

The Role of Psychiatry in Death Penalty Defense

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The author describes his experience as an expert in evaluating defendants convicted of capital murder. He reviews the Supreme Court decisions and provisions of state law that have led defense attorneys to obtain psychiatric evaluations of their clients. Three illustrative cases are presented, one of an incompetent grossly impaired defendant, one of a defendant for whom the finding of mental health played a role in over turning his conviction, and one for a defendant who was later found to be retarded and therefore not executable. The clinical and social implications of psychiatric participation in these cases are discussed.

This article reports on my experience as a defense expert in cases of capital murder. I argue that psychiatrists, in particular forensic psychiatrists, have an important role to play in capital defense. The argument does not follow from my political position on capital punishment. My position on the death penalty is best described as “weakly opposed.” I think death penalty states would be better off without it, but I hold no brief to argue that capital sentencing laws are wrong and should be abolished.

This paper does not argue that psychiatrists should oppose the death penalty. Nor does it argue that psychiatrists should distort findings or otherwise depart from ethical, sound practice in order to save a defendant’s life in cases of capital murder.

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The focus here on the psychiatrist’s role in defense reflects chance rather than bias. To date the people who have sought my help in these cases are all defense attorneys. I believe that, optimally, a forensic psychiatrist should consult for both prosecution and defense.

The existence of a role for forensic psychiatry in capital cases follows from certain Supreme Court decisions on capital punishment and from the state laws that have followed. A review of these decisions and laws is necessary to understand how the legal structure creates an opportunity, even a mandate for psychiatric participation in determining sentencing for capital murder.

Legal History

Over the last 40 years opponents of the death penalty have repeatedly brought Constitutional challenges to the Supreme Court. The Court has consistently found that the death penalty does not violate the Constitution. In the

1960s opponents developed a new strategy. They appealed individual cases, and they were successful. Between 1967 and 1972 there were no executions and over 600 prisoners were living on death row.

Delay was not abolition, and abolitionists continued to bring cases challenging the constitutionality of the death penalty. In 1972 the Supreme Court in *Furman v. Georgia* held that current death sentencing procedures were unconstitutional.¹ Fewer than 5 percent of murder convictions actually resulted in a death sentence, and appellants argued that imposing death sentence in only a few cases violated the Eighth Amendment prohibition against cruel and unusual punishment. The Court by a 5-4 margin agreed with them.

The majority wrote five separate opinions. Justices Brennan and Marshall said the death penalty is always unconstitutional. The remaining three, Douglas, Stewart, and White all said that imposing the death penalty without providing any sentencing guidelines for the jury was unconstitutional. All three rejected procedures that led to death sentences that were infrequent and apparently capricious. Their view that infrequent death sentences were capricious was based entirely on their own intuition, not any empirical research. Both Blackmun and Burger commented in their dissent on the lack of factual basis for this later conclusion.

Furman did not invalidate the death penalty, but it did invalidate more than 600 death sentences, because they were now found to have been arrived at through unconstitutional procedures.

Legislatures responded to *Furman* by passing death penalty statutes incorporating procedures that would satisfy the newly determined constitutional requirements for sentencing guidelines.

There were many legislative initiatives in response to *Furman*. Most were found to be constitutional, but some were not. The laws that the Court let stand all adopted similar procedures in order to meet the Constitutional requirement that sentencing not be capricious.

First, the new laws limited the category of capital murders to crimes viewed as especially heinous, for example, killing a police officer, killing to avoid arrest or confinement, killing for hire, or in the course of committing a felony. In Georgia, armed robbery, rape, and kidnapping are also capital offenses; in Alabama, so are treason and aircraft hijacking.

Second, the new procedures mandated a bifurcation of guilt and sentencing. After a trial on guilt or innocence, the procedures required a second trial on life imprisonment or death. This bifurcation makes possible introduction of evidence at the sentencing trial that would not have been admissible on the question of guilt or innocence.

