# Psychiatric Expertise in the Sentencing Phase of Capital Murder Cases

Kenneth B. Dekleva, MD

The role of forensic psychiatry in the sentencing phase of capital murder cases continues to attract intense attention in the psychiatric and legal professions as well as in the public eye. Such cases are high stakes, placing psychiatric experts under intense scrutiny. Issues of professional identity, roles, and ethics arise in capital cases, highlighting the increased psychiatric complexity and need for psychiatric expertise. This article will highlight these issues in the context of recent state (Texas) appellate and federal court rulings. The increased use of capital punishment and the need for increased psychiatric expertise in the sentencing phase of capital cases possesses important educational and ethics issues for our profession in its "quest for excellence."

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A series of historic U.S. Supreme Court rulings since *Furman v. Georgia* (1972) have paralleled an increased social acceptance and increased use of the death penalty under a wide variety of differing statutes.[1] These rulings—stemming from *Gregg v. Georgia* (1976)—have sought to grant "guided discretion" to juries in weighing the merits of an individual capital case in its punishment phase.[2] These legal changes have coincided with a greater need for psychiatric expertise in assisting fact finders in such cases. This need has paralleled the growing psychiatric complexity of such cases because of new scientific knowledge as well as novel psychiatric-legal questions. Psychiatrists play multiple roles in capital murder cases: involving pretrial diagnosis and treatment; assessment of competency issues; assessment of criminal responsibility and diminished capacity; investigation of aggravating and mitigating circumstances at sentencing; prediction of future dangerousness; assessment of victim impact testimony; and postconviction diagnosis, treatment, and assessment of appellate issues. This article will focus on psychiatric and legal issues surrounding one of the preceding roles of forensic psychiatrists in capital murder cases—the prediction of future dangerousness and assessment of aggravating and mitigating circumstances in capital sentencing proceedings. These topics and their educational and ethical implications for forensic psychiatrists will be highlighted in the context of recent legal rulings in Texas and the federal courts.

Dr. Dekleva is in private practice and is a Clinical Assistant Professor of Psychiatry at University of Texas Southwestern Medical School, Dallas, TX. This article is based on a lecture given at the annual meeting of the American Academy of Psychiatry and the Law, October 22, 1998, New Orleans, LA. Address correspondence to: Kenneth B. Dekleva, MD, P.O. Box 381759, Duncanville, TX 75138.

## Psychiatric Involvement in Capital Murder Cases

Involvement of psychiatrists in capital murder cases parallels the beginnings of their profession in this country. In punishment phase testimony during the 1924 capital murder trial of Leopold and Loeb, Clarence Darrow called on Dr. Healy, Dr. Glueck, and Dr. White—among the founders of modern American psychiatry—in asking "the Court to permit us to offer evidence as to the mental condition of these young men to show the degree of responsibility they had. We wish to offer this evidence in mitigation of the punishment."[3] This "Trial of the Century" antedated the media fanfare often seen in subsequent capital cases with psychiatric involvement. In subsequent years, psychiatrists have testified in many capital murder cases for both prosecution and defense.

Dietz writes of a "quest for excellence" in forensic psychiatry that transcends mere clinical practice guidelines involving the adoption of a professional role; development of a depth of knowledge and experience; full disclosure of biases, credentials, weaknesses, and conflicts of interest to attorneys, juries, and judges; judicious choice of cases; and scrupulous fairness in presenting findings and opinions to clients, juries, and judges.[4] Few cases in forensic psychiatry involve such high stakes as capital murder cases.[5–8] Such cases involve matters of life and death and often attract intense media attention.[9, 10] Roles can become blurred, because a psychiatrist who has treated a patient (e.g., in a correctional setting) can be consulted as an expert (for either the defense or the prosecution), despite the potential boundary conflict between being a clinician versus a forensic psychiatric expert, with recent debate highlighting the difficulty of wearing both "hats."[11] Such potential boundary conflicts demand caution in the wording of patient records, given that such records may end up being used in court proceedings. Ethics dilemmas can arise for psychiatrists on either side, including the case of psychiatrists testifying for the prosecution in the prediction of future dangerousness in capital cases, especially in cases in which they are not allowed access to the defendant.[12–16]

