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Choosing the Lesser of Two Evils:

A Framework for Considering the Ethics of Competency for Execution Evaluations

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Prisoners sentenced to death must be competent for execution before they can actually be executed (*Ford v. Wainwright*, 1986). The decision for many mental health professionals whether to conduct competence for execution evaluations may be fraught with complex ethical issues. Mental health professionals who do not personally support capital punishment may have a particularly difficult decision to make in this regard but should seriously consider the consequences of their decisions. This article applies Bush, Connell, and Denney's (2006) eight-step ethical decision-making model to the ethicality of deciding to or abstaining from conducting competence for execution evaluations. This article does not propose what decisions an individual evaluator should make regarding this work, but rather presents a systematic guide for mental health professionals (particularly those who do not support capital punishment) to consider.

Keywords:

Competence
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A Framework for Considering the Ethics of Competency for Execution Evaluations

“I truly knew that I did not do anything wrong, and indeed did the only thing I could do in the situation. Yet that nagging pest of discomfort of being part of a process I did not like or approve scraped at my conscience.” (Fisher, 1986, quoting a psychologist who evaluated an inmate’s competence for execution – an inmate who was executed two weeks after the evaluation).

Since the United States Supreme Court’s decision in *Ford v. Wainwright* (1986), prisoners sentenced to death must be competent for execution before they can actually be executed. When the issue of competency is raised, Mental Health Professionals (MHPs) are usually called upon to help the court make the determination of competency. During the course of any MHP’s career (particularly forensic MHPs) it is possible that one may be asked to conduct a competency for execution (CFE) evaluation. The decision of whether one will agree to conduct CFE evaluations may be fraught with complex ethical issues. Although some arguments exist that MHPs should refuse to participate in any CFE evaluation on ethical grounds, research has shown that 92% of MHPs feel that the decision to participate or abstain from such work should be left up to each MHP to decide for him or herself (Pirelli & Zapf, 2008).

In their 2006 book *Ethical Practice in Forensic Psychology: A Systematic Model for Decision Making*, Bush, Connell, and Denney argue that the best approach for availing the legal system of one’s expertise while also advancing sound ethical practice is to “develop an increased sensitivity to the disparities between conflicting interests and ethics” (p. 16). By systematically thinking about and making professional decisions, MHPs can aspire to positive ethical practice. Positive ethics encourages one to emphasize one’s highest ethical potential (e.g., striving for aspirational goals) rather than focusing on misconduct or avoiding enforceable disciplinary action (Handelsman, Knapp, & Gottlieb, 2002). Shifting one’s focus and standards to one’s

highest ethical potential requires time, commitment to ethical ideals, and effort to understand *why* certain practices are unethical (Bush, Connell, & Denney, 2006).

Actions that are clearly unethical are relatively easy to identify and steer clear of (e.g., those that violate psychology's ethical code and lead to sanctions); however, the ethics of other actions are less clear and individuals should take time to consider the implications of their decisions in such cases. For example, issues about which reasonable people disagree (e.g., capital punishment) may present much less clear ethical courses of action (e.g., whether it is "ethical" or "unethical" to conduct competence for execution evaluations). The ethics of the role an individual evaluator will take (e.g., conducting or abstaining from conducting CFE evaluations) will not be clearly "ethical" or "unethical," because the field's ethical standards do not explicitly deal with this issue and reasonable professionals disagree. Individual evaluators should consider this issue and each must determine for him or herself what course of action represents the highest ethical course of action for him or herself.

An eight-step model of ethical decision making is presented in Bush, Connell, and Denney's 2006 book to help forensic MHPs navigate ethical dilemmas. This article will apply this eight-step model to explore the ethicality of deciding to or abstaining from conducting CFE evaluations. Because most MHPs agree that this should be an individual decision and because the decision is so intimately intertwined with legal and ethical issues, it is important for each MHP to systematically consider these issues prior to making decisions about participating in this work. Strong arguments have been presented both for abstaining from and for conducting CFE evaluations. It should be noted that arguments for both sides have been proposed by those whose moral convictions are in support of and in opposition to capital punishment. MHPs, particularly those who do not support capital punishment, should seriously consider the consequences of their

decision in regard to abstaining from or conducting CFE evaluations. This article will not suggest what decision any individual MHP should make, but rather will present a systematic guide for MHPs to consider in coming to or re-evaluating their own conclusions.

