

6. PHYSICIAN PARTICIPATION IN CAPITAL PUNISHMENT: EVALUATIONS OF PRISONER COMPETENCE TO BE EXECUTED: TREATMENT TO RESTORE COMPETENCE TO BE EXECUTED

HOUSE ACTION: RECOMMENDATIONS ADOPTED AND REMAINDER OF REPORT FILED

INTRODUCTION

At the December 1992 meeting of the House of Delegates, the Council on Ethical and Judicial Affairs issued a report titled *Physician Participation in Capital Punishment*. In that report, the Council both reiterated its view that physicians should not participate in executions and described which physician activities constitute participation in an execution. The Council reserved judgment on the issues of (a) testimony by physicians regarding the competence of a condemned prisoner to be executed and (b) treatment of an incompetent prisoner by a physician to restore the prisoner's competence to be executed. After consulting with professional associations and other interested persons, the Council on Ethical and Judicial Affairs developed the following analysis on these two issues.

TESTIMONY REGARDING COMPETENCE TO BE EXECUTED

In its earlier report, the Council discussed the propriety of a physician testifying to a defendant's competence to stand trial. Ethical concerns are raised because the physician's testimony may ultimately contribute to the prisoner's execution. Without a finding of competence, the defendant cannot stand trial. Nevertheless, the Council concluded that it is acceptable for physicians to provide testimony. While there may be heavy reliance on physician testimony, the physician does not make the formal determination of competence that results in the defendant's ability to stand trial and be sentenced to execution. It is the judge who determines whether the defendant is competent to stand trial, weighing in part the testimony of the physician. The Council came to a similar conclusion regarding physician testimony about the defendant's competence during the trial or sentencing phase of a capital case. In both settings, physician testimony is ethically permissible. A jury or judge decides the guilt or innocence of the defendant and whether the death penalty should be imposed. As a matter of information, only about three percent of criminal homicides in Florida result in a death sentence.

Although physicians may ethically testify at the pre-trial, trial or sentencing phases, some physicians have strongly held beliefs against involvement in the process that may lead to a defendant's execution. There is no compelling reason to insist that these physicians act against their consciences.

Different concerns are raised when a physician is asked to testify to the competence of a condemned prisoner to be executed. The question of competence to be executed may arise after the final decision to execute has been made. Under the law, incompetent prisoners cannot be executed. If a physician's examination and testimony support a finding of the defendant being competent, this information will be considered by a judge or hearing officer in determining legal competence prior to carrying out the sentence.

As the Council's previous report emphasized, physicians must not use their professional knowledge and skills to help cause the death of prisoners. This is not to say that physicians should not participate in determining competence, since without physician participation, individuals might be punished unjustifiably. It is the responsibility of the physician to fully evaluate the prisoner applying medical criteria to assess the prisoner's mental status. Physician participation in the process can be justified on the basis of the importance of having physicians assist in the administration of justice. Physicians' participation in the proceedings assists society in ensuring that individuals are treated fairly and punished only when it is appropriate. The important principle in this situation is that the physician is acting as an advocate of justice, not as a source of punishment. The physician is acting as an expert advisor, providing important information that assists in the pursuit of a just result. While it is difficult to estimate the degree of reliance placed on physician testimony, in some instances it may prove to be the decisive factor.

The concerns with physician participation in evaluations of competence raise difficult ethical issues, but in the end physician participation appears more like than unlike physician participation in other forensic evaluations in capital cases. Participation in evaluation of a competence to be executed therefore is not unethical per se. However, certain safeguards are necessary. Psychiatric evaluation should be only one aspect of the information taken into account by the ultimate decision maker, a role that is legally assumed by a judge or hearing officer. Prisoners' rights to due process at the competence hearing should be carefully observed.

TREATMENT TO RESTORE COMPETENCE TO BE EXECUTED

More complicated ethical dilemmas arise when physicians are asked to provide treatment to restore competence of a condemned person who has been found incompetent for execution. Such prisoners are often psychotic and may be experiencing severe psychic torment accompanied by self-destructive behavior and, if left untreated, could suffer serious harm. Their treatment will usually involve the administration of psychotropic medications. Even in cases with milder psychiatric illness, a prisoner could suffer without treatment. On the other hand, responding to the state's request to provide treatment so that the prisoner's competence can be reevaluated to determine if the sentence can be carried out raises the specter of so close an involvement as to transgress the boundary of direct participation in execution itself. Such dilemmas would be avoided if states were to adopt the solution recommended to the U. S. Supreme Court by the AMA and APA in their amicus curiae brief, *Perry v. Louisiana*: commutation of the incompetent prisoner's sentence to life imprisonment without the possibility of parole. This would allow treatment of a prisoner's psychiatric disorder without further ethical concerns. Maryland has taken this approach by statute, and its consideration by other jurisdictions is encouraged.

