"Power and Greed and the Corruptible Seed": Mental Disability, Prosecutorial Misconduct, and the Death Penalty*

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Introduction

The Supreme Court’s death penalty jurisprudence is based in large part on the assumption that jurors can be counted on to apply the law in this area conscientiously and fairly. All our criminal procedure jurisprudence is based in large part on the assumption that prosecutors and judges will act fairly. I believe that these assumptions are based on nothing more than wishful thinking, and that the record of death penalty litigation in the thirty-eight years since the “modern” penalty was approved in *Gregg v. Georgia* gives the lie to them.

This article focuses solely on the role of prosecutors in this process, and the extent to which prosecutorial misconduct has contaminated the entire death penalty process, especially in cases involving defendants with mental disabilities. This is an issue known well to all those who represent such defendants in death penalty cases but, again, there is startlingly little literature on the topic. It is misconduct that is largely hidden and ignored. The article begins with some brief background on issues that relate to the treatment of persons with mental disabilities in the criminal justice system in general. It then discusses prosecutorial misconduct and the outcomes of that misconduct, with special attention to a cohort of appellate decisions in unheralded and rarely (if ever) discussed published cases that, in almost every instance, sanction such misconduct. Next, it demonstrates how some prosecutors purposely flaunt the canons of ethics in the prosecution of defendants with mental disabilities in death penalty cases, and then will discuss some solutions raised by scholars to (at least, partially) cure
this problems, and concludes with some modest suggestions of my own.

The title comes, in part, from what is perhaps Bob Dylan’s greatest song, *Blind Willie McTell*, an homage to the blues (McTell was, of course, one of the great blues singers in history), and is a “personal vision of slavery’s dark vision in American history.”² Oliver Trager, one of the great Dylanologists, calls it “a veritable Hieronymous Bosch of a country-gospel folk blues, with everything from slavery to minstrelsy to revivalism and prophecy rearranged into a vision as important as anything in Dylan’s canon.”[Ref #2, p. 50]. Another verse of the song includes these lines, that set out Dylan’s thoughts on the tragedy that is so much of American history, a tragedy not unrelated on at least one basic level -- the significance of race to any justice system to any justice system inquiry³ the topic of this paper:

> See them big plantations burning
> Hear the cracking of the whips
> Smell that sweet magnolia blooming
> See the ghosts of slavery ships
> I can hear them tribes a-moaning
> Hear that undertaker’s bell
> Nobody can sing the blues
> Like Blind Willie McTell⁴

I. Persons with mental disabilities in the criminal justice system
The death penalty is disproportionately imposed in cases involving defendants with mental disabilities (referring both to those with mental illness and with intellectual disabilities). Persons with mental disabilities are significantly over-represented at every level of the criminal justice system.\(^5\) Estimates of those with mental retardation range from 10-30%,\(^6\,7\) and of those with mental illness from 10-70%.\(^8\)

Mental disability is a significant confounding factor at every stage of the criminal justice system: from precontact to initial contact to intake and interrogation, to prosecution and disposition, and to incarceration. [Ref/ #5, pp.214-217]. In the context of capital punishment, these coalesce most vividly in the context of the false confession.\(^9\) There are many reasons why persons with mental disabilities are sentenced to death for murders they did not commit, and other reasons why they are sentenced to death in cases in which individuals without mental disabilities might have been spared the death penalty. The most prevalent issue is that of false confessions. Of the first 130 exonerations that the New York-based Innocence Project obtained via DNA evidence, 85 involved people convicted after false confessions.\(^10\) Mental impairment is a commonly recognized risk factor for false confessions.\(^11\) There is no disputing that false confessors have been found to score higher on measures of anxiety, depression, anger, extraversion, and psychoticism as well as being more likely to have seen a mental health professional or taken psychiatric medications in the prior year.\(^12\,14\) Defendants with mental retardation “have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to
engage in logical reasoning, to control impulses, and to understand the reactions of others.” A scan of websites of the various Innocence Projects reveals that, in every instance, mental impairment is listed as a major reason why innocent persons confess to crimes they did not commit.

II. Prosecutorial Misconduct

A. Introduction

In general, there is great political incentive for prosecutors to seek the death penalty and for trial judges to impose it, and an even greater incentive in jurisdictions in which prosecutors are elected. Professor James Liebman makes this crystal clear:

In all capital-sentencing jurisdictions, but particularly in ones where the political rewards of capital punishment are high and direct (for example, where elections for district attorney and trial judge are frequent and partisan and where voters favor the death penalty) and in ones that believe themselves to be under siege from violent crime, such offenses create incentives to move swiftly and surely from arrest to conviction to capital verdict.