Competence for Execution

Competence for execution is a legal construct rather than a clinical construct, which means that MHPs must be familiar with what the legal system is requesting when referring a death-sentenced offender for a CFE assessment. However, this may be a difficult task for two reasons. First, the legal construct itself is relatively ambiguous. Second, in contrast to other competencies (e.g., competence to stand trial, competence to waive Miranda rights), there has been little research on the construct of CFE from a clinical standpoint. Brodsky (1990) has argued that the ambiguous nature of the legal definition in combination with relatively few guidelines for MHPs to follow in conducting these evaluations may undermine the MHP's commitment to objectivity, because there will be ample opportunities for personal biases and values to influence the evaluation. For the purposes of this article, "objectivity" is an ideal to be pursued and is defined as being neutral and not having any investment in arriving at one conclusion over another. An objective evaluator is one who is disinterested in the outcome of the case (e.g., is not an advocate), and one who avoids partisanship or bias in their work.

Though the common law language and statutory requirements of competence for execution varies by state, the Supreme Court's decision in *Ford v. Wainwright* ensured the substantive requirements of the standard would be consistent throughout the country (Small & Otto, 1991). The test adopted by the *Criminal Justice Mental Health Standards* (American Bar Association, 1984) reflects the substance of the common law codified by *Ford v. Wainwright* as follows:

“A convict is incompetent to be executed if, as a result of mental illness or mental retardation, the convict cannot understand the nature of the pending proceedings, what he or she was tried for, the reason for the punishment, or the nature of the punishment. A convict is also incompetent if, as a result of mental illness or mental retardation, the convict lacks sufficient capacity to recognize or understand any fact which might exist which would make the punishment unjust or unlawful, or lacks the ability to convey such information to counsel or to the court” (p.290).

In an effort to help MHPs understand how best to address the CFE question, Ackerson, Brodsky, and Zapf (2005) surveyed 113 judges authorized to give death penalty sentences and asked them what CFE meant to them. They found four underlying content areas that the judges defined in terms of what it means to be competent for execution: the inmate’s ability to 1) understand and appreciate the punishment, 2) understand and appreciate death, 3) work with counsel, and 4) clinical considerations (e.g., diagnosis, clinical history, etc.). It is therefore important for MHPs to understand that meeting criteria for a clinical diagnosis is not necessarily sufficient for a determination of incompetence for execution. Two instruments are currently available to help MHPs guide their CFE evaluations to comport with the legal (and clinical) elements of CFE. These instruments will be discussed later in this article.

Arguments for Abstention and Non-abstention

The primary argument for abstention from CFE evaluation participation is one’s moral convictions (Deitchman, Kennedy, & Beckham, 1991). The literature devoted to the issue of participating in CFE evaluations is in agreement on the issue of objectivity. If a MHP’s personal beliefs about capital punishment would preclude his or her objectivity, he or she should abstain from the conducting these evaluations (Brodsky, 1990; Bonnie, 1990a). Second, ambiguous legal and clinical standards have often been cited as reasons why MHPs should not do this work (Mathias, 1988). A third argument is the “do no harm” mandate for the health professions (Hensl, 2005; Principle A: Beneficence and Malfeasance, American Psychological Association,

2002). Doing this work indirectly places MHPs in a paradoxical position of evaluating someone's ability to go forward to their death. Others argue that MHPs who participate in these evaluations align themselves too closely to punishment and threaten the public perception of the "healer" role (Applebaum, 1986; Heilbrun, 1987). MHPs who are opposed to the inequalities of the United States' system of capital punishment (Haney, 2005) and those who are opposed to capital punishment on other moral grounds argue that agreeing to participate in these evaluations runs the risk of legitimating the death penalty itself (Bonnie, 1990a; Radelet & Barnard, 1986).

