Ineffective Counsel in Death Penalty Cases and the Promise of Therapeutic Jurisprudence

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It is absolutely essential to consider the abject ineffectiveness of counsel in a significant number of death penalty cases involving defendants with serious mental disabilities and how such ineffectiveness is often (scandalously) accepted by reviewing courts. We must also assess all of the concerns raised in this excellent paper by Hiromoto and colleagues through the filter of therapeutic jurisprudence as a way to guide counsel to thoroughly investigate all aspects of such cases (especially those involving defendants with PTSD) and to present substantial mitigating evidence to the fact finders in the sorts of cases the authors are discussing.

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The authors of this excellent article conclude, "It is our belief that achieving systemic justice for capital defendants lies in ensuring an immensely thorough and thoughtful mitigation investigation regarding trauma history. Without this, concerns regarding the arbitrariness of the death penalty will persist" (Ref 1, p 11). And I agree completely with their position. But having said that, I will share some thoughts as to both the trials of cases involving death-eligible defendants with potential posttraumatic stress disorder (PTSD) claims, and the ways that such cases are resolved by appellate courts, in the hopes of adding another layer to this complex problem.

I do not think we can overstate the scandal that is at the heart of this entire area of law. Federal appellate courts, in construing *habeas corpus* petitions of this cohort of defendants who have been sentenced to death, have ignored the (admittedly) pallid standard of *Strickland v. Washington*[2] in inevitably affirming convictions and death sentences in cases where counsel did, by any objective standard, an utterly inadequate job.[3,4] As two co-authors and I recently noted in an analysis of all Fifth Circuit *Strickland* cases involving defendants with serious mental disabilities who had been sentenced to death, the decisions were "bizarre and frightening" (Ref. 3, p 308). There, we said, "In virtually all cases, *Strickland*
errors—often, egregious errors—were ignored, and in over a third of the cases in which they *were* acknowledged, defense counsel had confessed error" (Ref. 3, p 308, emphasis in original). We concluded that this cohort of cases was "an embarrassment to our system of criminal law and procedure" (Ref. 3, p 309). This is a sad re-articulation of what Federal Judge David Bazelon wrote nearly a half-century ago: that so many lawyers representing defendants with mental disabilities were "walking violations of the Sixth Amendment" (Ref. 4, p 2).

Hiromoto and colleagues acknowledge the substandard job done in many of the cases they address, but it is critical to acknowledge how substandard counsel frequently is. I offer here some thoughts on the article that may supplement the important points they make.

They are absolutely correct when they focus on the "fear of faking" of PTSD symptoms (Ref. 5, p 581), although we have known for years that "the use of new neuroscience techniques in the development of

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external measures of assessment should obviate most of these concerns" (Ref. 6, p 460–61; see also Ref. 7). What needs emphasis here is how most criminal defense attorneys have historically completely avoided introducing PTSD, for fear of negative jury response, as an explanation for why a client with wartime experience may have acted violently toward others or engaged in other illegal activities.[8]

They are similarly correct when they note that, in cases such as *Wiggins v. Smith,*[9] the Supreme Court has recognized the importance of the introduction of mitigating evidence at the penalty phase of the death penalty case. Subsequent research surveying lower court decisions both before and after *Wiggins*, however, indicated that capital defendants did not achieve any greater success in obtaining relief after *Wiggins* than they did before *Wiggins*.[10] As Professor John Blume and a colleague have noted ruefully, "[d]espite the Supreme Court's clear message, a number of courts still remain hostile to ineffective assistance of counsel claims and are still willing to put a judicial stamp of approval on appallingly inadequate representation" (Ref. 11, pp 159–60).

The focus on *Porter v. McCollum*[12] is important, but it is also necessary to consider the impact of *Porter* on subsequent cases via its failure to "acknowledge the reality of mental illness" in death penalty cases (Ref. 13, p 926). *Porter* explicitly "places a burden on the defense bar to ascertain clients' military background and subsequent related issues when defending them in capital cases" (Ref. 14, pp 77–78); a review of post-*Porter* litigation tells us that this, simply, is not the norm. As I have noted recently, "many [lower federal courts] have simply ignored all the post-*Strickland* decisions that seemed to have resuscitated at least a partially-sound adequacy of counsel standard" (Ref. 3, p 278).

