

Why I Think the Death Penalty Will Die

By Greg Westfall

“From this day forward I shall no longer tinker with the machinery of death.”

Justice Harry Blackmun (*dissenting to denial of cert.*)
Callins v. Collins, 510 U.S. 1141 (1994).

I just tried what I am sure will be my last death penalty case. It is a decision I made a year and a half ago – to stop doing capital work. It has just taken this long to be finished with them. *State of Texas v. Mark Anthony Soliz* was the last one that came in before I took my name off the list at the end of 2010. I tried my first death penalty case at the beginning of April, 1999. My last ended at the end of March, 2012. Thirteen years is enough for me.

I have had the good fortune, though, to be doing this during a watershed time for the death penalty. And from where I stand, it looks to me like the death penalty’s days are numbered. Here’s why.

On the one hand, we have *Wiggins v. Smith*, 539 U.S. 510 (2003) and the ABA and Texas guidelines for the defense of capital cases and all their requirements that mitigating evidence in a death penalty case be exhaustively investigated and presented to the jury. These documents provide not only the initial impetus for capital defenders to undertake an investigation “from the point of a defendant’s conception” (actually stated in the ABA Guidelines), but they also put the onus on the courts to pay for such an investigation. What’s more, it’s not just the Supreme Court, but the death penalty-consuming public who demands this. The part of the public that supports the death penalty is not going to support a death penalty that is administered without this type of work, both for guilt-innocence and mitigation.¹ They need this to feel comfortable with the death penalty. They need to feel like it’s fair.

Then, on the other hand, we have science. In particular, brain science. The state of the current research goes something like this: The brain is only partially developed at birth. Brain development after birth is driven more by experiences than genetics. A child who is abused or, worse, neglected, actually sustains brain damage. This brain damage evidences itself in many of the behaviors we see in our clients – hyperactivity, poor

¹ Having just gone through individual *voir dire* for six weeks, I can tell you that jurors are really concerned about exonerations. Anyone who could articulate an argument against the death penalty was likely to cite to innocent people in prison and exonerations. This doesn’t mean I think the courts or anyone else will do away with the death penalty because of exonerations, because I don’t. But it does translate to a demand that they be shown this is the right guy, number one, and that his case was presented as fairly as possible.

impulse control, aggressiveness, and a disturbing lack of empathy. The cluster has been often referred to as “attachment disorder,” although the inability to make attachments is really only part of it. There is also the multitude of insults to the fetus – such as fetal alcohol syndrome – that are becoming well-understood and evidence many of the same characteristics.

These discoveries serve to explain the behaviors in our clients that in the past were attributed to being simply “evil.” In fact, I believe that these discoveries and those to come will challenge the very notion of “evilness.” I asked every potential juror in this last case if anyone was just born evil. To a person they said “no.” To the extent that biology steps up with credible explanations for bad behavior, then perhaps we as a society can depend less and less on simplistic notions like “evil.” And to the extent that such explanations are given – and, ultimately, believed – our client’s moral blameworthiness should be reduced accordingly.

It comes down to fault and choices. Is our client like he is through no fault of his own? If so, then he should be less moral blameworthy. He made a choice to kill, yes, but how much did his disability *inform* that “choice?” In this light, the superstition of evilness begins to give way to something like a rational explanation. Ultimately, the majority of people will accept the science of brain development and abandon the simplistic notion of “evil.” When they do, and when it is shown that even this “monster” in front of them was created through no choice of his own, then they will take this into account. Life sentences will result.

So how do these two things feed off each other? Well, through the massive *Wiggins*- and ABA Guidelines-driven investigations, lawyers will discover and present the scientific answers to more and more educated and accepting juries. At the same time, the science will continue to evolve, revealing still more answers and better ways to diagnose and present them. Already, brain imaging has arrived to supplement the neuropsychological testing we have grown up with. That science is relatively new and quickly evolving.

And brain imaging, like the experts who are needed to present it, is really, really expensive. Which brings me to the reason I believe the death penalty’s days are numbered.

I have always said that the death penalty is a luxury. I define a luxury as anything you want but don’t need. We don’t need the death penalty. Everyone with any sense will agree that it doesn’t offer general deterrence. Anyone who cares to really research the issue even just a little can tell you that a death sentence is way more expensive than a sentence of life without parole. And anyone who works for TDCJ and has an ounce of integrity and honesty will admit that our prison system has no problem housing even the worst capital murderers.

The death penalty, simply stated, is unnecessary. It is redundant. It is a luxury. And this luxury is getting very expensive indeed. And there is no way to stop it now.

Brain science tells us that mitigating evidence is in there, we just have to find it. The methods for doing so, and presenting what we find to a jury are becoming more sophisticated and, yes, more expensive by the day. *Wiggins* and the ABA Guidelines absolutely require the defense team to explore every possible avenue of mitigation. By extension, the courts have to pay for it and they do, out of the pockets of we, the people. Over time, as the people who make up juries become more accepting of brain science, the rate of extremely expensive life sentences will only go up. It is a cycle that cannot now be undone.

So my humble prediction is that the death penalty will die, not because we all collectively decide it is wrong, but because we all collectively decide it is simply not worth the money. And while it might have been nice to see our society evolve to the point where we abandon the death penalty on more philosophical grounds, hey, whatever works.