

SPECIAL ISSUES IN CAPITAL SENTENCING

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DEATH PENALTY SENTENCING IN THE MODERN ERA

The modern era of death penalty statutes and procedures were a response to Furman v. Georgia (1972), a 5-4 decision by the U.S. Supreme Court declaring that the death penalty as it was then being practiced in the United States was unconstitutional. State legislatures throughout the country, including Texas, redrafted their death penalty statutes to address the concerns of the Court that the death penalty had been applied in a capricious and arbitrary fashion. These statutes were initially tested and modified by subsequent decisions of the U.S. Supreme Court in cases such as Woodson v. North Carolina (1976), Gregg v. Georgia (1976), Jurek v. Texas (1976), and Lockett v. Ohio (1978). The resulting death penalty statutes and procedures reflect three primary themes: a restricted class of death-eligible offenses, an individualized determination of death-worthiness, and heightened standards of reliability.

To narrow the range of death-eligible offenses, capital murder was restricted to a murder in the course of a felony, or directed against a particular class – such as a child or police officer. Rape was no longer treated as a capital offense. Further, the Court determined that death cannot be a mandatory penalty, regardless of the offense. Rather, the determination of death worthiness is an individualized consideration. This is achieved through several procedures. First, capital trials are bifurcated into two separate proceedings – a guilt phase and a sentencing phase. Second, the

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sentencing phase has to provide for weighing mitigating as well as aggravating information. Violence risk assessment considerations are a part of this individualized determination in some states.

Standards of heightened reliability are incorporated by the appointment of two attorneys to represent a capital charged defendant. To further reduce the potential for miscarriages of justice, death verdicts also come under increased scrutiny and multiple stages of appellate review. Direct appeal, first in state and then in federal court, examines legal errors that may have occurred at trial as a result of various rulings of the trial court. This is followed by post-conviction proceedings that investigate additional issues of ineffective assistance of counsel, prosecutorial misconduct, juror misconduct claims, and other issues that may have become known after the trial. At a federal level, this stage of appellate review is called federal habeas.

THE TEXAS CAPITAL SENTENCING PROCEDURE

The Texas Penal Code (Article 19.03) embodies these primary structures of capital or death-eligible litigation. It restricts offenses that are eligible for the death penalty to eight types of murder. Article 37.071 of the Texas Code of Criminal Procedure (available on the world wide web: <http://www.capitol.state.tx.us/statutes/cptoc.html> [accessed March 1, 2003]) calls for a bifurcated trial, specifying that if a defendant is found guilty of the capital offense for which the state seeks the death penalty, a separate sentencing proceeding is conducted to determine if the defendant will be sentenced to death or life imprisonment. At this sentencing proceeding relevant evidence may be presented by the state or the defense regarding the defendant's character or background, and the circumstances of the offense.

Special Issues

The jury's individualized determination of the defendant's death worthiness is structured by their consideration of and responses to three special issues:

1. Whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society;
2. Whether the defendant actually caused the death of the deceased or did not actually cause the death of the deceased but intended to kill the deceased or another or anticipated that a human life would be taken.

If the jury finds that the state has proven beyond a reasonable doubt the first two special issues, it then answers the third special issue:

3. Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed. [The jury "shall consider mitigating evidence to be evidence that a juror might regard as reducing the defendant's moral blameworthiness."]

Evolving Procedures

The above special issues framework of death penalty determination in Texas is dynamic and evolving in response to U.S. Supreme Court decisions. Only the first special issue (probability of committing criminal acts of violence) survives intact from Jurek v. Texas (1976) - the initial high court's affirmation of the Texas capital special issue scheme that had been passed by the Texas legislature in 1973. Modifications in the Texas death penalty determination special issues have been driven primarily by the Penry decisions of the U.S. Supreme Court (Penry v. Lynaugh, 1989; Penry v. Johnson, 2001) regarding whether the special issues as drafted at that time gave the jury a mechanism to consider and give weight to mitigating circumstances. This evolution of capital sentencing considerations in Texas and nationwide is continuing with the U.S. Supreme Court decision in Atkins v. Virginia (2002) barring the execution of the mentally retarded.

Standards for Mental Health Experts

Mental health consultations at capital sentencing are of unparalleled gravity, and should reflect the highest standards of professionalism, objectivity, competence, thoroughness, and science. Standards for mental health evaluations at capital sentencing have been proposed by Liebert and Foster (1994), as well as by the author (Cunningham & Goldstein, 2003; Cunningham and Reidy, 1998a, 1999, 2001, 2002; Reidy, Cunningham, & Sorensen, 2001), and the reader is directed to these sources. Briefly, remaining detached from the intense advocacy of the state and the defense “teams” in capital cases best preserves professionalism and objectivity. Mental health professionals should be advocates for the objective data and the best available science – not a particular outcome. This neutrality is also protected by avoiding simultaneously functioning as a consultant and testifying expert in the same case.

Competence in any forensic evaluation consists of three essential elements (see Committee on Ethical Guidelines for Forensic Psychologists, 1991). First the relevant psycholegal issue(s) must be accurately identified and operationally defined. Second, the practitioner must recognize and disclose the implications of the evaluation and its parameters so that informed consent is maintained. Third, the assessment must employ reliable procedures and apply current empirical data to the relevant questions. These three elements of forensic competency will provide a structure for the remainder of this chapter.

THE PSYCHOLEGAL ISSUES AT CAPITAL SENTENCING

Two primary psycholegal questions frame mental health assessments at capital sentencing and are reflected in the Texas special issues: moral culpability and violence risk assessment.

