

## USE OF SODIUM AMYTAL IN AN INSANITY AND DIMINISHED CAPACITY DEFENSE OF A CAPITAL MURDER CASE

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*A twenty-seven-year-old man was arrested after having shot and killed his estranged girlfriend with a semiautomatic weapon in a crowded bar. His defense attorney consulted the author at his private clinical/forensic practice in order to explore the possibility of an insanity and/or diminished capacity defense. The extensive evaluation is described. A taped sodium amytal interview, the nature and breadth of expert witness testimony and the issue of diminished capacity in this capital murder case are discussed.*

### THE OFFENSE

Dennis entered a bar in New Jersey. He had a scruffy beard and wore Army fatigue pants and a hooded sweatshirt. He ordered a couple of glasses of ginger ale and was quiet, but smiled almost constantly while seated at the bar. He left the bar and returned less than an hour later, consumed one beer and drank approximately three sips from a second beer. Penny, who had dated Dennis in the past, was employed there as a dancer. When Dennis returned, Penny was seated at the bar with her boyfriend. Penny told her boyfriend that Dennis was crazy and that he ought to be committed. She said she was afraid of him and had told her boyfriend he gave her "the creeps." Penny also informed her boyfriend that Dennis had followed her the day before to a different bar, where she also worked as a dancer.

The boyfriend purposely and conspicuously kissed Penny in Dennis' presence before she went up on the stage to perform. As Penny danced in only a bikini top and G-string, Dennis stared straight at her. When she finished her routine, she put on an oversized man's sport shirt and tied it around her waist. Dennis approached and grabbed her by the shoulder,

pushed her against the bar, and began shaking her. She screamed for help. As several customers approached, Dennis pulled out a gun from underneath his sweatshirt and began firing at Penny. Her new boyfriend was unable to help her, as he was pushed through the door by patrons who left the bar in a panic once the shooting started. After wounding Penny, he left the bar. Penny died of approximately fourteen gunshot wounds from hollow point bullets within moments of the assault.

Following the shooting, Dennis drove to his aunt's home, told her that he had shot his former girlfriend and asked her to telephone the bar to inquire about her condition. Dennis then produced the gun from under his sweatshirt and held it to his head. His aunt immediately called his father at work, who drove to the aunt's home. On entering the house, he found his son sitting at the kitchen table with the gun pointed at his stomach. "I am going to kill myself," he said, warning his father to stay away from him. After pleading with his son for half an hour, the father was finally able to convince him to give him the gun. He also arranged for Dennis' surrender to a police officer. The father turned over to the police the 9 mm semiautomatic weapon that his son had used during the shooting. He also gave the police fifteen hollow point bullets that had been in Dennis' possession. Ballistics disclosed that the bullets recovered from Penny's body had been discharged from the same gun.

At 3:00 a.m. the day after the shooting, Dennis attempted to hang himself in his cell with strips ripped from a blanket and tied to a door hinge. After his suicide attempt was thwarted by a corrections officer, Dennis asked the officer to shoot him because he had "done something very bad and didn't deserve to live." He had just killed his girlfriend, he said, and he had nothing else left to live for.

Dennis was admitted to Trenton Forensic Psychiatric Hospital later that day. The provisional diagnosis on admission was Major Depressive Disorder, Recurring Type; however, he did not present any signs of being psychotic and did not claim to have had any hallucinations. Dennis remained hospitalized for about 15 months because he was depressed and posed a high risk of committing suicide.

#### THE FORENSIC CONSULTATION

Within a few weeks of the arrest, the defendant's attorney referred him to me at my private clinical/forensic practice setting. The attorney requested consultation regarding the possibility of an insanity and/or diminished capacity defense. I agreed and was to become one of four expert witnesses to testify on the defendant's behalf at trial. I interviewed Dennis on four occasions over five months at the Trenton State Psychiatric Facility. In addition, collateral interviews were conducted involving Dennis' parents, employer, close friends and a former girlfriend. In addition, the following materials were reviewed: records of the police investigation, statements given by the several eyewitnesses to the incident, the transcript of the grand jury hearing, the psychiatric assessment conducted at the Trenton Forensic Facility, the high school records of the defendant and the medical records from the Child Guidance Clinic, where the defendant had been evaluated several years earlier.