The psychiatric complexities of capital cases are daunting. Lewis and her colleagues suggest that such complexity represents the tip of the iceberg and that "death row inmates comprise an especially neuropsychiatrically impaired population."[17, 18] Recently, Frierson and his colleagues found lower rates of severe mental illness and neuropsychiatric impairment than seen in Lewis' earlier studies.[19] Capital murderers may comprise a legally heterogeneous population. Phillips writes that presentencing psychiatric evaluations in capital cases comprise "only one piece of a complicated matrix that is taken into account by the ultimate decision maker."[20] A forensic psychiatrist benefits from reviewing as much of the pertinent forensic data as possible. This may include not only the results of psychiatric examinations and psychometric testing (where applicable and available), but also the defendant's past medical, psychiatric, and neurologic history; lab results; results of neuroimaging tests and neurologic procedures; police/arrest reports; criminal history; military history; school records; work records; investigative materials; polygraph results; personal drawings/writings by the defendant; collateral information about the defendant; media reports about the case; media interviews/appearances by the defendant; and forensic evidence such as DNA tests, fingerprint results, hair/blood/fiber evidence, other forensic data, and crime scene photos. In complex cases, a visit to the crime scene may be useful, especially when combined with data related to staging[21] and profiling/crime scene analysis.[22] Any data that can assist the forensic psychiatrist in obtaining a deeper understanding of the crime and the defendant(s) are potentially of value. The nature and variety of the aforementioned types of data require that forensic psychiatrists be conversant with the language of various forensic disciplines, because differing data may shed light on motivation, aggravating factors, mitigation, and future dangerousness.

## Predictions of Future Dangerousness

Under current Texas law, a capital defendant must meet—beyond a reasonable doubt—several "special conditions" to be sentenced to death by a jury, and the verdict must be unanimous. It is Special Condition 1 that has attracted the most controversy, because it allows psychiatric experts—and perforce demands of the jury—to make a prediction of the defendant's future behavior. It asks "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society."[23] As stated previously, this legal question vaguely uses terms such as "criminal acts of violence" and "continuing threat to society." The statute never specifies what such terms mean and no guidelines are offered for psychiatric experts. Oddly, the length of time for which the previously stated probability holds is never stated explicitly in the statute. The current statute differs little from the language of civil commitment statutes that empower psychiatrists to commit dangerous patients involuntarily in their everyday work in emergency rooms, hospitals, and clinics throughout the country. In *Jurek v. Texas* (1976) the U.S. Supreme Court ruled that the prediction of future conduct is both part and parcel and an essential element of many decisions rendered throughout the criminal justice system.[24] The context of such a prediction, and not merely the language of the statute, has generated the most intense controversy.[12, 14–16, 20, 26–29]

Predictions of dangerousness in capital cases pose challenges for a number of reasons.[30] First, clinical guidelines for the prediction of dangerousness have

been developed largely from work with civilly committed patients.[31] Such studies have less applicability to persons charged with more serious and violent offenses. Clinical guidelines have evolved over the years, and numerous variables exist in dangerousness prediction in clinical work.[32–34] The strength of a prediction varies with its specific nature (e.g., what type of violence is being predicted) and the duration of time being assessed.[32] "Specific" (versus "general") guidelines for making dangerousness predictions in forensic populations do not currently exist. Many psychiatrists possess a dearth of experience in working in clinical forensic settings and thus may be ill equipped to integrate the scientific literature regarding dangerousness prediction with their clinical experience. The lack of scientific data regarding the prediction of dangerousness in capital murder defendants can force psychiatric experts into the uncomfortable role of individualizing prediction for a given defendant by making inferences based on their clinical and forensic experience. Such a role has generated tremendous controversy and has implications for the admissibility of such testimony.[35] The best method of dangerousness prediction "combines" three different approaches—statistical/actuarial, historical/anamnestic, and clinical—and uses these factors in a case-specific, "contextual" domain, considering variables such as weapon type/availability, victimology, and the setting in which the predicted violence occurs, as well as other situational factors.[31] Forensic psychiatrists testifying in capital cases should formulate their opinions regarding future dangerousness in terms of "relative risk." The foregoing approach "firmly grounds clinical testimony about 'dangerousness' on a specialized body of knowledge that stands outside the ken of laypersons and should incrementally assist the trier of fact."[32]