Moral Culpability

Moral culpability or moral blameworthiness, the underlying concept in mitigation, is one that the sciences of psychology and psychiatry are uniquely suited to speak to. In the mental health

sciences, there is a bedrock assumption that choices and behavior are shaped and influenced by biological, developmental, cognitive, neuropsychological, emotional, relationship, cultural, community, and situational factors (Haney 1995; Staub, 1996). The interaction and convergence of these factors has been postulated as a primary cause of criminal violence (Haney, 1997; Hawkins et al., 2000; Monahan, 1981; Shah, 1978; U.S. Department of Justice, 1995). Stated simply, we all get a choice about criminal violence, but we don't get a level playing field of equivalent raw material or setting from which to make that choice. As damaging and impairing factors increase in magnitude, defective choices become more likely – and hence moral culpability decreases. Conversely, someone who enjoys developmental nurturance, family stability, academic achievement, and constructive community guidance would have greater moral culpability or moral blameworthiness for the same offense.

Not surprisingly, the state almost never endorses the defense view that interacting adverse biopsychosocial factors were integral to the defendant's capital conduct. The perspective advanced by the prosecution emphasizes the operation of willful choice, asserting that "a defendant's crime stems entirely from his evil makeup and that he therefore deserves to be judged and punished exclusively on the basis of his presumably free, morally blameworthy choices..." (Haney, 1997, p. 1459). In this assertion, the state routinely frames its arguments and examinations of mental health experts in terms of criminal responsibility rather than moral culpability – even though this mischaracterizes the relevant psycholegal issue.

Moral culpability vs. criminal responsibility

To explain this erroneous identification of the relevant issue, criminal responsibility is a guilt phase issue assessing fundamental capabilities and understandings which, if determined not to be present, would result in a finding of not guilty by reason of insanity. Obviously, a guilty verdict at the guilt phase has resolved this issue in favor of sanity. At capital sentencing a distinctly different psycholegal issue is at stake – moral culpability. Thus while all convicted capital defendants are equally criminally responsible,

they may vary widely in their moral culpability and hence death-worthiness. This important differential between criminal responsibility and moral culpability is illustrated in the contrast of their component queries:

Criminal Responsibility

Guilt phase

Is he mentally ill?

Did he have a choice?

Did he know right from wrong?

Could he control himself?

What did he do?

Moral Culpability

Sentencing phase

Was he developmentally damaged?

What shaped the choice?

What shaped his value system?

What diminished his control?

What was the life trajectory to this offense?

VIOLENCE RISK ASSESSMENT

The other primary psycholegal issue at capital sentencing under the current Texas statute is one of violence risk assessment. Several considerations are relevant in structuring this assessment of “whether there is a probability that the defendant will commit acts of criminal violence that will constitute a continuing threat to society.”

Operational definitions

Unfortunately, the Fifth Circuit (James v. Collins, 1993) declined to compel any guidance from the Texas Court of Criminal Appeals regarding the operational definitions of “probability,” “acts of violence”, or “continuing threat to society”. As a starting place, the function of this special issue within the capital sentencing schema as drafted in the aftermath of Furman is arguably to narrow the class of offenders who are eligible for the death penalty. If “probability” is construed to mean “any possibility,” then the question would always be answered in the affirmative and would serve no individualizing or narrowing function. Thus something more than any possibility must be contemplated by the special issue.

Similarly, if belligerence or verbal insolence to staff, or the shoving of or mutual fist fight with another inmate, are considered to represent criminal acts of violence that constitute a continuing threat to society, then virtually all inmates would qualify, and again any narrowing or individualizing function would be lost. Thus “threat to society” arguably envisions acts of violence of sufficient severity that a sanction of death is a reasonable preventative intervention. Similarly, no individualizing function is achieved if society is construed to mean “if in the general community at large at the time of sentencing.” Thus the relevant context of “society” would appear to be prison during a capital life term.

Acts of criminal violence vs. dangerousness

Not uncommonly at capital sentencing, “probability of acts of criminal violence” is reframed by the state (and sometimes inexplicably by the defense), as a question of whether the defendant is “dangerous,” or will be a “danger” in the future. If the special issue is re-framed as “danger,” though, it ceases to be definable or measurable in a scientifically reliable and reasonably discriminating fashion. More problematically, when construed as “dangerousness” the issue again loses any individualizing value. All violent felons, and particularly all capital offenders, would be considered to be dangerous. Their “dangerousness” is a significant rationale for their long-term confinement in a highly secure correctional facility. The special issue is not an assessment of a static characteristic of dangerousness, though. Rather it calls for an evaluation of the likelihood of violent acts.

WITNESS ROLES FOR MENTAL HEALTH EXPERTS

Testifying mental health experts at capital sentencing may function as evaluating, non-evaluating, or teaching witnesses depending on the nature of the issue under consideration and the extent to which the testimony will be particularized to the defendant.

Evaluating Witness

Broadly, an evaluating witness has interviewed and assessed the defendant, as well as interviewed third parties and reviewed records. This methodology allows for psychological testing and diagnostic formulation, and provides the strongest basis for particularizing the findings to the defendant. The defense, however, may decline a direct evaluation because such contact would trigger access to the defendant by a state-retained expert.

Non-Evaluating Witness

In the alternative, the mental health expert may be asked to serve as a non-evaluating expert. In this role the expert would rely on records and interviews of third parties, but would not interview or otherwise directly assess the defendant. The defendant, of course, is neither the sole nor the most reliable source of historical information regarding important developmental events and formative influences in his life. Records, as well as information obtained from family, community members, and other third parties represent important sources of developmental information – and are likely to be viewed by the jury as more reliable information than that provided by the defendant.

The nexus drawn by the mental health expert between certain historical/developmental factors and criminally violent outcomes in adolescence or adulthood relies on research studies examining the impact of these risk factors. Similarly, the most important data to a capital violence risk assessment involve the defendant's pattern of behavior when incarcerated and group statistical data - neither of which is fundamentally reliant on interviews or testing of the capital defendant. The findings and conclusions of a non-evaluating witness would necessarily be more tentative and cautious, but still quite important to the jury's consideration.

