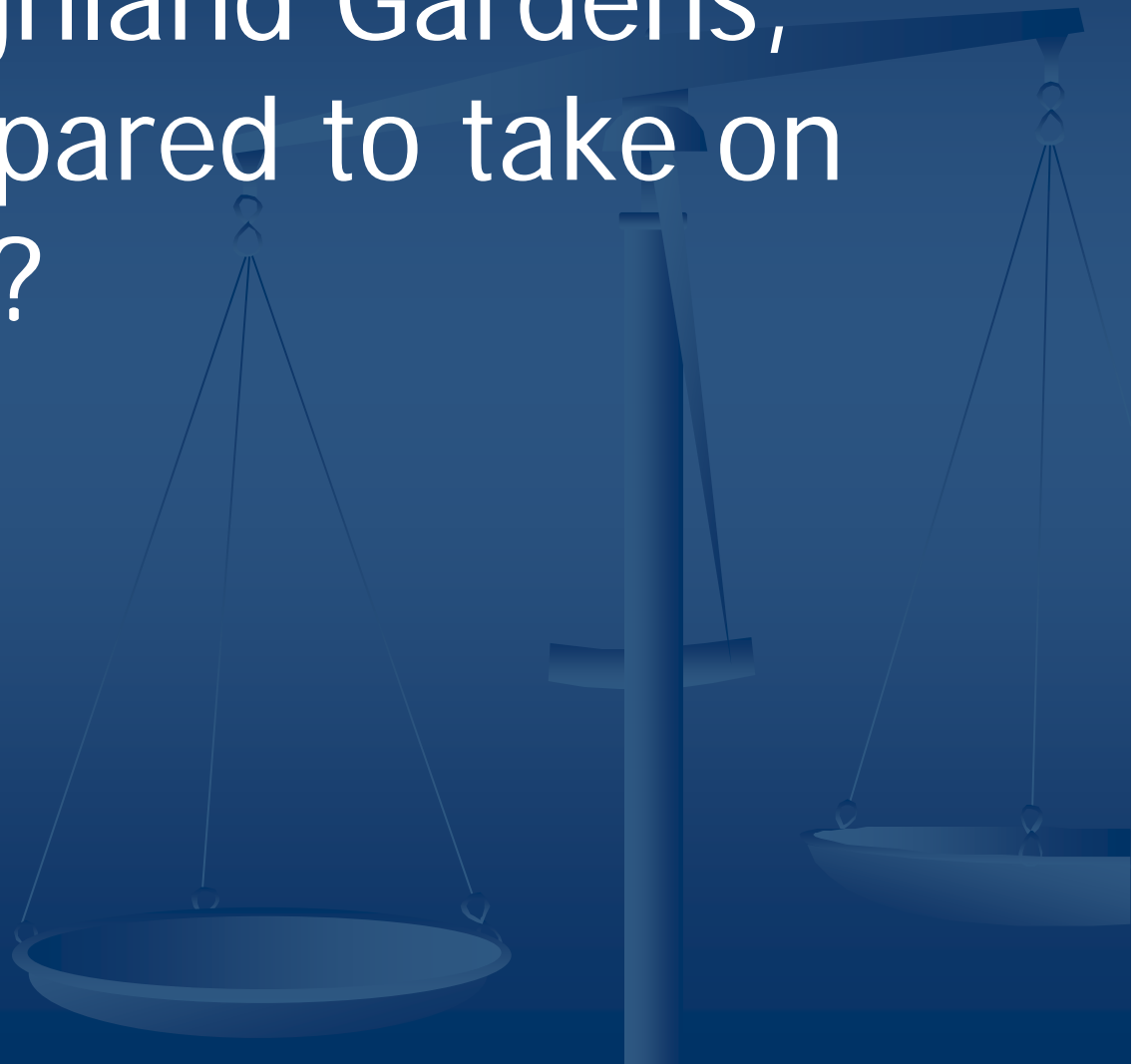
■ Q: One of the things that you did in your community is that you were one of the people who took a stand and tried to make it better for everybody?

■ A. Yes.



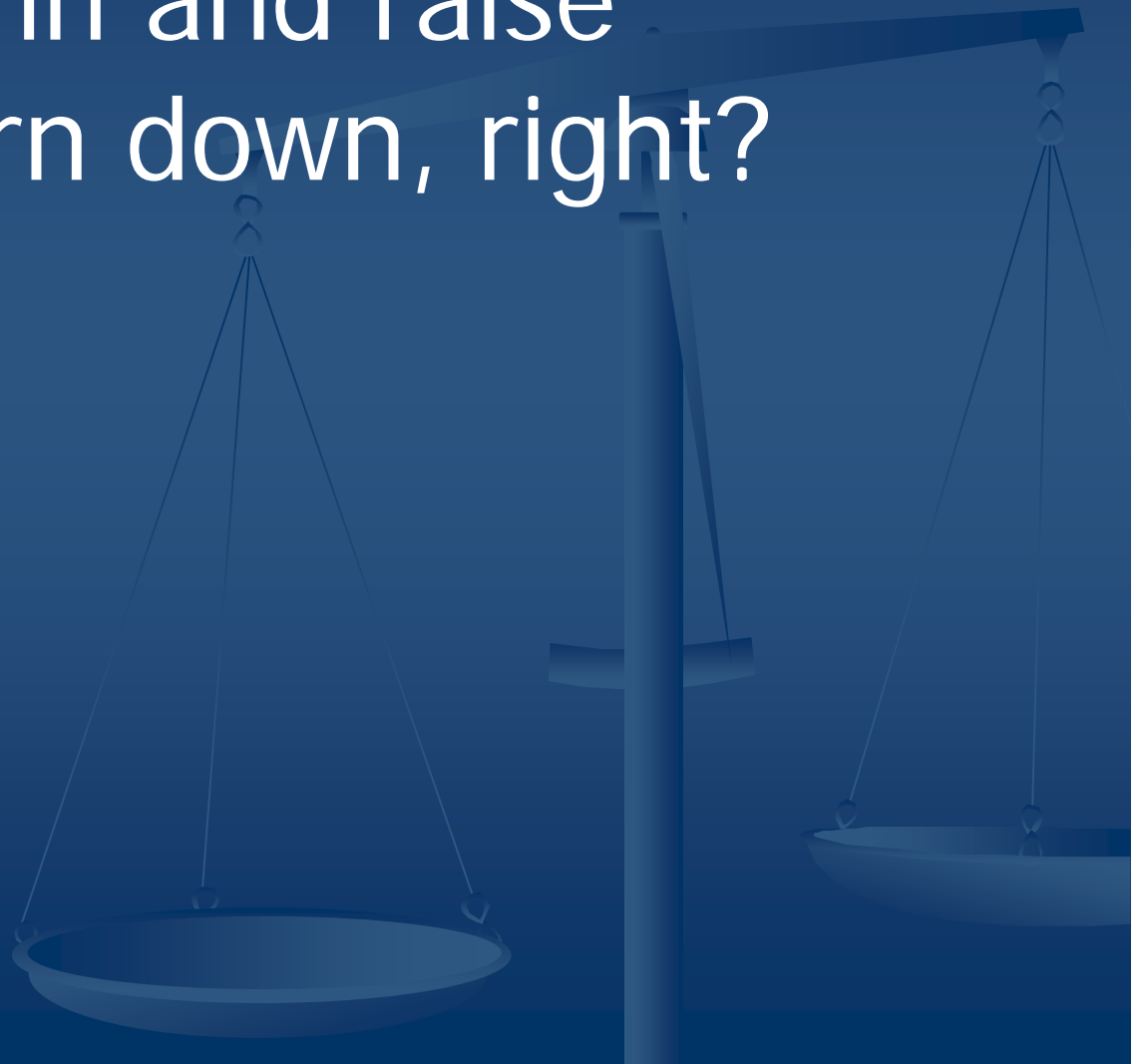
■ Q. And I think you told us that it wasn't just limited to your section of Highland Gardens, you were prepared to take on all of Chester?

■ A. Yes.



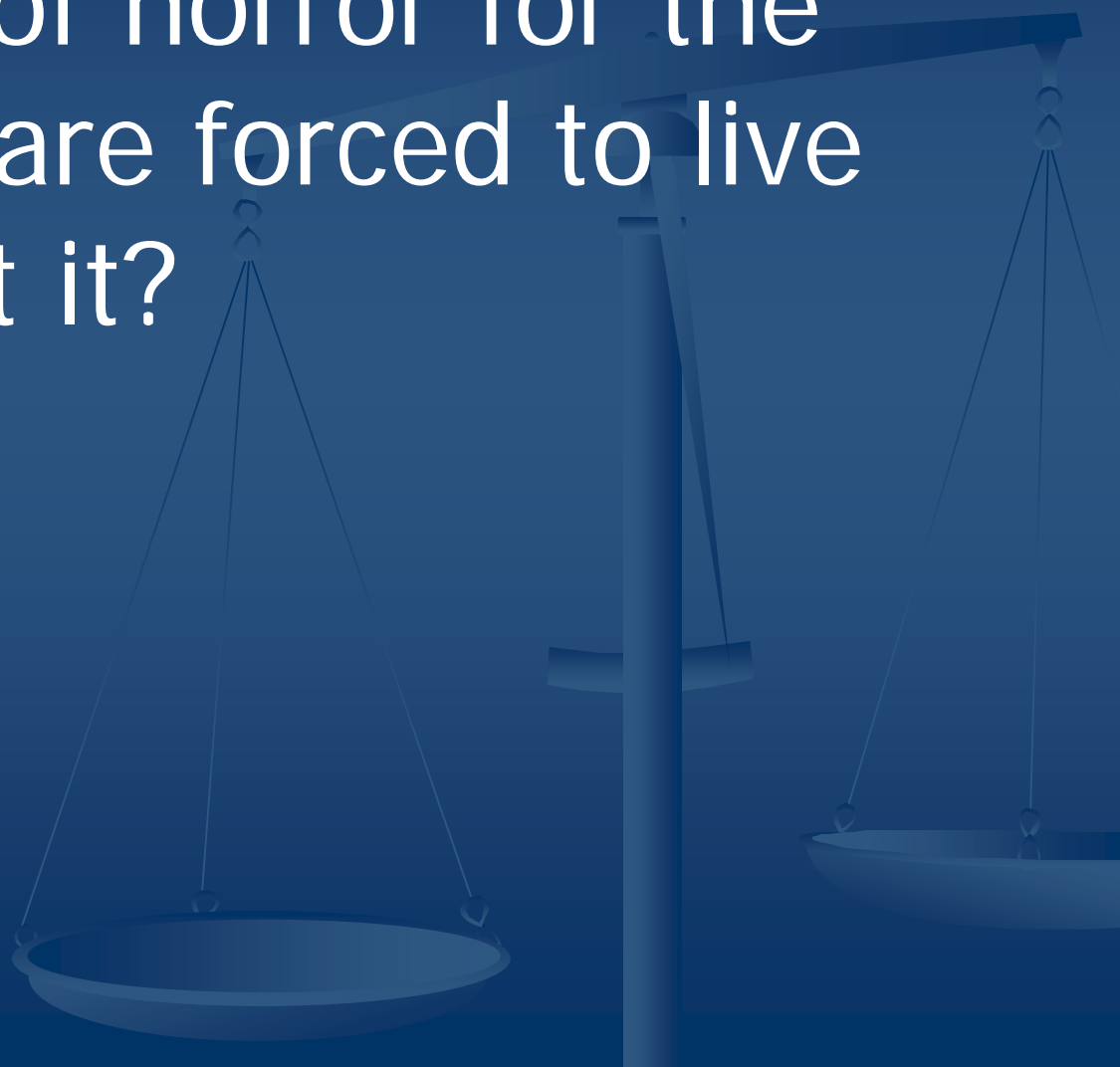
■ Q. And got some of these rat trap buildings that people are forced to live in and raise children in torn down, right?

■ A. Yes.



■ Q. Because I know that you recognize that those conditions lead to a life of horror for the children that are forced to live there, doesn't it?

■ A. Yes.



Frontloading – Objectionable?

