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Death Penalty Debate—Can New Violence Be Predicted?

■ Law: Warnings by expert witnesses unscientific, critics say, while civil courts have tough standard on reliability.

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LUBBOCK, Texas—Could it be that American courts have a looser standard for evidence when a person's life is at stake than when a corporation is defending its money?

That stark question is increasingly being raised by lawyers, legal scholars and, most recently, a highly regarded conservative federal judge.

It is at the heart of appeals in two pending death penalty cases, including that of a man, Miguel Angel Flores, who is scheduled to be executed this week. And it could reopen a significant front in the legal wars over capital punishment.

At issue is how much leeway scientists, doctors and other expert witnesses should have to present opinions to juries.

In the two states that lead the nation in executions—Texas and Virginia—the law asks juries to decide if a defendant is likely to be "a continuing threat to society."

Prosecutors frequently use psychiatric experts to offer their opinions on that question. Particularly in Texas, the psychiatrists almost never actually examine the defendants, but virtually always predict with a strong degree of certainty—sometimes 100% certainty—that the defendant will commit a violent act in the future. Testimony of that sort has been used in cases of more than 100 people on death row in Texas alone, according to a recent study.

Such predictions are widely discounted among scientists and would almost certainly never be allowed in a civil suit—a case over a defective

product, for example—legal experts on both sides of the death penalty debate say. The gap between what is allowed in the two types of cases is at the heart of appeals being filed by lawyers for Flores and another Texas inmate, Joe Lee Guy. Exams Called 'Hindrances'

Several studies have suggested that attempts to predict a person's dangerousness are wrong more often than right. And the American Psychiatric Assn. for many years has taken the position that "medical knowledge has simply not advanced to the point where long-term predictions . . . may be made with even reasonable accuracy."

One of the most frequently used psychiatrists in Texas death penalty cases is E. Clay Griffith, 75, now retired and living in Dallas. He testified against Flores and Guy.

In an interview, Griffith said he has testified in more than 145 capital cases in Texas—almost always for the prosecution. "I didn't lose any," he said.

There are at least 122 death row inmates in Texas whose trials included testimony from a psychiatrist about future dangerousness, according to a search of court records by the Texas Defender Service, a nonprofit organization that specializes in capital appeals.

Interviewing Flores would not have helped his assessment, Griffith said, adding that sometimes examining the defendant "is a hindrance in comparison to a hypothetical question."

In the Flores and Guy cases, Griffith said, there was an overwhelming likelihood that the defendants would commit violent acts in the future. He did not interview either man.

In Guy's case, Griffith said there was a "99, a 100%" certainty that the defendant would commit a violent act in the future, describing him as a "moral imbecile" with an antisocial personality disorder.

Griffith based his prediction on a long hypothetical question posed by a prosecutor describing the crimes and a review of some of the defendant's medical and school records.

Testimony of that sort draws

consistent criticism from leading psychiatrists.

"I don't believe a psychiatrist can respond to a reasonable degree of medical certainty on a hypothetical question about the future dangerousness of a defendant he has never examined," said Dr. Paul Appelbaum, chairman of the psychiatry department at the University of Massachusetts Medical School and vice president of the American Psychiatric Assn.

"It is like an art appraiser attempting to appraise the value of a painting blindfolded by merely being able to touch the painting," Appelbaum said.

The question of whether that sort of testimony should be allowed came before the U.S. Supreme Court in 1983 in a case from Texas. The justices said such testimony was allowable because jurors could make up their own minds about whether to believe it.

Objections to expert psychiatric testimony are "founded on the premise that a jury will not be able to separate the wheat from the chaff," the late Supreme Court Justice Byron R. White wrote in the opinion upholding the practice. "We do not share in this low evaluation of the adversary process."

In 1983, White's statement would have applied in suits over defective products, too. But since then the high court and appeals courts in several major states have taken a sharply different view of expert testimony in civil cases.

Responding to a steady drumbeat criticizing the use of what critics call "junk science" in court, judges have moved steadily to rein in the use of expert witnesses.

The rule in civil cases is now that expert testimony must be "not only relevant but reliable" before judges should allow juries to hear it. Judges should allow experts to testify in civil trials only if the theory they are putting forth has been rigorously tested and found reliable by the scientific community, the Supreme Court ruled in a 1993 case.

More Challenges Likely

The two lines of cases create

dramatically different rules, legal experts say.

"Courts are taking the issue of 'reliability' of expert testimony more seriously in civil cases than criminal cases. We seem to value money more than human life," said Myrna Raeder, a professor at Southwestern University Law School in Los Angeles.