Teaching Witness

Finally, the expert may function as a teaching witness, without interview of the defendant or significant exposure to re-

records or third party interviews. For example, by relying on testimony and evidence already presented at sentencing by family members and other sources, the expert might testify regarding current developmental research findings linking these factors to deviant developmental trajectory, adverse adult outcome, and criminal violence. Such testimony would be vital to the ability of the jury to test in an informed fashion the contrasting assertions of the state and the defense regarding moral culpability and the associated influences on the defendant's choices. As a teaching witness regarding violence risk assessment, the expert might outline conceptual and research literature regarding reliable methods of violence risk assessment at capital sentencing, as well as detail group statistical data from the empirical literature and correctional agencies that would serve as an anchoring point for individualizing the risk estimate to the defendant. This estimate could be tentatively particularized to the defendant based on a hypothetical question (see Rachal v. Texas, 1996). Such testimony could assist the jury in avoiding misconceptions and error, and in approaching the capital sentencing risk assessment task with a greater degree of scientific understanding.

PRE-CONSULTATION CONSIDERATIONS AND DISCUSSIONS

Forensic referrals to mental health experts sometimes consist of little more direction than "go see this guy and tell me what you think." Such referrals should always be clarified before an evaluation is undertaken. This need to clarify the referral questions and discuss the various evaluation procedures is particularly important in capital cases, as these procedures and parameters can have a significant impact on the representation of the defendant and on his constitutional rights. Unfortunately, it cannot be assumed that the referring attorney is aware of these implications. Several issues should be identified and resolved prior to accepting a capital case referral or initiating contact with the defendant:

Notify

When accepting an evaluation referral by the court or the state, always notify defense counsel in writing prior to interviewing the defendant. Defense counsel should also be apprised of the parameters of the evaluation and how the assessment will be memorialized (notes, audio recording, video recording).

Limit Assessment Purpose

It is typically inadvisable to evaluate both guilt phase (e.g. competency, criminal responsibility) and sentencing phase issues in the same case. To undertake both potentially removes protections the defendant might have enjoyed regarding admissibility of competency findings. Personality testing, interview of the defendant, and interview regarding the capital offense are quite relevant to a criminal responsibility assessment, but may not be informative of any sentencing issue. Further, if the defense-retained expert is designated to testify at sentencing, such prior interviews may open up the defendant to interviews by state-retained experts. Finally, if an insanity offense is attempted and rejected by the jury, two appearances by the same expert may tire the jury as well as reduce the expert's credibility at sentencing.

Establish role

After discussion of the implications of each role, establish whether the expert is being retained as an evaluating, non-evaluating, or teaching witness; and whether the expert will address moral culpability, risk assessment, or both.

Define interview parameters

Determine whether inquiry is permitted regarding the capital offense and/or any unadjudicated conduct. Such a consideration is complex. Interviewing the defendant about the capital offense could help establish whether his capacities were undermined by a major Axis I disorder. The defendant's accounts of the instant offense and/or prior unadjudicated offense(s), however, do not typically inform a mitigation analysis of a developmentally damaged trajectory, nor do these accounts contribute to a violence risk

assessment. Further, if the defense-retained expert elicits such a history the state will likely be allowed to also inquire regarding this conduct, depriving the defendant of important Fifth Amendment protections. Finally, there is the potential that the account of the defendant will be inconsistent with defense assertions of innocence at the guilt phase, or the jury's finding of guilt. The benefits, limitations, and implications of the defendant's self-incriminating statements should be disclosed to defense counsel prior to interviewing the defendant.

To Test or Not to Test

Personality testing adds to the descriptive richness and depth of a psychological assessment, and may be relevant to mitigation assertions of a major Axis I disorder. Personality testing in capital sentencing evaluations, however, also has important limitations and adverse implications that can render its use inadvisable (Cunningham & Reidy, 2001). To summarize these, personality testing has not been standardized on a population facing capital murder charges, and testing profile patterns including MMPI Megargee profile classifications routinely change over time. Personality assessment does little to illuminate the damaging developmental trajectory that is fundamental to mitigation. Further, personality testing does not reliably differentiate those inmates who commit acts of serious violence in prison from those who do not - and is thus of little or no value for violence risk assessments in this specialized context. Finally, personality assessment is likely to implicate the presence of a personality disorder and associated descriptions of maladaptive traits - an unsurprising finding in an individual who is assumed for purposes of the assessment to have been so damaged as to perpetrate a capital murder.

Additional Pre-consultation Issues

Other essential informed consent discussion topics include fee estimates, whether a report will be prepared, any personal advocacy positions regarding the death penalty, and any complaints or judgments that might affect the attorney's decision to retain the expert.

EVALUATION OF MITIGATION AND MORAL CULPABILITY

Comprehensive Investigation

The range of factors that impact on developmental trajectory and adult functioning are extraordinarily broad. Accordingly, a mental health expert addressing mitigation and moral culpability at capital sentencing faces the daunting task of identifying any factors that might adversely impact on physical, neuropsychological, psychoeducational, personality, social/interpersonal, moral, and vocational development and capability (see Cunningham & Reidy, 2001; Liebert & Foster, 1994; Norton, 1992). The comprehensiveness of this assessment task is well beyond any other forensic mental health consultation, and requires evaluation procedures of unique thoroughness.

Sample mitigating factors

At the conclusion of a comprehensive mitigation evaluation, it is not uncommon to have identified 10-15+ adverse developmental factors for the jury's mitigation consideration. While the adverse factors in any given case vary, the factors from a single case might include: multi-generational family dysfunction, genetic susceptibility to substance dependence and psychological disorder, disrupted primary attachments and maternal neglect, parental alcoholism, physical and psychological abuse, observed domestic violence, sexually traumatic exposure, learning disabilities, Attention Deficit Hyperactivity Disorder, head injuries and neurological insults, childhood onset psychological disorders, peer rejection and alienation, inadequate structure, supervision, and guidance, early adolescent onset of substance dependence, corruptive socialization, and inadequate interventions. Notice that the emphasis of a mitigation evaluation is often developmental and explanatory, rather than simply diagnostic and personality descriptive.