One of the most logical counterarguments for participation in CFE evaluations is that the death penalty is currently a reality; thus, these evaluations will have to be done by someone. However, studies have found that well over one-third of MHPs would refuse to conduct a CFE evaluation (Deitchman, Kennedy, & Beckham, 1991; Pirelli & Zapf, 20008). If well-trained, skilled, thorough, and experienced professionals decline, less qualified or less scrupled persons might fill the void (Bonnie, 1990a; Fisher, 1986; Heilbrun, 1987). Research has shown that most (about 78%) MHPs agree with this argument (Pirelli & Zapf, 2008). If all MHPs whose personal values are in opposition to capital punishment were to abstain from conducting these evaluations, the pool of potential evaluators would be less representative of all attitudes and might thus be skewed. Bonnie (1990a) argued that refusals to participate in these evaluations might deny the condemned the opportunity to present their case for leniency. Bonnie (1990a) also presented an argument based on logic that there is no categorical distinction between agreeing to participate in CFEs and participating in other capital case evaluations (e.g., competence to stand trial, mental state at the time of offense, etc.), because the duty to avoid harm and the gravity of the capital punishment issue applies throughout the entire case. It appears, however, that this may not be a logical issue for many evaluators: Pirelli and Zapf (2008) found that roughly 35% of MHPs

reported they would refuse to participate in CFE evaluations even though they would conduct other capital case evaluations.

Applying an Eight-Step Model for Ethical Decision Making to CFE Evaluation Decisions

The eight steps of Bush, Connell, and Denney's (2006) model for ethical decision making are as follows: 1) identify the problem, 2) consider the significance of the context and setting, 3) identify and use ethical and legal resources, 4) consider personal beliefs and values, 5) develop possible solutions to the problem, 6) consider the potential consequences, 7) choose and implement a course of action, and 8) assess the outcome and implement changes as needed. It must be noted that these steps are not necessarily sequential; they can occur out-of-order and/or simultaneously.

Step one. The first step in making a decision about abstaining from or conducting CFE evaluations is for the MHP to determine that he or she will systematically consider the strengths and weaknesses of both abstaining from and conducting the evaluations.

Step two. The second step is to consider the significance of the context and setting. The MHP must first consider whether he or she is qualified and competent to do this type of forensic work (Standard 2.01 Boundaries of Competence, American Psychological Association, 2002). Death is categorically different from all other punishment – different in its morality, politics, and symbolism (Bedau, 1987). Due to this unique context, the MHP must consider the gravity of the permanency of death, the immediacy of their work to the finality of the case, and the consequences to the professional based on the decision to abstain or participate.

External forces that may influence the CFE evaluation should be considered. For instance, demand characteristics may influence the responses on which the MHP bases his or her opinion (e.g., the MHP who is hired by the prosecution may elicit different behaviors and

responses from the evaluatee than the MHP who is hired by the defense based on the nature of the inquiry (Murrie et al., 2009). The context of the evaluation itself should also be considered. How will the evaluation be carried out? Where will the meeting with the evaluatee take place? How will the issue of informed consent be presented? How will the evaluation be structured? What instruments might be used? These and other context-specific issues are important to consider prior to conducting a CFE evaluation. The fully informed MHP has considered these issues in making their decision about participation in CFE evaluations.

Step three. The third step in this ethical decision making model is to identify and utilize ethical and legal resources. Many general resources are available, including the APA Ethics Code (American Psychological Association, 2002) and the CPA Code of Ethics (Canadian Psychological Association, 2000) for psychologists. The AMA Principles of Medical Ethics (American Medical Association, 2001) applies to psychiatrists. Specialty guidelines also exist to govern practice in forensic arenas, including the *Specialty Guidelines for Forensic Psychologists* (Committee on Ethical Guidelines for Forensic Psychologists, 1991) and the *Ethics Guidelines for the Practice of Forensic Psychiatry* (American Academy of Psychiatry and the Law, 2005). Position papers (also called “white papers”) have been issued by various specialty organizations. The American Psychological Association issued a public interest statement on the death penalty in the United States (2001) and published a report from the Task Force on Mental Disability and the Death Penalty (2005). The Canadian Psychological Association (1987) published a similar statement, as did the American Academy of Psychiatry and the Law (2001). Additionally, several books and journal articles have been published that may help MHPs navigate the potential ethical dilemma. Finally, consultation with experienced colleagues can be invaluable for providing a fuller perspective on the issue and helping one feel comfortable and confident in one’s decision.