- Relevant?
- Role in offense
- *Mens rea*
- “Character”

- With forensics, relevant to
 - Identity
 - Role in Offense



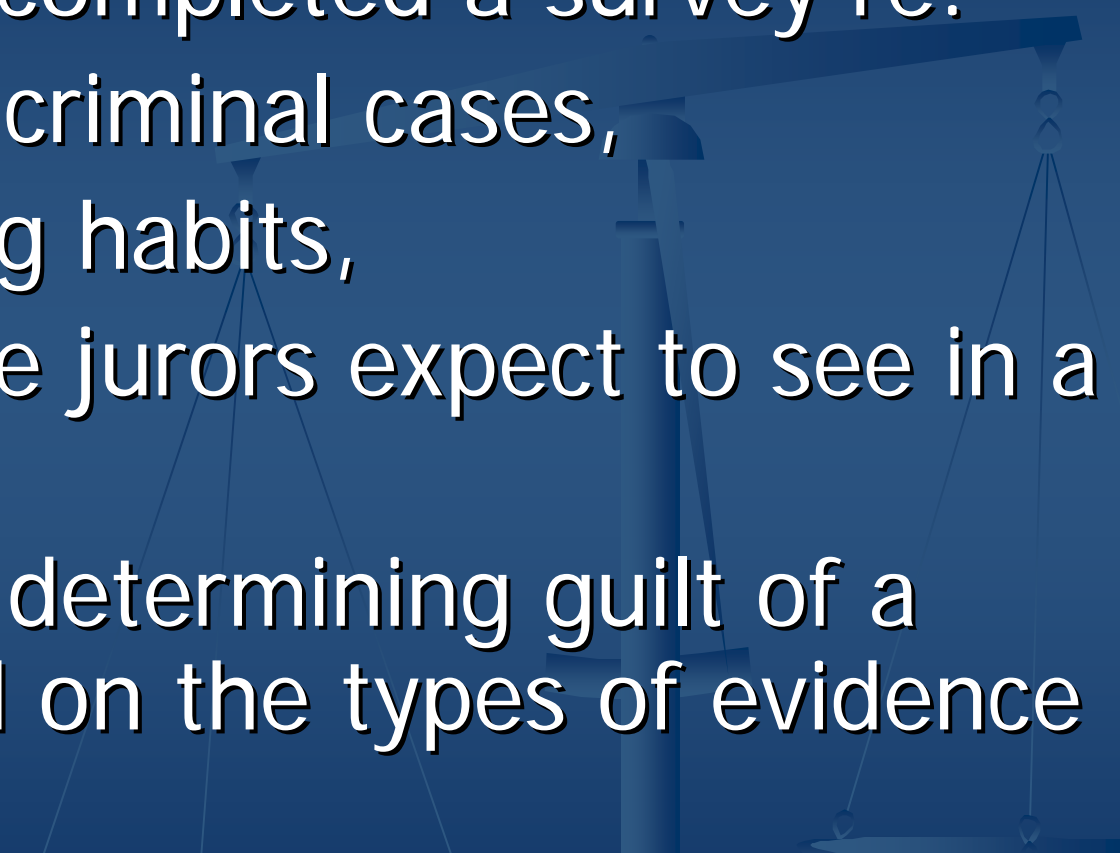
Science, Trial and Mitigation



The Purported(?)“CSI Effect”

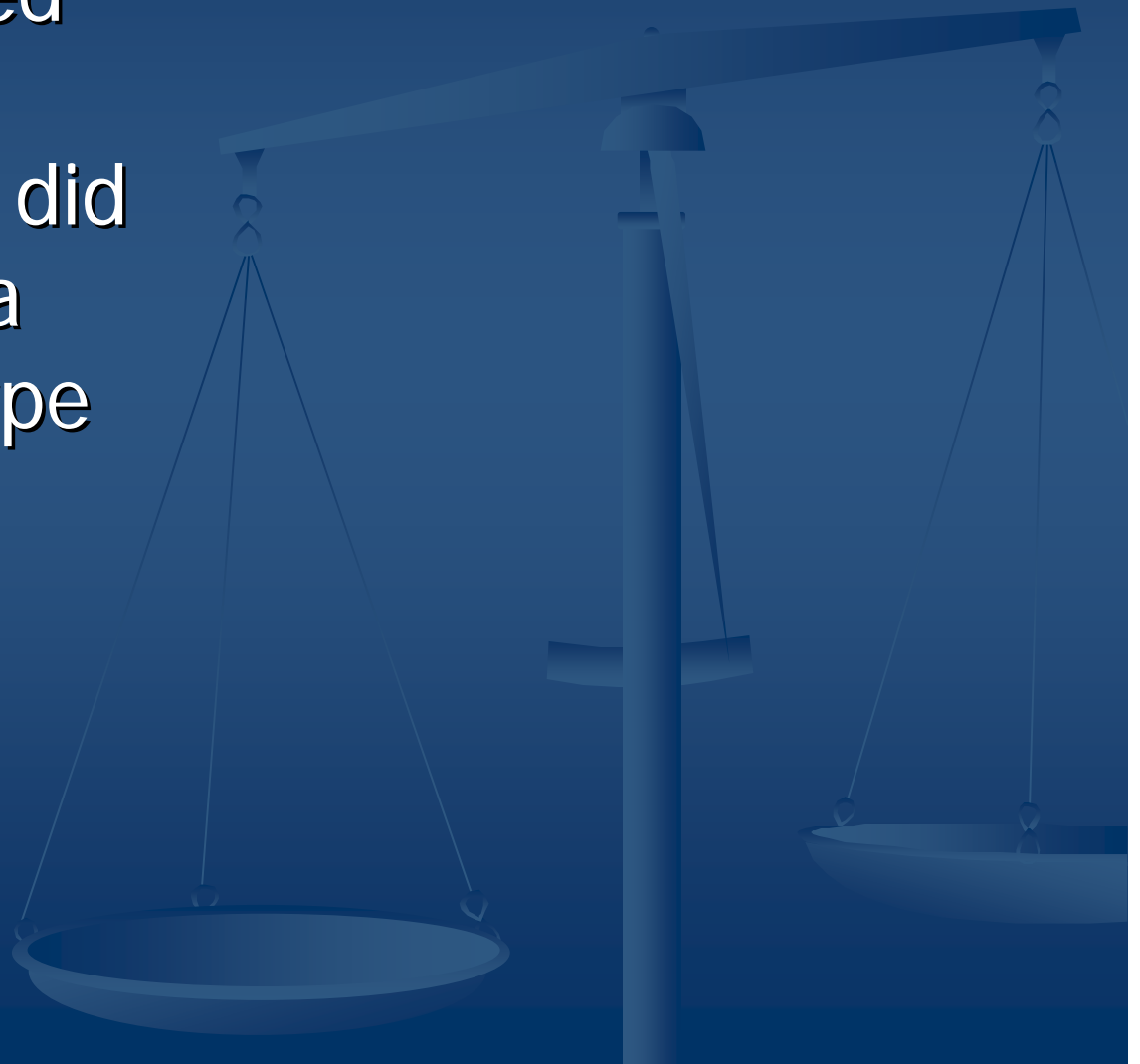


The 2006 Study

- 1,027 randomly summoned jurors in Ann Arbor, Michigan completed a survey re:
 - various types of criminal cases,
 - television viewing habits,
 - types of evidence jurors expect to see in a case, and
 - the likelihood of determining guilt of a defendant based on the types of evidence presented.
- 

Findings

- In most of the scenarios, increased expectations of scientific evidence did *not* translate into a demand for this type of evidence as a prerequisite for finding someone guilty.



Findings

- [J]urors were more likely to find a defendant guilty than not guilty even without scientific evidence *if the victim or other witnesses testified, except in the case of rape.*



Findings

- There was scant evidence...that *CS/* viewers were either more or less likely to acquit defendants without scientific evidence.



Findings

- Only 4 of 13 scenarios showed somewhat significant differences between viewers and non-viewers on this issue, and they were inconsistent.



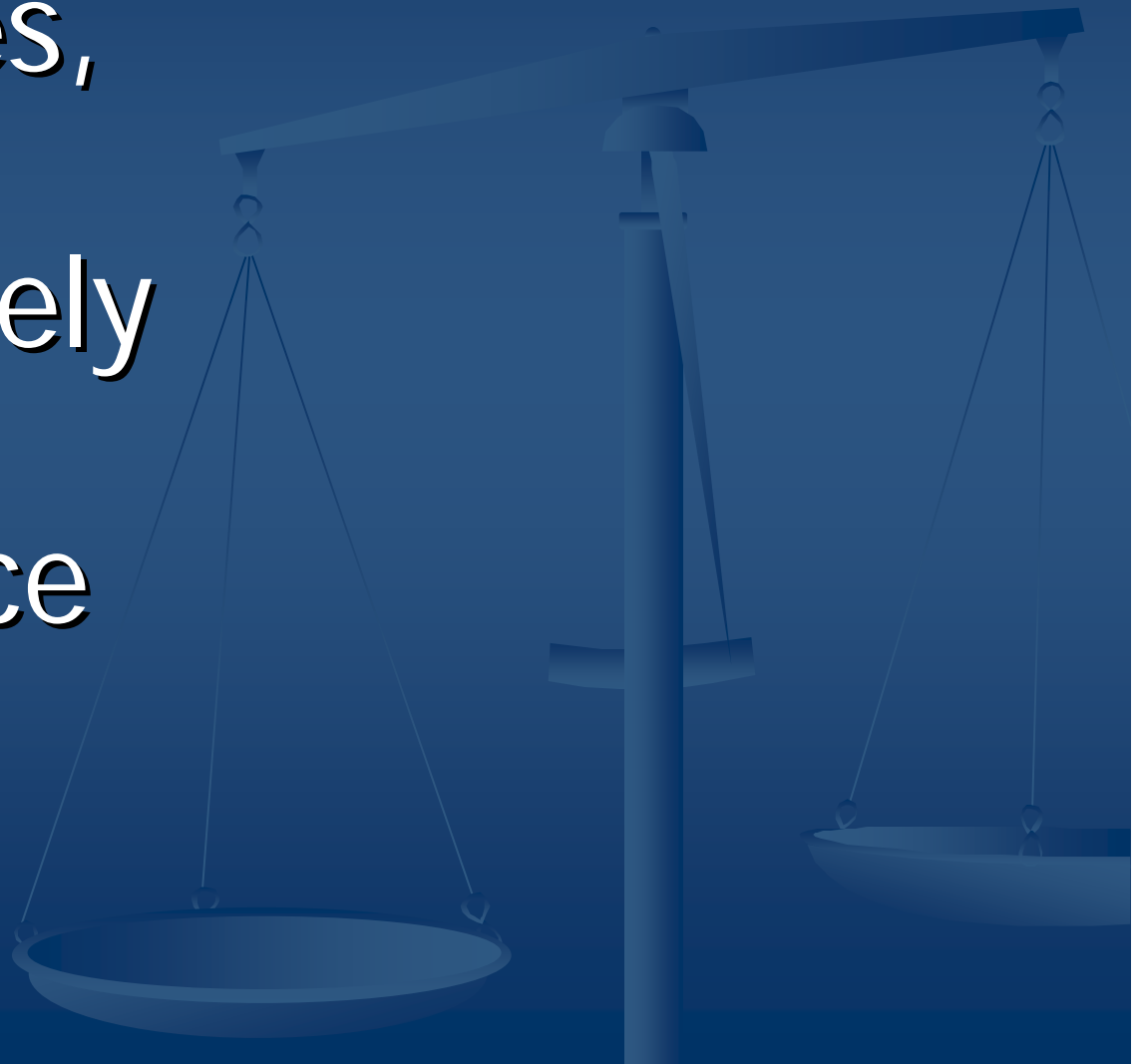
Findings

- In the "every crime" scenario, *CSI* viewers were more likely to convict without scientific evidence if eyewitness testimony was available.



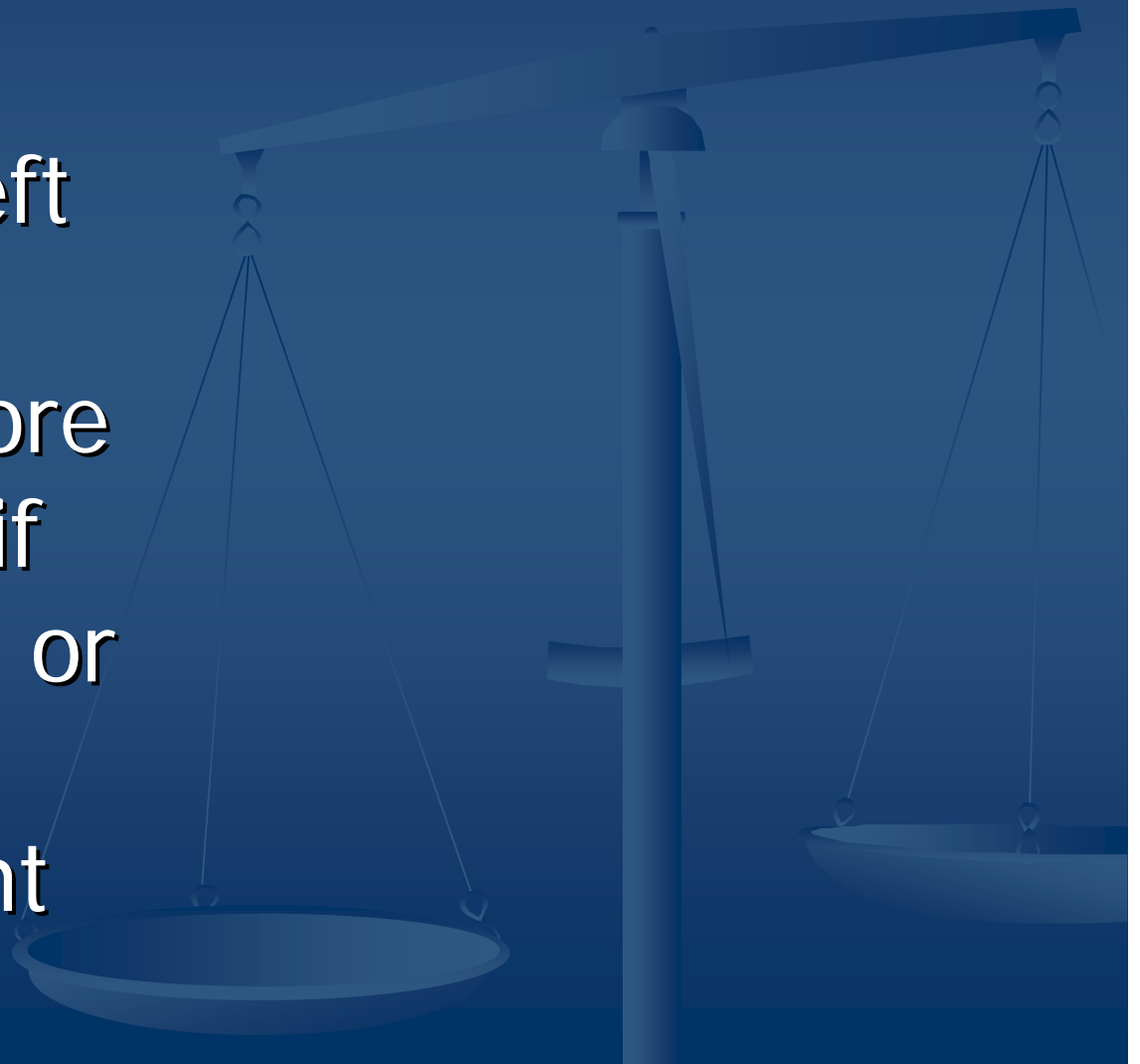
Findings

- In rape cases, *CS*/viewers were less likely to convict if DNA evidence was not presented.