Investigation support

Fortunately, the mental health expert usually has some assistance in the investigation task. Typically, a mitigation investigator with a social work background retrieves medical, academic,

social service, mental health, juvenile, military, correctional, and vocational records. The records of family members may be retrieved as well. The mitigation investigator also locates and obtains initial interviews from family, neighbors, teachers, and other third parties. These records and interview summaries are made available for the expert's review. Additionally, the mitigation investigator may organize the information from the records and interviews into a detailed chronology or timeline.

Interview of the defendant

Assuming that the expert has been assigned the role of an evaluating witness, a comprehensive and detailed multi-generational biopsychosocial family history will be obtained from the defendant through interview(s) totaling 8-20 hours. This time investment is needed to secure anecdotal description of specific events, particularly of trauma and victimization. Extended interviews also encourage more candid disclosure, helping counter the tendency of most capital defendants to minimize or deny dysfunctional family processes and traumatic experience (Dekleva, 2001; Cunningham & Reidy, 2001).

Interview of third parties

The expert will also typically interview numerous family members and other third parties in person, or by telephone. However, it is not unusual for family members of capital defendants to routinely minimize dysfunctional aspects of their history so as to place themselves and their family in the best possible light. Orienting family members to the purpose of the evaluation, patiently probing interviews, and sampling from a wide range of family members increases the likelihood of historically accurate disclosure. All interviews should be memorialized in detailed notes that are preserved and available at the time of testimony.

Referrals for specialized assessment

Because of a disproportionate incidence of neurological insults and neuropsychological findings among violent offenders, complete neuropsychological assessment is indicated in most capital sentencing workups. Often other factors are identified in the course of an assessment that requires referral for more specialized

consultation. These may include toxicology, endocrinology, mental retardation, psychopharmacology, learning disabilities, addiction medicine, and other specialized fields of expertise.

SO WHAT? THE NEXUS BETWEEN HISTORY AND OUTCOME

As was evident from the discussion of non-evaluating and teaching witness roles in the prior section of this chapter, identification and anecdotal description of impairing factors and adverse formative events in the defendant's development are only the beginning of the task. Next the expert will need to become conversant with the scholarly literature describing the impact of such impairments and adverse factors on developmental trajectory – particularly as these may have been demonstrated to have a nexus with criminal violence in late adolescence or adulthood. This review is case dependent. While a literature review of commonly encountered developmental factors in capital cases is well beyond the scope of this chapter, the reader is particularly directed to research studies and summaries sponsored by the U.S. Department of Justice identifying risk and protective factors for chronic delinquency and serious violence in the community (Hawkins et al., 2000; Kelley, Thornberry, & Smith, 1997; Thornberry, 1994; Thornberry, Smith, Rivera, Huizinga, & Stouthamer-Loeber, 1999; U.S. Department of Justice, 1995; Widom, 2000). Notable from these studies are findings that criminal and violent outcomes are associated with the cumulative saturation of risk factors, as well as the interaction between predisposing, risk, and protective factors. Familiarity with such research helps combat simplistic assertions of “the abuse excuse,” as well as erroneous logic that any occurrence of escape from deviant outcomes somehow voids the very real risk impact of adverse developmental factors (e.g. “Not everyone who has it hard growing up goes on to be a violent criminal so these factors must be irrelevant”). See Table 1 for developmental risk factors for a violent outcome in the community identified by Hawkins et al. 2000. This and other relevant papers can be accessed through the website and links of the Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Justice (<http://ojjdp.ncjrs.org/pubs/delinq.html>).

VIOLENCE RISK ASSESSMENT AT CAPITAL SENTENCING

Essential Conceptualizations

Context is key

Risk is always a function of context (Hall, 1987; Shah, 1978; Monahan, 1981). In other words, depending on what setting the individual is in, the probability of violent acts and the factors that predict these violent acts will vary. Violence risk assessment at Texas capital sentencing is concerned with a context that is quite distinctive from almost all other risk assessments: high security prison. Factors and instruments that are associated with increased rates of violence in the community do not reliably predict violence in prison.

Two processes likely account for the failure of common violence risk factors to generalize to a prison setting. First, prison is fundamentally different from the community. Prison life is extraordinarily structured, regimented, and supervised. Firearms are unavailable and access to drugs and alcohol is limited. In prison, a perpetrator cannot remain anonymous from those he victimizes. Further, most aspects of inmate life and privilege are subject to immediate and potentially enduring sanctions – markedly increasing onerous aspects of prison confinement.

Second, most of the risk factors associated with violence risk in the community are so pervasively represented in an inmate population that they fail to discriminate who will be violent. For example, as many as 75% of prison inmates can be diagnosed with Antisocial Personality Disorder (Meloy, 1988; Widiger & Corbitt, 1995). In the face of this prevalence rate, it is not surprising that there is no evidence that Antisocial Personality Disorder is predictive of serious prison violence (see Cunningham & Reidy, 1998a for a review of Antisocial Personality Disorder and psychopathy). Similarly, childhood behavior problems, criminal history, alcohol/drug abuse, past aggression in the community, impulsivity,

poor judgment, deceptiveness, lack of remorse, and other maladaptive features are ubiquitous among prison inmates – and also fail to identify which inmate will commit the rare act of serious violence in prison (Cunningham & Reidy, 1998a, 1998b, 1999, 2001, 2002; Cunningham & Goldstein, 2003; Reidy, Cunningham, & Sorensen, 2001). Given the lack of predictive validity for any personality or community history variable, clinically oriented interviews of the defendant have only a minor contribution at best to the violence risk assessment at capital sentencing.