I presented my observations and impressions at a meeting attended by the defendant's attorney and two other mental health experts. My diagnosis was a major depression with mood congruent psychotic features and a borderline personality disorder. The defendant, in my opinion, met the criteria for exculpability under the M'Naghten Rule. Although the other experts concurred with the diagnosis, there was some question as to the degree to which Dennis' thinking was psychotic at the time of the shooting. At the conclusion of this meeting, the participants agreed that a sodium amytal test should be conducted, as the defendant was amnesic for events immediately preceding the shooting at the bar.

#### THE SODIUM AMYTAL INTERVIEW

Pursuant to a court order, I had the opportunity to take part in a sodium amytal interview of the defendant conducted by the defendant's psychiatric expert. During this interview, the defendant (for the first and only time) described the events prior to the shooting. The following is an excerpt from the transcript of the videotaped sodium amytal interview: (I = interviewer, D = defendant)

I: Did you hurt her?

D: I don't know.

I: Did you kill her?

D: I looked at her and she turned into the devil.

I: She turned into a devil?

D: Yes.

I: Tell me what you saw.

D: I seen a devil.

I: What did it look like?

D: The devil with pitchforks and everything and fire and everything.

I: What did you do when you saw the devil?

D: I panicked and I got scared; he's coming to get me. And I shot, I think I got my gun and shot at her which I'm not absolutely sure.

I: What did you do then?

D: I started pulling the trigger.

I: How many times?

D: I don't know. I heard 20, other people said 25. I didn't want to kill nobody even if it were the devil because that God can help the devil.

I: You saw the devil?

D: Yeah, every time I think about it no matter where I go I see devils and every time I see her I can just...just the way she wiggled her...am I allowed to say this?

I: Sure anything you want.

D: She wiggled her bottom, she wiggled her breasts and I could just picture her with that mean face, she was beautiful but I could just see the horns sticking out of her and her tail. And breathing dragon with a pick.

I: You actually saw that?

D: I seen the face and image of the devil.

I: Can you describe the face?

D: It was horrible and then sometimes I think and I look at it, it was like it wasn't the devil it was her. Penny, what did I do to you? No you weren't Penny, you were the devil...

Several minutes later into the interview, it continues:

I: When did you realize that you killed Penny?

D: I think right there.

I: Right there? You said you saw the devil?

D: Yes.

I: When did you realize that when you shot you really shot her and not the devil?

D: I think maybe the bullets when they hit her or something changed her back over.

Under the influence of sodium amytal, the defendant said that he thought that Penny was evil. He formulated a plan to take her to the police and have her arrested. Dennis went home and got his gun in order to bring Penny to the police. During the drive back to the bar, the defendant began to believe that the devil was in Penny and he visualized doing a "positive thing by killing the devil." The defendant re-entered the bar and watched Penny dance. When she finished her dance and walked toward him, defendant saw the devil coming out of Penny's body. It had a red face, horns and red tail. Dennis then pulled his gun and killed the devil. When she fell to the ground, defendant realized that he had not shot the devil, but had shot Penny.

Following a review of the videotaped sodium amytal interview, the defendant's experts agreed that the defendant met the criteria for a M'Naghten and/or diminished capacity defense. Prior to trial, the prosecutor moved that the judge should preclude the use of the videotape of the sodium amytal interview of the defendant, the testimony of those conducting the interview, any mention of the sodium amytal interviews by other experts and the testimony of the experts to the extent that they relied on the results of the sodium amytal interview.