Findings

- In both the breaking-and-entering and theft scenarios, *CSI* viewers were more likely to convict if there was victim or other testimony, but no fingerprint evidence.



Guilt-Innocence Trial Forensics

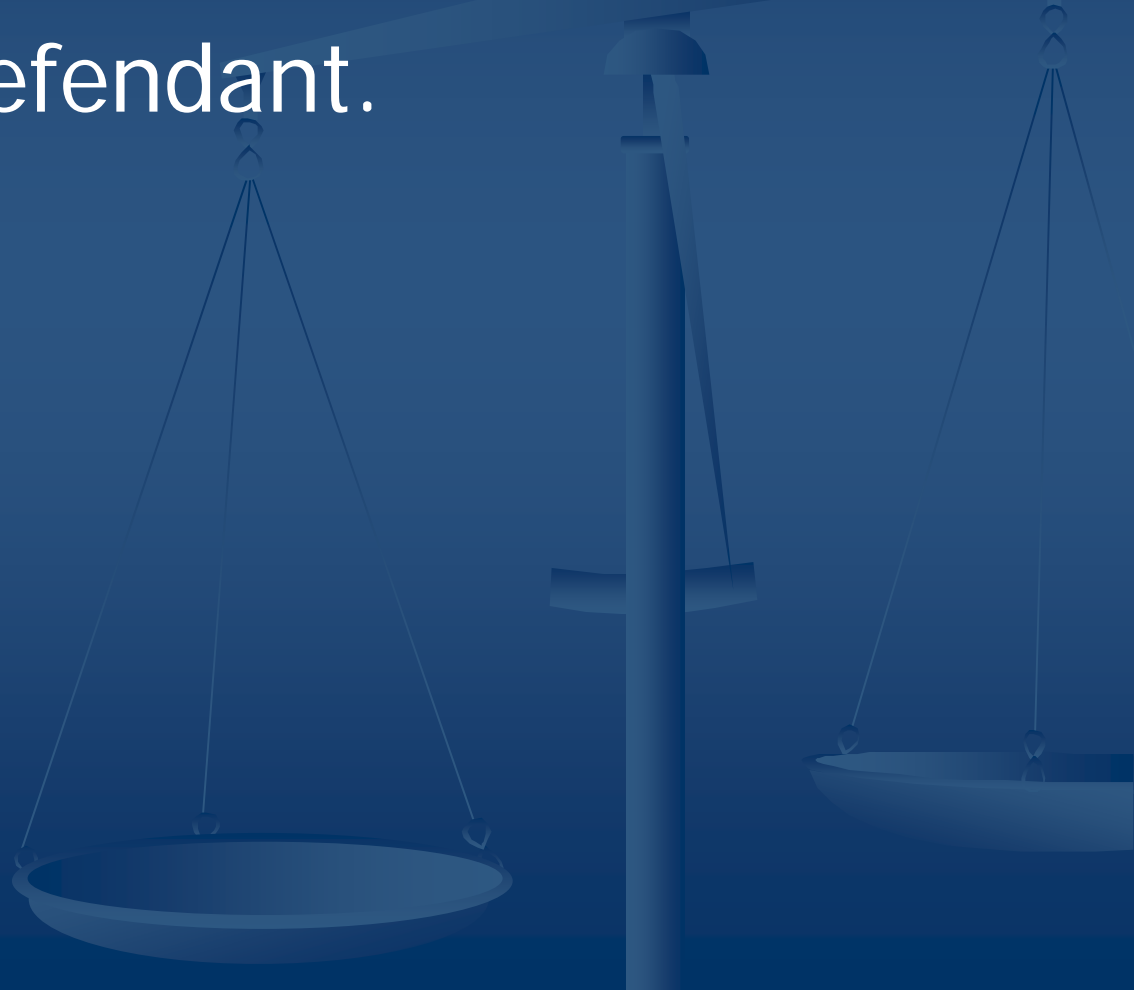


Forensic Pathology and *Mens Rea*

- Dr. Anthony opined that the stabbings were not "overkill" because they had not been delivered with "a great deal of force" and because Lake had not been repeatedly stabbed.
- She had seventeen stab wounds to the chest and neck area, multiple defensive wounds, and had been bludgeoned. A forensic pathologist testified that the number of wounds inflicted was consistent with rage.

Forensic Pathology and Self-Defense

- Angle of entry/exit can show 'victim' was lunging at the defendant.

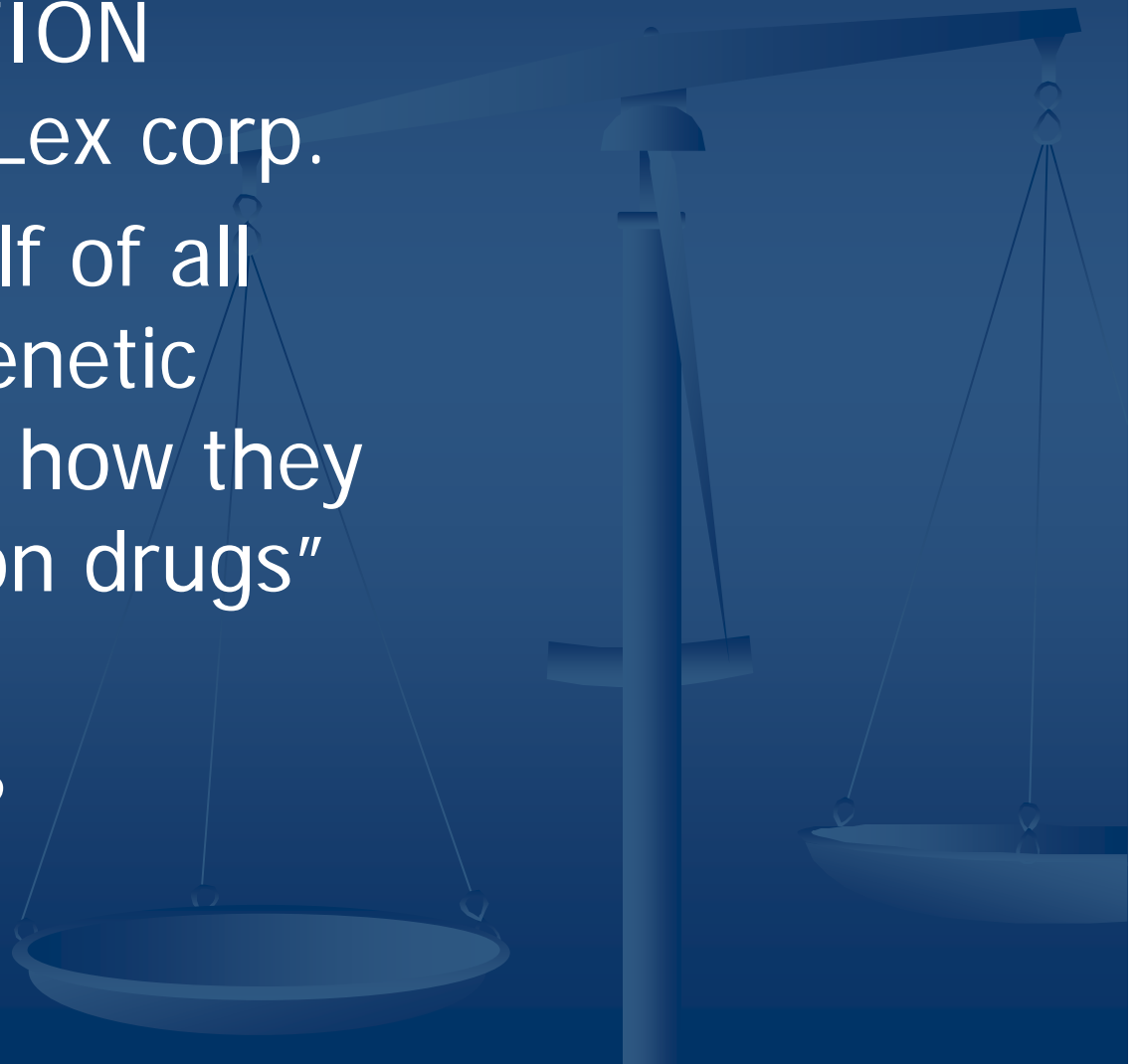


Toxicology



Toxicology and the Defendant

- DNA DRUG REACTION TESTING by GeneLex corp.
- “Approximately half of all Americans have genetic defects that affect how they process prescription drugs”
- Is it good science?