The new statutes also provided guidance or standards for juries at the sentencing trial. The laws specified aggravating or mitigating factors that juries must consider in deciding whether to impose a death penalty. Aggravating factors included killing in a wanton and cruel or vile manner, or endangering the lives of others, or for pecuniary gain. Mitigating factors include a dependent

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with no prior record, a murder committed while under the influence of extreme emotional disturbance, or with substantially diminished capacity to appreciate the criminality of the act, or murder committed by a very young or very old defendant.

Third, almost all states began to require automatic appellate review to ensure that capital sentences not be capricious or arbitrary. Since *Furman*, the Supreme Court has held that a jury could use its discretion to give a life sentence to any murderer no matter how aggravated without violating the capricious standard (i.e., mercy to the heinous was not unconstitutional),² but presumably a death sentence for a less aggravated would violate the standard. The Court also upheld discretion of prosecutors to charge for a noncapital crime, again emphasizing that discretionary mercy was not unconstitutionally arbitrary.^{2,3}

The Court further shaped adjudication on this issue by invalidating laws in North Carolina and Louisiana that imposed a mandatory death sentence for certain classes of crimes, for example, killing a police officer.^{4,5} Finally, the court held that a defendant raising a criminal responsibility defense in capital cases is entitled to a court-appointed psychiatrist even if indigent, "Through this process of investigation, interpretation, and testimony, psychiatrists ideally assist lay jurors, who generally have no training in psychiatric matters, to make a sensible and educated determination about the mental condition of the defendant at the time of the offense."⁶

In summary, the Court has developed the position that the death penalty is constitutional when it is applied on an individual basis. It is not constitutional when applied blindly or categorically to a person as a member of a class of persons, or to a crime as an exemplar of a class of crimes. Further, the court has said that the state can be arbitrarily merciful; it cannot be arbitrarily punitive. This legal position provides the rationale for psychiatric input to capital defense.

The Psychiatrist's Role in Defense

The psychiatrist's primary function when working for the defense is to gather data relevant to mitigation. Psychiatric evaluation is not limited to evaluation of the defendant's mental state at the time of the offense. Rather, the psychiatrist tries to understand the defendant, how he got to be the way he is, and why he committed a capital crime, if in fact he did.

Psychiatric assistance is essential in preparing adequately for a sentencing trial, and psychiatric testimony may be useful as well. The purpose of testimony is to help the sentencing jury see the defendant as a person, rather than solely as an incarnation of evil. Finally, in the event of a death sentence, psychiatric testimony can be useful at the stage of appellate review of the sentence. Here the psychiatrist may argue that the defendant was incompetent at an earlier stage, or that important psychiatric data were not available or were improperly evaluated.

Following are three capital murder cases that involved a psychiatric evalu-

ation. The first involved a review of a seven year earlier competency-to-stand-trial evaluation as well as an evaluation of current competency to stand trial. The second and third were psychiatric evaluations to support an appeal from a death sentence.

Richard D

Richard D was convicted of murder in a southern state and sentenced to death in 1981, when he was 24 years old. He was one of 13 children in a poor, rural African-American family. He was born to a woman whose husband beat her with stove wood while she was pregnant. Richard's father died while his mother was six months pregnant.

When Richard was a child, there was not always enough to eat and the family had no medical care. His mother moved to a northern state when Richard was four, and he was left to live with an aunt and her husband. Richard's sister described this man as, "so mean the gnats wouldn't bite him." He beat the children.

When Richard was five or six, his mother returned, and Richard lived with her. When he was twelve, she began to live with another man. This man repeatedly raped the two oldest girls, and beat the children with sticks and belts. If a child wet the bed, he would "smoke" the child, that is build a slow fire under a tree, and then put the child in a sack, and suspend the sack from a branch above the fire. All the children lived in fear of being smoked.

Richard left home at 16. He lived with

two older sisters and apparently did well. He had friends, and worked part time.

In 1980, at age 24, he moved to the city where his two brothers lived. He found work, first as a garbage collector, then as a machine operator. He became engaged and lived with his fiancée.

In December 1980, one month before the crime, he had a bad auto accident. He may have been smoking marijuana at the time.

