The expert calls and says, ?Great news?the defendant?s anterior cingulate cortex shows severe damage!? What do you do? Do you mumble, ?That?s great,? and make a note ?anterior cingulate cortex damaged? and smile at the phone? At that point, is that information equivalent to the auto mechanic explaining why your car makes the grinding sound? For most trial counsels (most human beings in general), information about the anterior cingulate cortex means very little. But that information could become a meaningful portion of your client?s defense. All you really need to make that information meaningful is context.

Context is how that piece of information fits into your defense. Like it or not, your defense plays as a story or narrative in the minds of the jurors. Jurors organize trial information into stories.1 Pennington, N. and Hastie R, ?The Story Model for Juror Decision Making,? Inside the Juror: The Psychology of Juror Decision Making, Cambridge, New York: Cambridge University Press (1993), pp. 192?221. They blend
case-specific information acquired during the trial with knowledge about events similar to those in question and form a story. *Id.* The pieces of the story interact in ways that alter their individual significance; each merges with what came before and "ows into what follows. Baron, J. & Epstein, J., *Is Law Narrative?*, 45 Buff. L. Rev. 142, 148 (1997); *see also* Griffin, L., *Narrative, Truth and Trial*, 101 Georgetown Law Journal 281 (2012).

The information about the damaged anterior cingulate cortex must merge with the other elements of the story before it can become meaningful. Without that merger, also known as context, the information by itself probably will not fit into the twelve stories generated inside the jury box. With a conscious attempt to merge the information and provide context, however, the information could jump from being left out of the story to a meaningful portion of the story.

Science lends meaning and credibility to the defense story because good science appears objective and verified. A story is believable to the extent that it involves observable or "knowable" facts; an element of the story provides meaning to the story by being equally observable or knowable. An element of the story, based on good science, can lend the story credibility or meaning.

Science attempts to sort that which is knowable from that which is not. Science is a determination of what is most likely to be correct at the current time with the available evidence. Scientific explanations can be inferred from confirmable data only, and observations and experiments must be reproducible and verifiable by other individuals. In other words, good science is based on information that can be measured or seen and verified by other scientists. McLelland, C., *The Nature of Science and the Scientific Method,* The Geological Society of America, [http://www.geosociety.org/educate/NatureScience.pdf](http://www.geosociety.org/educate/NatureScience.pdf) (August 2006). When incorporated into a story, science, by its objective nature, makes that story believable. Incorporating science into the story involves only asking a few questions of your expert and your witnesses.

You could incorporate the information about the damaged anterior cingulate cortex into your defense story with two simple steps. First, find out how your expert could explain, in layman's terms, that the client's anterior cingulate cortex is damaged. (The expert tested the client and interpreted the results, but that is not really part of the narrative.) What could the client do if he were not damaged? What does the client have difficulty with because of the damage? Is there anything the client can do now to remediate the damage? Getting the expert to tie any mental health problem into "real world" behavior and "real world" consequences transforms story disrupting science into part of the story.

Second, bring in the investigator and explore how the client's disability impacted his life before and after the offense. If the expert says that the damage often inhibits the perception of pain, ask the investigator if the client frequently fought as a child or adolescent, or if he took physical risks that impressed his friends or peers. A client with a very high threshold for pain, because of brain damage, experiences a very different risk in a fight than an average juror. Once the prosecutor presents evidence that the client fought as an adolescent or while in jail awaiting trial, you can follow up with questions about the client's reactions after the fights, i.e., "Did he seem hurt? Did he complain about being injured?"

In another example, if the expert tells you that the damage often keeps patients from feeling strong emotional reactions to unique events, ask the investigator if the client seemed unimpressed by the traumatic events of his childhood, his mother dying, or his friend getting hit by a car. When the prosecutor presents evidence that the client is a cold, emotionless predator who did not even react to the trauma of his early life, you can second the prosecutor's argument: No one ever saw the client react emotionally to trauma, and the expert will become part of the story. The client does not react emotionally to trauma because the part of his brain that would provide that reaction does not work.

Consciously or not, jurors pull evidence into the form of a story. If the evidence will not fit into a storyline, jurors will eschew the evidence and not the story. You can prevent the jury from leaving your expert
testimony or ?science? out of the story by linking the ?real world? impact of the scientific conclusion into the established facts of the client?s life. Mitigation is in the eye of the beholder, and the expert testimony, by itself, might not appear mitigating to every juror. You can, however, entice the jury to consider your mitigation in every case by making it an objective, unassailable part of the defense story.

Notes


2. Jurors control the final story with generic expectations about what makes a complete story. Pennington at 193.