Raeder expects to see more and more challenges to expert testimony that is offered by prosecutors in death penalty cases. Already, she notes, some courts have rejected expert testimony that would have been routinely accepted in the past—on hair evidence, for example, and handwriting analysis.

Defenders of the use of psychiatric predictions have tried to avoid an argument over the contrast with civil cases. The Texas attorney general's office, for example, has declined to discuss the issue beyond stating that the Supreme Court's 1983 decision on psychiatric testimony remains in force.

Terry D. McEachern, the district attorney in Hale County, Texas, who prosecuted Guy, prefers to focus on the impact within the criminal courtroom. "I think it aids the jury," he said, referring to the psychiatric testimony.

But Michael Gottesman of Georgetown University Law Center in Washington, argues that issues raised by the differing standards cannot be avoided.

The current rule in criminal cases "looks totally out of step" with the decisions in civil suits, he said. The standard to admit expert testimony "should be higher in a criminal case, particularly when you're looking at putting someone to death," he added.

The use of psychiatric testimony in capital cases has also been sharply criticized by Peter Huber, a fellow at the Manhattan Institute in New York and a former law clerk for Justice Sandra Day O'Connor whose influential book denouncing junk science is widely credited with sparking the legal movement to limit expert testimony.

The sharpest recent criticism has come from an unexpected source: U.S. Appeals Court Judge Emilio M. Garza of San Antonio. A conservative jurist who was appointed by President George Bush in 1991, Garza has upheld numerous death penalty verdicts.

In a recent court opinion involving Flores, Garza said psychiatric testimony predicting dangerousness "is, to put it bluntly, unreliable and unscientific."

The judge acknowledged that the Supreme Court's 1983 ruling bound him, but wrote that "it is as true today as it was in 1983 that neither the [Supreme] Court nor the state of Texas has cited a single reputable scientific source contradicting the unanimous conclusion of professionals in this field that psychiatrist predictions of long-term future violence are wrong more often than they are right."

Garza's view, however, was rejected by the two judges who heard Flores' appeal with him. Under Texas law, the "jury is asked to judge future dangerousness," Judges Patrick E. Higginbotham of Dallas, a President Ronald Reagan appointee, and Fortunato P. Benavides of Austin, a President Clinton appointee, wrote.

Because the jury has to make that judgment, "we cannot then reject as constitutionally infirm the admission into evidence of the same judgment made by a trained psychiatrist," they said.

One of the unusual twists of the issue is that the Texas Supreme Court and Gov. George W. Bush have been at the forefront of the effort to rein in the use of expert testimony in civil cases.

Maintaining that a "litigation explosion" has imposed "significant and unnecessary costs on U.S. high-tech companies, small businesses and consumers," Bush made changes in legal rules one of the centerpieces of his campaign for governor in 1994.

During his presidential campaign, he has said he will extend his work to the federal level if he is elected, pledging to "curb the use of 'junk science' by raising the federal standard for the admission of scientific testimony."

The Texas Supreme Court has issued a series of rulings saying that precautions must be taken in civil cases to prevent "expert" witnesses from having an undue impact on jurors.

"An expert witness may be very believable, but his or her conclusions may be based on unreliable methodology," Judge Raul A. Gonzalez wrote in one widely followed case.

"A jurist with a degree should not be allowed to testify that the world is flat, that the moon is made of green cheese, or that the Earth is the center of the solar system," he said.

Flores and Guy face an uphill battle in getting the Supreme Court to reconsider its position. Both defendants have raised other issues. Guy's lawyers argue

that their client's original trial was tainted by a lawyer who was drunk and using drugs at the time—charges the attorney has denied.

In Flores' case, the most prominent other issue is that he is a Mexican citizen and alleges that prosecutors failed to tell him he had a right to contact officials from his country's consulate before he was questioned. Although courts have agreed that failing to notify foreign citizens of that right violates an international treaty, they have in the past refused to block executions on that ground.

Flores faces execution for the rape and murder of Angela Tyson in Hutchinson County in 1989.

Guy was convicted of a 1993 robbery-murder in Plainview, a town in northwest Texas, 50 miles from Lubbock. Guy was scheduled to be executed in June but won a stay from a federal district judge. His claims are scheduled to be heard by a federal district judge in Lubbock on Nov. 20.

Photo:

A judge writing in the case of Miguel Angel Flores said predictions of dangerousness are unscientific.

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Myrna Raeder, Professor at Southwestern University Law School

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