Prearraignment Forensic Evaluation: The Odyssey Moves East of the Pecos

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Although the ethical guidelines of both the American Psychiatric Association and the American Academy of Psychiatry and the Law explicitly prohibit the forensic examination of criminal defendants before appointment of counsel, except for the purpose of providing emergency medical care and treatment, the practice continues in many parts of the country. This article presents a recent case in which this practice was challenged on appeal, to serve as a focus for discussion of the evolution of, and rationales for and against, these ethical positions. It will also serve as a focus to examine the legal views concerning such examinations, derived from the appeal of the decision in the case itself as well as decisions in similar cases.

> Ethical considerations in medical practice preclude the psychiatric evaluation of any adult charged with criminal acts, prior to access to, or availability of legal counsel. The only exception is the rendering of care to the person for the sole purpose of medical treatment.
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> American Psychiatric Association, Annotations to the American Medical Association *Principles of Medical Ethics*.[1]

> With regard to any person charged with criminal acts, ethical considerations preclude forensic evaluation prior to access to, or availability of legal counsel. The only exception is an examination for the purpose of rendering emergency medical care and treatment.
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> American Academy of Psychiatry and the Law, Ethical Guidelines for the Practice of Forensic Psychiatry.[2]

Despite the explicit ethical prohibitions against prearraignment forensic evaluations cited above, which were established in 1985 and 1987, the practice continues in many areas of the country. In this article I will present a recent case involving this issue as the focus for discussion. The facts presented below are obtained from the brief for appellant in the case, but were not disputed by respondent. Other legal issues raised on appeal concerning Dr. B's participation in the trial are not relevant to this discussion, and will be omitted.

Facts of the Case[3]

Mr. A became disgruntled at the county bureaucracy; he went to the county office building during the lunch hour of January 15 armed with a shotgun. He shot the first three people he saw, killing two of them. When the police arrived, he begged them to shoot him, saying that he would shoot them if they did not. The police shot and

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wounded Mr. A, who was then hospitalized for emergency surgery. Later that same afternoon, while Mr. A was still in surgery, the assistant district attorney who would later prosecute the case against Mr. A contacted Dr. B by telephone and retained him to conduct a mental evaluation of Mr. A.

Mr. A came out of two to two and one-half hours of surgery successfully at 3:30 p.m., and was taken to the hospital's intensive care unit, where he was interrogated by police from 8:34 to 9:05 p.m. At 9:00 p.m., Dr. B. was contacted at home by the district attorney's office and asked to evaluate Mr. A that evening. Dr. B saw Mr. A at 9:33 p.m. in the intensive care unit; Mr. A was under sedation and was connected to an oxygen mask, a nasogastric tube, a Foley catheter, a chest tube, and an intravenous line. Dr. B told Mr. A that he had been asked to interview Mr. A by the district attorney's office, and that Mr. A's statements were not confidential and might be reported to other persons. He asked if Mr. A had an attorney, and Mr. A said that he did not. He then asked if Mr. A wished to have an attorney before he talked to him, and Mr. A said that he did not. Dr. B asked if Mr. A understood that he would be giving up his right to have an attorney present if he talked with him, and Mr. A indicated that he understood.

Dr. B then asked Mr. A if he recalled what had happened earlier in the day, and Mr. A said that he had shot three people; in response to Dr. B's question, Mr. A said that he didn't really know why he had shot them. Dr. B asked if Mr. A would care to discuss the details of the events, and Mr. A responded that he did not wish to at that time. Dr. B suggested to him that he might want to reconsider talking to him, since he did not have an attorney. Mr. A closed his eyes, and Dr. B said "Well, I'll wait a few minutes and come back and talk with you again." Twelve minutes later, Dr. B returned to Mr. A's bedside, gave him an abbreviated version of his previous warning, and questioned him about his past history as well as the details of the shooting. He also performed a mental status examination.

On February 26 of the same year, after appointment of counsel for Mr. A, Dr. B and another psychiatrist were formally appointed under state law by the court at the request of the district attorney to examine Mr. A for criminal responsibility. A third psychiatrist was appointed at the request of the defense. Dr. B examined Mr. A for the second time on June 22 and submitted his report to the court on August 17; he examined Mr. A a third time on August 22.

