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The Role of Psychologists as Expert Witnesses in the US Criminal Justice System

Abstract: The article briefly describes the criminal justice system in the United States of America, the roles of psychologists as expert witnesses, and the guidelines underpinning the ethical practice of psychology within the legal system. A case study is provided to illustrate the principles introduced. This concise review of ways that forensic psychologists can be involved in US criminal justice proceedings provides valuable insight into a complex system.

Keywords: Forensic Psychology; Ethics; Criminal Cases

The adjudication of criminal cases in the United States is predicated on the principle of due process of law, which is:

The conduct of legal proceedings according to established rules and principles for the protection and enforcement of private rights, including notice and the right to a fair hearing before a tribunal with the power to decide the case. [2, p. 575]

This is based on an adversarial process which “...demands that each side have the opportunity to put forward whatever evidence best makes its case” [3, p. 10]. The goal of this paper is to briefly describe the roles and practice issues of psychologists who are expert witnesses in criminal proceedings in the US, particularly those psychologists who are self-employed in independent practice.

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In the US, psychologists may be involved in all phases of criminal litigation. Common issues involve:

1. Determining criminal competencies, such as whether a person is competent to stand trial;
2. Criminal responsibility, such as whether a person was insane at the time the offense was committed; and
3. Moral culpability, such as when the government seeks the death penalty. A defense team will often use an expert to develop mitigation, and the prosecution may retain an expert to attempt to rebut mitigation.

Psychologists who consult as experts in criminal forensic cases can do so as employees of government agencies or institutions, typically working in forensic hospitals or clinics. Forensic psychologists can also work privately in independent practice. A psychologist who is working privately in independent practice can be appointed by the court, or can be retained by either the prosecution or the defense. Regardless of the retaining party, the role of the psychologist expert is to educate the judge or the jury that is serving as the fact-finder in the case.

Both the prosecution and the defense are free to retain any qualified expert they wish for consultation. Private experts set their own fees, typically on an hourly basis. If the defense team chooses to hire an expert, the cost of the expert is paid by the defense. A defendant is not required to pay for an expert if the defendant is indigent. If the prosecution chooses to hire an expert, the cost of the expert is paid by the prosecution. Private experts can also be appointed by the court. If the court appoints an expert, the expert is paid by the government.

In cases with serious charges, such as homicide, multiple mental health experts can be involved, often including both psychologists and psychiatrists. These experts are entitled to review all relevant documents and materials, though what is considered “relevant” material may sometimes be disputed by opposing attorneys. A psychologist can have access to any reports and supporting materials



relied upon by other experts. This can sometimes amount to thousands of pages of materials, which can include, but are not limited to medical and mental health treatment records; police reports; criminal history; surveillance videos; recordings of telephone calls placed from jail; and school and employment records. In some cases, an expert may also interview witnesses and/or family members. The guiding principle remains - any expert being asked to evaluate a defendant must have access to all information relied upon by any other expert who evaluated the defendant.

In cases where a defendant's past or present psychological status is an issue, if the defendant was examined by an expert retained by the defense, that defendant must be made available for examination by an expert retained by the prosecution. Psychological testing is frequently administered as part of the examination. One of the authors (J.D.S.) will usually see a defendant more than once and video-record these interviews. Like all other materials relied upon, these video recordings are made available to all parties if the case proceeds and the expert is noticed as a witness. In the event that the expert is noticed as a witness, the expert will usually generate a report. The report is then sent to the retaining party for further disclosure to the court and other parties. If the parties do not reach an agreement, experts can be called to testify in court, during which time they are examined by the retaining counsel and cross-examined by opposing counsel. This is frequently portrayed in American film and television. However, this depiction is often inaccurate and exaggerated.

In the field of psychology, the principles of thoroughness, fairness, and transparency are enshrined in practice guidelines. For example, Guideline 1.02 of the American Psychological Association's 2013 Specialty Guidelines for Forensic Psychology addresses the need for impartiality and fairness:

When offering expert opinion to be relied upon by a decision-maker, providing forensic therapeutic services, or teaching or conducting research,



forensic practitioners strive for accuracy, impartiality, fairness, and independence ... Forensic practitioners recognize the adversarial nature of the legal system and strive to treat all participants and weigh all data, opinions, and rival hypotheses impartially.

When conducting forensic examinations, forensic practitioners strive to be unbiased and impartial, and avoid partisan presentation of unrepresentative, incomplete, or inaccurate evidence that might mislead finders of fact. This guideline does not preclude forceful presentation of the data and reasoning upon which a conclusion or professional product is based. [1, p. 8]

Guideline 1.03 emphasizes the need to avoid conflicts of interest:

Forensic practitioners refrain from taking on a professional role when personal, scientific, professional, legal, financial, or other interests or relationships could reasonably be expected to impair their impartiality, competence, or effectiveness, or expose others with whom a professional relationship exists to harm... [1, p. 9]

Guideline 9.02 stresses the need for thoroughness and accuracy in an evaluation:

Forensic practitioners ordinarily avoid relying solely on one source of data, and corroborate important data whenever feasible... When relying upon data that have not been corroborated, forensic practitioners seek to make known the uncorroborated status of the data, any associated strengths and limitations, and the reasons for relying upon the data. [1, p. 15]

Case Study

The following case was chosen to illustrate how both the prosecution and defense can retain psychological experts:

D. S. was charged with killing a store clerk in the course of a robbery. He was eligible for the death penalty if convicted. Capital cases in the US are divided into three phases, which are all presented in front of a jury:



1. The guilt/innocence phase, during which the defendant's guilt for the acts charged is determined;
2. The aggravation phase, during which the prosecution must establish the presence of statutorily defined aggravating factors, the presence of which are necessary for the government to impose the death penalty;
3. The sentencing phase, during which the defense can present evidence to lessen the defendant's culpability, with the goal of having the jury sentence the defendant to life in prison in lieu of the death penalty.

In capital cases, it is the last phase in which expert mental health testimony is most likely to be presented. United States Supreme Court decisions have permitted defendants to present evidence from an extensive variety of sources, including whether the defendant is remorseful, has limited intellectual abilities and/or has diagnosed brain disease, was under the influence of alcohol, or has a history of child abuse or neglect [3].

D. S. was found guilty of First Degree Murder, and the prosecution was successful in establishing the presence of aggravating factors. The trial therefore moved on to the sentencing phase.

D. S. was seen by two defense-retained psychologists and one psychologist retained by the prosecution. All three experts met with the defendant on multiple occasions. Voluminous data were available for review, including police reports, academic and developmental records, medical and mental health records for both the defendant and his family, records from previous arrests and incarcerations, and interviews with friends, family, and others who had had contact with the defendant.

All three psychologists generated reports, which were available to the other experts, and testified during the sentencing phase. They were examined by the retaining counsel and cross-examined by opposing counsel.



The jury returned a verdict of life, and the judge sentenced the defendant to serve a natural life term (that is, with no possibility of parole). In the context of this case, this verdict was a success for the defense, in that the alternative was a death sentence.

Conclusion

It is somewhat ironic that a legal process which is designed to resolve issues in a fair, equitable, and peaceful manner does so by emphasizing conflict, and the experience of this conflict dissuades many psychologists from working as forensic experts. Nonetheless, the adversarial legal process in the US provides both the defense and the prosecution the opportunity to assiduously advocate for their respective sides. However, note that it is respective counsel who advocates for a position, not the expert. The ultimate value of the expert is to educate the factfinder, be it a judge or a jury, on matters which are outside the scope of the factfinder's expertise.

References

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