The authors are exactly correct when they say, "Moreover, courts also seem skeptical that mental health evidence, even if it should have been looked into, would have made a difference in capital mitigation cases" (Ref. 1, p 7). I question how courts would know. There is no metric by which a court can decide that evidence that had not been presented to the trial court would not have made a difference in jury deliberations. This is an utter impossibility, and this entire line of inquiry deserves far more attention from both legal and mental health scholars than has been paid previously.

Hiromoto and colleagues' point that an expert is also a teacher ("an expert can help teach lay people about PTSD" (Ref. 1, p 7) is a very important one. The late Robert Sadoff, MD, a former president of the American Academy of Psychiatry and Law, wrote and lectured about this extensively,[15] and I would have liked to have seen even more on this point.

When the authors appropriately say, "Defense-retained forensic psychiatrists need to evaluate data . . ." (Ref. 1, p 8), they again are absolutely right. But this admonition should apply also to all defense mental health experts, including, importantly, forensic psychologists.

This sentence puzzles me: "A forensic expert ideally maintains an objective or neutral stance toward the defendant" (Ref. 1, p 8). Think about the utter lack of objectivity exhibited by witnesses such as James Grigson (the infamous "Doctor Death")[16] or witnesses who have fraudulently testified to the use of "ethnic adjustments" in distorting the IQ scores of intellectually disabled defendants at death penalty trials.[17–19] I have written elsewhere about what I have characterized as "the fallacy of the impartial expert,"[20] per the position of Dr. Bernard Diamond,[21] and I think this point might be noted here.

Similarly, I am puzzled by this sentence: "Forensic psychiatrists may find providing testimony regarding the effects of trauma in the mitigation phase more palatable as they are not tasked with vehemently defending their conclusions, as in criminal responsibility testimony" (Ref. 1, p 9). Any time forensic experts take the stand they must be prepared to vehemently defend their conclusions, especially in a death penalty case. I was hoping for an explanation here.

The authors refer to the "floodgates" rationale: "There is a real concern that a focus on the traumatic backgrounds of individuals involved in criminal cases might open the floodgates for nearly every defendant to claim a traumatic history as a reason for leniency" (Ref. 1, p 9). This is troubling for two reasons: First, the reality is that most defendants have no expert witness (as over 90% are indigent, and there are rarely adequate funds available for those with the level of expertise needed to make these arguments),[17] and, as discussed above, the level of counsel is so substandard that this is not likely at all. Second, this is an argument raised every time there is any development in the law that evens the playing field so as to make the proceedings fairer to defendants. Professor Blume and his colleagues have analyzed this carefully in the context of *Atkins* claims, concluding that "*Atkins* has not opened floodgates of nonmeritorious

litigation" (Ref. 22, pp 627–28). A comprehensive analysis of the Supreme Court's often-expressed "fear of floodgates" argues for a presumption against court-centered floodgates arguments. It is, simply, (or at least, should be) a nonissue.[23]

The discussion of the American Bar Association (ABA) guidelines may need some clarification (the authors suggest it is "unclear" whether the guidelines are "aspirational or essential." They are clearly essential. The guidelines "made clear the absolute requirement that capital defenders retain the assistance of a mitigation specialist as an essential member of any defense team" (Ref. 24, p. 770); they are not merely aspirational, but, rather, were developed to "reflect prevailing professional norms" (Ref. 25, p 1078). There can no longer be any question but that "a rich understanding of the complexities of psychological trauma is crucial for the development and presentation of mitigation evidence related to exposure to traumatic events" (Ref. 26, p 926).