During direct examination by the prosecutor during the second (sanity) phase of the bifurcated trial, Dr. B claimed an advantage over the other two psychiatrists who had examined Mr. A, because his initial examination came within hours of the alleged crime rather than several months later. He disagreed categorically with every conclusion of the defense's psychiatrist, who had diagnosed Mr. B as suffering from a brief reactive psychosis at the time of the crimes, and as suffering from borderline and narcissistic personality disorders.

The state put its second expert witness on the stand but examined him much less intensively than Dr. B, asking chiefly whether or not he agreed with Dr. B's opinions. The jury found Mr. A to have been sane at the time of the crimes.

Clinical Ethical Issues

There is a significant literature on the subject of conflict of interest on the part of psychiatrists who practice in the public sector. Beginning with Szasz' classic writings in the 1960s,[4] a number of authors have discussed the potential for double-agentry involved when psychiatrists (and, increasingly, other mental health professionals as well) provide clinical services as agents of the courts and of other governmental and private institutions.[5-10]

These conflicts of interest are most problematic when treatment services are provided by employees of governmental institutions, because the clinicians have explicit responsibilities toward both their employers and their patients. It might appear that potential conflicts would be reduced or eliminated when clinicians are engaged specifically to provide evaluations for third parties, inasmuch as no clinician-patient relationship is established, providing that the clinicians inform those they evaluate of the nature and purpose of the evaluation. Because of the cultural image of clinicians as helpers (which has been assiduously fostered by the professions themselves for centuries), however, many evaluees continue to view clinicians as their "doctors" despite warnings to the contrary.[11, 12]

Prearraignment Forensic Evaluation

Goldzband in 1976[13] described the practice in California in which psychiatrists frequently examined suspects for the prosecution before arraignment or appointment of counsel. He attributed the practice to the procedures associated with the state's plea of diminished capacity (which has since been legislatively repealed). Under those procedures, the defense was not required to alert the prosecution before trial of its intent to raise the plea. The prosecution could ask for a recess to obtain its own psychiatric examination of the defendant; but in practice it rarely did, choosing instead to have the defendant examined by its chosen psychiatrist(s) before appointment of counsel. Goldzband reported that the California courts barred testimony from such interviews on the issue of guilt, but not on the issue of mental state relevant to diminished capacity.

When several defense attorneys complained of this behavior to the area district branch of the American Psychiatric Association (APA), a local task force was formed to try to resolve the situation. The district attorneys initially claimed that the prearraignment examinations were humanitarian efforts to divert the mentally ill from the criminal justice system; but they finally admitted that their major purpose was to develop evidence to rebut diminished capacity pleas.

Because neither the area trial judges nor the prosecution psychiatrists were receptive to suggestions that such examinations violated principles of in-

formed consent, the task force ultimately decided that its only alternative was to develop standardized consent procedures to be used for the examinations. They consulted the APA Council on Psychiatry and Law, which rejected the plan, holding that such examinations violated defendants' rights, regardless of warnings. The task force then prepared a recommendation that all forensic psychiatric examinations before appointment of counsel should be considered unethical. That proposal was rejected by the APA Area VI Council (several of whose members performed such examinations themselves) as being too restrictive.

The APA ultimately adopted the prohibition in its 1985 revisions of its Annotations to the American Medical Association's Principles of Medical Ethics, as has been quoted at the beginning of this article. An attempt was made to determine the reasoning behind the adoption of this prohibition; but the Chair of the Committee at the time did not recall the discussion, and a request for a review of the Committee's minutes was ultimately turned down because of the time the research would have taken.[14]

In developing its own ethical guidelines, the American Academy of Psychiatry and the Law (AAPL) included a similar prohibition against prearraignment psychiatric examination, which has been quoted at the beginning of this article. The draft guidelines were discussed over several years by the members of the AAPL Ethics Committee, circulated widely within AAPL during their development, printed in the *AAPL Newsletter*, and debated several times at business meetings held during the annual AAPL scientific meetings before being adopted. While many sections of the draft guidelines were quite controversial, and were revised a number of times before final adoption, the prohibition against prearraignment examinations generated little debate, and was adopted in its present form without changes.

When the case described above was presented at the 1989 Annual Scientific Meeting of AAPL as part of a panel presentation by the AAPL Ethics Committee;[15] however, there was considerable objection from some members of the audience to the prohibition against prearraignment examinations. Further discussion of the situation therefore seems advisable.