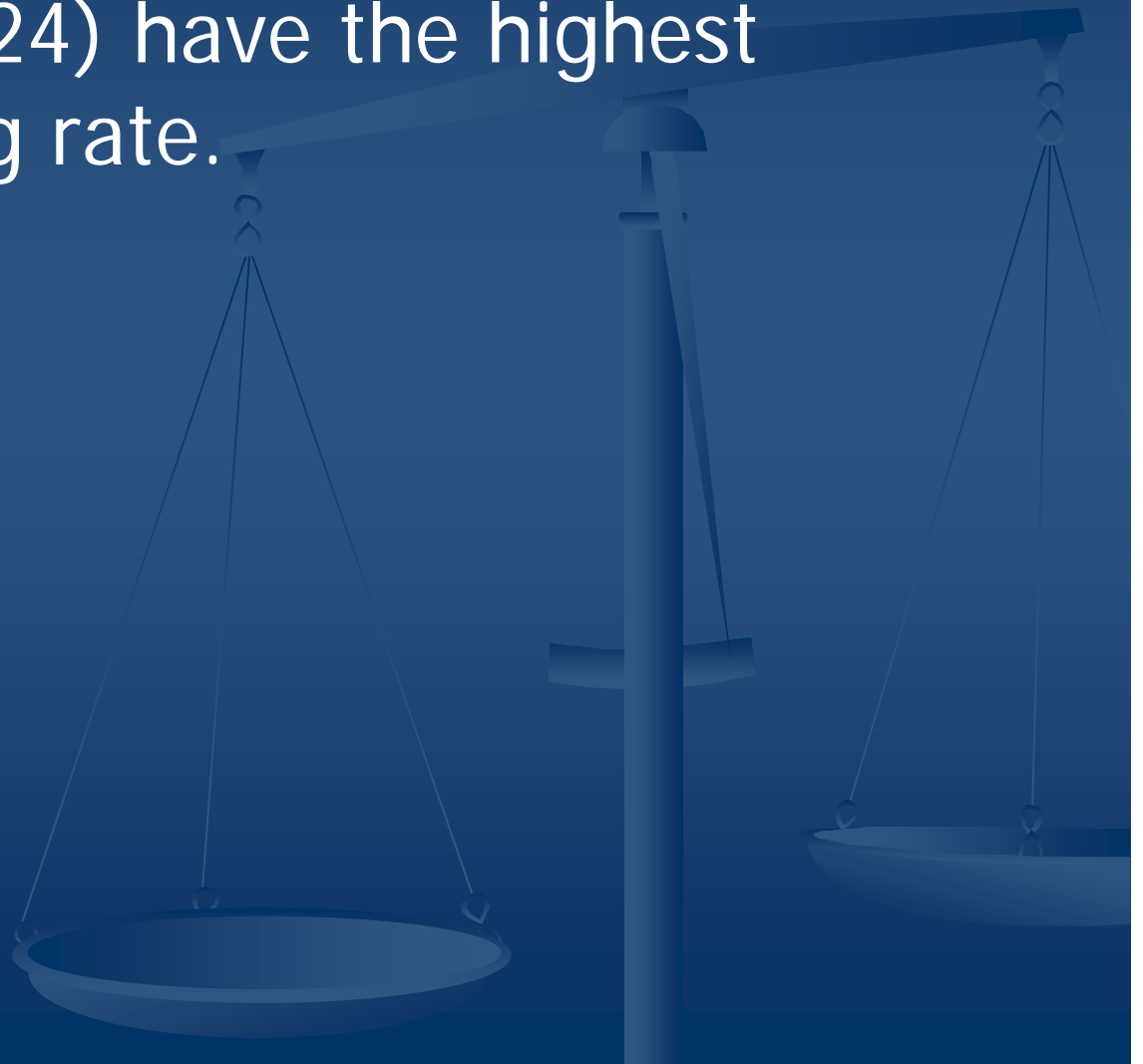


Brain Forensics



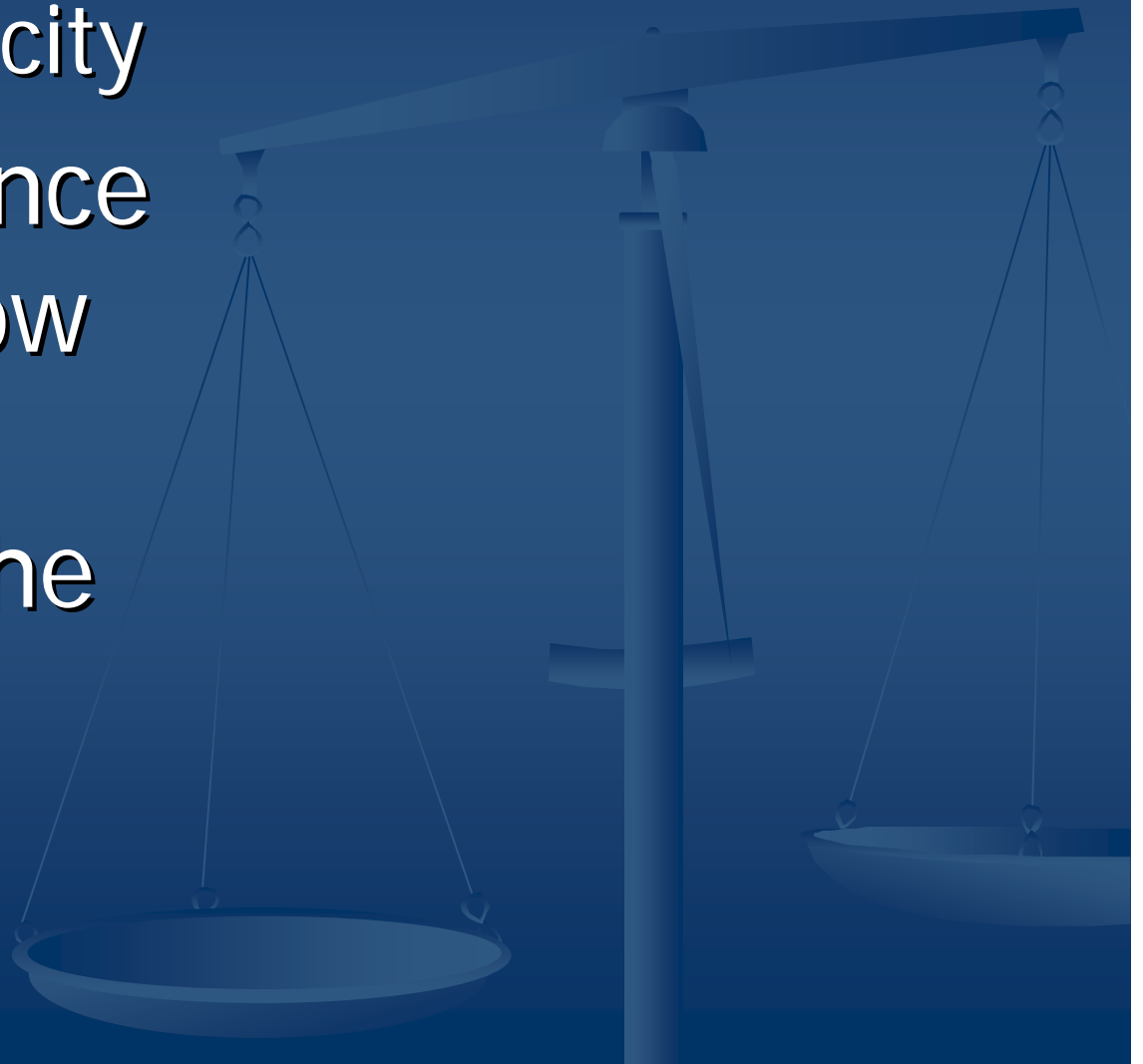
Youth

- Young adults (18-24) have the highest homicide offending rate.

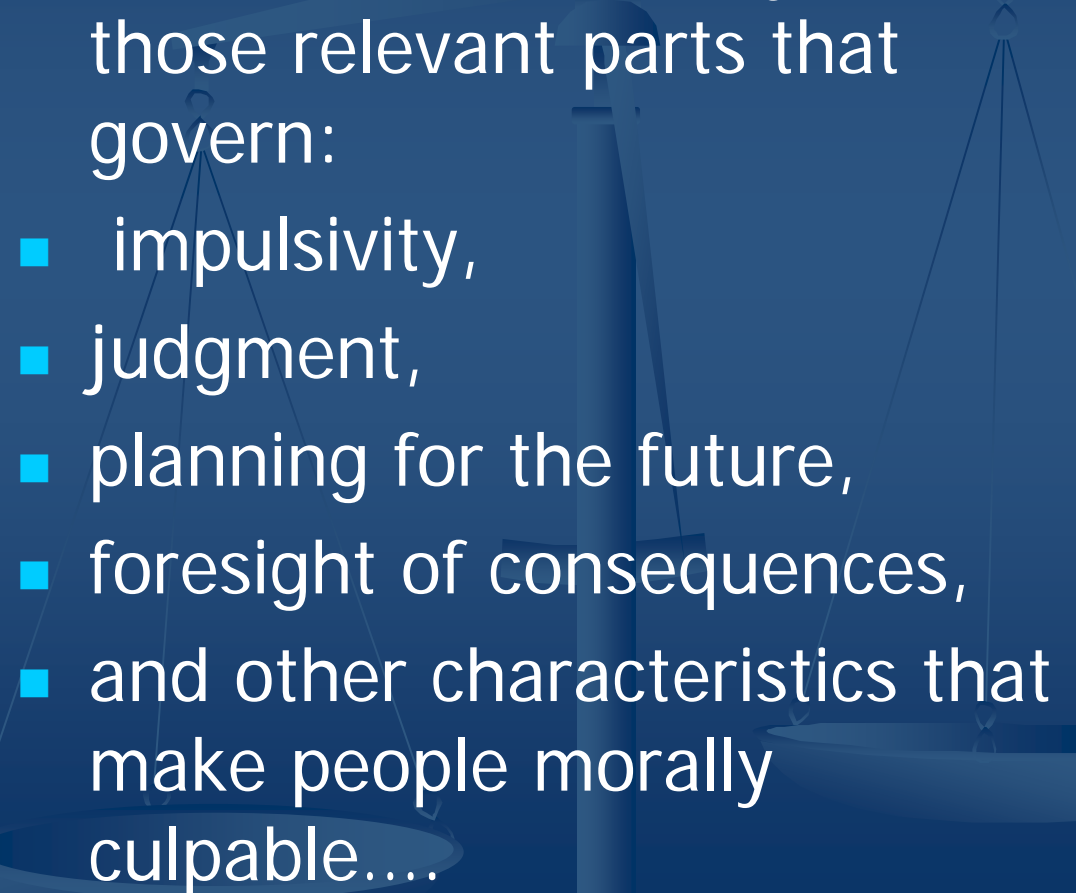


Forensic Mitigation at Trial: Psychology/Neuroscience

- Diminished capacity
- Is *Roper* evidence relevant to show impulsiveness, and a lack of the intent to kill?

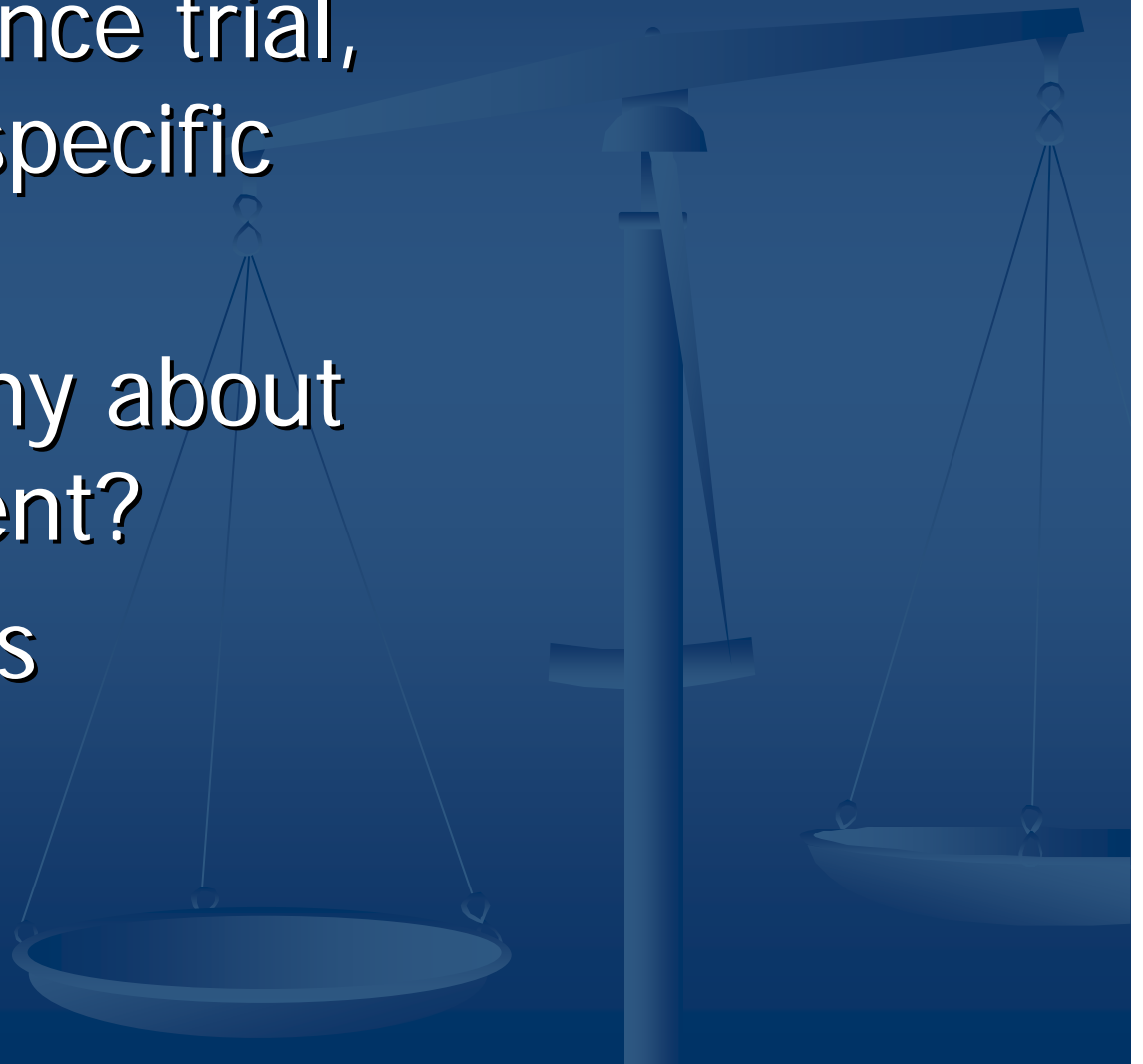


Juvenile Brain Development

- The evidence now is strong:
 - the brain does not cease to mature until the early 20s in those relevant parts that govern:
 - impulsivity,
 - judgment,
 - planning for the future,
 - foresight of consequences,
 - and other characteristics that make people morally culpable....
- 

Brain Development and Mitigation

- At a guilt innocence trial, concerning the specific intent to kill:
- General testimony about brain development?
- Brain scan of this defendant?



Roper and Eligibility

- Applied strictly to chronological age, not mental age.


- Bowling v. Kentucky, 224 S.W.3d 577 (Ky. 2006).