The prosecutor's grounds for this motion were that the use of sodium amytal is not sufficiently scientifically reliable to aid the trier of fact in the resolution of the issues. The prosecutor argued the reliability is demonstrated by showing that the technique at issue has gained general acceptance in the scientific community. This standard was originally set forth in the seminal case of *Frye v. U.S* (1).

The defense's position regarding the standard for admissibility of expert testimony and evidence was governed by the case of *U.S. v. Downing* (2). The defense maintained that the *Frye* general acceptance test had been unequivocally rejected as too malleable, conservative, suffering from serious flaws and at odds with the spirit, if not the precise language, of the Federal Rules of Evidence. Support was presented for the position that narcoanalysis should only be used as an auxiliary procedure, along with other psychiatric techniques for gathering data about a subject's personality. In this case, the sodium amytal test provided the defendant's experts with information they could not otherwise obtain. However, the sodium amytal interview was only one of many procedures used by the experts for gathering information about the defendant.

The trial court stated: "The precise issue before me has never been, as far as I can determine, decided in New Jersey. That issue is, may an expert witness testify as to sanity when his opinion is based in part upon a claimed delusion when the only statement regarding that delusion from the accused was obtained while under the influence of a sodium amytal interview?"

The trial court made findings of fact as follows:

- 1) The defendant's experts were eminently qualified.
- 2) The responses elicited during sodium amytal interviews are helpful as a diagnostic tool and are used as a therapeutic tool.
- 3) That all experts agree that responses based on a sodium amytal test are reasonably relied upon by experts in the field of psychiatry in forming opinions on inferences as to sanity.
- 4) That Rule 56 mandates the admission into evidence of the testimony and opinion of defendant's experts.

- 5) The responses elicited during a sodium amytal interview are not yet admissible as substantive evidence even if the court were to use the test in *U.S. v. Downing*.

After hearing all the witnesses at the evidentiary hearing, the trial judge denied that portion of the state's motion which sought to preclude defendant's expert medical witnesses from giving opinion testimony which was based in part on responses elicited during the sodium amytal interview. The judge noted that there had been testimony produced at the hearing to the effect that responses elicited during a sodium amytal interview are reasonably relied upon by experts in the field of psychiatry as a diagnostic tool and in forming opinions as to sanity. Thus, admission of this opinion testimony was required, since the facts or data upon which an expert bases an opinion need not be admissible in evidence as long as they are of a type reasonably relied upon by experts in the field. However, the judge granted that portion of the prosecutor's motion which sought to preclude mention of the term, sodium amytal.

The judge was concerned that if the jury heard the term, sodium amytal, it might unfairly conclude that whatever defendant said under the influence of this "truth serum" must be true. The judge further held that he would not permit the defendant's attorney, during the direct examination of his expert witnesses, to elicit the fact that a sodium amytal interview had been conducted. However, the judge ruled that the prosecutor would be allowed during cross-examination to elicit the fact that the opinions of defendant's experts were based upon the results of a sodium amytal interview in an effort to discredit the opinions of these witnesses. The prosecutor did not take advantage of this opportunity. Hence, sodium amytal was never mentioned in the jury's presence.

In his analysis, the trial judge found that admitting the evidence substantively would overwhelm, confuse or mislead the jury. The trial judge felt that the jury would conclude that sodium amytal is a truth serum and that the jury "might be overwhelmed by the use of the term 'sodium amytal' and/or 'truth serum' and attribute to it a mythical aura of infallibility." Consequently, the judge ruled that the jury could not see the videotape. The judge further ruled that the experts involved in the administration of

the test must tell the jury that they arrived at their conclusions through their tests and interviews of the defendant.

In a sense, the judge's ruling represented a middle ground, allowing testimony about the doctors' findings, but refusing to permit discussion of sodium amytal, unless the issue was raised by the prosecution during the trial.