Step four. Step four of the ethical decision making model is to consider personal beliefs and values in the context of deciding whether to conduct CFE evaluations. Connell (2008) argues “[in] work that involves providing input or opinion to the courts ...objectivity is an absolute requirement” (p. 57). The question of whether objectivity is even possible (particularly in this work) has been raised. Brodsky, Zapf, & Boccaccini (2001) argue that, “yes,” objectivity is possible, because MHPs are specifically trained to reduce the reliance on their personal values and to develop skills in remaining objective and impartial in one’s work. They suggest the threshold before biases impact decisions might be higher than might be expected if a person didn’t have this training (Brodsky, Zapf, & Boccaccini, 2001). Others argue that for some MHPs, objectivity may not be possible due to the strength of their convictions. If the strength of one’s morals would preclude objectivity, MHPs should abstain from conducting these evaluations (Bonnie, 1990a; Connell, 2008). The empirical literature has not decisively weighed-in on the issue of whether objectivity is possible, particularly in work such as this where personal values and beliefs may be strong. Due to the limited empirical evidence regarding whether one’s belief in one’s objectivity results in actual objectivity, MHPs must consider different levels of potential bias in their own work.

Intentional bias is clearly unethical; for example, a MHP who chooses to provide testimony based on the attorney’s case conceptualization (regardless of the results of the evaluation – e.g., a “hired gun”) is behaving unethically (Principle C: Integrity; Ethical Standards 2.04 Bases for Scientific and Professional Judgments, 3.04 Avoiding Harm, 5.01 Avoidance of False or Deceptive Statements, and 9.01 Bases for Assessments, American Psychological Association, 2002). MHPs who decide that they will take cases, but only report and testify in the direction consistent with his or her personal beliefs and values (e.g., an evaluator who is morally

opposed to capital punishment who testifies a defendant is incompetent for execution regardless of the results of the evaluation) is also intentionally behaving in a non-objective and unethical manner (Principle C: Integrity; Ethical Standards 2.04 Bases for Scientific and Professional Judgments, 2.06 Personal Problems and Conflicts, 3.06 Conflict of Interest, 5.01 Avoidance of False or Deceptive Statements, and 9.01 Bases for Assessments, American Psychological Association, 2002). Although such intentional biases are likely very infrequent, more insidious forms of bias may be more common.

Selection bias, in which MHPs might choose only to conduct CFE evaluations for a particular side (e.g., only defense or only prosecution) might introduce a systematic bias. Other MHPs who choose to accept cases based on their first impression evaluations of the facts of the case may also be introducing systematic selection bias (e.g., a MHP who is only willing to take cases in which they believe that the inmate is likely incompetent for execution). Another form of selection bias is that MHPs who are willing to participate in CFE evaluations have been found to be significantly more in favor of the death penalty than those who are unwilling (Deitchman, Kennedy, & Beckham, 1991; Pirelli & Zapf, 2008). This suggests that there exists a selection bias skewed toward those MHPs who support capital punishment.

Finally, all MHPs should be aware that they may be influenced by unintentional biases. For example, MHPs should be aware that there are evaluator- and case-specific influences that may be operating in CFE evaluations. Evaluator-specific influences might include the MHP's personal values and convictions about the use of capital punishment and his or her own past personal and professional experiences (e.g., past experiences of being or knowing a victim, having personal connections to a perpetrator of a violent crime, or previous experiences in CFE assessment). Case-specific biases can also operate at the level of personal biases (e.g., personal

biases about the type of people who commit the particular type of crime in the case, biases regarding people who come from the particular background of the inmate, biases about the type of victim involved in the case or the degree of emotional involvement in the case, etc.).

Step five. The ethical decision making model's fifth step is to develop a list of possible solutions. If the MHP knows that his or her personal convictions about capital punishment would preclude his or her ability to be objective in such an evaluation, he or she must abstain from conducting CFE evaluations and might need to limit the range of accepted referral issues to remain consistent with the commitment to objectivity.

There is an argument in the literature that when people are made aware of their potential biases, they work to correct them (Wegener & Petty, 1997). This argument suggests MHPs should work to be aware of their potential biases so that they can strive to correct for them. It also suggests that concerned MHPs should consider participating in this work unless their personal convictions would absolutely preclude their objectivity. Those MHPs who have determined that they could strive for objectivity in CFE evaluations have several options.

Making a strong commitment to do thorough and detailed evaluations is the first aim. Writing very detailed written reports so readers can evaluate the data for themselves is another goal. Some have argued that MHPs can and should let their personal opinions and values be known to others. For example, Cunningham and Reidy (2001) argue that MHPs should provide information regarding personal beliefs to the retaining attorney in these types of cases, and further that MHPs should acknowledge these attitudes to the court if asked to do so. Still others have argued that MHPs might choose only to report on the clinical issue and avoid the ultimate legal question of CFE (Brodsky, Zapf, & Boccaccini, 2001; Small & Otto, 1991). Small and Otto (1991) recommend evaluators limit their report and testimony to the functional abilities of

defendants related to the legal test (i.e., the prisoner's [a] understanding of the nature of the sentence and penalty and [b] ability to assist and work with counsel).

