

# Commentary: Expert Testimony as a Potential Asset in Defense of Capital Sentencing Cases

Montgomery *et al.* have documented the extent to which jurors apparently do and do not rely on expert testimony regarding dangerousness and mental illness. This article reviews some of the methodological issues raised by their findings and argues that their results have potential value for appellate defense counsel in appealing death sentences in which trial counsel failed to introduce expert testimony on mental illness.

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*J Am Acad Psychiatry Law* 33:519–22, 2005

Montgomery *et al.* have written an important paper.<sup>1</sup> First, their work represents a significant methodological advance over almost all earlier work on jury behavior in capital cases. Most work on juror attitudes and behavior has been conducted in samples of students who were asked to participate in mock trials. Following this exercise, the student jurors were asked about their experiences and how they made their decisions. Critics have noted that these studies do not provide much useful information about how jurors may behave in real-life cases of capital murder. The decision of whether to sentence a man to life or death is an awesome one, and asking students to imagine themselves in this situation does not begin to approximate the real thing.

Drawing on data developed by The Capital Jury Project, Montgomery *et al.*<sup>1</sup> report on real jurors from real cases. The Project, funded by the National Science Foundation, was undertaken to gain a better understanding of jury behavior in capital murder cases. In the Project, four or more jurors from capital murder trials in death penalty states were interviewed, typically, for three to four hours each. Using the interview data from South Carolina cases, Mont-

gomery *et al.* report jurors' responses to expert mental health testimony. These Project interviews involved 214 jurors in 65 capital murder cases, 30 of which involved death sentences, and 35 of which did not.

Answers to three questions were the focus of the Montgomery *et al.* report. Jurors were asked to rate how well each question described the defendant: one question on defendant dangerousness—"dangerous to other people"—one on the defendant's general mental condition—"emotionally unstable or disturbed"—and one on his condition at the time he committed the murder—"went crazy when he committed the crime." ("He," because approximately 90% of capital murder defendants are men.)

The principal findings were:

- Prosecution testimony on defendant dangerousness did not relate to juror ratings of a defendant's future dangerousness. Jurors did relate future dangerousness to the defendant's criminal history, to the viciousness of the murder and whether the victim was made to suffer, and to the race of the victim (dangerousness was a factor more often when the victim was white).
- Defendant expert testimony did relate to jurors' estimates of the defendant's mental condition—that is, whether the defendant was seen as "crazy," at the time of the murder. When defense experts testified on the defendant's mental condition, jurors rated such defendants as more

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likely to have “been crazy” at the time of the crime. Jurors also rated defendants who expressed remorse as “less crazy” at the time of the murder than defendants who expressed little or no remorse.

- Defense expert testimony related to jurors’ estimates of the defendant’s general mental instability. When defense experts testified, jurors saw the defendants as more mentally unstable. Jurors did not relate mental instability to remorse, but they did relate it to the defendant’s race—white defendants were seen as more unstable than were black defendants.

These findings about the role of defense experts were consistent across a wide variety of statistical models in which other relevant variables were held constant: the defendant’s criminal history, the viciousness of the crime, the juror’s race, and the interaction of the victim’s race with the defendant’s race (i.e., white victim-black defendant cases were not judged as different from any others).

What do these findings tell us? First, we think they provide a resounding endorsement of jurors’ common sense. Although the jurors had not conducted a literature review, they behaved as if they had. There is no evidence that psychiatrists or psychologists can predict dangerousness in the individual case better than anyone else. Jurors appropriately refused to give any weight to expert opinion on this subject. In contrast, jurors recognized that mental health professionals have expertise in evaluating mental condition or psychological state, and the jurors appropriately considered expert testimony in forming their opinions on these questions.

There are limitations to these data that are important. We do not know what the experts actually testified to in the 65 cases. We do not have any direct evidence that the defense experts’ opinions had any effect on how the jurors decided to sentence the defendant. However, these findings are an important beginning, and they point us in a direction that may have profound practical consequences. They also increase our knowledge and understanding of jury process in capital cases.