Neither history of community violence nor severity of offense predicts violence in prison

Reviews sponsored by the U.S. Department of Justice (Alexander & Austin, 1992; National Institute of Corrections, 1992) have concluded:

1. Past community violence is not strongly or consistently associated with prison violence.
2. Current offense, prior convictions, and escape history are only weakly associated with prison misconduct.
3. Severity of offense is not a good predictor of prison adjustment.

Consistent with these conclusions, Flanagan (1980) found that inmates serving longer sentences (and thus convicted of more serious and more violent offenses) had lower rates of disciplinary infractions in prison than inmates serving shorter sentences.

No violence risk assessment instrument or personality testing profile predicts serious prison violence

Illustrating the same controlling effect of contextual and associated prevalence factors, neither violence risk assessment instruments nor personality testing profiles have been demonstrated to identify inmates who will commit acts of serious violence in prison. Psychopathy Checklist Revised (PCL-R) scores have been found to have non-significant correlations with institutional violence (Edens, Poythress, & Lilienfield, 1999; Kossen, Steuerwald, Forth, & Kirkhart, 1997). In the absence of any data supporting its utility in predicting serious prison violence, the application of the PCL-R to violence risk assessment at capital sentencing has been

sharply criticized (Edens, 2001; Edens, Petrila, & Buffington-Vollum, 2001). Similarly, there is no research support to date that the HCR-20, Violence Risk Appraisal Guide (VRAG), or Sex Offender Appraisal Guide (SORAG) reliably assess the likelihood of serious violence in American prisons (Cunningham & Goldstein, 2003; Cunningham & Reidy, 2002). Finally, there is no personality test score elevation or profile pattern that is reliably associated with prison violence (Cunningham & Reidy, 1998b, 1999).

Rates of serious violence in prison are surprisingly low

The Texas Department of Criminal Justice (TDCJ) Statistical Summary 2002, (accessed 3-4-03, www.tdcj.state.us.tx.us/publication/executive/statsumfy02.pdf), reported that fifty-one percent of the inmates in TDCJ have a violent offense conviction, and 38% have an aggravated (3G) violent offense conviction. Forty percent have served a prior term in TDCJ. With such a large proportion of inmates having a violent and repetitive criminal history, an extremely high rate of serious violence in prison might be expected. In fact, the security and management provisions of TDCJ are quite effective in limiting the most severe violence. Only three TDCJ employees have been killed by inmates in the past 20 years. The national rate of inmate on staff homicide in state prisons nationwide is also extraordinarily rare – averaging 1 per 1,000,000 inmates per year. In 2002, the rate of inmate-on-inmate homicide was 4.07 per 100,000 inmates (TDCJ Executive Services, 1-13-03). This rate is below the 1999 homicide rates of 5.7 per 100,000 community residents in the general population of the United States, and 6.1 per 100,000 community residents in Texas; and only a third the 17.5 per 100,000 rate of homicide among community residents in Dallas (Pastore & Maguire, Online: <http://www.albany.edu/sourcebook/> [accessed 3-4-03]). Inmate-on-staff assaults requiring more than first aide treatment occurred at a rate of only .3 per 1,000 inmates in 2002, and serious inmate-on-inmate assaults at a rate of 5 per 1,000 inmates. These and other statistics regarding inmate misconduct in TDCJ are published in monthly Emergency Action Center Reports by the TDCJ Executive Services office.

Past pattern and group statistical methods can form a reliable basis

While a pattern of violence in the community is not predictive of violence in prison, a pattern of violence in prison does markedly increase the likelihood of future prison violence. Additionally, a number of group rates also reliably inform the capital violence risk assessment. These include correctional statistics from TDCJ and the Bureau of Justice Statistics that provide perspective regarding rates of institutional violence for inmates in general. Other research has contrasted rates of disciplinary offenses by length of sentence (Flanagan, 1980). More specific to capital offenders are studies that report rates of institutional violence among former death-row inmates, life-sentenced capital offenders, and murderers (see Table 2). A recent study by Sorensen and Pilgrim (2000) of serious violence among convicted murderers in TDCJ is particularly important because of its sample size ($N = 6,390$), and statistical extrapolation of the prevalence of serious violence during a 40-year prison term (.164). The large sample size also allowed identification of factors that incrementally raise or lower the projected frequency rate of serious institutional violence during a 40-year prison term (see Table 3).

Group statistical data from the above sources provides an anchoring point for the violence risk assessment. To summarize these rates, the majority (70-80%) of capital offenders do not commit acts of serious prison violence. About 10% are repetitively violent in prison. The likelihood of violence declines with the severity of the violence specified. The risk of aggravated assault of a staff member is about 1%. The lifetime likelihood of the homicide of another inmate is .2 – 1%. The likelihood of the homicide of a staff member is 1 per 1,000,000 per year. These risk estimates are then modestly adjusted up or down based on factors such as availability of community supports and visitation, prior responses to structured settings, history of employment in the community, etc. – always with consideration of the rate of that factor in an inmate population.

Parole recidivism statistics are presented in Table 4. In considering these statistics, return to prison in many cases was

secondary to technical violations or misdemeanors, and not new violent felonies. This is a dynamic area of research, and thus this table is not intended to be exhaustive of the research in the parole recidivism arena.

Risk assessment includes risk management

Violence risk assessment also includes consideration of what risk management procedures could be applied to reduce any risk. These may include psychiatric treatment, counseling services, anger management, or more secure confinement options. Regarding this latter intervention, an inmate confined in administrative segregation is single-celled, confined to his cell 23 hours a day, hand-cuffed behind his back when removed from his cell, and has no physical contact with other inmates. An administrative segregation inmate's opportunity to engage in serious violence is thus markedly reduced.