Mental Health Forensics: Looks Can Be Deceiving



The Numbers: 2002

- 148,300 persons in state prisons for murder
 - 16% had mental illness
 - 2008 estimates: 26,000 mentally ill persons incarcerated for murder
- 

The Numbers 2002

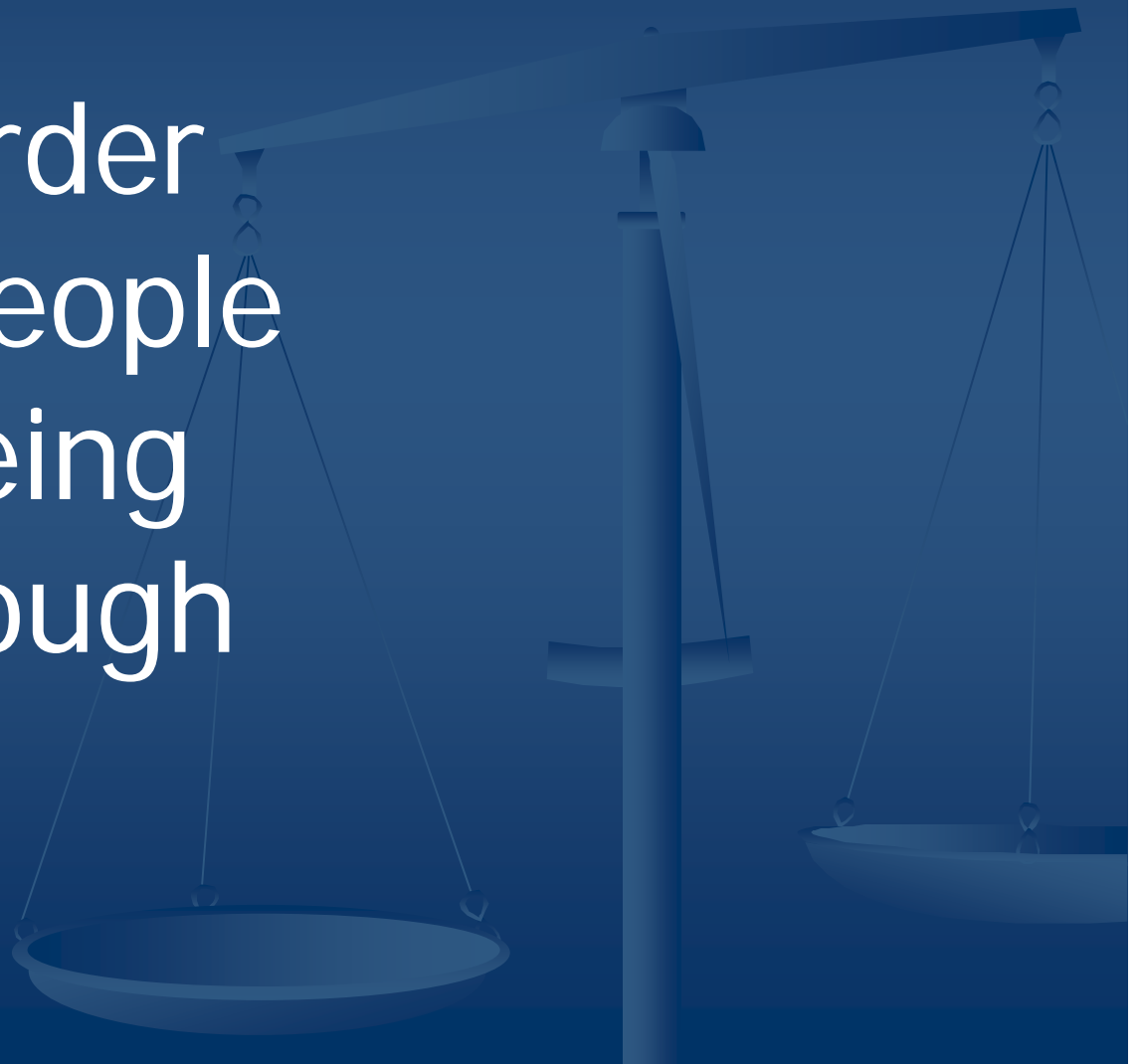
- From one study (Indiana), the most common diagnosis was major depression.





PTSD (NIMH)

- PTSD is an anxiety disorder that some people get after seeing or living through a dangerous event.



PTSD (NIMH)

When in danger, it's natural to feel afraid.

This fear triggers many split-second changes in the body to prepare to defend against the danger or to avoid it...

But in PTSD, this reaction is changed or damaged.

People who have PTSD may feel stressed or frightened even when they're no longer in danger.

PTSD – Not Just Vets

- Inner-city adolescents who are exposed to a high number of violent events are at greater risk for mental health problems in the areas of depression, suicidal behavior, and posttraumatic stress disorder than those who have had minimal exposure.

Exposure to Violence In Inner-City School-Based Adolescents
by James J. Mazza, Ph.D.

Exposure to Violence

- [A]dolescents who are exposed to many violent events are experiencing higher levels of depression...and have more symptomatology associated with PTSD than those with minimal exposure.

Exposure to Violence In Inner-City School-Based Adolescents
by James J. Mazza, Ph.D.

Exposure to Violence

Moderate levels of exposure to violence were also related to...increased severity of PTSD but not depression when compared to none/low peers.



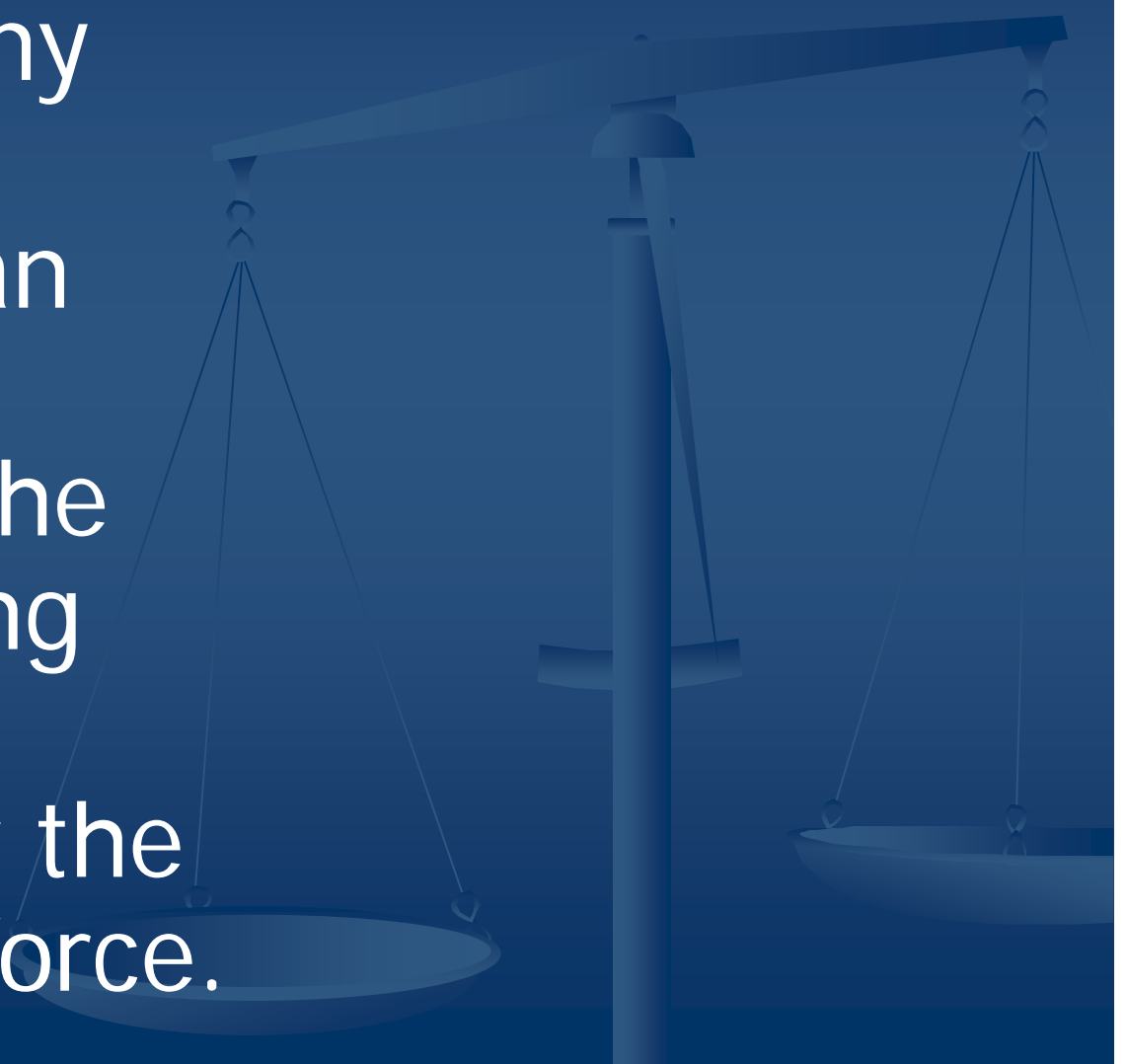
Exposure to Violence In Inner-City School-Based Adolescents
by James J. Mazza, Ph.D.

PTSD in the Home

- PTSD often is caused by childhood or adolescent exposure to persistent threats to the physical integrity of the child or others in his/her household, which produce intense and long-lasting fear, helplessness, or horror.

Battered Person

- expert testimony regarding the battered woman syndrome is admissible as the basis for proving self-defense or justification for the use of deadly force.



Battered Person

- there are myths about the victims of abuse which can be dispelled by expert testimony.



Science and Reliability



The Question of Invalid(?) Science

- Habeas relief granted to capital defendant where science of infant brain injury has changed, and injury attributed to a blow to the baby's head can now be explained by a fall.

Ex parte Cathy Lynn Henderson, Texas Court of

Mental Illness and the Death-Sentenced Inmate

- ABA Resolution 8/2006: Defendants should not be executed or sentenced to death if, at the time of the offense, they had a severe mental disorder or disability that significantly impaired their capacity (a) to appreciate the nature, consequences or wrongfulness of their conduct,

Mental Illness and the Death-Sentenced Inmate

- ABA Resolution 8/2006: Defendants should not be executed or sentenced to death if, at the time of the offense, they had a severe mental disorder or disability that significantly impaired their capacity (b) to exercise rational judgment in relation to conduct, or

Mental Illness and the Death-Sentenced Inmate

- ABA Resolution 8/2006: Defendants should not be executed or sentenced to death if, at the time of the offense, they had a severe mental disorder or disability that significantly impaired their capacity (c) to conform their conduct to the requirements of the law.

Mental Illness and the Death-Sentenced Inmate

- Because I see no principled distinction between the diminished capacities exhibited by Overstreet and the diminished capacities that exempt the mentally retarded from execution, I would declare that executing Overstreet... violat[es] the Cruel and Unusual Punishment provision of the Indiana Constitution.

■ Overstreet v. State, 877 N.E.2d 144, 175 (Ind. 2007) (dissenting opinion on this issue)

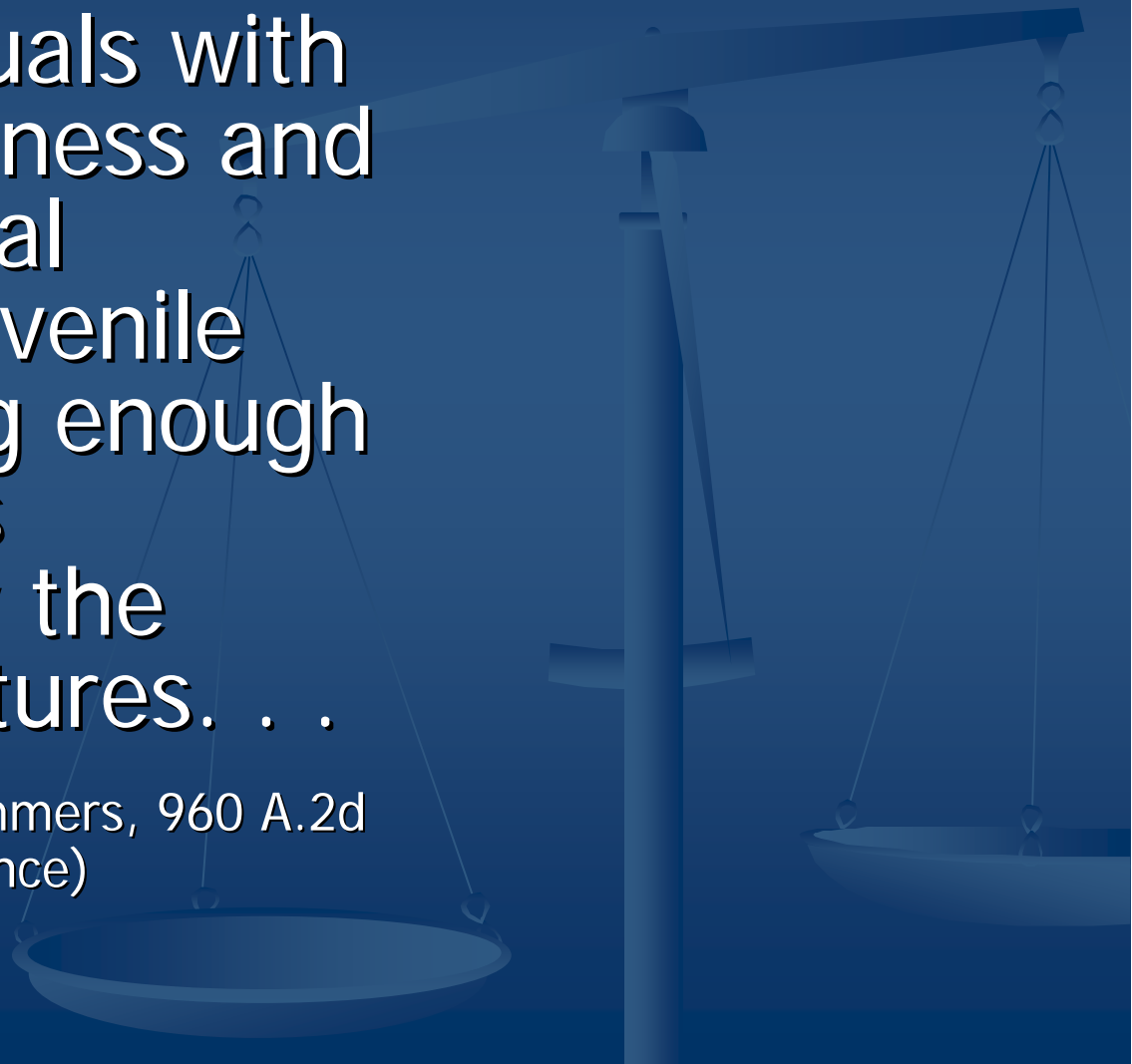
Mental Illness and Atkins

- In his brief, he provided only a cursory argument that *Atkins* should apply directly to the seriously mentally ill without any evidence demonstrating legislative action against the execution of seriously mentally ill defendants,
- diminished imposition of the death penalty on seriously mentally ill defendants,
- support from national and international opinion,
- or guidance for the exercise of this Court's independent judgment.