#### THE TRIAL

Following eight days of jury selection, the trial commenced and after one month concluded with a jury verdict of guilty on all counts of the indictment. The court sentenced the defendant to a term of life imprisonment, 37 1/2 years without parole. Notice of appeal was filed a month after the sentencing.

I testified for approximately seven hours at the trial. On direct examination, a detailed description of both the process and the findings of the evaluation were presented. The diagnosis of Borderline Personality Disorder was presented, as well as the tendency for persons having this type of disorder to regress into a transient psychotic state. I testified that the defendant was in a psychotic state at the time of the shooting, during which he hallucinated that Penny was the devil, and indicated that the defendant did not appreciate the nature of his act, nor did he know that what he was doing was wrong. In fact, the defendant believed that he was riding the world of something evil.

In order to develop the basis for these conclusions, it was important to buttress expert testimony with considerable historical support for both the etiological underpinnings of the defendant's borderline personality and the family's lifelong focus upon the concept of evil, in general, and the devil, in particular. The direct examination could then proceed to cover the following issues:

- 1) An overview of normal development during the first 36 months of life, with specific emphasis upon the developmental issues during the symbiotic and the separation/individuation stages.
- 2) The definition of Borderline Personality Disorder and an overview of the developmental issues involved in the etiology of this disorder.



- 3) A description of the events during the first 36 months of the defendant's life.
- 4) The criteria for Borderline Personality Disorder and illustrations of the way in which the defendant met seven of the eight criteria.
- 5) A discussion of the tendency of those with severe Borderline Personality Disorders to regress into transient psychotic states.
- 6) A discussion of the results of a defense neuropsychological evaluation wherein defendant's Rorschach responses included numerous perceptions of images of the devil.
- 7) An historical overview of defendant's family preoccupation with the devil and the importance of the Málachio or overlooks.
- 8) A discussion of defendant's having previously hallucinated the image of the devil in his grandmother's sofa.

As part of this testimony, emphasis was placed on a discussion of the findings of the sodium amytal interview (without any mention of the words sodium amytal) and a discussion of the stressors in the defendant's life that were impacting upon the defendant prior to the shooting.

On cross-examination, I differentiated between the Borderline and Antisocial Personality Disorders. On redirect examination, I discussed the literature review that had been conducted in preparation for testimony, particularly as it related to the transient psychotic state of the defendant (3, 4, 5). Although none of the prosecution experts opined that the defendant was in a psychotic state at the time of the incident, they did agree that a person with a personality disorder may experience a transient psychotic episode when exposed to stress or drugs. They also agreed that a person with a borderline personality, when exposed to stressors similar to those confronting the defendant, might experience a brief psychotic episode during which he would be out of touch with reality.

The major question before the jury, however, was whether the defendant hallucinated and actually believed he saw the devil, as he reported in the sodium amytal interview.

### THE APPEAL

The defendant's appeal was based upon two central issues: that the trial judge erroneously excluded the admission of the sodium amytal interview and videotape, as well as expert opinion testimony based upon the interview and that the trial judge erred by refusing to give a requested charge on the defense of diminished capacity.

In reference to the exclusion of the sodium amytal interview, the legal issues, as well as mention of the case law pertaining to the admissibility of the interview, were explored above in the discussion of the evidentiary hearings that were held prior to the trial.

In reference to the diminished capacity issue, defendant's counsel argued that the charge was justified, based on testimony about the defendant's drug abuse disorder, as well as the fact that he consumed alcohol and marijuana within a 24-hour period prior to the shooting. The trial judge denied the request, because he believed that none of the expert witnesses had testified that defendant lacked the capacity to act purposefully or knowingly.

