

Forensic Evaluation in Capital Cases

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Abstract

This article focuses on how psychological-neuropsychological testing can be utilized in capital cases. Statutory and case law provide the legal parameters regarding the application of test findings to assessment of the mitigating factors a jury or judge must consider in determining whether to impose the death sentence. The article also discusses what background records and information are needed and what steps must be taken in arranging evaluations in prison settings where capital defendants are housed. The various tests are described. Two case studies illustrate how the evaluation has to address the specifics of the case.

Keywords: psychological testing, neuropsychological testing, death penalty, mitigating factors.

Learning Objectives

After studying this article, participants should be better able to do the following:

1. Discuss the legal cases that guide evaluations in capital cases;
2. Explain how the psychologist-neuropsychologist can address some of the mitigating factors that the jury must weigh in considering imposition of the death penalty;
3. Describe the psychological and neuropsychological tests that are available;
4. Compare the similarities and differences in the roles of the defense and prosecution experts.

Forensic Evaluation in Capital Cases

Federal law and the statutes of 34 states allow for the death penalty in murder cases. There are 3,251 inmates being held on death rows as of 1/1/11 (www.deathpenaltyinfo.org). While some of these inmates have just recently been convicted and given the death sentence, others have been on death rows for as long as 20 or more years as their cases have gone through a series of appeals.

This article addresses two aspects of forensic psychological-neuropsychological evaluation in capital cases. The first of these has to do with the necessary procedures at the time of the sentencing phase of the trial. The second has to do with reevaluation during the appeals process, which raises the question of what a current evaluation can tell us about an individual's psychological and cognitive functioning as far back as 20 years ago when the offense was committed.

The Legal Parameters

Psychological and neuropsychological evaluation is required in death penalty cases because state and federal statutes list aggravating and mitigating factors for the jury to weigh when considering imposition of the death penalty. While these statutes vary to some degree, they all contain language similar to that found in the Pennsylvania Statute (18:1311 Pa. C.S.A., 1974). The following are the mitigating factors for which forensic evaluation may provide relevant information:

1. The defendant was under the influence of extreme mental or emotional disturbance;
2. The capacity of the defendant to appreciate the criminality of their conduct or to conform their conduct to the requirements of law was substantially impaired;
3. The defendant acted under extreme duress, or acted under the substantial domination of another person;
4. Any other evidence of mitigation concerning the character and record of the defendant, and the circumstances of their offense.

There have also been a number of federal cases that are relevant to psychological-neuropsychological evaluation. *Barefoot v. Estelle* (1983) held that violence-risk assessment is admissible in Death Penalty cases. *Ford v. Wainright* (1986) held that the Eighth Amendment prohibits a state from carrying out a sentence of death upon a prisoner who is insane. *Atkins v. Virginia* (2002) held that mentally retarded offenders cannot be executed. *Panetti v. Quarterman* (2007) held that the prisoner is entitled to submit expert evidence addressing the issue of whether mental illness deprives them of the mental capacity to understand that they are being executed as a punishment for a crime. That is, they must have a rational understanding of the state's rationale for their execution.

Evaluation at the Time of Trial

Preparation Prior to the Evaluation

Some aspects of the evaluation for sentencing purposes at the time of the trial do not differ from other criminal or civil evaluations. It is always necessary to discuss the facts and issues with the attorney before undertaking the evaluation. While obtaining appropriate records is important in all cases, the breadth of records needed in a capital case is far greater. These include school records, occupational records, criminal history, affidavits or interviews with family members (and, where possible, teachers and others who knew the defendant as a child), medical records (particularly any hospitalizations that can document mental illness or brain damage), and records pertaining to psychiatric, psychological, and substance abuse issues. Also, it is clearly important to have records specific to the criminal charges. This may include the Complaint, Affidavit of Probable Cause, police investigation reports including statements of defendants, co-defendants if any, and witnesses, as well as transcripts of the preliminary and other hearings. While it is preferable to have all of these prior to seeing the defendant, this is often impossible because of the length of time required to accumulate what may end up being a voluminous amount of records. When records are received after the evaluation, it may be necessary to return to conduct additional interviewing and testing.