■ Commonwealth v. Baumhammers, 960 A.2d 59, 106 (Pa. 2008) (concurrency)

Mental Illness and *Atkins*

- [T]he similarities between individuals with severe mental illness and those with mental retardation or juvenile status are strong enough to justify serious consideration by the country's legislatures. . . .
- Commonwealth v. Baumhammers, 960 A.2d 59, 106 (Pa. 2008) (concurrence)



Mental Illness and *Atkins*

- [I]t is not clear that either purpose of capital punishment -- retribution or deterrence -- is served...

- Commonwealth v. Baumhammers, 960 A.2d 59, 106 (Pa. 2008) (concurrency)



- I request that our legislature consider the issue, summon and question scientific experts (which an appellate court may not do), and consider whether the national consensus and our statutory law are in line with the demands of the Eighth Amendment and of fundamental fairness, considering the best scientific evidence of the impact of severe mental illnesses on individual culpability.

Mental Illness and the Death Sentenced Inmate

- Christopher Offord
pled guilty to first-
degree murder...
- Heinous, atrocious,
or cruel.

Offord v. State, 959 So. 2d 187 (Fla. 2007); *see also*
Green v. State, 975 So. 2d 1081, 1087 (Fla. 2008)

Mental Illness and the Death Sentenced Inmate

- under the influence of extreme mental or emotional disturbance
- capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law was substantially impaired.

Offord v. State, 959 So. 2d 187 (Fla. 2007); *see also* Green v. State, 975 So. 2d 1081, 1087 (Fla. 2008)

Mental Illness and the Death Sentenced Inmate

- In 3 prior cases, HAC was sufficient, however, mitigation was weaker.
- Offord's lifelong history of severe mental illness makes the death sentence in this single-aggravator murder a disproportionate punishment.

Offord v. State, 959 So. 2d 187 (Fla. 2007); *see also* Green v. State, 975 So. 2d 1081, 1087 (Fla. 2008)

Science, Mitigation and the Penalty Trial



The Supreme Court Weighs in



Wood v. Allen, 130 S. Ct. 841 - Supreme Court 2010

- “. . . [T]he state court's finding that Wood's counsel made a strategic decision not to pursue or present evidence of Wood's mental deficiencies was not an unreasonable determination of the facts in light of the evidence presented in the state-court proceedings.”

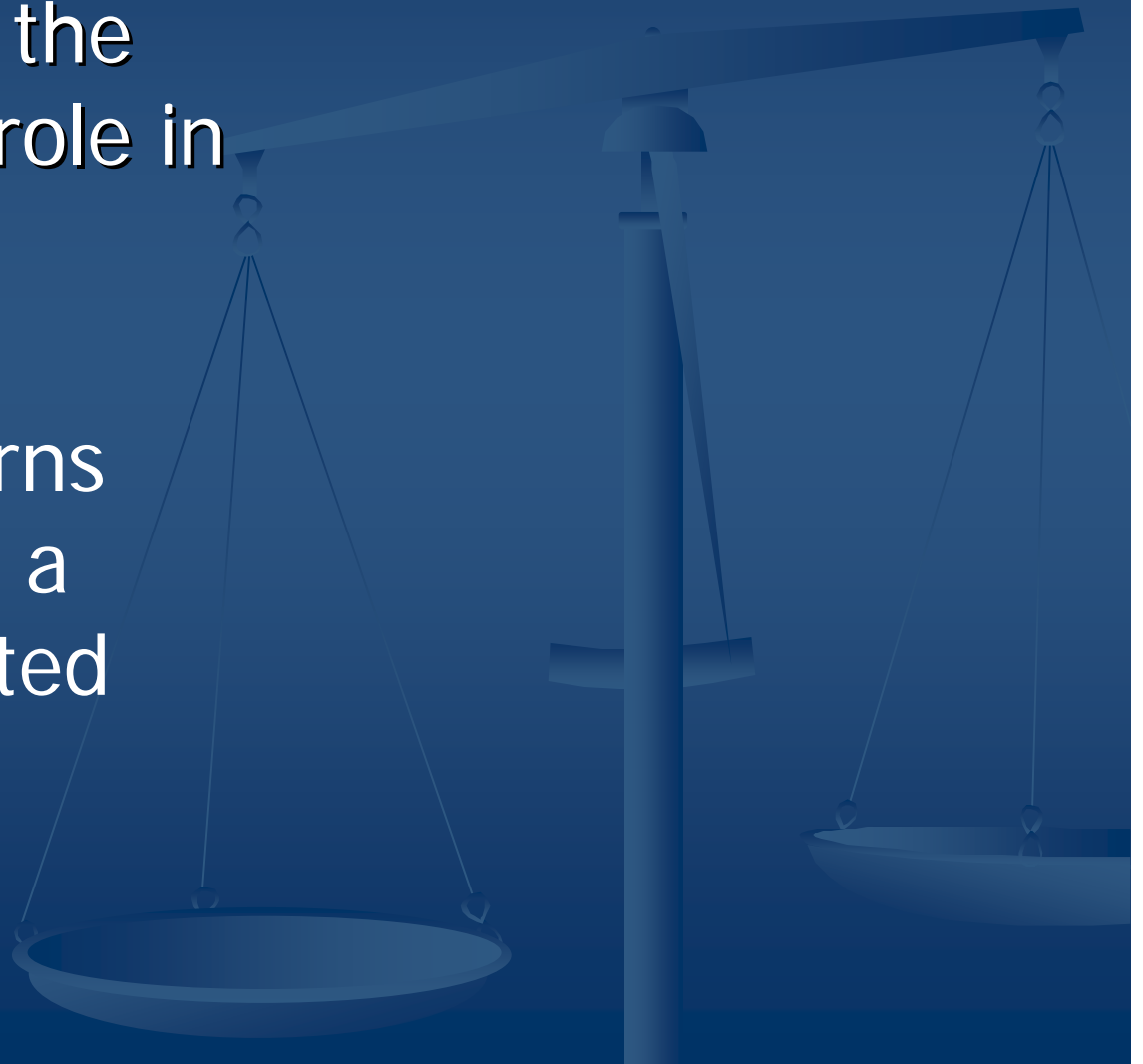
Residual Doubt



- [T]he Oregon Supreme Court erred in interpreting Green as providing a capital defendant with a constitutional right to introduce residual doubt evidence at sentencing.
- In this case, we once again face a situation where we need not resolve whether such a right exists...

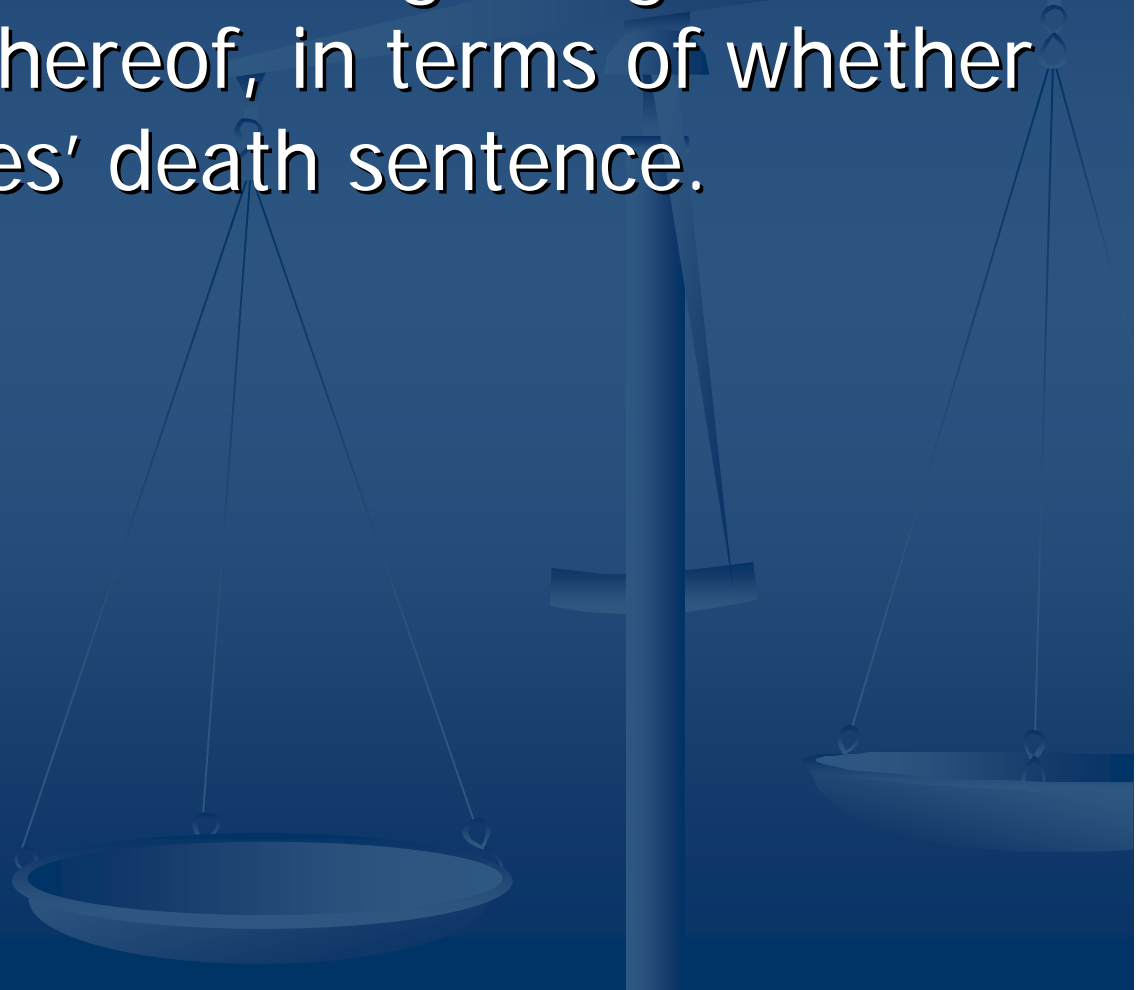
Residual Doubt

- Court leaves open the right to challenge role in offense.
- “[S]entencing traditionally concerns how, not whether, a defendant committed the crime.”