The most compelling research in this area of prediction involves the use of Hare's Psychopathy Checklist—Revised (PCL-R).[36–38] Hare's research needs duplication in a variety of forensic settings among individuals who have been convicted of a wide range of crimes, and using the PCL-R as a risk assessment tool in capital cases requires its individualization for each defendant. Certain variables in the PCL-R may be more predictive of long-term future dangerousness than others.[39] Concerns exist regarding the applicability of the PCL-R to minority populations,[40] adolescent populations,[41, 42] and females. Also, using the PCL-R in chart/record reviews (e.g., without the benefit of a psychiatric interview) remains controversial; some suggest extreme caution in this regard, whereas others suggest that such use of the PCL-R may actually lead to an "underestimation" of the PCL-R score, particularly on the more "subjective," interpersonal elements of it.[43, 44] To date no controlled study has been done (using as comparison groups capital murderers sentenced to death and those sentenced to life) examining the relationship between defendants' PCL-R scores and their future violent behavior in prison.

Research on violence committed by capital murderers has attempted to answer the question of whether such defendants possess a lower risk of violence in prison than inmates convicted of murder or lesser crimes.[45, 46] Marquart and his colleagues tracked several cohorts of capital murderers from 1972 to 1989, studying a large cohort of capital murderers commuted to life (some of whom were later paroled) after the 1972 *Furman* decision.[47, 48] The *Furman* decision created—*de facto*—a "natural experiment" regarding future dangerousness in such cases. Marquart bases his findings on comparisons of statistical base rates of violence within different populations in a prison setting. Nationwide, the large post-*Furman* cohort ($n = 558$) had six murders while in prison after their commutations. Marquart identifies no single predictor variable for those murders and notes that approximately 10 percent of the post-*Furman* cohort accounted for the largest number of violent acts within prison, compared with the rest of the foregoing cohort. Marquart suggests that the post-*Furman* commutees had fewer serious rule violations than inmates sentenced to either life or a systemwide prison control group. Data regarding post-*Furman* parolees are equally intriguing. This cohort had a strikingly low recidivism rate (20%), and only one new murder. Marquart writes, "these data suggest that the capital murderers on parole do not represent a disproportionate threat to the larger society."[48]

None of the foregoing studies resolve the methodological problem of relying on proxy variables in the assessment of low base-rate phenomena (such as violent behavior in prison among those convicted of capital crimes). One might also inquire whether the behavior of the post-*Furman* commutees was a result of psychological changes that the previously mentioned inmates had undergone on death row. These data beg the question of whether the said inmates'

putative changes were caused by psychiatric factors, spiritual factors, enforced sobriety, or other factors such as the psychological trauma of being on death row. Marquart writes, "although this possibility seems far-fetched and self-serving, it is a viable explanation for the behavior of some prisoners."[48]

Cunningham and Reidy integrate Marquart's findings with those of recent psychometric research.[40, 45] They suggest that although "studies reflect a markedly higher rate of postrelease violent recidivism for PCL-R psychopaths, use of the PCL-R in capital sentencing to estimate postrelease violent recidivism must be approached cautiously."[45] They also write, "given the limited research on minority populations, psychopath prison behavior, and recidivism following release at advanced age, any use of the PCL-R at capital sentencing must be cautious or arguably be restricted to ruling out psychopathy with probable lower violence risk rather than assigning increased risk in its presence."[40] Nevertheless, by implying that the "lack" of psychopathy (or the presence of a cut-off score less than 30) can be used to predict decreased dangerousness risk and better institutional adjustment, some mental health experts appear willing to accept this psychological construct when it suits their legal case and to discard it when it is perceived as pejorative. In conclusion, psychiatrists who use the PCL-R in sentencing phase testimony in capital cases should be aware of its strengths as well as its potential limitations and can expect rigorous *Daubert* challenges to its incorporation into their testimony.