In the absence of commutation, there is no simple answer to the ethical dilemma with which physicians are confronted. Some commentators have suggested that a critical issue is whether the prisoner has consented to treatment. There are problems with the consent issue. If the prisoner is incompetent to be executed, it is very unlikely that he/she would be competent to consent to treatment. The problems with incompetence could be avoided if the prisoner had completed an advance directive. However, the prisoner's consent is not sufficient to justify treatment if treatment would violate a physician's ethical obligations.

On balance, the arguments generally weigh against treatment to restore competence since the prisoner would be considered worse off with treatment and execution than to continue without treatment. Physicians are obligated to serve the interest of their patients first when they are providing treatment.

There may, however, be exceptional circumstances in which treatment is justified even though it may have the unintended effect of restoring competence for execution. As noted in the Council's earlier report on physician participation in capital punishment, a physician's obligation to avoid unethical participation in executions does not require total abandonment of the condemned. Appropriate comfort and medical care for death row prisoners can be provided with the individual's informed consent, or in emergencies, with implied consent. If prisoners lack competence to provide informed consent to treatment, therapeutic interventions, including the use of psychotropic medications, can be provided in accordance with ethical principles and state law. Psychotic prisoners may engage in harmful activity such as repetitive head-banging, attempts at self-castration, enucleation of their eyes, or eating their own feces. Severe paranoia can lead to refusal of all food and fluids. Catatonia, should it develop, can be life-threatening, resulting in pneumonia, pulmonary thromboembolism and circulatory collapse.

In such instances in which there is extreme suffering, medical intervention which is intended to mitigate the level of suffering is ethically permissible. On the other hand, if treatment is primarily directed to restore competence to be executed, it is ethically unacceptable. The Council recognizes that it will not always be easy to distinguish between these situations, perhaps even to determine when treatment initiated to reduce extreme suffering should be stopped. While even brief treatment of a severe psychotic disorder may have the unintended effect of restoring the prisoner's competence for execution, there is no alternative at this time than to rely upon the treating physician to exercise judgment in deciding when and to what extent treatment is necessary to reduce suffering. The cumulative experience of physicians applying these principles may lead to future refinements.

To minimize the ethical conflict to which the treating physician is subject, treatment should be provided in a properly secured general medical or psychiatric facility, not a cell block. The task of reevaluating the prisoner's competence to be executed should be performed by an independent examiner. Given the ethical conflicts involved, physicians who would prefer not to be involved with treatment of an incompetent, condemned prisoner should be permitted to be excused or to transfer care of the prisoner to another physician.

TREATMENT OF COMPETENT PRISONERS TO BE EXECUTED

When a condemned prisoner requires medically necessary psychiatric intervention but is not affected by psychiatric disease as to be incompetent to be executed, then treatment is appropriate.

RECOMMENDATIONS

The Council on Ethical and Judicial Affairs recommends that the following treatment be adopted:

1. Physician participation in evaluations of a prisoner's competence to be executed is ethical only when certain safeguards are in place. A physician can render a medical opinion regarding competency which should be merely one aspect of the information taken into account by the ultimate decisionmaker, a role that legally should be assumed by a judge or hearing officer. Prisoners' rights to due process at the competency hearings should be carefully observed.
2. When a condemned prisoner has been declared incompetent to be executed, physicians should not treat the prisoner to restore competence unless a commutation order is issued before treatment begins.
3. If the incompetent prisoner is undergoing extreme suffering as a result of psychosis or any other illness, medical intervention intended to mitigate the level of suffering is ethically permissible. It will not always be easy to distinguish these situations from treatment for the purpose of restoring the prisoner's competence and, in particular, to determine when treatment initiated to reduce suffering should be stopped. However, there is no alternative at this time other than to rely upon the treating physician to exercise judgment in deciding when and to what extent treatment is necessary to reduce extreme suffering. The cumulative experience of physicians applying these principles over time may lead to future refinements.

Treatment should be provided in a properly secured, general medical or psychiatric facility, not in a cell block. The task of reevaluating the prisoner's competence to be executed should be performed by an independent physician examiner.

4. Given the ethical conflicts involved, no physician, even if employed by the state, should be compelled to participate in the process of establishing a prisoner's competence to be executed if such activity is contrary to the physician's personal beliefs. Similarly, physicians who would prefer not to be involved with treatment of an incompetent, condemned prisoner should be excused or permitted to transfer care of the prisoner to another physician.

(References pertaining to Report 6 of the Council on Ethical and Judicial Affairs are available from the Ethical Standards Division Office.)