In his appeal, defense counsel cited *State v. Breakiron*. In *Breakiron* (6), the New Jersey Supreme Court held that a defendant is entitled to have the jury instructed that evidence of mental disease or defect may be considered either with respect to an insanity defense or as negating the state of mind required for a particular offense. The court held that the jury shall determine whether the defendant has proven by preponderance of the evidence that the claimed mental disease or defect exists and that a diminished capacity charge be given to the jury when competent reliable evidence has been offered. Defense counsel maintained that by failing to charge diminished capacity, the trial judge prejudiced defendant in that his chances for a guilty verdict to a lesser included offense were greatly reduced.

The appeal was argued before the Appellate Division of the Superior Court of New Jersey. The Appellate Court rendered its decision and the murder conviction was reversed. Rather than retry the case as a noncapital case, the State of New Jersey agreed to a plea bargain wherein defendant received a sentence of 39 years (19-1/2 years without parole). The defen-

dant had previously been sentenced to life imprisonment (37-1/2 years without parole).

The decision stated, "As there was no dispute that defendant shot and killed [Penny], we emphasize the psychiatric and expert testimony which required a jury instruction. In doing so, we note that as the trial was conducted before our Supreme Court's decision in *State v. Breakiron*, the trial judge did not have the benefit of that decision, which similarly reversed a murder conviction because of the trial judge's failure to charge diminished capacity." The New Jersey statute was cited that allows the introduction of evidence of mental disease or defect relevant to the question of whether the defendant had the requisite mental state, which is an element of the crime charged. The decision stated: "A diminished capacity charge must be given to the jury when competent reliable evidence has been offered. A trial judge is obliged to instruct the jury to consider relevant evidence tending to show that a defendant did not have the requisite state of mind to commit the offense charged."

In summary, the Appeals Court stated, "The jury might well have assessed the defendant's state of mind differently had it been specifically instructed that the proofs concerning his mental condition could bear on his ability to act purposely or knowingly. Hence, consideration of the diminished capacity defense might well have led the jury to find that defendant acted only recklessly, or without any culpable state of mind, and the error cannot be found to be harmless." Finally, on the issue of the exclusion of the sodium amytal interview, the Appeals Court found no error on the part of the trial judge. The decision stated, "We find no error prejudicing defendant by virtue of the judge's rulings on the subject of the sodium amytal interview."

#### DISCUSSION

The collaborative relationship among defendant's experts led to the recommendation that a M'Naghten and diminished capacity defense was in order. After hearing this recommendation and after viewing the videotape of the sodium amytal interview, defendant's counsel felt confident in employing these affirmative defenses. Without the very clear and dramatic in-

formation emanating from the test, it is unlikely that such affirmative defenses would have been attempted.

Was it in the defendant's best interest to pursue the insanity and diminished capacity defense? After all, defendant was found guilty. It is possible that the defendant could have avoided the costly and time consuming rigors of a trial.

The use of the taped sodium amytal interview allowed the defense team to take a tack that ultimately created a question in the minds of the jury. In spite of overwhelming inculpatory evidence, the jury took two days to deliberate before rendering a verdict. Of equal importance was the influence that this data was to have upon the jurors as it may have served to affect their deliberations during the penalty phase of the trial. The jury voted against death.

The critical issue that won the defendant a new trial was the issue of his state of mind at the time of the offense. A significant amount of material was yielded by the sodium amytal interview and the resulting testimony relative to this very issue. The appeals court relied upon this material in their decision to overturn the verdict as they felt that sufficient information had been presented for the judge to charge the jury on a diminished capacity verdict.

#### CONCLUSION

Even though the sodium amytal test may not be substantively admitted in evidence, it is generally accepted that this test is a tool that can help the forensic expert formulate his opinions (7). These opinions may be presented in evidence at trial. Courts have observed that it is not the admissibility of the defendant's statements or admissions, but the doctor's opinion which is at issue. Narcoanalysis must be used only as an adjunct to a complete evaluation (8). In this case, even the limited role allowed regarding the results of the sodium amytal interview very likely served as a catalyst for decisions that subsequently worked in favor of the defendant and, hopefully, in favor of the cause of justice.

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