Marquart's studies have not been replicated. Data (which have not been subjected to rigorous statistical analysis) from the Texas Department of Corrections Special Prosecution Unit suggest that inmates currently incarcerated in Texas prisons are more violent than those in Marquart's earlier studies.[49] The Texas Department of Corrections (TDC) data herald the fact that violence occurs in all parts of the prison system, even on death row and in administrative segregation units, and that prison gang violence remains a growing problem. According to the TDC data, 43 murders occurred from 1990 to 1999; persons serving time for murder committed 23 of the latter. In addition, there were 182 escape cases from 1988 to 1999, 20 of which were undertaken by convicted murderers and 6 of which were carried out by capital murderers. The TDC data suggest the need for further research. At present, psychiatric experts in capital cases may wish to incorporate prison violence data (when available) into their testimony, to give fact finders an appropriate context for their predictive functions. Forensic psychiatrists may wish to note that a need exists for ongoing, updated studies of base-rate prison violence and those factors allowing for risk stratification of the most problematic and violent inmates.

## Assessment of Mitigating Circumstances

The assessment of mitigating circumstances played a critical role in capital cases after the *Lockett v. Ohio* (1978)[50] and *Eddings v. Oklahoma* (1982)[51] U.S. Supreme Court decisions, which state that juries cannot be precluded from assessing mitigating factors, and that a trial court must consider all evidence a defendant introduces to mitigate a capital sentence. The primary role of a defense psychiatric expert is to obtain data pertinent to mitigation and to assist the jury in seeing the defendant's humanity.[52] Mitigating factors may include psychiatric and neuropsychiatric impairment, the youth of the defendant, mental retardation, learning disabilities, a history of childhood abuse, the presence of diminished capacity, and the lack of a prior record of violence.[53, 54] Haney writes of mitigation as the "recognition of basic human commonality—[and] an opportunity for capital jurors to connect themselves to the experiences, moral dilemmas, and human tragedies faced by the defendant."[55] To search for mitigating circumstances is to ask, what made the defendant into the person that he or she became? Which events shaped the defendant's life? Do factors exist that potentially lessen the defendant's moral blameworthiness for the crime?

Ferreting out mitigating factors and weaving them into coherent testimony is difficult. First, defendants—especially adolescent males—tend to "conceal" mitigating data, often in collusion with their families, even when such data are so compelling as to be potentially lifesaving.[18] Some defendants may not only conceal mitigating data, but even brag about their crimes. Second, juries often view mitigating data as stigmatizing, especially if mental illness, brain damage, or mental retardation are involved.[56, 57] As Haney writes, "human beings react punitively toward persons whom they regard as defective, foreign, deviant, or fundamentally different from themselves."[55] Third, mitigating factors may be perceived as "aggravating" by juries and opposing experts,[55, 58]

for example, neuropsychiatric impairment, which can lead to disinhibition, impulsivity, and other violent behavior.[59] Last, mitigating factors may carry more probative weight when of sufficient severity that they are of the range of ordinary human (e.g., jurors') experience. The average juror may have difficulty in grasping complex psychiatric testimony. This is especially true with data involving neuropsychiatric impairment, and the psychiatric expert can easily become mired in a legal morass.[60] Neuroimaging can illuminate psychiatric testimony, especially when a demonstrated injury resonates with the jury and correlates with clinical data. But defense psychiatric experts should inform attorneys about the legal risks of using neuropsychological testing and neuroimaging, because the revelation of "normal" neuroimaging data or neuropsychological test results can prove deadly to the defendant.