His behavior changed markedly after the accident. His fiancée reported that he refused to leave her apartment because he said "they" would get him. He would not allow her to leave because he said she might bring something back with her. Once Mr. D came home from work and told his fiancée that there was a woman at work with a deformed leg. The more he looked at her leg the more he began to feel there was something wrong with his own leg, and he began to have trouble walking.

Several weeks before the crime, Mr. D moved out and moved in with his brother. He went back to his fiancée's apartment to get a radio, and came running out screaming. He said, "demons was in there." He would sit and stare at the ceiling or lock himself in his room. He begged his brother not to leave him alone.

In mid-winter, two days before the crime he left the city wearing only a tee shirt, blue jeans, and rubber flip flops.

He failed to pick up his last pay check. He got on an intercity bus planning to go home, and he rode for several hours. The bus went right by his house, but Mr. D fell asleep and did not get off. Later,

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the bus driver put him off in a small hamlet. The police picked him up and checked his criminal record, which was negative.

The police let him spend the night in jail, and then drove him three miles out of town. He came back, and the police drove him 15 miles out of town. He again came back, and he knocked on a window of a business but knocked too hard and broke it. Later, he stopped at a woman's house saying he was cold. She told him to leave. He didn't, and she called the police. They came and picked Mr. D up again. He apparently spent a second night in the town jail, and then went down the road to another country hamlet.

Mr. D wandered around. He sat in a woman's car, and refused to leave but she "tricked him" out of it. Later, around 9:00 p.m. he went into a house. The owner got him out, but he kept banging on the back door. The owner called the police. A white police officer responded. There was a scuffle in a ditch that witnesses heard but did not see. The officer was shot to death with his own gun.

Later that evening, Mr. D knocked at a nearby house, saying his name was Richard and that he wanted to stay there. The owner said no. Mr. D left and the owner went for help. When the police came, Mr. D was sitting on a chair in the kitchen. The officer's gun was later found under the house.

Mr. D has been continuously incarcerated since that night. Initially, he did not recognize his mother or sister and, they said, he made no sense. A jail officer

noted that Mr. D ranted and raved. Once he ate feces.

A local psychologist evaluated him for competency in June 1981 and doubted Mr. D was competent. Mr. D was sent to the state forensic hospital, where he was evaluated for competency, found competent to stand trial, and returned for trial.

No attorney who worked with Mr. D thought he was capable of assisting in his own defense. His court-appointed attorney stole Mr. D's last, uncashed pay check, which should have been introduced at trial as evidence of Mr. D's mental state. At trial, Mr. D was found guilty and sentenced to death.

Shortly thereafter, it was discovered that the chief of the forensic team was an uneducated imposter. Nevertheless, the competency evaluation was not impeached, and the conviction was not overturned.

Mr. D spent seven years on death row. He was briefly treated with Haldol, with little apparent effect. He was reevaluated for competency in 1988. In spite of substantial evidence that he was grossly mentally damaged, he was found competent. One evaluator wrote that he was, "as intelligent as the average citizen" of the state. He was so isolated and bizarre in prison that he was eventually transferred back to the county jail.

I interviewed him in the fall of 1988, and found him totally unable to comprehend the basic facts needed to assist an attorney. I explained a trial to him as simply as I could, and then asked him to explain it back to me. Here is what he said.

"A person in a court trial is defense. A court trial is the system of . . . same as city trial. It's the law. It's confusion. Confuse everything, a system. It's the government. The branch system. Dealing with civil defense."

I asked him, "what does the D.A. do?"

D.A. is . . . D.A. is . . . D.A. Is . . . something like lets you use the telephone to pay bills and get out."

Because I believe that it is essential to rule out ignorance as a cause of failure to understand trial procedure and other relevant facts, I spent considerable effort to explain these to the defendant. None of these efforts produced any noticeable change in his ability to explain these facts to me.

My report concluded that there was substantial reason to doubt Mr. D's competency when he was tried in 1981, that at present he was severely damaged, diagnosis unclear but probably neurological, and that he was clearly incompetent to stand trial at present.