### Relevant Findings from the Literature

A review of the literature suggests that the presence or absence of expert testimony could play a critical role in jury sentencing decisions. The evidence is

fragmentary, and the argument depends on some inferences that may or may not prove to be correct. Eisenberg *et al.*<sup>2</sup> used the Capital Jury Project data to tease apart individual juror’s sentencing recommendations from the unanimous consensus that finally emerged. The data set included jurors’ votes on the first ballot, as well as on the last. On the first ballot, juror characteristics that were associated with a death sentence were race (white); religion (Southern Baptist) and attitude toward death penalty (positive). Crime/defendant characteristics associated with a death recommendation were seriousness (i.e., viciousness) of the crime and the defendant’s remorse. But, most important for our current argument, the data showed that first ballot votes determined the final jury vote in almost every case. If seven or fewer jurors voted for life initially, the final verdict was always life. If nine or more jurors voted for death, the final verdict was always death. In 11 trials, eight jurors voted for death and four for life. In these 11 cases, there were seven recommendations of the death sentence and four of a life sentence. Thus, for the defense to win a life sentence in a close case, it may be sufficient to persuade one additional juror to favor life on the first ballot. From this we conclude that effective presentation of mitigating evidence may be a key to winning a life sentence.

Again using the South Carolina data set, Garvey *et al.*<sup>3</sup> looked at answers to the questions about how much difference it would make to jurors in considering the sentence if certain facts about the defendant were true. Regarding the mitigation, a history of mental illness, 56.2 percent of jurors reported that they would consider a death sentence to be slightly or much less likely if this mitigating factor were shown. For mental retardation, the comparable percentage was 73.6; for severe childhood abuse, 38.0 percent; and for a failed attempt to get help, 48.2 percent. These data were extracted from answers to the hypothetical question: “How much difference would it make?” not from answers about what actually influenced jurors. Still, the data suggest that evidence on mitigation of the type that mental health and social science experts are well able to provide could sway opinions in close cases. Freedman and Beck<sup>4</sup> reported that a history of the defendant’s trying but failing to get help was common in the lives of death row inmates. The authors referred to this as “institutional failure.”

Lastly, the question of mitigation is directly relevant to the role of race in capital sentencing. Baldus *et al.*, in their review of post-*Furman*<sup>5</sup> death penalty evidence of a role of race in capital sentencing, state that “race of victim is a substantial influence in jury sentencing decisions *based on failure to find mitigation in the case*” (Ref 6, p 1715, emphasis added). Hence, our argument is that expert mental health evidence could influence not just sentencing outcome but could play a salutary role in limiting the impact of racial prejudice on sentencing outcome.

There is one important caveat, however. There is no actual evidence that expert opinion influences jurors’ sentencing decisions. If it can be shown in future research that jurors’ decisions on life or death are related to the presence of defense expert testimony at the sentencing trial, then the absence of such testimony may raise a legitimate basis to argue that defense counsel was ineffective. Ineffective assistance of counsel is the primary basis on which the federal courts hear an appeal of a capital sentence.

### Death Penalty Trial Strategy

All states now have a bifurcated trial process for capital defendants. The first phase of the trial is the innocence or guilt phase, and if the defendant is found guilty, the trial proceeds to the penalty or sentencing phase. During the penalty phase, the jury hears so called “aggravation” testimony from the prosecution, which consists of statutorily mandated categories that allow the jury to dispense the death penalty (often testimony that asserts the defendant’s depravity and future dangerousness) and “mitigation” testimony from the defense, which is typically favorable evidence regarding the defendant’s history, character, and mental condition.<sup>7,8</sup> Montgomery *et al.*<sup>1</sup> have appropriately concluded from their data that expert testimony did not have a measurable impact on jury impressions of the defendant’s future dangerousness but that the introduction of the mitigating factor of a defendant’s mental abnormality did have an influence.