Psychiatric testimony can have the capability to weave a coherent narrative of the defendant's life by telling the jury a story. Gilligan writes of our need to articulate a tragic story in making sense of the tragedy and senselessness of murderous violence: "to approach the study of violence as the study of tragedy is to see that tragic dramas are all about violence."[61] Childhood pictures of the defendant, school photos and the like, can show the jury a richer and multidimensional picture of the defendant as a human being. Such data should be woven with the testimony of lay witnesses who can narrate the life story; the psychiatric expert can give meaning—and a sense of legitimacy—to such a narrative. To give such a narrative relevance, it should be integrated into a trial strategy and tailored to the sensitivities of jurors. Forensic psychiatrists should familiarize themselves with issues in jury selection and the jury's makeup. Psychiatric testimony in capital cases derives its legitimacy from factual and psychological issues derived from *voir dire* and the course of the trial.

Research data on jurors' perceptions, feelings, and actions in capital cases can assist forensic psychiatrists in formulating their testimony. The Capital Jury Research Project suggests that jurors give great weight to issues such as the defendant's responsibility, premeditation, whether the defendant deserves capital punishment, the nature of the crime, the defendant's dangerousness and history of violence, the innocence and pain/suffering of the victim, motive, premeditation, and the defendant's lack of remorse.[62] This study suggests that jurors give less weight to the defendant's mental illness as a factor in the crime, the psychosocial background of the defendant, the defendant's predicted dangerousness in prison, and the presence of alcohol, drugs, or insanity in the defendant at the time of the crime. These findings parallel those of Perlin, who writes that

> . . . mental illness, rather than serving as a mitigating factor, is often seen in reality as an aggravating factor. . . . If [counsel] should rely upon "empathy" evidence. . . he runs the risk of putting before the jury the evidence that has the greatest potential for turning into evidence in aggravation. . . [and] the presentation of such evidence can be deadly to the defendant.[56]

In the assessment of aggravating and mitigating circumstances, the forensic psychiatrist must assess both sets of data, regardless by which side one is employed, while realizing that the decision on whether to proffer psychiatric testimony is a "legal" decision made by the attorney(s) by whom one has been retained. In most capital cases the defense psychiatric expert will almost always have the opportunity of being able to interview the defendant. More subtle differences, which can lead to the perception of bias, emanate from opposing psychiatric experts' access to slightly different data. The narratives of competing psychiatric testimony are colored by the inevitable biases of the participants[63, 64] and by the intense emotion of such cases. Forensic psychiatrists have much to offer in such cases; the weaving of narratives and meanings has rich underpinnings in psychiatric tradition. Their credibility may be enhanced by their ability to integrate both aggravating and mitigating sets of data into their testimony, when allowed for by legal strategy. Doing so may somewhat—but not always—lessen the risks of slippage into an advocacy role, especially for defense experts, whose testimony may sometimes be perceived as more "clinical" and less "scientific" by fact finders.

## Cases

Psychiatric participation in capital cases over the past two decades has been shaped largely by two cases—*Barefoot v. Estelle*,[65] and *Ake v. Oklahoma*[66]—and the legal and moral tension between them. The debate surrounding these rulings has been well articulated in the psychiatric and legal literature.[67–69] These rulings gave primacy to mental health experts in capital cases, and other rulings outlined the parameters of psychiatric testimony in such cases. More recent appellate rulings in Texas, as well as the federal courts, have redrawn some of the pa-

rameters of psychiatric testimony in capital cases. In its 1996 *Soria v. Texas* ruling, the Texas Court of Criminal Appeals opined that

> . . . we accordingly hold that when the defendant initiates a psychiatric examination and based thereon presents psychiatric testimony on the issue of future dangerousness, the trial court may compel an examination of appellant by an expert of the State's or court's choosing, provided, however, that the rebuttal testimony is limited to the issues raised by the defendant. . . . We emphasize that the State's expert may only testify on the basis of statements made during such examination that were the product of a rational intellect and free will.[70]

The court also suggested that sanctions might be imposed by exclusion of defense psychiatric testimony should the defendant refuse to cooperate with the examination by the state's expert. In addition, the Texas Court of Criminal Appeals conceptualized that the presentation of defense psychiatric testimony in the said case constitutes a limited waiver of the defendant's Fifth Amendment rights.

