



E33 Death Row Defense: Investigating and Evaluating Forensic Issues in Post-Conviction

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After attending this presentation, attendees will understand the role that guilt and mitigation investigations, and the forensic issues commonly developed through such investigations, play in the representation of death row inmates in the state post-conviction stage of appeals. The importance of post-conviction investigation in preventing the execution of wrongfully convicted defendants will be underscored, as will intellectually disabled defendants who are constitutionally barred from receiving the death penalty.

This presentation will impact the forensic science community by educating attendees about the variety of forensic issues encountered in death penalty defense, and the ways in which a legal team identifies and develops these issues in post-conviction. The forensic community will also gain insight into how the work of capital defense organizations and innocence projects have proven that wrongful convictions are far too common to be acceptable in our criminal justice system.

Over 130 people have been exonerated from death rows around the United States since 1973.¹ Between 1973 and 1999 there were an average of three exonerations per year.² From 2000 through 2011 there have been an average of five exonerations per year.³ In a 2001 study that looked at the cases of eighty-six wrongfully convicted death row inmates dating back to 1973, the three leading causes of wrongful convictions were faulty eyewitness identifications, government misconduct, and the testimony of jailhouse informants.⁴ However, mishandled or unpreserved evidence or the use of unqualified experts was a contributing factor in almost ten percent of the wrongful convictions.⁵

In post-conviction, capital defense organizations systematically review client's cases for evidence of innocence, prosecutorial misconduct, and other indicia of wrongful conviction. Representing capital clients in post-conviction requires that an attorney become knowledgeable in multiple forensic disciplines in order to spot potential forensic issues, successfully develop them through investigation and expert involvement, and cogently present them to a judge in the form of legal claims. During the guilt phase and mitigation phase investigations that take place in post-conviction, forensic issues are frequently encountered and must be fully explored.

A guilt investigation focuses on the development of forensic issues related to the crime and the physical evidence, while a mitigation investigation focuses on trauma and mental illness in a client's family history.

Several steps of a guilt investigation involve the forensic sciences:

- Careful preliminary review of the prosecution's forensic evidence, including lab reports, the crime scene, and lay and expert testimony;
- Finding, examining, and evaluating the physical and scientific evidence collected and developed during pre-trial law enforcement investigation; and
- Consulting with experts and considering independent defense scientific testing and analysis.

Steps in a mitigation investigation that involve the forensic sciences include:

- Making preliminary assessments of a client and his family members for potential mental health or intellectual functioning issues; and
- Consulting with forensic mental health experts to fully develop a history of mental illness and/or brain damage that was not presented at trial.

Hypothetical case examples will be presented in order to illustrate a sampling of issues that are frequently encountered in the course of guilt and mitigation investigations in capital post-conviction.

References:

1. Staff Report, House Judiciary Subcommittee on Civil & Constitutional Rights, Oct. 1993, with updates from Death Penalty Information Center (www.deathpenaltyinfo.org).
2. *Id.*
3. *Id.*
4. Warden R. How mistaken and perjured eyewitness identification put 46 innocent Americans on death row: an analysis of wrongful convictions since restoration of the death penalty following *Furman v. Georgia*. Berrien Springs (MI): Andrews University, 2001.
5. *Id.*

Capital Defense, Fact Investigation, Wrongful Conviction