Arranging the Evaluation

Arranging the forensic evaluation in prison settings where capital defendants are housed is often problematic. Some prisons seek to limit contact by a glass (with telephone for communication) or screen partitions. This would preclude administration of many of the necessary tests. Neuropsychological testing also requires the use of a tape recorder to play prerecorded tests. Many prisons have policies precluding visitors, even including mental health professionals, from bringing in tape recorders and laptops. Other special equipment beyond paper and pencil tests is often limited by the prison as well. For example, the Tactual Performance Test of the Halstead Reitan Neuropsychological Battery utilizes a hollow box which serves as a stand for a form board that has cut out shapes, and within the box are ten blocks of various shapes. Special arrangements have to be made in advance with prison administration to bring these items in and to be allowed to conduct the type of face-to-face evaluation necessary to administer the tests. Also, prisons are notoriously noisy environments, and therefore special accommodations may also be necessary to minimize noise, as noise has the potential to interfere with attention and concentration, thus leading to caution in interpreting test results. Often a Court Order is required to make the necessary arrangements. Because psychological-neuropsychological evaluations can take eight or more hours to administer, it is necessary to divide the evaluation into two or more visits to the prison, so as to minimize the impact of fatigue, which can also interfere with cognitive abilities.

The Test Battery

There are many tests available to forensic psychologists-neuropsychologists. However, it is always preferable to use those that are the most widely used, and which have been demonstrated to have the strongest reliability and validity. Not following this guideline can lead to difficult moments on the witness stand during cross-examination as the psychologist may be challenged regarding the reliability of tests and of the conclusions that follow from the test results. The psychologist must also ensure that the purpose and subjects for which the test and norms were

developed is appropriate to the defendant. A complete and appropriate battery includes testing for personality features, achievement (reading, reading comprehension, and arithmetic), intelligence, and memory. Tests also must be administered that were developed specifically to assess organic brain dysfunction. It is also necessary to administer symptom validity tests and, in some cases, tests that measure the risk of violent behavior within the institution.

The following is the battery this examiner uses which adheres to the above guidelines. Other evaluators may prefer different tests that still adhere to the guidelines. I use the MMPI-2 (2001), or the most recent version of the MMPI, the MMPI-2-RF (2008). I find the Rotter Incomplete Sentences Blank to provide information on needs, attitudes, and values. Where there is evidence of depression or anxiety, either clinically or by review of the MMPI-2 results, I add the Beck Depression (1996) and/or Beck Anxiety Inventories (1993). If there is evidence of Post-traumatic Stress Disorder, I add the Detailed Assessment of Post-traumatic Stress (DAPS) (2001).

For testing of intellectual and memory functioning it is almost imperative to use the Wechsler measures: The Wechsler Adult Intelligence Scale-IV (WAIS-IV) (2008) and the Wechsler Memory Scale-IV (WMS-IV) (2009), as these are the most widely used and best validated. Abbreviated measures of intelligence or memory, while suitable for some purposes, are not appropriate for use in capital cases. For achievement testing I utilize the Wide Range Achievement Test-4 (WRAT-4) (2006). Use of adaptive ability scales will be discussed separately under the mental retardation section of this article.

For assessment of organic brain dysfunction the Halstead Reitan Neuropsychological Battery (HRNB) including the Trail Making Tests (1985) are preferred. In contrast to other batteries, Heaton, Miller, Taylor and Grant (2004) have published norms broken down by gender, race, age, and educational level. These norms provide cutoffs based on research that show what level of deficit is required to classify the person as suffering from organic brain dysfunction. Many other measures provide standard scores and percentiles, but some lack the research base to determine

whether or not the score falls into the organically impaired range.

Symptom validity measures are built into the MMPI-2 and MMPI-2 RF to assess whether the defendant is underreporting or over-reporting pathology on personality tests. There are also freestanding measures such as the Structured Inventory of Malingered Symptoms (SIMS) (2005). Within the intellectual and memory tests there are what is called “embedded measures” that may indicate whether the person is investing less than optimal effort, and/or is deliberately malingering. However, it is also important to have freestanding measures such as the Validity Indicator Profile (VIP) (2003) and/or the Test of Memory Malingering (TOMM) (1996).

Various risk assessment measures are available. This examiner prefers the Hare Psychopathy Checklist Revised (PCL-R) (2003) and the Violence Risk Assessment Guide (VRAG) (1998).

Assessment of Mental Retardation The Atkins Case

In *Atkins v. Virginia* (2002) the Supreme Court held that mentally retarded offenders cannot be executed. The Supreme Court considered a lot of important information and recognized that because there is a standard error of measurement in all intelligence tests, the cutoff for retardation for these purposes should be an IQ of 75 or less, instead of the traditional cutoff of less than 70. Also, *Atkins* indicated that the retardation must be established to have begun prior to the age of 18. This requires correlation of current testing with the IQ findings from school and other records.