The Texas Court of Criminal Appeals expanded on the *Soria* opinion in its 1997 opinion *Lagrone v. Texas*, stating that "we feel compelled to expand the scope of our rule in *Soria* to allow trial courts to order criminal defendants to submit to a state-sponsored psychiatric exam on future dangerousness when the defense introduces "or plans to introduce" its own future dangerousness testimony." They opined that, "our sense of justice will not tolerate allowing criminal defendants to testify through the defense expert and then use the Fifth Amendment privilege against cross-examination to shield themselves from cross-examination on the issues which they have put in dispute." Trial courts have interpreted *Lagrone* in a variety of ways, in part because of questions surrounding the measurement of intent: what constitutes intent to put forth testimony regarding future dangerousness? The foregoing difficulties have *de facto* forced many trial courts to default to the holdings of *Soria*. The Texas Court of Criminal Appeals noted this in *Lagrone*, where they opined that,

> [W]e are fully aware that the defendant has not actually waived his Fifth Amendment rights until he has actually presented expert testimony on the issue of future dangerousness at trial. . . . it is necessary to employ a sort of "legal fiction" in these cases which infers a limited waiver of the defendant's Fifth Amendment rights once he has indicated an intent to present future dangerousness testimony.[71]

The tension between issues of fairness and parity in the presentation of future dangerousness testimony at punishment and the Fifth Amendment rights of the defendant were raised in dissent by two of the appeals court's members in a concurring opinion, who wrote that "I cannot agree we should ignore invocation of a defendant's constitutional rights because recognizing them 'works against the State in almost every case'." Likewise, another concurring judge noted that "to preclude and forbid a defendant from presenting evidence that is indisputably relevant to the potentially lethal special issues that the jury has to answer simply because he chooses to exercise his constitutional rights to silence is the epitome of imprudence." These concurring judges borrowed from *Estelle v. Smith*,[72] reiterating its argument that "the State must make its case on future dangerousness in some other way."

The Texas Court expanded on the foregoing rulings in its 1999 decision in *Chamberlain v. Texas*,[73] in which the State's psychiatric expert testified regarding the defendant's future dangerousness risk (which was not based on an examination of the defendant, as the defense had "not" allowed access to the defendant after the trial court's granting of motions based on *Soria* and *Lagrone*). The defense was prohibited from rebutting such testimony with their psychiatric expert unless the state's expert was allowed to examine the defendant psychiatrically. The appeal argued that *Chamberlain* differed from *Soria* and *Lagrone* because in the said case the state offered psychiatric testimony first, rather than in rebuttal. The Texas Court of Criminal Appeals opined that

> [T]he holdings of *Soria* and *Lagrone* are governed by the principle that if a defendant breaks his silence to speak to his own psychiatric expert and introduces that testimony which is based on such interview, he has constructively taken the stand and waived his Fifth Amendment right to refuse to submit to the State's psychiatric experts. The focus is the defendant's choice to break his silence. The issue is not whether appellant introduced psychiatric evidence or merely rebutted such evidence. The issue is whether the psychiatric testimony he intended to introduce was based on his own participation in the psychiatric testing and examination.