Those opposing the prohibition made several main arguments: First, as argued by Dr. B, examinations conducted as soon as possible after the events in question provide much more reliable information as to a person's mental state at the time of the alleged crime. Given the difficulties inherent in retrospective evaluations of mental state,[16] there is little question that immediate examinations are likely to provide more accurate assessments of mental state. Proponents of this approach argued that justice (as well as the reputation of the profession) is best served by the provision of the best possible opinions; and also that evaluators who see defendants prior to appointment of counsel may well determine that they are in fact not responsible for their

behavior, thus providing the defense with strong evidence in support of an insanity defense. They also pointed out that in many jurisdictions examiners are appointed by the court, rather than by either side in the criminal case, thus eliminating one potential source of bias.

They further argued that since no clinician-patient relationship is established by forensic evaluation, as long as that fact is made clear to the defendant, the examiner's only ethical obligation should be to provide as thorough an evaluation and as objective an opinion as possible. Several discussants objected strongly to the implication of the guidelines that evaluators retained by prosecutors are presumed to be biased toward the state. In addition, publicly funded examinations for criminal responsibility in a number of states are provided by state facilities, and prosecutors are thus not able to pick and choose among examiners.

Proponents of the prohibition countered that fundamental fairness should preclude examinations before the appointment of counsel, because by definition only the prosecutor can select examiners; and all prosecutors are aware of which examiners are more likely to offer opinions supporting sanity. All examiners have inherent ideological biases on social questions such as criminal responsibility,[17] and to that extent are somewhat predictable as to their ultimate opinions, regardless of the thoroughness of their evaluations or the sincerity of their efforts to remain "objective." Even in jurisdictions in which judges appoint examiners, most judges simply ratify recommendations from the attorneys involved in the case, so that prosecutors would continue to have an unfair advantage.

Second, as discussed previously, psychiatric interviews of suspects in custody are at least as adversarial as police interrogations, and thus should require that at least as much protection be afforded defendants.[18–24] New York's highest court[25] and a California appeals court[26] explicitly underscored this point. Although several authors have emphasized the fact that psychiatrists have special skills in interrogation not possessed by police,[18–20] there is another significant factor which needs to be taken into consideration in situations in which defendants are to be examined by psychiatrists before appointment of counsel.

Read[27] points out that although defendants are generally familiar with the purpose and methods of police interrogation, most do not understand how a psychiatric examination works, and do not understand that the manner of communication is often as important as the content. Before the opportunity to consult with counsel, typical defendants do not know anything about the insanity (or diminished capacity) defense, and are therefore not in a position to know how to respond in their own interests to a psychiatric examination. Although no courts have reached this conclusion, standard *Miranda* warnings, such as that given in the case presented above, would clearly be inadequate to adequately inform a defendant of the full purpose of a psychiatric examination. In addition, it is probable that mentally disordered

defendants who have just been arrested are even less likely to be competent to understand even the usual *Miranda* warnings, much less the much more complex information concerning the purpose of a prearraignment psychiatric interview. It is, of course, just this vulnerability which make such examinations so valuable to prosecutors.

Legal Analysis

Arguments on Appeal of the Case Presented One of the major bases for the appeal of the sanity finding in the case presented[3] was the argument that the trial court committed reversible error by refusing to suppress statements made by Mr. A when he was interrogated by Dr. B shortly after his arrest. It was argued that Dr. B's interrogation of Mr. A was custodial, and therefore required a *Miranda* warning. Appellant further argued that the warnings given by Dr. B were insufficient, and that Dr. B did not honor Mr. A's assertion of his right not to talk further with Dr. B. Therefore, all of Dr. B's testimony should have been suppressed because it was tainted with the information impermissibly obtained at the initial interview.

In its response[28] the state countered the appellant's position by arguing that the privilege against self-incrimination did not apply to sanity examinations, and thus no *Miranda* warning was required; and even if such a warning were required, the information provided by Dr. B was sufficient. The state denied the appellant's claim that Mr. A asserted his right to remain silent, or that Dr. B did not observe such an assertion if Mr. A made it. The state further argued that even if it was error to admit Dr. B's statements based on his initial interview with Mr. A, the error was harmless the information obtained was not significantly different from that obtained in his subsequent interviews after appointment of counsel and the interposing of an insanity defense.