The authors' final conclusion is such an important one, in which they urge courts to "more readily appoint consultants to defense teams to interpret potentially mitigating evidence" (Ref. 1, p 11). In a recent article, I have argued that there are cases in which multiple experts may be needed: one to evaluate the defendant and one to explain to the fact-finders why their "ordinary common sense" (a psychological construct that reflects the level of the disparity between perception and reality that regularly pervades the judiciary in deciding cases involving individuals with mental disabilities; Ref. 27, p 365, n. 127) is flawed.[28] I define "ordinary common sense" as a self-referential and nonreflective way of constructing the world ("I see it that way, therefore everyone sees it that way; I see it that way, therefore that's the way it is"; Ref. 29, p 253, n. 78). The authors' point here is precisely the one that I sought to make.

There are two other points for me to make. First, I think it is absolutely essential that lawyers and expert witnesses engage in this sort of work study and absorb the principles of therapeutic jurisprudence as part of their work. Therapeutic jurisprudence (TJ) recognizes that, as a therapeutic agent, the law can have therapeutic or anti-therapeutic consequences.[30] It asks whether legal rules, procedures, and lawyer roles can or should be reshaped to enhance their therapeutic potential while not subordinating due process principles.[31] Professor David Wexler clearly identifies how the inherent tension in this inquiry must be resolved: the law's use of "mental health information to improve therapeutic functioning [cannot] impinge upon justice concerns" (Ref. 32, p 21). Therapeutic jurisprudence "look[s] at law as it actually impacts people's lives" (Ref. 33, p 535), and supports "an ethic of care" (Ref. 34, pp 605-07).

As stated flatly by Judge Juan Ramirez and Professor Amy Ronner, "the right to counsel is . . . the core of therapeutic jurisprudence" (Ref. 35, p 119). "Any death penalty system that provides inadequate counsel and that, at least as a partial result of that inadequacy, fails to insure that mental disability evidence is adequately considered and contextualized by death penalty decision-makers, fails miserably from a therapeutic jurisprudence perspective" (Ref. 36, p 1542). If counsel in death penalty cases fails to meet constitutional minima, it strains credulity to argue that such a practice might comport with TJ principles.

In so many death penalty cases involving defendants with mental disabilities, counsel fails miserably to abide by therapeutic jurisprudence principles, leading our entire system to "fail . . . miserably" from this TJ perspective (Ref. 37, p 235). I believe attention must be paid to our legal system's abject failures here.

Second, in a previous article about PTSD and veterans returning from war in Iraq and Afghanistan, I considered how PTSD was dealt with in a full array of federal sentencing considerations and concluded with these recommendations, one that I think complement the ones made by Hiromoto and colleagues:

> Courts must "get" the significance of the expanded PTSD definition in DSM-5 (Ref. 13, pp 917–18).
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> Fact finders must understand how experiences of soldiers in current wars may have been dramatically different from what their "ordinary common sense" has led them to believe is how soldiers "should have reacted" to battlefield conditions (Ref. 13, p 905). Parenthetically, for those whose PTSD came from different sources than war injuries, fact-finders would have to re-structure their thinking so as to not impose such "should have reacted" beliefs on, by way of example, abused women or refugees from war zones.
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> Fact finders must, finally, acknowledge how sanist thinking has distorted their decision-making in this area. For those unfamiliar with the term, sanism is "an irrational prejudice of the same quality and character of other irrational

prejudices that cause (and are reflected in) prevailing social attitudes of racism, sexism, homophobia and ethnic bigotry" (Ref. 36, p 1507, n. 19).

Fact finders must embrace TJ as a "redemptive" means of "stripping bare the law's sanist façade" of such decision-making (Ref. 38, p 591).

Lawyers need to understand the vocabulary and techniques of these new rehabilitative approaches.

Judges, lawyers and all those who interact with the criminal justice system or defendants with PTSD need to understand the true consequences of failing to acknowledge the impact of PTSD, and the contingent benefits (lowering recidivism rates, enhancing behavioral changes) of actually putting into context the PTSD considerations (Ref. 13, pp 926–27).

I think it is vital to explicitly articulate, from a TJ perspective, the burden on counsel to thoroughly investigate all aspects of such cases and to present substantial mitigating evidence to the fact finders in the sorts of cases the authors are discussing. I believe that would be the most likely way for the changes the authors seek to come about.

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