STEPS IN A VIOLENCE RISK ASSESSMENT AT CAPITAL SENTENCING

1. Retrieve and review correctional and empirical group statistical data. Review capital violence risk assessment literature.
2. Review the defendant's jail and prison records. Identify any pattern of serious violence in jail or prison. (Note: Mutual fist fights are not considered serious violence.) Seek rates of inmate weapons infractions and assaults in that facility for comparison.
3. If the defendant is interviewed seek information regarding past and current celling and custody, involvement in inmate work or educational programming, any disciplinary infractions and the defendant's explanation of these, family contact and visitation, mental health consultations and medication support, community employment history, and past response to structured settings.
4. Interview correctional staff and other third parties.

5. Examine relevant group rates and establish anchor points of risk corresponding to the severity of various predicted acts.
6. Modestly adjust the group rates in light of individual factors that are not so pervasive among inmates as to already be accounted for in the group rate.
7. Consider what risk management interventions might be brought to bear, and the impact of these on the risk estimate.
8. Identify how the risk estimate is likely to change as the defendant ages during a capital life term or based on age at parole.

POST-TRIAL CONSULTATIONS POSTCONVICTION AND FEDERAL HABEAS

Death penalty appeals often involve a claim that the defendant was not afforded adequate representation by counsel, as guaranteed by the Sixth Amendment of the U.S. Constitution. This claim is known as “ineffective assistance of counsel (IAC),” and may be raised in state postconviction proceedings, and subsequently in federal habeas. The adequacy of the mitigation and violence risk assessment perspectives offered by the defense at capital sentencing can be a part of the IAC claim. The associated consultation of a psychologist retained by the appellate counsel may be limited to a narrow issue, or may involve undertaking a comprehensive capital sentencing evaluation. Because the critical issue is what, with adequate investigation, could have been presented at trial, the psychologist providing consultation at this stage should only utilize assessment instruments and research findings that were available at the time of trial. The findings and conclusions of the consultation are typically initially filed in the form of an affidavit, but may be followed by testimony at an evidentiary hearing. The state may also retain a psychologist to critically review the methods and conclusions of the defense-retained psychologist.

Competence to Waive Appeals

Psychologists may also be consulted when a death row inmate seeks to waive appellate review, and thus “volunteer” for

execution. In addition to broad considerations of competency assessment (See Otto, this issue), two factors have particular potential to influence a knowing, intelligent, and voluntary waiver in a death row context. First, clinical studies have demonstrated a high rate of psychological disorder among death row inmates (see Cunningham & Vigen, 1999, 2002). The impact on the waiver decision of depression and associated distorted perspectives of hopelessness and futility, as well as conscious or unconscious suicidal motivations should be carefully evaluated. This and other disorders also have obvious potential to diminish reality testing, efficiency of thought, problem solving, and decision making. Second, the conditions of confinement on death row are often extraordinarily adverse in terms of sustained social isolation, restricted activity, and austerity. The chronic deprivation of these conditions may be so psychologically painful that the escape of death seems preferable. The evaluation should consider the extent to which the waiver may be in response to environmental coercion, and thus be less than voluntary.

Competency to be Executed

Given the psychological vulnerabilities of many death row inmates and the adversity of their confinement (see Cunningham & Vigen, 1999, 2002), as well as the stress of an impending execution, it is not surprising that some profoundly decompensate. Attorneys may also have concerns due to an inmate's history of mental health problems, past suicide attempts, apparently aberrant behavior, or his own difficulty in communicating with the client. Any of these may give rise to a defense claim that the inmate is not competent to be executed, and psychologists and/or psychiatrists may be appointed to evaluate this issue.

Statute and Underlying Concepts

A claim of incompetence for execution is based on Ford v. Wainwright (1986), a U.S. Supreme Court decision holding that it is cruel and unusual punishment and thus a violation of the Eighth Amendment to execute inmates who have lost their "sanity." The Ford majority decision did not articulate a single standard for assessing this incompetence for execution, though Justice Powell in a concurring opinion described the essential construct as whether the

inmate is aware of the impending execution and the reason for this punishment. This concept was adopted in the Texas statute (Article 46.05. Competency to be Executed. Texas Code of Criminal Procedure):

A defendant is incompetent to be executed if the defendant does not understand:

1. that he or she is to be executed and that the execution is imminent; and
2. the reason he or she is being executed.

The simplicity of the statute's language is deceptive, however, as there remains substantial ambiguity regarding what is envisioned by "understand" and how this understanding is functionally expressed. Some guidance regarding the operational meaning of "understand" is provided by the majority opinion in Ford, which described various miscarriages of justice that occur when a prisoner is unaware of the nature of or reason for a pending execution. These include an absence of retribution value, an inability of the inmate to prepare for death in coming to terms with conscience or deity, the experience of fear and pain without understanding, and the loss of the dignity of society. These rationales suggest that "understanding" is something more than rote assent, entailing a rational as well as factual comprehension. Accordingly, some authors assert that to avoid interpreting the Ford criteria for the court, capitol evaluations should address all relevant competence-related abilities - including rational understanding and appreciation - and not be limited to narrow constructions of the standard (Zapf, Boccaccini, & Brodsky, 2003).

The American Bar Association (1986) has posited that "understanding" also extends to a capacity to assist appellate counsel, to "recognize or understand any fact which might exist which would make the punishment unjust or unlawful, ... [and] the ability to convey such information to counsel or the court" (p. 290). Some scholarly commentators also incorporate an "assist" capability as a component of competency for execution (Heilbrun, 1987; Heilbrun, Radelet, & Dvoskin, 1992). While this third element is

codified in some jurisdictions, it is not formally incorporated in Article 46.05.