Liebman quotes a newspaper article by Tina Rosenberg about Philadelphia district attorney Lynne Abraham’s self-confessedly “passionate” commitment to capital punishment, notwithstanding her doubts whether it deters crime, and her use of it more
often per homicide than any other prosecutor in the nation, which follows from her conclusion that it gives citizens “the feeling of control demanded by a city in decay,” especially in light of her observation that “[w]e feel our lives are not in our own hands. . . This is Bosnia”). [Ref. # 21, p. 322, n. 36]. Elsewhere, Liebman notes how the imposition of the death penalty is basically a county-by-county issue, resulting in the anomaly that, over a 22 year period, 66 American counties accounted for 2569 of the 5131 death sentences imposed, and underscores how “police, prosecutors, judges, and juries operate with strong incentives to generate as many death sentences as they can—reaping robust psychic, political, and professional rewards—while displacing the costs of their many consequent mistakes onto capital prisoners, post-trial review courts, victims, and the public.” Professor J. Amy Dillard is clear: “Prosecutors abuse their discretion when they choose to seek death in order to seat a death-disposed jury.”

There is no question that there is often “acute (and ever intensifying) political pressure” on prosecutors “to seek the death penalty.” And there is no reason whatsoever to think that this pressure is somehow diminished in the case of a defendant with mental illness, precisely the sort of defendant -- “the most despised and feared group in society” -- that most engages a community’s fears. And of course, because prosecutors “reap political benefits from being tough on crime but do not typically have to pay for expensive appeals, they have an incentive to seek the death penalty in marginal cases that may be hard to defend on appeal.” Prosecutors
adopt what scholars have called a “conviction psychology,” one that presumes guilt in all cases. Consider the saga of former Oklahoma City District Attorney Robert Macy who, according to journalistic accounts, “lied, ... bullied [and] spurned the rules of a fair trial, concealing evidence, misrepresenting evidence,” yet consistently won re-election with more than 70% of the votes.

All of these phenomena potentially have an especially fatal impact in cases involving defendants with serious mental disabilities.

B. Outcomes of misconduct

Reginald Brooks was sentenced to death for the murder of his three sons. Some eighteen years after having been found guilty, a trial judge found he was competent to be executed, noting, however, that the defendant suffered from paranoid schizophrenia and presented with “persecutory delusions that he has been framed for a crime that occurred while he was leaving town.” During the litigation process, Brooks’ appellate counsel obtained documents, apparently from the trial prosecutor’s file, pointing to evidence that in the period leading up to the killings, Brooks had displayed bizarre, aberrant, and paranoid behavior indicative of deteriorating mental health. Brooks’ trial lawyer has said that none of the documents were disclosed to the defense and that this “secretion of the witness statements totally prevented me from properly and competently representing Mr. Brooks.” [Ref. # 32]. Brooks was executed on November 15, 2011.
In a study of the thirteen executions that have taken place in California since the death penalty was reinstated in that state in 1977, prosecutorial misconduct was raised as a significant issue in seven of the cases—over half. 34, pp. 375-76 This cohort of cases includes at least one case 35 in which the prosecutor lied—there is no other word for it—to the jury about the consequences if a “not guilty by reason of insanity” verdict were to be entered [Ref. #34, pp. 382-87], lies that were deemed by the California Supreme Court to be “harmless error.” [Ref. #35, p. 705].

Other cases from other jurisdictions show this same judicial sanctioning of lies on the consequences of a successful insanity plea. 36-37 In only one jurisdiction have such convictions been reversed, the reviewing court in one case noting that “the prosecution cannot suggest to the jury that an acquittal would result in the defendant's release from an asylum in just a few months.” 38, p.1354; 39, p. 816

Often, even where appellate courts find error based on prosecutorial misconduct in cases involving defendants with mental disabilities, they find such errors to be harmless, not of constitutional magnitude, 40-41 or improperly preserved. 42 Nearly seventy years ago, Judge Jerome Frank charged that “Government attorneys, without fear of reversal, may say just about what they please in addressing juries, for our rules on the subject are pretend-rules.” 43, p. 661 Little has changed since.

