Reflections on Death Penalty Evaluations: “How Can You Sleep At Night?”

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ABSTRACT

Death penalty cases challenge the forensic expert professionally, emotionally, and ethically. The threat of the ultimate punishment our society can inflict calls for the ultimate in professional care from the examiner. Evaluations of “competence to be executed” further heighten these challenges given the proximity of the evaluation, and the evalee, to the execution of sentence. In this article, the author, a board-certified forensic psychiatrist (American Board of Psychiatry and Neurology, Inc.) employed by the State of Missouri, provides reflections upon his work on one recent case that garnered worldwide media attention due to the nature of the medical issues involved. [Psychiatry Ann. 2015;45(12):626-629.]

The question “how can you sleep at night?” was posed to me by a visiting medical student from the United Kingdom to whom the death penalty was a fascinating and frightening, yet abstract concept. As I pondered a reply, I reflected on my involvement in seven death penalty cases over my 23-year forensic career.

BACKGROUND

I have been involved in seven death penalty cases as a forensic examiner; six were “pretrial” and one was for the question of “competence to be executed.” Two involved military courts-martial when I was ordered to duty as a “confidential expert” for the defense during my active military practice. In neither case was the defendant punished with death. My next two cases were as a government-salaried forensic psychiatrist with a state agency. In each case I explored questions of competency to stand trial and criminal responsibility, as well as possible mitigating factors. Again, in neither case was the defendant punished with death. In yet another case, I was again a government-salaried witness appointed by the court. I testified for the prosecution in that case that the defendant was competent to proceed to trial. He was ultimately convicted, sentenced to death, and later died in prison...
of natural causes. In my sixth death penalty case I was hired as a private expert by the defense. I opined, along with two other experts (one originally hired by the prosecution), that the defendant was not criminally responsible due to mental illness, and he was found at trial to be not guilty by reason of insanity.

In one case I was asked to perform an examination as to an inmate’s competence to be executed. In agreeing to perform that evaluation, I considered that if I were willing to serve as an expert examiner in death penalty cases pre-trial, I should be willing to participate in such a case prior to execution. Even as I agreed to conduct the evaluation, it dawned on me that this matter was profoundly different than the other six cases with which I had been involved. In each of those cases, the defendant had yet to go to trial and had yet to be found guilty. In each of those cases, even had the defendant been convicted, it had yet to be determined whether or not he would be punished with death. It was clear to me that my answer to the question of competence to be executed might well be the final clinical opinion before execution of sentence. Therefore, I qualified my “yes” answer and first researched the ethical guidelines of my professional societies: the American Medical Association (AMA), the American Psychiatric Association (APA), and the American Academy of Psychiatry and the Law (AAPL).

On May 19, 2013, AAPL published answers to ethical questions in the practice of forensic psychiatry. The answer to Question 14 was that there is no further definition of “participation,” I turned to the AMA's Code of Medical Ethics. Their “Opinion 2.06 - Capital Punishment,” last updated in June of 2000, listed the parameters of a physician’s ethical involvement in a death penalty case. Testifying as to “…medical diagnoses as they relate to the legal assessment of competence for execution” is not considered to constitute “physician participation in an execution.”

CONDUCT OF THE EXAMINATION

The scope of this article does not include an in-depth discussion of how to perform a “competence to be executed” examination. Usually, by the time their execution is imminent, many inmates have resided on “death row” for years. There is typically a voluminous amount of data, both clinical and legal, available to the examiner that must be reviewed. In fact, workload should be a factor for the busy expert to consider before accepting such a case. A number of US Supreme Court opinions have held that “death is different.” The irrevocable nature of the ultimate penalty mandates a careful and thorough review of available evidence, no more and no less than the attention required by the most delicate and risky of medical procedures.

I conducted my review of the record and examination of the inmate to what I considered to be the prevailing forensic standard of care, and submitted a thorough report explaining the basis for that opinion. I entered the evaluation process with an open and impartial mind. As in many such cases, it was evident that a number of mental health professionals had submitted opinions at various stages of the legal proceedings over many years. This reinforced my determination to do a thorough job, as I realized that my own opinion in the matter would be compared to those of my predecessors. As I conducted the evaluation I strove to follow the principles I was taught during my fellowship training in forensic psychiatry, including the importance of considering all pertinent clinical and documentary evidence in answering the forensic question posed. Ultimately I arrived at an opinion, in accordance with the formal question posed to me, that there was not reasonable cause to believe that the inmate in question lacked the capacity to understand the nature and purpose of the punishment about to be imposed upon him.