However, a diagnosis of Mental Retardation requires not only the low IQ score, but also documentation of deficits in two or more of the following areas of adaptive skills: Communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, and health and safety (WAIS-IV Administration and Scoring Manual, 2008). While some of these

can be determined from the interview, testing (e.g. academic skills), and records, it is helpful to use a formal measure such as the Vineland Adaptive Behavior Scales-II (2005) where possible. This scale should be used with a past caregiver or relative who knew the defendant well. Trying to use it directly with the defendant is problematic, as many individuals, particularly those who are mentally retarded, may not have an accurate perception of their adaptive skills. If there is no alternative it can be used with the defendant, as long as the self-report is compared with other tests and records, and the results are interpreted cautiously.

Interviewing and Testing Defendants Who Are Not Fluent in English

Some capital defendants are of Hispanic or other ethnic backgrounds and possess a limited knowledge of English. Some of the personality tests such as the MMPI-2 and the Beck Measures have been translated into Spanish and other languages (Pearson Psychological Assessments present catalogue, 2011). There is research that has established differences in norms for individuals of various backgrounds. Some of the neuropsychological tests and some of the subtests of the WAIS-IV and WMS-IV are language-free, as long as an interpreter can explain the instructions to the defendant. However, some of the subtests are heavily dependent on knowledge of English and/or a background environment in the Continental U.S. There are special tests that have been developed for Spanish speaking populations from Puerto Rico and South America that are more appropriate to the defendant who is of Hispanic background (Pearson Psychological Assessments catalogue, 2011). When possible it is preferable to have a psychologist-neuropsychologist who is fluent in the language of the defendant.

Regarding the history and interview, it is again preferable to have an evaluator fluent in the language, as the use of an interpreter opens up the possibility of slight changes limiting the assessment of subtleties, as well as difficulty in completely understanding the thought processes, intellectual functioning, and personality functioning of the defendant.

Evaluation as Part of Post-Conviction Relief Appeals (PCRA)

As noted in the introduction to this article, when an individual is sentenced to death, this results in a series of appeals which may stretch over many years. The most common basis for a PCRA is that trial counsel was ineffective. This can be applied to counsel in prior PCRA's that were unsuccessful, as well as in regard to the original trial. Some aspects of ineffective counsel are separate from the evaluation process, but a number of issues related to the evaluation do arise. First, did the trial counsel supply the evaluator with all the necessary records? Often, trial counsel will not have done such things as getting affidavits from family and others regarding mental or cognitive problems. That is later done by the appeals counsel. The argument then is that if the evaluator had this information there was the potential to alter or augment the diagnoses and opinions. Second, counsel may have been ineffective in the choice of a qualified expert familiar with death penalty issues. Third, and very frequent in many jurisdictions, up until the last ten years the necessity of evaluation including assessment for possible brain damage was not recognized, and the funds were not made available by the courts. Thus, trial counsel may have obtained a psychiatric and/or psychological evaluation, but not a neurological and/or neuropsychological evaluation. When these cases come back on appeal the neuropsychologist finds himself in the position of conducting an intellectual-memory-neuropsychological battery in an effort to apply the results to the time of the offense many years before.

The difficulties of such an effort are obvious. Some inmates incur head injuries from conflicts during their incarcerations. If organic deficits are the result of these injuries then clearly they were not present at the time of the offense. Older inmates may be experiencing the onset of cognitive decline due to dementia or similar disorders. Here, too, this was obviously not present at the time of the offense. Thus, even if a clear pattern of organic brain dysfunction emerges on these later evaluations, these other factors have to be ruled out. Also, the findings have to be correlated with records contemporaneous to or preceding the offense. It is true that many individuals who end up charged with a serious offense have had a

lifestyle which leads to brain injury. Many have been physically abused as children, exposed to toxins such as lead paint chips, have been involved in fights leading to head injuries, and/or have been involved in motor vehicle accidents. Thus, there is sometimes a clear basis for establishing organic brain dysfunction at the time of the offense.

Applying the Psychological-Neuropsychological Findings To the Statutory Mitigating Factors

Once the psychologist-neuropsychologist determines that mental illness and/or organic brain dysfunction is present, it is then necessary to apply this to the mitigating factors. The first of these mitigating factors is that the defendant was under the influence of extreme (underlining mine) mental or emotional disturbance. Because of the word "extreme," and the subjectivity of the term, this becomes an area for both direct and cross examination. Most experts would agree that psychosis, particularly Schizophrenia, meets these criteria, as does a Cognitive Disorder (organic brain dysfunction). Most would agree that Bipolar Disorder or Major Depressive Disorder meets it. However, there are other Axis I diagnoses that interfere less with functioning, such as Dysthymic (Depressive) Disorder, or Anxiety Disorder, which do not typically require hospitalization. Particularly controversial is whether the Axis II Personality Disorders meet these criteria. Personality Disorders are defined as an enduring pattern of inner experience and behavior that deviates markedly from the expectations of the individual's culture, is pervasive and inflexible, has an onset in adolescence or early adulthood, is stable over time, and leads to distress or impairment (DSM-IV-TR, 2000). Is this "extreme" mental or emotional disturbance? The defense expert can expect to be cross examined vigorously if the expert states that a Personality Disorder meets these criteria.