In its response to the state's brief,[29] the appellant cited the APA and AAPL ethical prohibitions against such examinations as part of its arguments that Dr. B's testimony should have been stricken. The state court of appeals reversed the finding of sanity without addressing the issue of the admissability of Dr. B's testimony. The case is currently on appeal to the state supreme court.

The issue of psychiatric examinations of defendants without benefit of counsel was analyzed in detail in the context of psychiatric examinations for the prosecution in criminal cases in the landmark U.S. Supreme Court decision in *Estelle v. Smith*.[30] In that case, the Court held that court-ordered examination which could result in testimony in the capital sentencing phase of a trial violate the Fifth Amendment privilege against self-incrimination if the defendant is not informed of that possibility; and that they also violate the Fifth Amendment guarantee of access to counsel if defense counsel are not informed of the examination.

Since *Estelle*, a number of courts have been presented with cases involving variations on the theme of coerced psychiatric examinations; their decisions have varied depending upon the circum-

stances of the case under review and upon their interpretation of the *Estelle* decision. Most courts have held that *Miranda* warnings are not necessary for psychiatric examinations performed after appointment of counsel in noncapital cases, as long as the testimony is directed only to the issue of the defendant's mental state.[31-39] One court even held that such testimony was admissible even when the examination occurred before appointment of counsel, holding that as long as there was no overt coercion or false information given the defendant, no warnings were even required.[40]

Several courts held that the introduction of psychiatric testimony by the defense constituted automatic waiver of the privilege against self-incrimination[4] or that the state has the right to offer testimony in rebuttal.[31-33, 35-37] In one recent case which has been upheld on appeal to a state appeals court,[39] the defendant had not yet announced that he intended to enter an insanity plea or a defense of extreme emotional disturbance (as required under state law prior to trial). Anticipating an insanity defense, the prosecutor asked a psychiatrist to evaluate the defendant for sanity. The psychiatrist responded that he would not perform the evaluation unless the court explicitly appointed him for that purpose, which the court did. The psychiatrist testified that the defendant was sane, and the jury so found. The appeals court held that although the defendant had not placed his mental status at issue at the time of the court order for psychiatric examination, the psychiatrist's testimony was admissible in rebuttal to the defendant's insanity defense because the information obtained after the defense was entered did not differ substantially from that obtained before, and because defendant was represented by counsel at the time of the order. The case is currently under appeal to the state supreme court.

Other courts, however, have held that evidence of mental state at the time of the alleged crime elicited by either psychiatrists[25] or law enforcement officers[41] before a defendant's opportunity to consult with counsel, or after appointment of counsel but without that attorney's knowledge[42] is inadmissible, even in rebuttal to an insanity defense. Psychiatric testimony in the guilt or capital sentencing phase of a trial has generally been ruled inadmissible[26, 43-46] unless defense counsel was aware of the examination in advance and the defendant was given specific warning of the possible use of the evidence resulting from the examination.

The Supreme Court, in *Allen v. Illinois*,[47] ruled that coerced psychiatric examinations and resulting testimony under Illinois' Sexually Dangerous Persons Act did not violate Allen's privilege against self-incrimination because the state legislature defined the proceedings as civil (despite the incarceration attendant upon being found to meet the Act's criteria), and thus the Fifth Amendment did not apply. It is clear from *Allen*, as well as the Court's decision in *Colorado v. Connelly*[48] in which it held that an acutely psychotic person is capable of understanding *Miranda* warnings before

the availability of counsel, that the federal courts will be increasingly resistant to barring psychiatric testimony on the issue of mental state, even if that evidence can lead to dispositional decisions other than the death penalty.[49] This trend is consistent with the Supreme Court's general move toward creating exceptions to the exclusionary rule.[50]

The increasingly conservative membership of even some state courts was also evident in a recent decision by the California's Supreme Court, in which it held that the use of testimony in a capital sentencing hearing by a correctional psychiatrist who had examined the defendant one week after the crime was permissible because the defendant had been given repeated *Miranda* warnings, and had waived his right to consult with counsel before submitting to the examination.[51] The court rejected Bonillas' claim that the decision to submit to such an examination was so complex that advice of counsel was necessary before truly informed consent could be given.