Evaluation Components

As a general principle the more serious the ramifications and the more irreversible the implications, the more comprehensive and well-reasoned the assessment needs to be. Evaluations of competency, then, would appear to call for particular care in methods and report detail. A number of commentators (Heilbrun, 1987; Heilbrun & McClaren, 1988; Small & Otto, 1991; Winick, 1992; Zapf, Boccaccini, & Brodsky, 2003) have discussed standards for competency to be executed evaluations, and have proposed essential components of these assessments (for an example of a case report incorporating these elements please see Cunningham, 2002). Several elements can be distilled from the recommendations of these commentators. As with any forensic evaluation, great care needs to be taken in letting the comprehensiveness of the methodology be driven by the referral presentation of the death row inmate.

1. Conducive assessment context: Evaluations of inmates are facilitated and inhibited by many of the same factors that impact any other evaluation. Typically a prison medical or mental health clinic unit provides a reasonably quiet and conducive setting. Some dialogue and problem solving with correctional personnel may be required to satisfy both security and evaluation needs.

2. Disclosure of the purpose of the evaluation: Although these evaluations are almost invariably court ordered, the inmate still must be informed of the purpose of the evaluation, whether the examiner has been selected by the defense or the state, and who will receive a report of the evaluation.

3. Assessment of functional capabilities: The focus of the inquiry is on the functional abilities of the death row inmate to “understand” that his execution is imminent and the reasons for it. In operationalizing these psycholegal criteria, the inmate should be questioned regarding his conviction, sentence, pending punish-

ment, procedures and sequence of the execution, disposal of remains, and finality of death. The court is provided with the greatest illumination when the inquiry includes probes to ascertain the quality and sophistication of the inmate's appreciation and thought processes. This may include questions regarding the inmate's plans for his last meal, preparations for the disposition of his personal property, and considerations of who will be his final visitors or execution witnesses. Inmates who have an imminent execution date or have had 11th hour stays in the past may be able to provide information regarding prior preparations. Queries regarding spiritual understandings and preparations, or attempts to make amends or find closure with victims, family, or others, as well as correspondence, visits, and consultations with clergy or spiritual advisors may also reveal the quality of the offender's understanding of his impending death and the reasons for it. An interview checklist to facilitate uniformity, comprehensiveness, and depth of inquiry in these evaluations has been developed (see Zapf, Boccaccini, & Brodsky, 2003).

4. Evaluation of the stability of functional capability: The assessment is not only oriented toward evaluating the capital offender's current understanding, but also toward projecting that understanding to the time of execution. Thus the stability or instability of psychological functioning, and associated fluctuations in "understanding," are relevant to how reliably the evaluation will generalize to that future execution date. Data relevant to this stability issue may be reflected in the inmate's mental health records, medical records, and prison file. The evaluator is entitled to these records by law, and these should always be obtained and reviewed. Multiple evaluation contacts also allow for appraisal of the stability of the inmate's psychological status and associated capability, and contribute to the reliability of the evaluation findings.

5. Utilization of multiple sources of information: The reliability and comprehensiveness of the evaluation is much increased when multiple sources of information are accessed. In addition to direct interview of the capital offender and comprehensive review of his records, important perspectives can be provided by third parties. Face to face or telephone interviews with death row correc-

tional officers and prison mental health personnel may be particularly helpful. In complex cases where additional collateral data is needed the prison chaplain and/or spiritual advisor, family, friends, pen pals, appellate counsel, and others who may have observations regarding past history, functioning over time, and execution specific understandings and preparations might also be contacted.

6. Case specific psychological testing: Some commentators argue that undertaking a comprehensive assessment of psychopathology, cognitive functioning, personality, and symptom exaggeration/minimization should always be undertaken in these evaluations as part of a determination of the presence, nature, and severity of any psychological disorder. This disorder-related data is posited as having inferential implications as the underlying psychological integration and reality testing impact the quality and stability of a capital offender's execution understandings. Others argue that these methods are so inferential that they do little to illuminate the question of functional abilities. Perhaps the best resolution of these contrasting views is that the employment of psychological testing and/or standardized assessment of response sets should be considered on a case by case basis.

7. Detailed and descriptive reports: All evaluation data should be memorialized in exhaustive detail. This not only allows for review and scrutiny by the attorneys or the court, but also provides the basis for highly descriptive reports. Given the ambiguity of the Ford standards, the greatest contribution of the psychologist is not in concluding that the inmate does or does not understand. Rather, the psychologist is uniquely suited to describing and illustrating the nature and quality of the functional understandings expressed by the capital offender – and their relationship to any associated mental disorder.

CONCLUSION

Mental health evaluations at capital sentencing are complex consultations that require careful preparation. This article is not intended to satisfy that requirement. Rather this summary is in-

tended to provide an overview and outline of key concepts and resources that can facilitate self-study and reflection. In addition to this self-study, mental health professionals who desire to perform these evaluations are encouraged to seek specialized continuing education training. Workshops addressing the role of forensic psychologists in death penalty sentencing evaluations are offered under the auspices of the American Academy of Forensic Psychology. Seminars regarding death penalty litigation are also offered by the Texas Defender Services, National Legal Aid and Defender Association, and other organizations.

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Table 1
U. S. Department of Justice Model: Predictors of Youth Violence

Individual Psychological Factors

- Internalizing disorders
- Hyperactivity, concentration problems, restlessness, and risk taking
- Aggressiveness
- Early initiation of violent behavior
- Involvement in other forms of antisocial behavior
- Beliefs and attitudes favorable to deviant or antisocial behavior

School Factors

- Academic failure
- Low bonding to school
- Truancy and dropping out of school
- Frequent school transitions

Peer Related Factors

- Delinquent siblings
- Delinquent peers
- Gang membership

Family Factors

- Parental criminality
- Child maltreatment
- Poor family management practices
- Low levels of parental involvement
- Poor family bonding and family conflict
- Parental attitudes favorable to substance use and violence
- Parent-child separation

Community & Neighborhood Factors

- Poverty
 - Community disorganization
 - Availability of drugs and firearms
 - Neighborhood adults involved in crime
 - Exposure to violence and racial prejudice
-

Note. From "Predictors of Youth Violence," by J. D. Hawkins, T. I. Herrenkohl, D. P. Farrington, D. Brewer, R. F. Catalano, T. W. Harachi, and L. Cothorn. U. S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, April 2000.

