Choosing the Lesser of Two Evils: Considering the Ethics of Competency for Execution Evaluations

Tess M.S. Neal
The University of Alabama

"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).

Introduction

Prisoners sentenced to death must be competent for execution at the time of their death (Ford v. Wainwright, 1986)

Although some arguments exist that Mental health professionals (MHPs) should refuse to participate in any Competence for Execution (CFE) evaluation on ethical grounds, 92% of MHPs feel the decision to participate or abstain should be left up to the individual to decide (Pirelli & Zapf, 2008).

Present Study

In their 2006 book Ethical Practice in Forensic Psychology: A Systematic Model for Decision Making, Bush, Connell, and Denney encouraged forensic clinicians to aspire to positive ethics and systematically consider ethical issues.

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.

This presentation applies Bush, Connell, & Denny’s (2006) 8-step ethical decision-making model to the ethics of abstaining or participating in CFE evaluations.

### Arguments for Abstention

- Moral convictions precluding objectivity
- Ambiguous legal and clinical standards
- "Do no harm" mandate
- Risk of legitimating the death penalty in its current inequitable form and application

### Arguments for Participation

- It is a reality – someone has to do them
- Denies the condemned an opportunity to present their case for leniency
- No categorical distinction between CFEs and other types of capital case evaluations
- If qualified people decline, less qualified people fill the void

### Conclusions

- Arguments for and against participating have been made by supporters of 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, MHPs should carefully and systematically consider whether they could conduct a CFE evaluation.
- MHPs should remember that their professional opinion in CFE evaluations is just that – a professional opinion, and not a legal mandate.

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### 8 Steps

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<th>8 Steps</th>
<th>Application when considering CFEs</th>
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<tr>
<td>1. Identify the problem</td>
<td>Determine to systematically consider the strengths and weaknesses of both abstaining from and conducting these evaluations</td>
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<td>2. Consider the significance of the context and setting</td>
<td>Are you competent to work in this area? Consider the permanency of death, the immediacy of your work to the finality of the case, the consequences of your decision, and how you would conduct the eval.</td>
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<td>3. Identify and use ethical and legal resources</td>
<td>General ethics resources (APA, CPA, AMA), and forensic specialty guidelines [SGFP, EGFP] are relevant. Position papers, books, articles, and experienced colleagues can provide a fuller perspective.</td>
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<td>4. Consider personal beliefs and values</td>
<td>Evaluate your opinions regarding capital punishment. (CP) Also consider different levels of potential bias (e.g., selection bias, case-specific bias, etc.).</td>
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<td>5. Develop possible solutions to the problem</td>
<td>Abstain if objectivity would not be possible. If possible, commit to do thorough and detailed evaluations. Consider how you will address the ultimate legal question and how the courts will respond.</td>
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<td>6. Consider the potential consequences</td>
<td>Abstaining might limit the diversity of available competent and qualified MHPs. If you opt to conduct CFEs when your personal values go against CP, you may have to deal with inconsistencies. If you decide only to testify to the clinical issue you may find yourself forced to testify to the ultimate legal issue anyway.</td>
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<td>7. Choose and implement a course of action</td>
<td>Decide whether refraining or participating is more ethical for you and implement your decision.</td>
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<td>8. Assess the outcome and implement changes as needed</td>
<td>Evaluate the outcome by asking yourself, “Would I change my mind about conducting a future CFE evaluation based on the results of this decision process?” If so, repeat.</td>
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