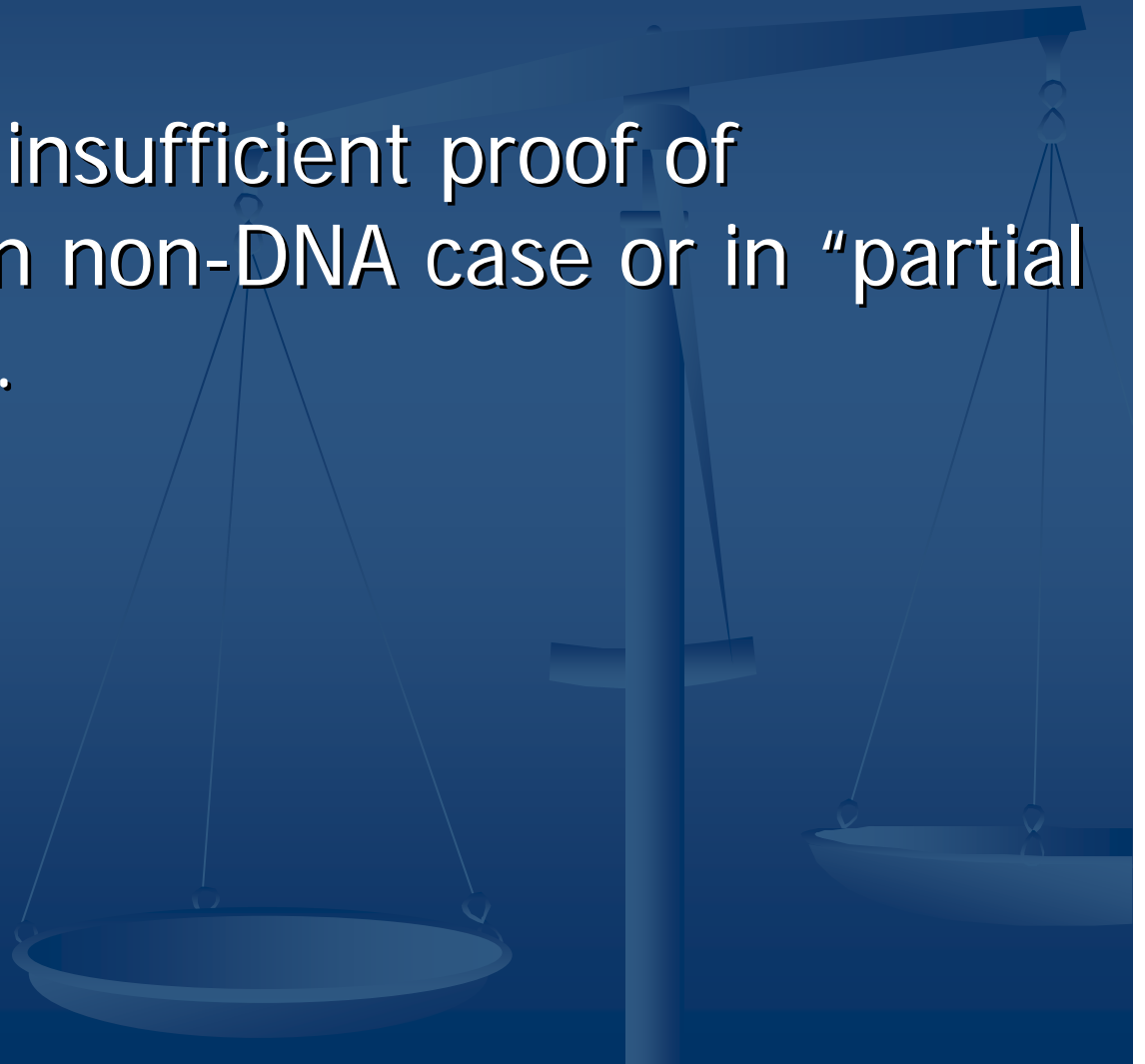
Forensics and Residual Doubt

- Right (?) for defense to re-argue significance of forensics, or lack thereof, in terms of whether defendant 'deserves' death sentence.



Forensics and Residual Doubt

- Right (?) to argue insufficient proof of individualization (in non-DNA case or in “partial match” DNA case).

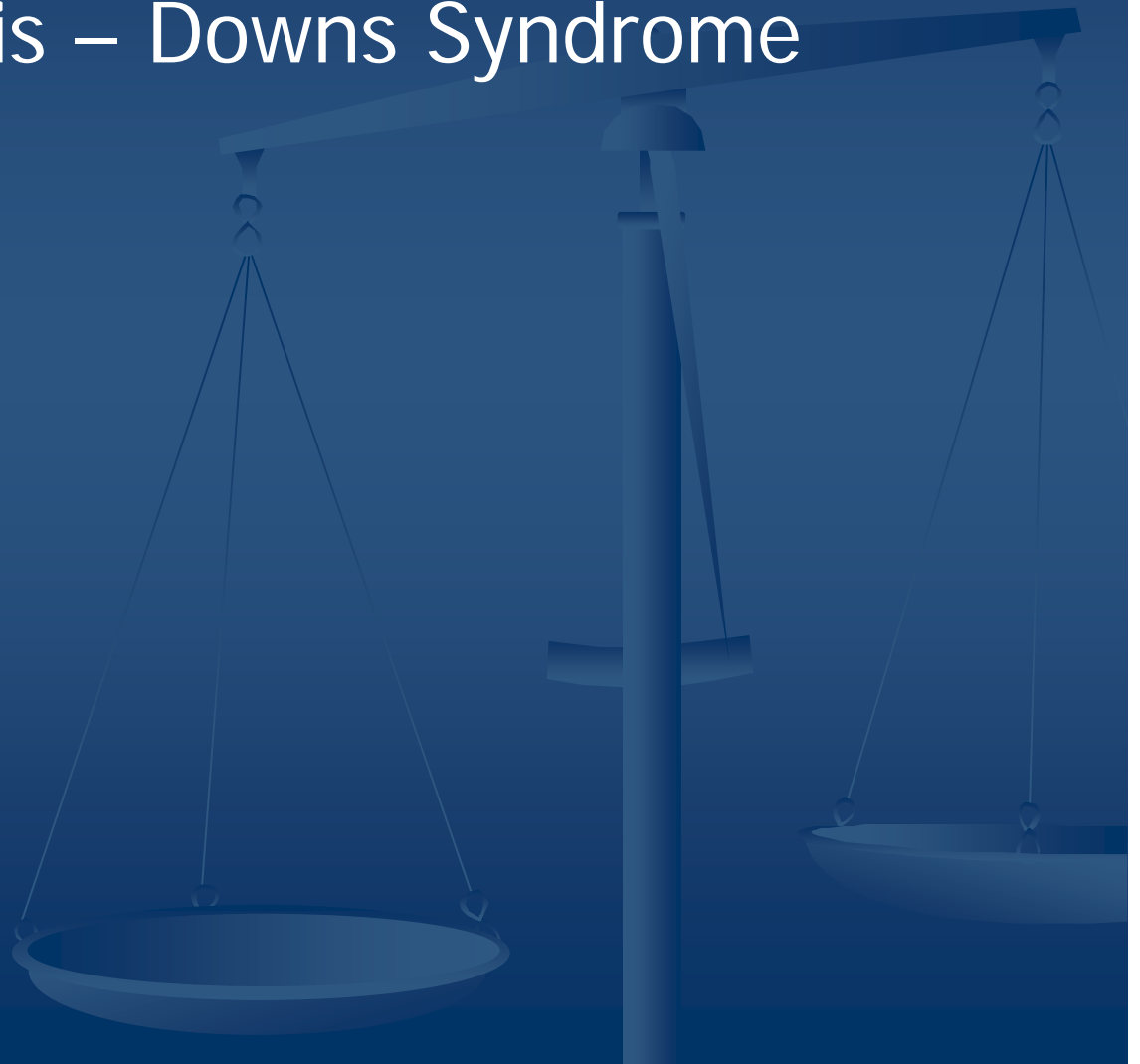


DNA and Sentencing



What Might Genetics Show?

- Confirm a diagnosis – Downs Syndrome



What Might Genetics Show?

- Support a diagnosis – a genetic predisposition towards a disease/condition (person with a “short allele at SLC6A4 gene is more likely to become depressed...after stressful situations...)



What Might Genetics Show?

- Predisposition to maladaptive behavior (violence)



Genetics and Aggression

- [A] low-activity MAO-A gene was determined to be a risk factor for conduct disorder when combined with an adverse childhood environment.

Genetics and Behavior

- Researchers say they've discovered a gene in mice that regulates levels of a chemical responsible for controlling anxiety, impulsive violence, and depression in humans.

Genetics – the Double-Edged Sword

- Will jury hear/see this evidence as future dangerousness?



Genetics – the Double-Edged Sword

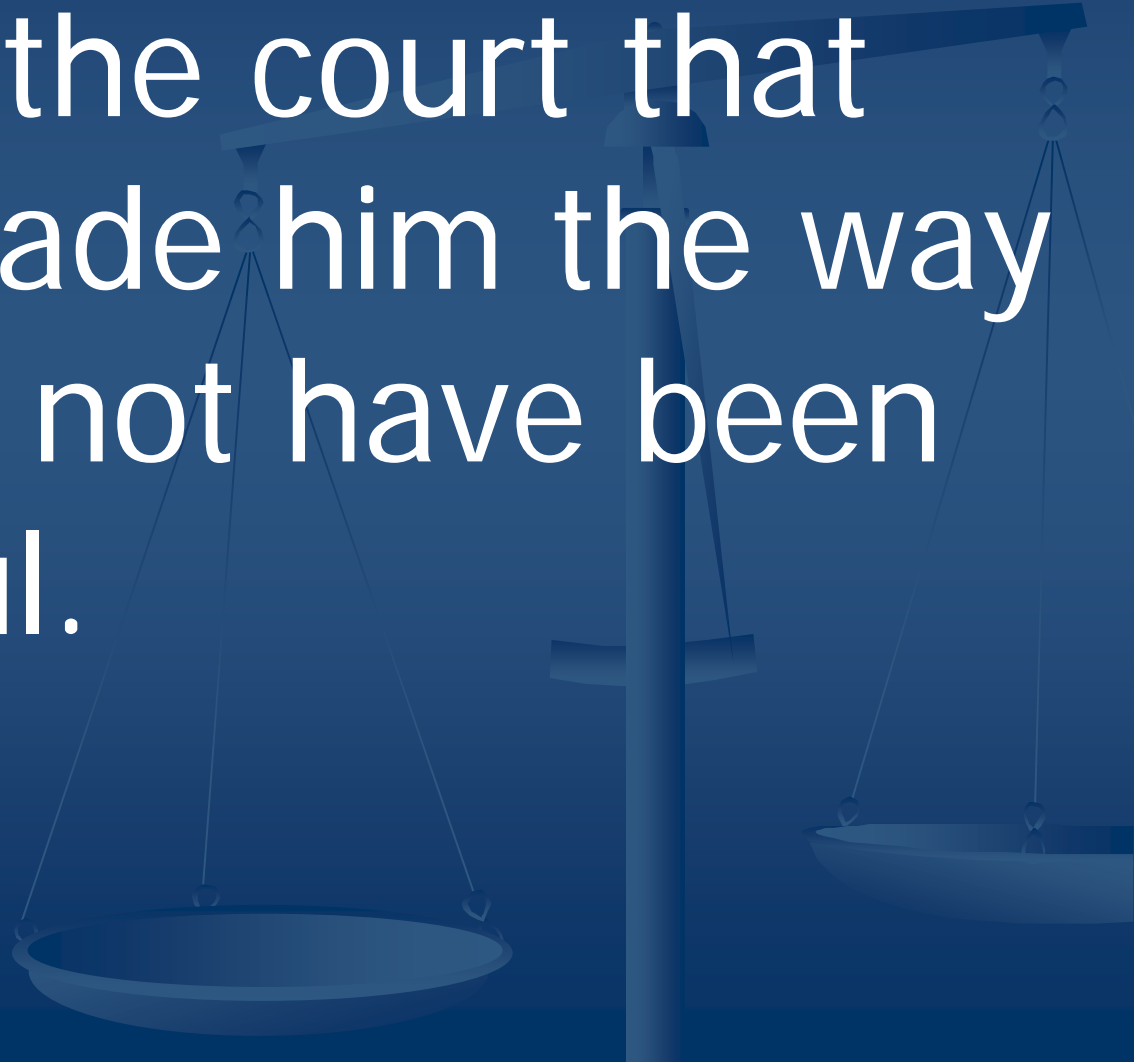
- The “monstrous other” perception paradigm.



The Double-Edged Sword

- [A]ssuring the court that genetics made him the way he is could not have been very helpful.