In November 1989, I testified in federal court on competency, and the judge overturned the original conviction and ordered a new trial in state court. In February 1991, I reevaluated Mr. D and wrote a report stating that his mental state was unchanged. I concluded that he was incompetent and likely to remain so. The district attorney chose not to go forward, and Mr. D was transferred to a state mental hospital, where he remains.

Reggie F

Reggie F., a single African-American male, was tried, convicted of rape and murder, and sentenced to death when

he was 20 years old. He grew up in an intact, happy family in a small southern city. Both his parents worked. He did well in school, had friends, played most sports, and enjoyed life. He went to an integrated school and had white and African-American friends.

He got into trouble in the 10th grade, hanging out with an older crowd who smoked marijuana and drank. He started cutting classes, drinking and smoking, and selling drugs. His family knew what he was doing, and urged him to quit, but as Mr. F said, he was "too big to whip." He flunked the 10th grade twice and then dropped out. He never worked, and had one drug conviction.

He became sexually active at age 13. He is a tall, handsome man with a pleasant manner. Women have always found him attractive, and he has had a number of relationships, typically with women slightly older than himself. Prior to his arrest he was in a stable relationship, living with Denise and her two-year-old daughter, June.

On the day of the crime, Mr. F says he was not drinking or smoking, although he understands that drugs and alcohol could mitigate his offense. In the evening, Denise wanted to go out clubbing with her sister, and asked Mr. F if it was all right. He said it was, and she went. Later, he would deny being angry about this.

June and Mr. F fell asleep. June woke up crying around 1:00 a.m. Mr. F hit her a few times to make her stop, and she did. A little while later, she woke again and cried. Again she would not stop crying. He hit her repeatedly, and

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she fell off the bed striking her head. She then vomited a substantial amount of food. Mr. F mopped it up with a paper towel. June then lay quietly and Mr. F went back to sleep.

Around 4:00 or 5:00 a.m. Denise came home and found June apparently not breathing. The couple took June to the hospital where she was pronounced dead.

At trial, there was testimony that June had been raped, and that she died as a result of blows to the head. Mr. F was convicted of rape and murder.

At the sentencing trial, the jury recommended life. The judge overruled them and ordered death. Mr. F spent the next seven years on death row while his attorneys employed various legal means to keep him alive.

Mr. F's attorneys asked me to evaluate him, and I interviewed him on two successive days. He is a pleasant, polite young man, with no evidence of any Axis I mental disorder. He is adamant that he did not rape June, and his counsel informs me that the state's evidence on this point is badly flawed. Asked about his sexual history, he said he is "old fashioned," that is, he likes sexual intercourse with adult women, but not oral sex. He denied any sexual contacts in prison. He has had several fights with other inmates. He says these occurred during basketball games or when he was protecting himself.

He admits hitting June but cannot understand why he hit her so hard or so often. He insists that he loved June and got along well with her. He says it is uncharacteristic for him to lose his tem-

per the way he did. He feels bad about what he did, and he cannot understand it.

At deposition I testified that Mr. F is without mental disorder, that his background provides no clue as to why he might have committed this crime, and that neither he nor I understand why he caused this girl's death. I presented his insistence that he did not rape the child, and testified that his sexual history was inconsistent with rape of a child.

I think the state's attorney was surprised by my testimony, because at the end he asked me quizzically, "And Mr. F wasn't psychotic or anything like that?" I answered in some surprise myself, "Nothing like it."

After my evaluation, shortly before the appeal was to be heard, the defense attorney interviewed the jurors who had convicted and sentenced Mr. F. When one juror had been asked at the voir dire whether he was a police officer, he had not answered the question. He now informed defense counsel he had been a police officer for 10 years, and had investigated many cases of physical and sexual child abuse. Under state law this constitutes grounds for a new guilt trial since the defense counsel could have rejected this juror for cause.