Convictions in cases replete with serious prosecutorial misconduct – based on, inter alia, inflammatory statements to jurors in closing arguments, 44-46 on failure to turn over documentary evidence, 47-48 on mischaracterization of expert testimony on mental
state, and on mischaracterization of the prevailing insanity defense legal standard\textsuperscript{51}, p.\textsuperscript{1055} -- are regularly affirmed in cases in which the insanity defense is proferred \textsuperscript{52} [Refs. #36, 51], in which the incompetency status is raised \textsuperscript{53} [Refs. # 37, 44], where extreme emotional disturbance is alleged, \textsuperscript{54} and where mitigation is sought at the penalty phase.\textsuperscript{55-57} Although there are some instances of reversals (usually on the grounds of ineffectiveness of counsel) [Refs. # 48, 57], in this cohort they are a distinct minority, most cases finding no error.\textsuperscript{58-60} Courts simply say that the role of the reviewing court is “to act only as a kind of constitutional backstop to ensure that trial errors do not so infect the trial as to render it fundamentally unfair.”[Ref. # 51, p. 1053]. What has mostly escaped attention is the way that prosecutorial misconduct festers in the trial of cases involving this cohort of defendants; in the words of Dr. Saby Ghoshray, “the deadly cocktail of racial disparity, inadequate counsel, and prosecutorial misconduct continues to interject lethal consequences for mentally incapacitated prisoners.”\textsuperscript{61, p. 617}.

There is little incentive for prosecutors to reform their ways. There is often absolutely no accountability.\textsuperscript{62} In some jurisdictions, convictions are rarely reversed on the basis of prosecutorial misconduct; by way of example, of 150 reported cases in Louisiana in which prosecutorial misconduct was found, there were only 20 in which convictions were reversed.\textsuperscript{63, pp. 353-54} For those in jurisdictions where prosecutors are elected, convictions enhance re-electability.\textsuperscript{64, p. 405} Even if the misconduct is noticed, the defendant’s conviction is still likely to stand. And there is no stigma to the miscreant prosecutor since s/he is virtually never mentioned by name in any subsequent appellate
opinion. [Ref. # 63, pp. 357-58]. Sanctions are nearly non-existent; a Chicago Tribune article found that not one prosecutor was convicted of a crime or disbarred in 381 murder cases where the conviction was reversed due to prosecutorial misconduct. 65, p. 1370 n. 251 Although scholars have written frequently and persuasively about ethical breaches in such cases (and the need to monitor such breaches), their words are generally met with overwhelming indifference.

This leads to a further inquiry: To what extent are prosecutors in the aggregate to blame for this state of affairs? I believe that several global charges can be leveled against members of the prosecutoriate with regard to the specific issue of the misuse and/or exploitation of evidence of mental disability in death penalty cases:

1. Some prosecutors consciously misuse mental disability evidence to play on the fears of, to scare, and to exploit the ignorance of jurors.

As I have already indicated, prosecutors can lie with impunity as to the likely denouement of an insanity acquittal. Further, Stephen Bright has noted, in the death penalty context, how “most prosecutors and other public officials exploit the victims of crime and the death penalty for political gain by stirring up and pandering to fears of crime.” 66, p. 1076 A report by Amnesty International focuses on the questions under consideration in this paper by concluding that “US prosecutors can exploit public ignorance or fear regarding mental illness by arguing that the ‘flat’ or ‘unremorseful’ demeanor of mentally ill defendants should be considered further grounds for imposing death sentences.” 67 And Professor Evan Mandery has pointed out how prosecutors have
systematically opposed legislation that would exclude persons with serious mental illness from being eligible for the death penalty.\textsuperscript{68, pp. 981-92 n. 7}

Consider Jamie Fellner’s discussion of prosecutorial conduct in the trials of defendants with mental retardation, noting her criticism of the ways that prosecutors frequently “vigorously challenge the existence of mental retardation, minimize its significance, and suggest that although a capital defendant may ‘technically’ be considered retarded, he nonetheless has ‘street smarts’—and hence should receive the highest penalty.”\textsuperscript{69, p. 12} More recently, in this past Supreme Court term, \textit{Hall v. Florida}\textsuperscript{70} held that Florida’s “bright line” test of a 70 IQ as the “gold standard” for executability was unconstitutional as it created an “unacceptable risk” that persons with intellectual disabilities would be executed [Ref. # 70, p. 1990], and was contrary to all professional judgment. In support of the majority’s views, Justice Kennedy noted that neither Florida nor its supporting \textit{amici} could “point to a single medical professional who supports this cutoff,” and that Florida’s rule “goes against unanimous professional consensus.” [Ref. # 70, p. 2000]. In a dissent that I can only characterize as whiny, Justice Alito dismissed this universal position of experts as not reflecting the position of the American people but, “at best, represent the views of a \textit{small professional elite}.” [Ref. # 70, p. 2005 (emphasis added)] So there is certainly some support in the US Supreme Court for this position that Fellner ably and appropriately decries.\textsuperscript{71-72}

2. Some prosecutors consciously seek out expert witnesses who will testify—with total certainty—to a defendant’s alleged future dangerousness, knowing that
such testimony is baseless.

