

THE BOSTON PHOENIX, SECTION ONE

COLORADO SPRINGS — It was 9 a.m. on November 30 and James Grigson, MD, was preparing to do what he has done more than 100 times. He was going to testify for the prosecution in the sentencing phase of a capital murder trial. He was going to say that the defendant was a sociopath and he was going to say that he was "100 percent sure" he'd kill again.

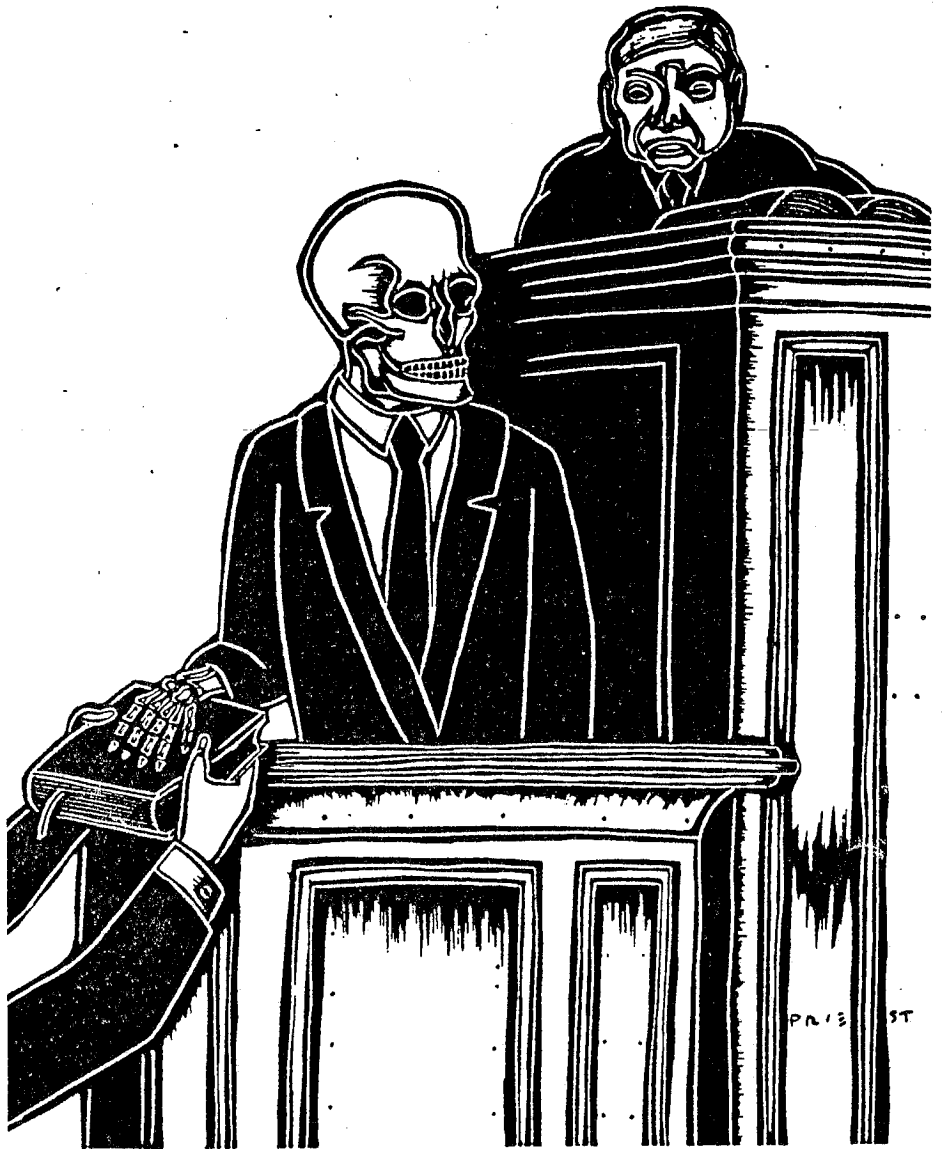
But the trial of Frank Orona being heard in Colorado Springs District Court would not be business as usual for "Dr. Death."

James Grigson seeks death penalties, doing whatever it takes, he says, to "protect potential future victims." In the process, he ignores the overwhelming evidence that predictions of future dangerousness are wrong two out of three times, at best.

Grigson lives and works as a forensic psychiatrist primarily in Texas but has traveled to several other states to testify for district attorneys, who call on him because of his uncanny ability to convince jurors to vote for death. The talent has earned him public notoriety. He has been interviewed on *60 Minutes* and has had several articles and editorials written about him, including a column in the December 4, 1988, *Washington Post* magazine and, most recently, a feature article in the May issue of *Vanity Fair*. Most Americans, however, became aware of Dr. Death from the movie *Twin Blue Line*, the story of the exoneration of Randall Dale Adams. Grigson had predicted that Adams would "kill again." He continues to believe so.

Grigson's "road show" has also come to the attention of the American Psychiatric Association (APA) — from whom he's received two letters of reprimand, in 1980 and 1982, for violating the Principles of Medical Ethics. It was the type of testimony Grigson gave in two capital murder cases, *Estelle v. Smith* and *Barefoot v. Estelle*, both of which landed in the US Supreme Court, that led to those letters.