The same judge who overruled the jury heard the appeal. My testimony was not required on appeal, because the state's psychiatric expert and I agreed on the psychiatric evaluation. The defense counsel presented the information about the juror and my psychiatric evaluation to the judge. The judge overturned the

original conviction and ordered a new trial on the original charge.

Defense counsel's impression was that the judge had originally imposed the death penalty because he believed the defendant had raped and killed the child. Apparently, the psychiatric evaluation raised a question in the judge's mind as to whether there had in fact been a rape. The judge was impressed with the testimony of two opposing experts that this defendant was a psychologically healthy man with adult sexual interests. The judge then questioned whether the original verdict convicting the defendant of rape and murder was unjust. Counsel believes that the judge used the juror issue as the legal basis to overturn a verdict over which he now had doubts. In this case, the success of the appeal apparently turned on the fact that two independent psychiatrists agreed in their evaluation, and that the judge found the defense psychiatrist to be credible.

Robert B

At age 21, Robert B, a single white male, was convicted of murder and sentenced to death in a southern state. He was born to an alcoholic woman. Both parents deserted after extensive physical abuse of Robert, and he subsequently lived in 19 different foster homes. State social workers repeatedly recommended a special placement for Robert, but he never had one.

As a child, Robert showed substantial evidence of emotional and behavioral problems. He was encopretic, learning

disabled, and a school failure. He had a violent temper, lied, and was verbally abusive and physically assaultive. He received counseling and medication intermittently throughout childhood.

He beat cats to death, sexually molested an eight-year-old girl, broke windows, set fires, and ran away. He was repeatedly in juvenile court and was psychiatrically hospitalized four times. He threatened one foster mother with a butcher knife.

At age 14–15 he began to use marijuana and to steal. He dropped out of school at 16. He was using marijuana, Quaaludes, and amphetamines. He reportedly abused a four-year-old girl.

Between age 18 and 21 he was arrested eight times for burglary, battery, and theft. He worked briefly at unskilled jobs. He had few if any significant relationships.

At age 21, Mr. B was drinking and using drugs heavily. He was homeless, staying briefly with different friends. Later he would describe a relationship with an older male accountant who gave him a car and money. He would deny any sexual contact with this man.

Mr. B had a date with a young woman whom he knew casually. She was found the following day in a secluded area bludgeoned to death. The passerby who found her also saw Mr. B trying to hide the body. At trial, Mr. B testified that he had been drinking heavily and was high on LSD and marijuana at the time he killed his date. Mr. B was convicted of first degree murder and sentenced to death.

Mr. B told me that the fact he did not

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kill the passerby proves he is not a heartless killer. He killed only under the influence of drugs and alcohol. If he had killed this witness he would have gotten away free because no one would have known of either murder. Given this motive, which he did not act on, he argues that he is a worthwhile person in spite of having committed a murder.

Mr. B has been on death row in state prison for several years. He has had one fight in prison. He has had no visitors, and his family does not write. Only the accountant writes. Since Mr. B has been in prison, two blood relatives have been indicted for first degree murder.

Mr. B is a slightly built man with an earnest manner. He is mildly depressed. He tries to put his best foot forward but has limited social skills and awareness. His thought processes are formally intact. He knows that he murdered the victim. He accepts responsibility for it, and he feels remorse. He hopes not to die for his crime.

A distinguished law firm has taken on his case, *pro bono*. Robert's IQ has been tested, and he is retarded. Under state law, no retarded person can be executed, and his retardation is currently under litigation.

Comment

The first two cases illustrate directly the value of psychiatric input to defense in cases of capital murder. Paradoxically, the psychiatric contribution in one case was to portray the defendant as mentally disordered, while in the other

it was to portray him as without any disorder. This latter case illustrates more forcibly than any argument that the psychiatrist best serves his or her client by accurate observation and truthful reporting, rather than by slanting or distorting findings or testimony.

The third case illustrates more generally the value of mental health professional input to capital defense. The psychiatrist's evaluation did not directly assist the defendant to escape capital punishment. However, the psychologist's test finding that the defendant was retarded in this case served to postpone, perhaps indefinitely carrying out the sentence.