Step six. The sixth step of the model is to consider the possible consequences of the various solutions. The primary potential consequence to abstaining from conducting CFEs might be limited available competent and qualified MHPs representing a range of personal convictions. The existing pool of potential evaluators might be skewed toward support for capital punishment. Those clinicians who opt to conduct CFEs when their personal values go against capital punishment will have to deal with the inconsistencies between their values and their decision to do the evaluation(s). MHPs who make their personal values and beliefs known to the court may be particularly vulnerable on cross examination, may have reduced credibility in the eyes of the jury, and may not be retained at all or again. And finally, MHPs who decide only to testify to the clinical issues (e.g., whether the inmate qualifies for a diagnosis, etc.) may find themselves forced on the stand to testify to the ultimate legal issue anyway (e.g., whether the inmate is competent for execution). Small and Otto (1991) recommend that if an evaluator is forced to offer a legal opinion in a CFE case that the evaluator should explicitly instruct the court that his/her opinion regarding the ultimate legal issue is not formed as a function of special expertise.

Step seven. Step seven is to choose and implement a course of action. MHPs must choose the solution that represents his or her most ethical course of action. Because ambiguity will still be present, MHPs should think in terms of positive ethics and choose the highest ethical option available. The MHP must then implement his or her choice.

The MHPs who decide to conduct CFE evaluations may use materials developed for use in such evaluations to assist them in coming to their conclusions. Ackerson, Brodsky, and Zapf's (2005) findings suggest MHPs should consider both legal and clinical factors of competency for

execution. These researchers published the Competency for Execution Research Rating Scale (CERRS) to help MHPs systematically consider the four factors of competency for execution: understanding and appreciating punishment, understanding and appreciating death, capacity to work with counsel, and relevant clinical information. MHPs who used the CERRS in an experimental study included significantly more legal criteria in their CFE evaluations than MHPs who did not use the CERRS (Ackerson, Brodsky, & Zapf, 2005). This is desirable because CFE is a legal construct and a clinical diagnosis alone is not synonymous with incompetence for execution. A second available instrument is a structured interview checklist that can systematically guide the MHP's CFE evaluation. This checklist is called the Interview Checklist for Evaluations of CFE (Zapf, Boccaccini, and Brodsky, 2003).

Step eight. The eighth step is to assess the outcome and implement changes as needed. If a referral for a CFE evaluation is accepted, the MHP should follow his or her planned course of action and then evaluate the outcome. After the plan has been implemented, the MHP should ask him or herself, "Would I change my mind about conducting a future CFE evaluation based on the results of this decision process?" If so, the eight-step process could be repeated.

Conclusion

The decision of whether one will participate in CFE evaluations is an individual one that each forensic MHP might have to make. This paper sought to provide a systematic way of thinking through some of the issues in making a well-informed decision. Arguments for and against MHPs participating in such evaluations have been made by supporters of the death penalty and by people who are ethically and morally opposed to capital punishment. Unless one's moral scruples would preclude one's ability to be objective in participating in these evaluations, MHPs should carefully and systematically consider whether they could conduct a

CFE evaluation. There are professionals who argue for conducting these evaluations in spite of their personal opposition to capital punishment: “We are faced, admittedly, with a tragic choice....however, I would not demean the dignity of the condemned as a price for society’s failure to abolish the death penalty” (Bonnie, 1990b, p. 102). Bonnie (1990a) points out that judges and attorneys must also deal with potential issues of personal values and beliefs that might be in opposition to capital punishment. However, these legal professionals must work to set aside their own convictions in the letter of the law. The adversarial system is built upon the assumption that justice will usually prevail if all parties put in maximum effort. In light of this, Bush, Connell, and Denny (2006) argue, “It is the forensic psychologist’s responsibility to thoroughly and adequately perform his or her duties; if the resultant outcome favors the ‘unjust,’ we believe that the psychologist must forgo a sense of personal responsibility for that injustice.” (p. 18). Finally, MHPs should remember that their professional opinion in CFE evaluations is just that – a professional opinion, and not a legal disposition.

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