The worthless and baseless testimony of Dr. James Grigson on questions of future dangerousness, and how that testimony led inexorably to the inappropriate executions of defendants with mental disabilities is well known.\textsuperscript{73}, pp. 19-28 Dr. Grigson was decertified by the American Psychiatric Association and the Texas Society of Psychiatric Physicians in 1995,\textsuperscript{74}, p. 556 n. 6 but he continued to testify in death penalty proceedings for years after that.\textsuperscript{75}, p. 257 n. 331; \textsuperscript{76}, p. *20 A simple WESTLAW search reveals 57 such cases from 1995 until his death in 2004.\textsuperscript{77} To the best of my knowledge, there have been no sanctions brought against any of the prosecutors who retained Dr. Grigson to testify in this cohort of cases

3. Some prosecutors suppress exculpatory psychiatric evidence.

In \textit{Brady v. Maryland},\textsuperscript{78} the Supreme Court ruled that “the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” [Ref. # 78, p. 87]. The goal advanced by imposing meaningful sanctions for \textit{Brady} violations is “not merely to punish the individual prosecutor but to ensure that the government does not feel empowered to violate constitutional mandates with impunity.”\textsuperscript{79}, p. 442

Over the years, there have been multiple examples of cases in which prosecutors have concealed psychiatric evidence that might have made trial impossible, that might have cast doubt on the veracity of state’s witnesses, that created doubt as to the
voluntariness of the state’s witnesses, and that created doubt as to the voluntariness of
the defendant’s confession. This cohort includes cases involving
prosecutorial suppression of evidence that defendants were legally incompetent to
stand trial, that key witnesses had multiple psychiatric hospitalizations, and of
psychiatric reports as to the extent of a defendant’s mental illness.

Judicial sanction is rare as well. In a study of 707 cases in which California courts
explicitly found prosecutorial misconduct, the offending prosecutors were “almost
never discipline[d].” In exhaustive independent studies of cases involving
prosecutorial misconduct in jury argument, Professor Bennett Gershman (a former
prosecutor) and Professor Christopher Slobogin were able to find only one decision in
which such conduct resulted in discipline. Another study of 318
cases involving homicide defendants who received new trials because of prosecutorial
misconduct, found that one prosecutor was fired (but was reinstated on appeal),
another received a 30 day in-house suspension, and a third’s license was suspended for
30 days for other misconduct in the case; not one of the 315 others received any kind of
sanction from a state disciplinary agency.

Thoughtful critics have crafted careful potentially ameliorative
recommendations, but there has been no response from organized prosecutors’
associations. Professor Jeffrey Kirchmeier and his colleagues suggest, inter alia, that
prosecutor offices should reevaluate their training programs for new and long-time
capital attorneys regarding ethics in capital cases and how to deal with pressures to
achieve convictions and death sentences, that such offices should responsibly evaluate their methods for internal sanctioning of lawyers who behave improperly in capital cases, that courts, prosecutor offices, and ethics committees should together ensure that prosecutors who egregiously violate ethics rules in capital cases are not allowed to act as counsel in further capital cases, and that states should pass laws mandating that the death penalty may not be sought a second time against a defendant when a prosecutor previously committed egregious misconduct such as intentionally withholding exculpatory evidence. [Ref. # 65, pp. 1382-84] Natasha Minsker focuses on trial practice and evidentiary rules, concluding, inter alia, that the “harmless error” analysis should not be applied to evaluate misconduct in death penalty cases, that prosecutors should not charge death for the purpose of securing a plea bargain to a lesser sentence, that they should provide open-file discovery and scrupulously disclose to the defense any and all information that might be beneficial to the defense, either during the guilt or the penalty phase, that they should not seek to mislead the jury about the legal requirements for finding in favor of death or about the legal consequences of their decision not to find for death, and that they should refrain from public comments that could prejudice the defendant in a death penalty case. [Ref. #34, pp. 399-402] Christopher Slobogin recommends that prosecutors be reported to the bar to be sanctioned (by reprimand, suspension or disbarment, depending on the circumstances of the case). [Ref. # 81, p. 35] . Myrna Raeder has concluded that prosecutorial offices should be required to adopt written policies governing the
introduction of forensic and other expert testimony, and that, at a minimum, prosecutors presenting specific expertise would be required to obtain specialized training. But again, there have been few actions voluntarily taken by prosecutors to implement any of these suggestions.

In short, prosecutors have virtually carte blanche authority to misinform jurors, to play to irrational fears, and to employ unscrupulous experts. And there are virtually no voices raised in opposition.

Conclusion

We are faced with the reality that prosecutors in this cohort of cases violate the law and the codes of ethics with impunity, and are often rewarded for it. To return to the Dylan lyric with which this paper began, they have power, they are greedy and they are corrupt. To return to the article’s title, the “ghost of the slavery ships” in Dylan’s songs are never far from the surface. My hope is—again, borrowing from the song’s lyrics— that this is "not all there is." [Ref # 4].
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