In all three cases, the psychiatric input occurred relatively late in the process. The cases illustrate indirectly the importance of psychiatric participation in the early stages of capital defense. Richard D's attorney should have obtained an independent competency evaluation prior to trial. He should also have considered a possible insanity defense if the defendant had been found competent. For both purposes, psychiatric participation was essential.

In the case of Reggie F, the judge reversed himself after hearing convergent psychiatric testimony from prosecution and defense experts that this defendant was a mentally healthy adult male, and hearing testimony from the defense psychiatrist on the sexual history. The defense had presented the defendant's description of himself as interested exclusively in heterosexual intercourse with adult women—his interests did not extend even to oral sex. Appar-

ently impressed with this testimony, the judge decided that this description did not fit with rape of a two-year-old. He then concluded the original verdict had been unjust, and he reversed himself.

Had the judge heard this testimony at trial, it seems reasonable to believe that it would have convinced him then to accept the jury verdict. Mr. F would have avoided the stress of existing for seven years under sentence of death and the concomitant stress of living on death row. The state and the defense would have avoided the expense of an appeal.

In fact, there may be a serendipitous aspect to the way in which this case evolved. Had the original sentence been life rather than death, the defense attorney would not have planned to appeal, and so would not have sought out and interviewed the jurors. The defendant would have been imprisoned for life.

Now that a new trial will occur, the defense attorney is optimistic that a manslaughter plea may be negotiable. According to my understanding of the facts, that would be a just outcome in this case.

Perhaps uniquely, this case illustrates in a dramatic and unexpected way, the value of advances in psychiatric nosology and diagnosis. The outcome turned on an issue that is of interest in academic discussions—the reliability of psychiatric diagnosis. In this case, diagnostic agreement between two psychiatrists who might have been expected to disagree, proved to be literally a matter of life and death.

In the case of Robert B, defense psychiatric testimony at the guilt trial could

have contributed to a defense that the killing was not premeditated. During the sentencing trial, psychiatric testimony was essential to portray the mitigating factors in this case.

There is no question that Mr. B committed a brutal, unprovoked murder. But it is also true that Mr. B had been subjected to severe developmental insults. These began *in utero* with his mother's heavy drinking, and continued through infancy and childhood when he was first abused, and then abandoned. Throughout elementary school, he never lived with anyone for as long as a year. The state early recognized his need for specialized care, yet no such care was ever offered. Had a psychiatrist discussed the effects of fetal alcohol exposure, child abuse, and repeated foster home shifting, a jury might have decided that life imprisonment rather than death was the appropriate sentence in this case.

These three defendants, like the majority of capital murder defendants, had appointed attorneys at trial. All the attorneys were inexperienced, and Mr. D's was both corrupt and incompetent. The federal judge who heard Mr. D's appeal ruled that he had been deprived of effective assistance of counsel.

The typical defendant in a capital case is a poor man, often African-American, with an appointed attorney. Appointed defense attorneys in the South, where most capital sentences occur, are typically paid \$20 an hour to represent defendants. Not surprisingly, they avoid these cases when they can, and when appointed, they rarely spend the time that these cases require.

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In contrast to the defense, the prosecution is typically well funded, commands considerable resources, and is experienced and highly motivated to do a good job. It is fair to say that this imbalance in resources creates a presumption of unfairness, which is often correct in fact. For the forensic psychiatrist to become involved in these cases helps to redress this inequality of resources. Psychiatric participation serves not only the

individual defendant but the more abstract value of equal justice under law.

References

1. *Furman v. Georgia*, 408 U.S. 238 (1972)
2. *Gregg v. Georgia*, 428 U.S. 153 (1976)
3. *Profitt v. Florida*, 428 U.S. 242 (1976)
4. *Roberts v. Louisiana*, 428 U.S. 280 (1976)
5. *Woodson v. North Carolina*, 428 U.S. 325 (1976)
6. *Ake v. Oklahoma*, 470 U.S. 68 (1985)