- Schiro v. Landrigan

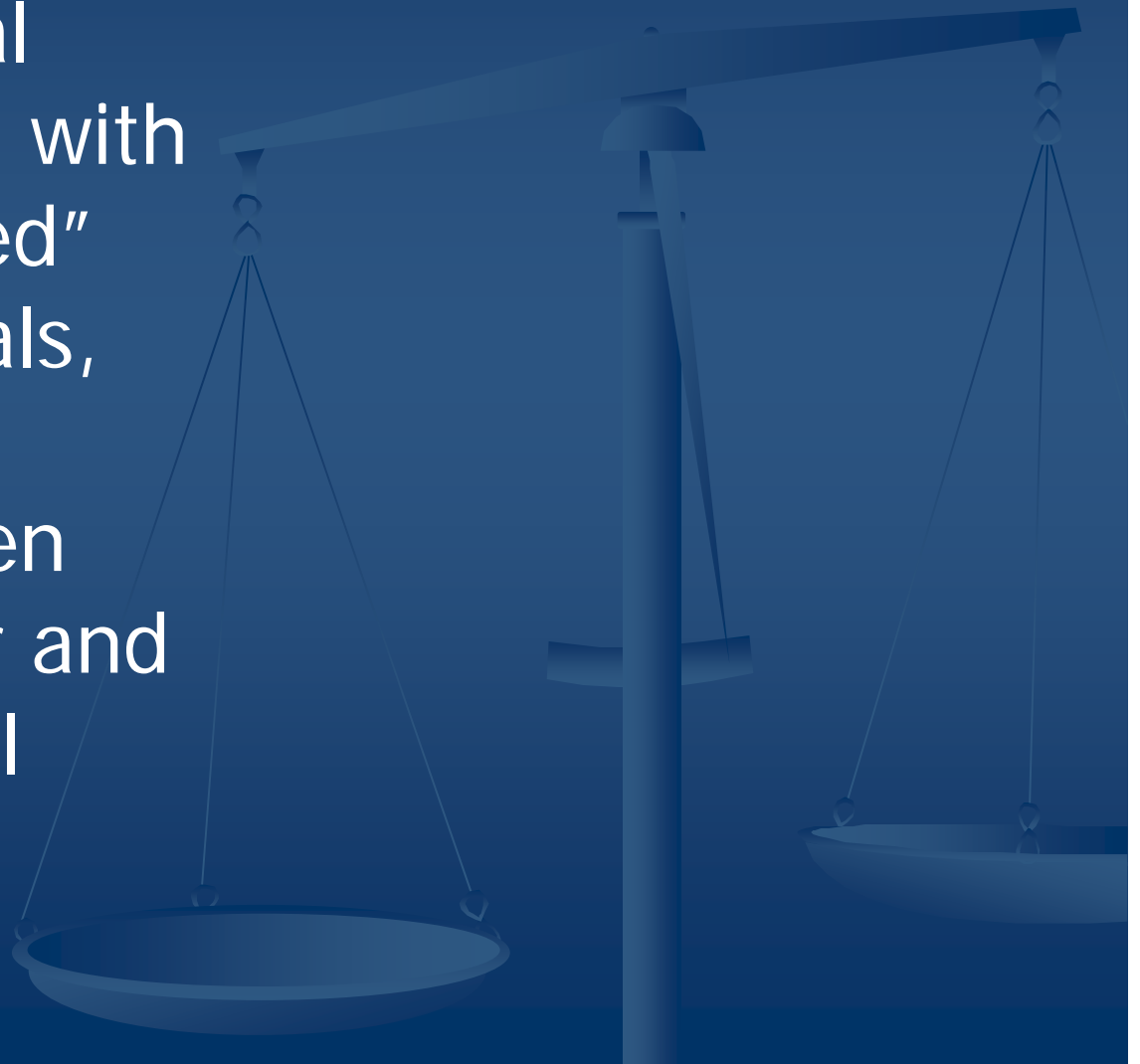


Neuropsychology



Anti-Social Personality: Causation?

- Neuropsychological studies carried out with “conduct disordered” antisocial individuals, have revealed an association between antisocial behavior and neuropsychological variables.



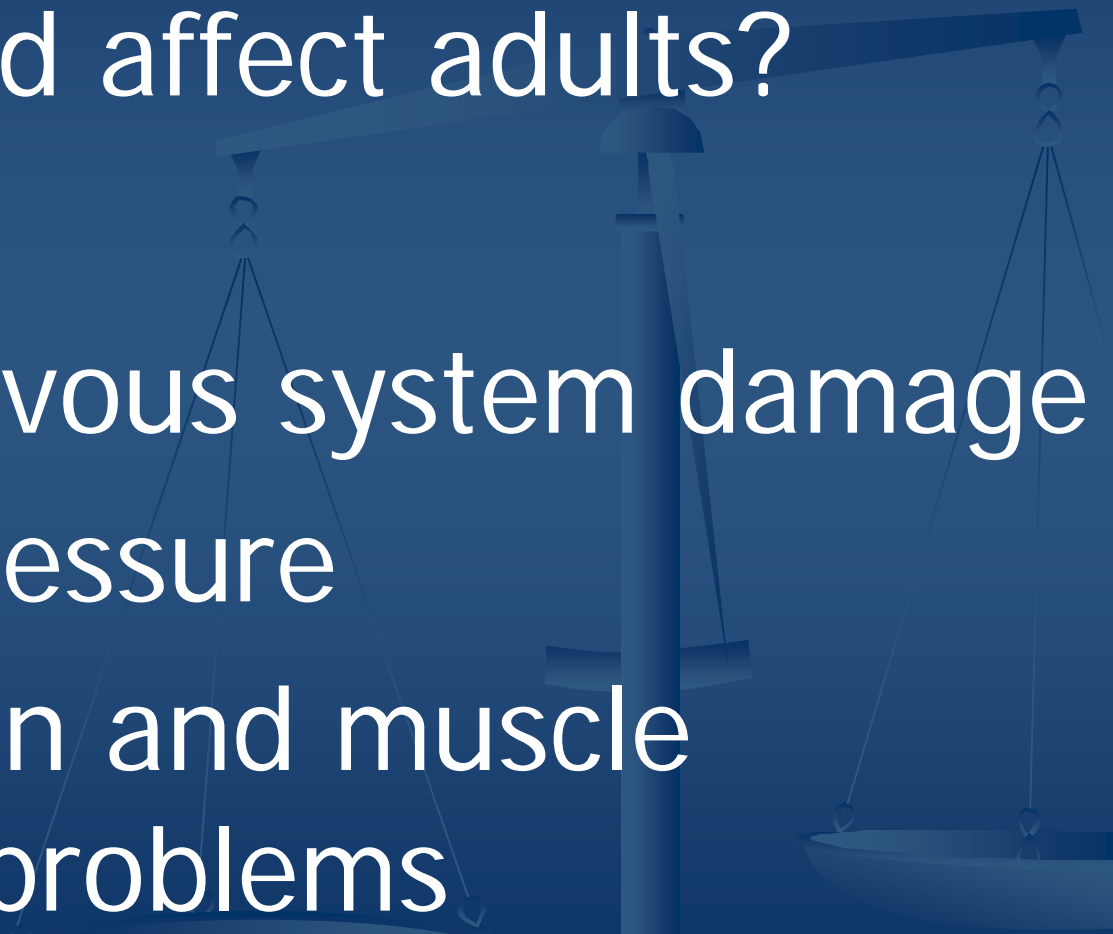
Environmental Impact



The Lead Poisoning Study

- "When environmental lead finds its way into the developing brain, it disturbs neural mechanisms responsible for regulation of impulse.
- That can lead to antisocial and criminal behavior[.]"

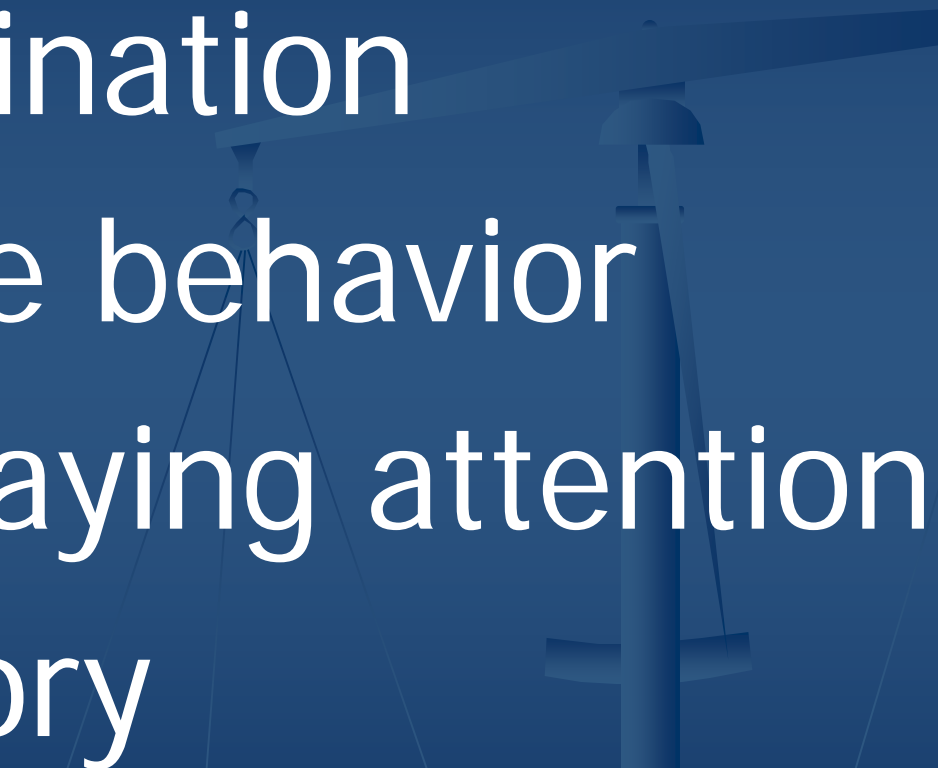
Lead Poisoning

- How does lead affect adults?
 - Impotency
 - Brain and nervous system damage
 - High blood pressure
 - Hearing, vision and muscle coordination problems
- 

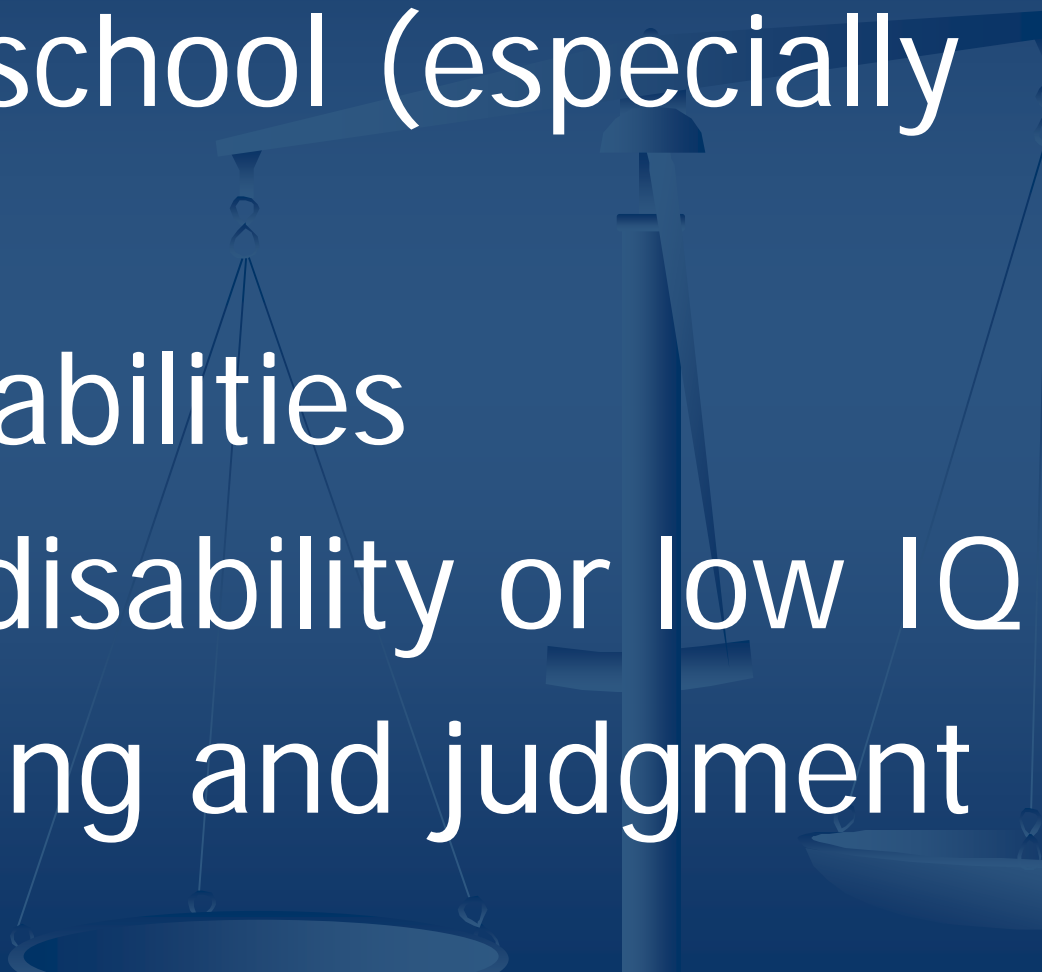
Maternal Influence and Science



Fetal Alcohol Syndrome (CDC)

- Poor coordination
 - Hyperactive behavior
 - Difficulty paying attention
 - Poor memory
- 

Fetal Alcohol Syndrome (CDC)

- Difficulty in school (especially with math)
 - Learning disabilities
 - Intellectual disability or low IQ
 - Poor reasoning and judgment skills
- 

Environmental Pollution



- Prenatal exposure to environmental pollutants known as polycyclic aromatic hydrocarbons (PAHs) can adversely affect a child's intelligence quotient or IQ, according to new research by the Columbia Center for Children's Environmental Health (CCCEH).
- ScienceDaily 7/20/09

Resource



THE IMPACT OF BEHAVIORAL SCIENCES ON CRIMINAL LAW

Edited by NITA A. FARAHANY

OXFORD