The American Bar Association has addressed the issue of mental health examinations in general in its Criminal Justice Standards,[52] although the recommended rules are less than clear with regard to examinations before appointment of counsel. Section 7-3.1(d) prohibits a pretrial psychiatric examination of a defendant unless ordered by a court, approved by defense counsel, or necessary "solely for the purpose of determining whether emergency mental health treatment or habilitation is warranted." The Commentary to this section cites Goldzband[13] and the American Psychiatric Associations ethical guidelines[1] with approval to support its conclusion that *Miranda* warnings alone are insufficient to protect defendants from the dangers of revealing damaging information without understanding what they are doing. Such evaluations would still be permitted, however, before appointment or availability of counsel under a valid court order.

Conclusions

It is generally true, as clinical critics of the prohibition against psychiatric examinations before the appointment of counsel contend, that the sooner the evaluation after the legally relevant actions, the more likely the evaluation is to provide accurate information concerning a person's mental state at the legally relevant time. Immediate examinations would thus counter some of the public perceptions that forensic psychiatrists are indulging in retrospective mind-reading when they attempt to reconstruct the mental states of persons at times remote from those legally in question. It is also possible, as proponents of immediate examinations contend, that the conclusions reached from examinations immediately following criminal acts would be as helpful to the defense as to the prosecution.

These potential advantages must be balanced, however, against the risks of such procedures. I believe that the greatest risk is posed by another common public perception, that of the "hired gun." It can be granted that most of the evaluators who perform such examinations reach their conclusions without

consciously conforming their opinions to the preferences of those requesting the evaluations. Nevertheless, there are two major systematic sources of bias in forensic evaluation which cannot easily be ignored or removed.

The first, previously discussed, is the demonstrable fact that individual experts have personal (as opposed to professional) views on legally relevant concepts such as criminal responsibility.[17] These views soon become known to the legal community if the expert testifies often enough to develop a "track record," and if only the prosecution has access to experts immediately after the alleged crime, it will have an actual as well as perceived advantage to the extent that it is free to choose its experts. It is true that some states provide inpatient evaluations of criminal responsibility, thus limiting the prosecution's ability to choose particular experts; but in those states, it is rare for hospitalization to occur before appointment of defense counsel, thus eliminating the conflict. In addition, facility staffs themselves tend to develop biases for or against concepts such as criminal responsibility, which can be as predictable as those of individual clinicians. Prosecutors therefore continue to hold an advantage, inasmuch as they are free to request immediate evaluations (if the staff's track record indicates that it is less likely to offer opinions of nonresponsibility); or to eschew the opportunity if they can predict that the staff is likely to find nonresponsibility. In the latter case, the defense is denied the opportunity provided to the prosecution in the former case, because once defense counsel has been appointed and has had the opportunity to interview a client, the immediacy of the evaluation has evaporated.

The second bias is introduced by the process of "forensic identification,"[53] in which experts may be influenced in their ultimate opinions by the side which retains them.[53, 54] Thus, even if experts' ideological viewpoints are not a major determinant of their ultimate opinions, their relationships with either prosecution or defense attorneys may affect those opinions. After appointment of defense counsel, both types of bias are averaged out by the adversarial process; but if only the prosecution has access to experts whose opinions will tend to carry more weight solely because of the proximity of their evaluations to the legally relevant events, the advantage again rests solely with the prosecution.

This discussion also raises the issue of the "objective" expert, appointed by (and paid by) the court, thus ostensibly removing any psychological or economic bias in favor of one side or the other.[55] As has been pointed out by a number of critics, however, the seeming advantage in elimination of the "battle of the experts" is more than outweighed by the inappropriate appearance that the testimony is in fact objective, free of the biases discussed above.[56, 57]

Many forensic evaluators may believe that they are performing an objective evaluation, and that the subjects of those evaluations do not need to be protected against them by attorneys. Nevertheless, the consequences of such evaluations, while not "incriminating" in the strict

legal sense, may have equally significant impacts on defendants' dispositions, including hospitalizations longer than potential criminal sentences, and even the imposition of the death penalty. Inasmuch as few defendants fully understand the meanings of the *Miranda* warnings concerning police interrogation, they can hardly be expected to comprehend the much more complex issues involved in a psychiatric examination.

On balance, therefore, I would support the positions taken by the American Psychiatric Association and the American Academy of Psychiatry and the Law against forensic evaluations before the appointment of defense counsel. The possible advantages of access to defendants before their mental states change through time or treatment are outweighed by the actual and perceived biases toward the prosecution as the system is implemented in actual practice. Clinicians should not lend their professional expertise and credibility to such a distortion in the balance of the adversary system.

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