The next mitigating factor is that the capacity of the defendant to appreciate the criminality of their conduct or the ability to conform their conduct to the requirements of law was substantially impaired. Because

this criterion is disjunctive, each should be considered separately. Even in the presence of severe mental or emotional disturbance, an individual may have the capacity to appreciate the criminality of his conduct. Thus, the defense expert cannot opine that the defendant lacked the capacity if there is factual evidence to the contrary. Such factual evidence would include efforts to avoid detection or apprehension and, subsequently, statements to the police that indicate that the defendant was aware that what he did constituted a criminal act. Ability to conform is also subject to cross examination regarding the factual details of the offense. If the defendant acted over the course of time and space, and/or engaged in behaviors that imply a consciously formed intent, it will be difficult to argue this prong of the mitigating factor.

The next factor is operating under extreme duress or substantial domination of another. This may apply to individuals who are of limited intelligence, have dependent personality traits, are anxious, or have other characteristics that lead them to be easily influenced. Again, the factual scenario is important. For example, witness statements, if available, may be consistent with the defendant having been an active participant who initiated action or, on the contrary, that it appeared that the defendant was intimidated or frightened and threatened by a co-defendant who was the primary actor.

The final category is any other evidence related to the character and record of the defendant. This “catch all” category is based on cases such as *Woodson v. North Carolina* (1976) which held that the sentence of death is qualitatively different from any other punishment, and is irrevocable, opening the door to consideration of any relevant factors. Here is where the mental, emotional, and cognitive factors can be included even if they did not meet the more stringent criteria of extreme mental or emotional disturbance. Here also can be included things such as a history of Learning Disability, a history of the defendant having been physically and/or sexually abused, the effects on the defendant of observing violence in the home as a child, growing up in a poor or deprived environment, etc.

If the evaluation is at the time of the trial, the jury will weigh the aggravating and mitigating factors in determining whether or not to

impose the death penalty. If the evaluation is part of a PCRA, a judge will determine whether the new information warrants a new sentencing hearing.

Similarities and Differences Between Defense and Prosecution Experts

The defense expert always has the opportunity to conduct an interview, history, and a battery of tests. Thus, all of what has already been stated above applies. The prosecution expert may have the opportunity to conduct an evaluation, often with an attorney for the defendant present. A defense evaluation is covered by attorney-client privilege, and does not have to be released if the defense attorney determines it is not helpful to the case. The defense expert cannot then be called by the prosecution. However, the prosecution evaluation is not so protected, and the results must be released to the defense attorney.

In some cases the prosecution expert will not have the opportunity to conduct an interview or test battery. Then the expert role becomes one of a consultant to the prosecutor. If a defense expert is called to testify, then all the defense expert's notes, raw test data, etc. are turned over to the prosecution expert for review. This allows the prosecution expert to opine whether the appropriate test battery was given, whether the tests were administered and scored properly, whether the data were interpreted correctly, and whether the psychological diagnoses and mitigation conclusions follow from the data. Often the prosecution expert will sit at the prosecution table and help generate questions for cross examination. The prosecution expert may also be called to testify, but has to be careful to limit opinions to the methods and findings of the defense expert, and not to offer opinions directly about the defendant. This is because in the absence of an evaluation, it is not ethical to offer opinions about an individual who has not been evaluated.

Case Studies

Case Study Number One

In this case I served as an expert/consultant for the prosecutor. I was not given the opportunity to evaluate Mr. Y. Mr. Y had threatened his wife repeatedly that if he ever found out she was cheating on him he would kill their three-year old son. When he formed the belief that she was cheating, he took his son and threw him off a bridge, drowning him. He then went back to his wife and told her that he did it, and then went to the police station and told them what he had done. However, he would not tell the police where he drowned the boy because he told them he wanted the mother to suffer. This occurred in 1993. He was found guilty and the jury imposed the death sentence. There were numerous appeals filed on his behalf over the years, but the death sentence remained in place. There was an obviously flawed evaluation at the time of the original trial, but over the years since then there were several thorough and complete psychological and neuropsychological evaluations. The latest appeal hearing, based on ineffective counsel for a prior appeal, took place in 2011. The defense experts were testifying about the defendant's mental state 18 years prior.