Table 2
Assaultive Rule Violations of Former Death Row
Inmates and Comparison Inmates

Study	Sample	Follow-up Interval	Assault Rate Former Death Row Inmates	Comparison Inmates
Marquart, Ekland-Olson & Sorensen, 1994	N=100 FDR, Texas	1924-72 (avg. 12 yrs)	.20 cumulative	
Marquart, Ekland-Olson & Sorensen, 1994	N=47 FDR, Texas	1973-88 (avg. 10 yrs)	.07 cumulative	.10 cumulative
	N=156 LS, Texas 128 Murderers/28 Rapists	1973-88 (avg. 11 yrs)		
Marquart, Ekland-Olson & Sorensen, 1989	N=90 FDR Texas	1974-88 (avg. 6.3 yrs)	.016 annual	
	N=107 CLS Murderers, Texas	1974-88 (avg. 7.2 yrs)		.026 annual
	N=38,246 TDC Systemwide	1986		.12 annual
	N=1,712 TDC High Security Unit	1986		.20 annual
Marquart & Sorensen, 1989	N=533 Nationwide 453 Murderers/80 Rapists	1972-87 (15 yrs)	.31 cumulative	
Akman, 1966	N= 67 FDR Canada	1964-65 (2 yrs)	0 cumulative	
	N=7,285, Systemwide, Canada	1964-65 (2 yrs)		.007 annual
Bedau, 1964	N=55 New Jersey	1907-60 (53 yrs)	0 cumulative	
Sorensen & Wrinkle, 1996	N=648 Murderers, Missouri 93 Death Row; 323 LWOP; 232 LWP	1977-92		.218 cumulative
Reidy, Cunningham & Sorensen, 2001	N=39 FDR, Indiana	1972-99	0.028 annual	
Sorensen & Pilgrim, 2000	N=6,390 Murderers, Texas	1990-99 (avg. 4.5 years)		.024 annual .084 cumulative

Note. From "Violence Risk Assessment at Federal Capital Sentencing: Individualization, Generalization, Relevance, and Scientific Standards" by M.D. Cunningham and T.J. Reidy. *Criminal Justice and Behavior*, 29, 512-537. Originally adapted from Reidy, Cunningham, & Sorensen (2001); FDR = Former Death Row Inmates; LS=Life Sentence; CLS=Capital Life Sentence; TDC= Texas Dept. of Corrections; LWOP=Life without Parole; LWP= Life with Parole

Table 3
Predicted Probability of Serious Violence among Incarcerated Murderers
across a 40-Year Prison Term

Predictor Variable	Predicted Probability (Any serious violence)	Predicted Proportional Change
All factors held constant	.164	
Capital offense characteristics:		
Robbery or burglary		
Multiple murder victims		
Attempted murder		
Prison gang membership		
Prior prison term		
Age		
Less than 21		
26-30		
.072		
31-35		
Over 35		
<hr/>		
Risk of aggravated assault on a correctional officer	.01	
Risk of inmate-on-inmate homicide	.002	

Note. Adapted from “An Actuarial Risk Assessment of Violence Posed by Capital Murder Defendants” by J.R. Sorensen and R.L. Pilgrim, Journal of Criminal Law and Criminology, 90, p. 1262 (2000).

Table 4
Rates of Parole Recidivism of Capital Murderers, Murderers, and General Population Inmates

Capital Murderers					
	Sample	Follow-up Interval	N	Recidivism Rate	New Murder Rate
Marquart & Sorensen (1989)	National Sample	1972-87	188	.20 return to prison: (.10 new felony)	.005
Bedau (1964)	NJ	1907-60	31	.03 new felony	0
Bedau (1964)	OR	1903-64	15	.20 return to prison	0
Vito & Wilson (1988)	KY	1972-85	17	.29 return to prison, 6 jailed	0
Wagner (1988)	TX	1924-88	84	.08 new felony	0
Stanton (1969)	NY	1930-61	63	.05 return to prison	0
Non-capital Murderers					
Donnelly & Bala (1984)	NY	1977, 5 yr. post-release	66	.27 return to prison	
Bedau (1982)	12 States	1900-76, 4-53 yr. post-release	2646	.3 new felonies	.006
Bedau (1982)	Nationwide	1965-69, 1974-75, first yr. of release	11,404	.015 major violations	.003
Bedau (1982)	Nationwide	males, first yr. of release	6094	.01 major new felony	.002
		females, first yr. of release	756 (F)	.004 major new felonies	.001
Stanton (1969)	NY	1945-61	514	.22 return to prison (.03 new felonies)	.004
Beck & Shipley (1989)	11 States	1983, 3 yr. post-release	506	.21 return to prison	.07 rearrested
Eisenberg (1991)	TX	1986, 5 yr. post-release	56	.45 return to prison	not reported
Perkins (1994)	29 States	discharged from parole	5371	.33 return to prison	not reported
Canestrini (1996)	NY	1985-91, first 3 yrs. post-release	5054	.24 return to prison	.024
General Prison Population					
Beck & Shipley (1989)	11 States	1983, 3 yr. post-release	16,355	41.4 return to prison	.03 rearrested
Perkins (1994)	29 States	post parole discharge	209,995	.46 return to prison	not reported
Eisenberg (1991)	TX	1986, 5 yr. post-release	1539	.48 return to prison	not reported
Canestrini (1996)	NY	1985-91, first 3 yrs post release	121,555	.44 return to prison	.004

Note: From "Integrating Base Rate Data in Violence Risk Assessments at Capital Sentencing" by M.D. Cunningham and T.J. Reidy, *Behavioral Sciences & the Law*, 16, 71-95 (1998).