REFLECTIONS

More than 6 months passed with no contact from parties on either side of the case. Therefore, I was quite surprised while relaxing one day with my morning paper to see a picture of my evaluation in the news. The headline was graphic, with the body of the article indicating that a number of previous mental evaluations had found the inmate to be “ineligible for execution.” I then noted my own name mentioned by prosecutors in opposition to those opinions. As I finished the article I remained confident in the opinion that I had submitted in the case, having satisfied myself before submitting the report that my conclusion was sound to the best of my ability and the standard of reasonable medical certainty. Nevertheless, a number of thoughts went through my mind. Execution of sentence was reportedly imminent, just a few days hence. I reflected upon being involved in the legal proceedings (albeit not the procedure) of executing a fellow human being. I was certainly privy in great detail to the crime, and I could feel empathy for the victims (whom I never met) affected by that crime. However, as I conducted my evaluation, as I hopefully do in all of my forensic evaluations, I strove to consider the facts objectively without regard to personal feelings in the case. Likewise, as I read this article and others, I reminded myself that it works both ways. Just as I should not let personal feelings for the victims affected by the
In my more dramatic concerns, but they are not allow empathic feelings for the one accused cloud my judgment regarding my forensic opinion in the case. Still, being intimately involved in the process of considering a person for execution necessarily involves a certain measure of self-reflection. Did I consider everything necessary to arrive at a fair opinion? Did I properly apply my clinical reasoning, tempered with my forensic expertise and experience, to arrive at the most appropriate answer to the question I was asked?

In addition to my professional soul-searching, I took note of further concerns. Was I going to look outside my window and see reporters, maybe even protesters, in my yard? Should I clear my patient schedule for the next several days in anticipation of a summons to a late hour appeal? Should I warn my family to expect the unexpected, maybe threats or even a confrontation? The prosecutor’s office alleviated some of my more dramatic concerns, but they did advise that I be available by phone for the next several days for any possible last-minute consultation.

In fact, I received no further contact from anyone in the matter. A final legal appeal was heard at a late hour, but the execution was not stayed. My findings were mentioned in the final appellate opinion, as was expert input submitted by the defense. I was on call for my hospital the evening of the scheduled execution. It was a relatively slow night for calls. With some apprehension I occasionally checked the Internet seeking news of the impending execution. The news finally appeared. The sentence of death had been carried out, making this the first of my seven death cases that ended with execution as the outcome. I felt no sense of triumph or satisfaction. I could not help but think that, had I answered in the affirmative that the inmate lacked capacity to understand the nature and purpose of the punishment to be imposed, the proceedings would likely have been halted. However, as I reflected on the work I had put into the case and the reasoning I applied to my opinion, I remained confident that to have answered in the affirmative would have been to misrepresent the facts as I saw them and betray the objectivity to which I have devoted my forensic career. My work in five other cases had, among other factors, helped stand between a defendant and a sentence of death. In those cases I had worked with no less objectivity, nor strained no less earnestly for the truth, than in my work on this case. In spite of my visceral sensation upon seeing the case carried fully to its judicial conclusion, I felt strongly that I could have submitted no other answer.

DISCUSSION

Participation in a death penalty case at any level should be a matter of both personal conscience and professional judgment.

I began this article with a question that was posed to me by a visiting medical student: “how can you sleep at night?” My first response was that I did, as it happened, lose some sleep. I have run the case through my mind more than once since the execution. I believe this even more strongly applies to death penalty matters, where the stakes are highest.
taken the form of reproach or regret. I approached the case with every possibility of arriving at an opinion favorable to either side. I would have testified in support of that opinion despite potential recriminations from either side, and there have been recriminations. I have been the recipient of hostility and even death threats from family members of victims in cases in which I testified for the defense. Emotions are invariably high on either side of a violent crime case, and that fact doubly reinforces the need to strive for objectivity. Media accounts can also be one-sided. No reporter has ever asked to interview me in any of my death cases, although to be fair, I likely would not agree to speak, at least while a case had yet to be decided. Neither would I expect legal counsel on either side of a hard-fought case of a high-profile crime to encourage reporters to familiarize themselves with both sides of the issues. The justice system in the United States is adversarial after all, characterized by opposing parties who contend against each other for a result favorable to themselves.7

Some forensic cases may involve allegations or circumstances prone to raise the eyebrows of the layman, possibly even one’s own personal acquaintances. Death cases, by their nature, are likely to be the most publicized and controversial of all. Worldwide news attention may be received, and as noted above, may be oriented toward one side or the other. Controversial factors may exist or arise in a prospective case that one has little ability to foresee at the outset. The forensic professional may do well to bear this in mind as yet a further consideration when contemplating such work. I did feel some measure of professional affirmation when I read the final appellate decision, which legally upheld the sentence after consideration of my opinion and those of other experts. However, affirmation is by no means equal to a sense of gratification. A human life was extinguished in accordance with the laws of the society in which I live. In my opinion, that is not an appropriate reason to feel “gratified.” I feel gratified only in the sense that I was in no way pressured to accept the case. I feel gratified that I could be confident that regardless of which “side” benefited from my opinion, I would suffer no professional repercussions. I feel gratified to have met and worked with a defense attorney who treated me with respect, despite surely understanding that my ultimate conclusion might favor either side. And finally, I will feel gratified if people smarter and more influential than myself can glean something of value to society from my reflections on such work.

In conclusion, and finally getting to the long-delayed answer to my student’s question, I now sleep just fine at night, and hope I continue to do so until I encounter the next tough and emotion-laden question that will rise to challenge my professional expertise.

REFERENCES