Furthermore, the appeals court wrote that "[T]he essential principles at work in *Lagrone* and *Soria* are waiver and parity; if a defendant testifies, even in mere rebuttal, the State may be allowed to cross-examine him." The foregoing rulings in *Soria* and its progeny, *Lagrone* and *Chamberlain*, have led to a diminution of psychiatric testimony in capital cases in Texas. This has in part eliminated some of the most problematic ethics issues in capital cases—especially the use of testimony based on hypothetical

questions—for forensic psychiatrists raised in the era of *Barefoot v. Estelle*. But rarely are mitigating data so compelling as to justify the legal risk of the defendant's submitting to psychiatric examination by a state's expert. The legal tension between parity, fairness, and the defendant's Fifth Amendment rights will likely remain a center of future legal controversy.

Federal courts have used similar language as that of *Soria* and its progeny in several recent rulings. In the 1996 federal capital trial *U.S. v. Haworth et al.*,[74] the U.S. District Court in New Mexico stated that

> [P]sychiatry is far from an exact science because it does not rely primarily on the analysis of raw data. Instead, 'the basic tool of psychiatric study remains the personal interview, which requires rapport between the interviewer and the subject'[citation omitted]. The Government's expert cannot meaningfully address the defense expert's conclusions unless the Gov't.'s expert is given similar access to the "basic tool" of his or her expertise: an independent interview with and examination of the defendant.

The court in this case realized the tension between the defendant's Fifth Amendment rights in capital cases (as in *Estelle v. Smith*[72]) and highlighted the tension between such defendants' rights and "the interests of the other party and regard for the function of justice to ascertain the truth . . . prevail in the balance of considerations determining the scope and limits of the privilege against self-incrimination" (quoting *Brown v. U.S.* 356 U.S. 148 (2958)). As in the previously mentioned Texas appellate cases, the foregoing U.S. District Court set limitations on the relevant parties' experts and when such testimony could be raised; the said court also called for sanctions if a defendant failed to provide proper notice or failed to participate in a court-ordered mental examination.[74] Similar rulings have been made in the capital cases of *U.S. v. Beckford*,[75] *U.S. v. Orlando Hall*,[76] and *U.S. v. Vest*.[77] The parameters of psychiatric testimony in federal capital cases will likely remain a hotly contested and controversial issue.

## Ethics Issues

The legal parameters of recent appellate cases have altered some of the ethics dilemmas facing forensic psychiatrists in capital cases. Many jurisdictions in Texas have seen a shift away from the use of hypothetical, sentencing-phase testimony by forensic psychiatrists. But cases such as that of Karla Faye Tucker (executed in Texas in 1998) raise profound ethics issues about the future dangerousness of defendants who have remained for years on death row, with no further history of violent acts or disciplinary problems within the prison system.[78–80] This postulate follows the logic of *Barefoot v. Estelle*, which declares that predictions of dangerousness are valid precisely because they are made repeatedly in psychiatric and forensic settings.[65] Forensic psychiatry's sense of fairness, ethics, and justice demands that—because death row inmates' future dangerousness is potentially a dynamically changing variable, subject to change over time—periodic re-evaluation take place. Other significant ethics problems regarding psychiatric testimony in capital cases have to do with the execution of juveniles[18, 81, 82] and the risk of executing the innocent.[83, 84] Leong and Eth write, "the introduction of behavioral science data serves only to confound the juvenile death penalty as fundamentally a moral issue."[81] The recent American Bar Association moratorium on capital punishment—highlighted by numerous recently overturned capital sentences—also presents forensic psychiatrists who testify in capital cases with perplexingly difficult ethics dilemmas.

## Future Challenges

The increased need for psychiatric expertise in capital cases has profound implications for the training of future practitioners who would consult on and testify in such cases. Juries in capital cases give great weight and probative value to forensic psychiatric experts who have had wide-ranging experience in clinical correctional settings such as jails, conditional release programs, forensic psychiatric hospitals, and prisons. If such experts possess additional experience in having consulted with law enforcement agencies, this also may carry weight with juries. Last of all, forensic psychiatric experts should be conversant with the relevant forensic psychiatric literature, both for legal reasons as well as for purposes of cross-examination.[35] Forensic psychiatric educators should emphasize the methodology and knowledge base of forensic psychiatry: how do we acquire and verify forensic psychiatric data, and how do we validate forensic psychiatric data and conclusions? Such requirements place a heavy burden on those who would train the "forensic psychiatrist of the future."[85] The complexity of capital cases portends increasing psychiatric involvement (not necessarily testimony) in such cases in the future.