This conclusion that evidence of mental abnormality influences jurors’ decisions has far-reaching implications for the conduct of capital trials and for subsequent appeals of death sentences. With respect to conducting both the guilt and penalty phases of a capital trial, it is clear that competent defense attorneys must make a considered and informed decision about whether and how to present mental health or

mitigating evidence at one or both phases of the proceedings.<sup>9–11</sup> In the traditional analysis, defense attorneys must weigh the potential benefits of presenting sympathetic information about a defendant’s past, such as a childhood characterized by violence, a history of drug dependency, or the presence of a major mental illness, against the possibility that this evidence may also reveal that the defendant committed other crimes or has a mental illness that might make him a poor candidate for rehabilitation. The notion that juries give ample weight to the typically mitigating explanatory factors brought forth by defense mental health experts and less weight to predictions of future dangerousness by prosecution experts should tip the balance in favor of presenting this background evidence as a penalty phase strategy. In essence, these findings may alter the double-edged sword problem of presenting mitigating factors to the jury that might be construed as enhancing the perception of the likelihood of the defendant’s future dangerousness.<sup>12</sup> This is in keeping with the views of many prominent capital crime defense attorneys, who believe that appropriate and psychiatrically sound mitigating evidence is effective in any capital case, despite the presence of overwhelming aggravating factors.<sup>11</sup>

Perhaps even more significantly, these findings are relevant to the appeal of a death sentence based on the claim of ineffective assistance of counsel. It is well established that the Sixth Amendment to the United States Constitution entitles all criminal defendants to the effective assistance of counsel. In *Strickland v. Washington*,<sup>13</sup> the Supreme Court set forth the two-part test which applies to such a claim, namely that the appellant must show that “counsel’s representation fell below an objective standard of reasonableness” and “that there is a reasonable probability, but for counsel’s unprofessional errors, the result of the trial would have been different.” The *Strickland* test imposes a low standard of competence for criminal attorneys, and the Court has articulated that it is “highly deferential” to trial courts when evaluating ineffective assistance of counsel claims. The application of the *Strickland* standard in death penalty cases has been widely criticized as undermining the right to counsel, as it has significantly curtailed appellate review in these cases.<sup>14,15</sup> Defendants have alleged the ineffective assistance of counsel in death penalty cases both for calling and for failing to call mitigation experts, and neither type of claim has fared well un-

der the *Strickland* test.<sup>16</sup> In most cases that assert that failure to use a mitigation expert constitutes ineffective assistance of counsel, appellate courts have declined to overturn the sentence determined by the lower courts. The only consistent basis for overturning death sentences on the basis of ineffective assistance of counsel has been the complete failure to present mitigating evidence and failure to present mitigating evidence of mental impairment.<sup>11</sup> Under the so called “performance prong,” the courts have held that counsel’s performance was reasonable if the failure to present mitigating evidence could be explained by articulating any possible strategic basis for the choice. When conducting a “reasonableness” review, appellate courts have upheld attorney performance by supplying hypothetical strategic concerns that may have motivated trial counsel’s decisions, even when the record does not provide any support that the attorney considered such a strategy.<sup>16,17</sup> Similarly, under the “prejudice prong,” the courts have concluded that the failure to present mitigating evidence did not constitute the ineffective assistance of counsel, because the cumulative impact of the aggravating evidence was so great that mitigation would not have prevented imposition of the death penalty.

The results of this study have important implications for post-conviction review under the *Strickland* standard. With regard to the *Strickland* reasonableness test for attorney performance, evidence that mental health expert testimony affects jurors’ perceptions of the defendant’s mental condition may render an attorney’s failure to present this evidence a less defensible generic strategy on post-conviction review. In essence, these data would support the dominant view of the bar that failure to present mitigating evidence, absent counsel’s well-grounded belief that it would worsen the outcome for the defendant, would constitute representation that is below the current standard of legal representation.<sup>18</sup> Similarly, if juries accord particular weight to defense mental health experts regarding mitigating evidence, it may also alter appellate court analysis under the “prejudice” prong of the *Strickland* test. Empirical evidence that juries place less faith in psychological testimony regarding future dangerousness than they do in evaluations of the defendant’s mental functioning may undermine appellate court conclusions that defendants are not prejudiced by the absence of mitigation

because of the “cumulative” nature of the aggravating evidence. It would be premature to base these arguments solely on the data presented in the Montgomery *et al.* article, as there is no direct evidence that the weight accorded to defense experts translated into a decision on how to sentence the defendant. If subsequent research establishes a direct link between defense expert testimony and the jury’s willingness to impart a death sentence, it is likely that both attorney trial strategy regarding mental health evidence and ineffective assistance of counsel analysis will be altered, in the ways outlined herein.

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