This forensic evaluator's role was to consult with the prosecutor to help cross-examine the expert witnesses. All prior records, testimony transcripts, petitions, mental health reports, and raw test data were reviewed by this psychologist. One of the issues was that on recent interviews the experts formed the opinion that at the time of the offense the defendant thought that he was possessed by a demon. There had been an evaluation a year before the offense—due to a domestic violence charge—and several in the year or two after the offense, and there was no contemporaneous support for a psychotic process consistent with such a delusion.

While a number of the recent neuropsychological findings did indicate cognitive deficits, and some of the test findings were consistent with a diagnosis of a Cognitive Disorder, others were not. By the time of these evaluations the defendant was 66 years old, so cross examination of the

defense experts included questions aimed at clarifying whether the deficits that were found could have been the result of a dementia. There were also certain test administration practices that were subjected to cross-examination. For example, one of the defense's bases for the diagnosis of Cognitive Disorder was that though he is right-handed, he performed more poorly with his right hand than with his left on some of the Reitan Neuropsychological Battery tests. However, the defense neuropsychologist never asked if Mr. Y had any peripheral injury to account for this difference, or whether as a child he was left-handed and had been switched. Also, some of the tests were administered without following the standardized instructions. Furthermore, some of the tests used did not have norms or research documenting how low of a score must be obtained to be indicative of organic brain dysfunction. Neither of the two primary psychological-neuropsychological experts administered symptom validity tests.

This examiner testified and indicated to the judge that there was some evidence of a Cognitive Disorder (which would qualify as an extreme mental or emotional disorder). However, I also pointed out the weaknesses and flaws so that the judge could determine whether the weight of the evidence did support the diagnosis. In addition, all the defense witnesses testified that Mr. Y lacked the capacity to appreciate the criminality of his actions and to conform his behavior to the requirements of law. This examiner testified how that conclusion did not follow from the data, including the factual scenario (described above). The judge is yet to rule on whether or not there will be a new sentencing phase.

This case study demonstrates the kinds of issues that can be raised when the psychologist acts as a consultant to the prosecutor.

Case Study Number Two

Mr. X was evaluated at the request of the defense attorneys. He was charged in the shooting deaths of his ex-girlfriend and her boyfriend in September of 2010. The full psychological-neuropsychological battery was administered. School, medical, and criminal records were reviewed. In this case the defense also arranged for a PET Scan and an MRI.

Mr. X got into an argument with a friend for having Mr. X's ex-girlfriend and her boyfriend over to the friend's house. He drove to his mother's house about two minutes away, where he lived and had a rifle. He returned and fired a volley of shots into the car containing the boyfriend and his ex-girlfriend. Both were killed.

Both Mr. X's intelligence and memory were measured within the lower end of the Average Range. However, he was impaired on the neuropsychological battery, apparently due to a traumatic head injury in a motor vehicle accident on New Year's Eve of 2009. The neuropsychological test battery localized the damage to the temporal-parietal area. The PET Scan and MRI also showed damage to the parietal area, as well as various areas of sub-cortical damage.

This psychologist's diagnosis was of a Personality Disorder, Not Otherwise Specified, with Obsessive-Compulsive Features, Intermittent Explosive Disorder, and Cognitive Disorder Due to Traumatic Brain Injury. The two latter diagnoses fit under the mitigating criteria of extreme mental or emotional disorder. However, his intentional movements through time and space to obtain the gun and return, and his fleeing

the scene after the shooting, precluded other specific mitigating factors. Under the Other Category of mitigating factors ("Any other evidence of mitigation concerning the character and record of the defendant...") were included his childhood experience of rejection by both parents, and rigid ideas about how women should behave (which fueled his anger). This examiner was prepared to testify, but following his conviction of First Degree Murder, the prosecution left the offer of life imprisonment on the table. The defendant accepted it, precluding the need for testimony at the sentencing phase of the trial.

This case study demonstrates the breadth of data that can be utilized in a capital case. Both cases illustrate how the factual scenario has to be integrated with test findings in reaching conclusions about the applicability of the mitigating factors.

Conclusion

Psychological and neuropsychological testing is essential in capital cases to address the mitigating factors that a jury or judge must consider in deciding whether to impose the death penalty, or when the death penalty is being appealed. An evaluator needs to be cognizant of the practical, legal and theoretical issues involved in order to meet the professional responsibilities required by such evaluations.

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