Prosecutors in capital cases may rely increasingly on forensic psychiatric input during their investiga-

tion and in terms of assessing mitigating evidence pretrial. The potential use of forensic psychiatrists in capital cases has been tempered by the utilization, in many jurisdictions, of mandatory, lengthy sentences without the possibility of parole.[86] An uncharted area of research pertains to prosecutorial discretion concerning which cases deserve the death penalty.[87] Race bias—a controversial factor in capital cases[88] (e.g., a defendant who murders a white victim is more likely to be sentenced to death)—may in fact be a "dependent" variable related to the exercise of prosecutorial discretion. Further research should do much to answer such questions.

Future research pertaining to psychopathy, paraphilias, sexual homicide, neuropsychiatric impairment in violent populations, dangerousness prediction, childhood trauma and the subsequent development of psychopathology, malingering, the relationships between violence and mental illness, and the biological markers of violent behavior may lead to strengthening the empirical foundation of predictions of future dangerousness in capital cases. More data are needed that can explain the relationship between violence, mental illness, substance abuse, personality disorder, psychopathy, and antisocial behavior in a wide variety of forensic settings, ranging from community settings to the highest-security prisons and forensic mental hospitals.

## Conclusions

In this article, I address psychiatric, educational, ethical, and legal issues surrounding the role of forensic psychiatrists in capital sentencing proceedings, with a focus on recent appellate cases in Texas and recent federal cases. To date, psychiatric debate regarding the foregoing issues has provided few "practical" guidelines to practitioners who choose to participate in such cases, whose voices often have been drowned out by emotional debates surrounding the morality of capital punishment. This article attempts to provide forensic psychiatrists with an update on how new legal rulings "create an opportunity, even a mandate for psychiatric participation in determining sentencing for capital murder."[52] Like many psychiatric colleagues who participate in such capital cases, I believe that, "ideally," a forensic psychiatrist should consult for both prosecution and defense, that "participation in capital cases is, in principal, no more or less problematic than forensic participation in any criminal case,"[20] and that, moreover, participation in such cases serves as a function of due process and of equal justice under the law.[20, 52]

No amount of technical and psychiatric jargon can divorce psychiatric participation in capital cases from their moral, ethical, tragic, and human aspects. Psychiatric testimony in capital cases should—in the words of Griffith—utilize the cultural formulation in the forensic context "to construct a fuller story of how the forensic event occurred."[89] Griffith cautions forensic psychiatrists about the perils of "the natural perversion of truth seeking," and reminds us that it is the "capacity to pick one's path through the minefield of forensic work that defines the accomplished expert." But psychiatric experts—especially in capital murder cases—should strive to tell the jury "a story of murders: murders of the flesh, and of the spirit; murders born of heartbreak, of hatred, of retribution . . . the story of where those murders begin, of how they take form and enter our actions, how they transform our lives, how their legacies spill into the world and the history around us."[90]

Recent state (Texas) appellate court rulings and federal district court rulings have altered the parameters of psychiatric testimony in capital cases. These novel parameters deal less with the explicit content of such testimony and more with particular legal strategies, the defendant's Fifth Amendment rights and due process issues. Until recently, psychiatric testimony in capital cases has been shaped by the colossal legal, moral, and psychiatric debates surrounding the *Barefoot* and *Ake* rulings. A new generation of legal rulings in capital cases has led to new dilemmas, new debates, and new challenges facing forensic psychiatrists. Will such rulings strip forensic psychiatry of its passionate advocacy—its rich legacy from *Ake v. Oklahoma*—pertaining to its role in the drama of capital cases? Or will forensic psychiatrists respond to these challenges by reinvigorating the *ethos* of a profession embarked on Professor Stone's "moral adventure?"

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