In the case of *Estelle v. Smith*, the Court ruled in 1981 that it was unconstitutional to allow Grigson's testimony, which he'd given at the penalty phase of the Texas trial, because he had not warned the defendant that what he said during a pretrial evaluation would be used during the sentencing phase. (The lapse violated the defendant's Fifth Amendment privilege against self-incrimination.)



BOB PRIEST

Burying Dr. Death

A psychiatrist who lives by expert testimony dies by expert testimony

by Matt C. Zaitchik

(Matt C. Zaitchik, a forensic psychologist for the commonwealth, observed the Colorado Springs courtroom testimony of James Grigson and the defense experts, including Paul Appelbaum.)

In its 1983 ruling regarding *Barefoot v. Estelle*, the Court said that it was not unconstitutional for Grigson to respond to hypothetical questions in order to state his opinion that there was a probability the defendant would commit further criminal acts. A friend-of-the-court brief filed by the APA took issue with Grigson's testimony, stating that it was not possible to predict future dangerousness with any degree of clinical certainty and that the reliability of Grigson's prediction was even more suspect because the doctor had not personally examined the defendant. Yet though the Court acknowledged that predictions of future dangerousness have limited accuracy, it did not bar Grigson's testimony because, it wrote, the defense had had the opportunity to call opposing expert witnesses and the jury was thus able to "separate the wheat from the chaff." (In his dissent, Justice Harry Blackmun argued that Grigson's type of testimony "equates with death itself.")

In Colorado Springs, the defense would take the *Barefoot* decision to heart.

The Orona case

Twenty-nine-year-old Frank Orona, who has a history of alcohol abuse and lesser criminal offenses, was found guilty of the first-degree murder of 72-year-old John Cook, whom he'd hired to fix his roof. During the trial, the defense argued that Orona had killed Cook in a "panic" after Cook had made sexual advances toward him. They pointed to his past as evidence that Orona was highly conflicted regarding his sexuality — he had reportedly been a male prostitute but denied that he was gay.

For its part, the prosecution argued that Orona had stabbed Cook 13 times in a premeditated fashion. They stated that his motive had been to rob Cook and that he'd lured the elderly contractor to his home for that reason. In fact, Orona had taken cash from Cook and attempted to use his credit cards after the murder.

The same jury of nine women and three men that had found Orona guilty would now decide whether he would be sentenced to death or to life in prison, the latter meaning a minimum of 40 years behind bars before he would be eligible for parole.

Grigson had not testified during the guilt/innocence phase of the trial and was brought to Colorado Springs to testify for the prosecution. It was the first time he'd been called to testify in Colorado and also the first time that the two letters of reprimand would be entered into evidence by the defense. Headed by public defender Terri Brake, the defense team planned to go after Dr. Death full throttle, enlisting the help of nationally known forensic mental-health specialists to discredit him in order to tell the jury what was wheat and what was not.

The method to Grigson's madness

The Division Two courtroom is on the fourth floor of the Colorado Springs Courthouse. It is a modern room in a modern building, with wall-to-wall carpeting and a well-appointed judge's bench. It is also tiny: there are a total of 24 chairs in the gallery, and by November 30 several of these had already been reserved, per order of Judge Richard V. Hall — three seats for deputy sheriffs and "as many as necessary" for the media.

Judge Hall is a stern-looking man, 50-ish and rugged. He makes his rulings in careful, measured tones and looks directly at the attorneys or witnesses only when he disapproves of what they're saying and wants them to know it. He's somewhat more cordial to the jury, but his seriousness lets them know the enormity of their task.

Although they'd been surprised by the first-degree-murder conviction ("We expected murder two," says attorney Brake), the defense team was confident that the jury would come back with life. Brake had done her homework. She'd gotten a court order requiring Grigson to produce the letters of reprimand from the APA. She'd read everything she could get her hands on about Grigson and had lined up five experts to rebut his testimony directly. Paul Appelbaum, a forensic psychiatrist and ethicist at the University of Massachusetts Medical Center, in Worcester, was the defense's primary expert witness.

At 9:05, Judge Hall entered the courtroom. The defendant was brought in by two deputies, followed shortly after by the jury. When instructed to do so, Assistant District Attorney Linda McMahon called Grigson to the witness stand.

The doctor's entrance was impressive. A tall, bespectacled man with gray hair, he strode with assurance toward the bench, raised his right hand, and swore to tell the truth. As he passed the jurors, he smiled at them. Just a country doctor from Texas. Specializing in death.

In a charming Southern drawl, the soft-spoken Grigson listed his credentials, always looking at the jury, apparently to reassure them that he was in control. As he earnestly explained what a forensic psychiatrist does, he appeared to speak directly to two older women jurors sitting directly in front of the witness stand.

"I've seen over 1400 individuals charged with murder . . . 396 individuals charged with capital offenses."

The jury listened intently.

McMahon: "Doctor, can you tell the jury what are the characteristics of a sociopath or antisocial personality disorder?"

Grigson: "Yes, ma'am." [Turning to the jurors] "It's not an illness, disease or defect. Most notably, they do not have a conscience like the rest of us. They don't feel guilt, shame, or embarrassment. They're only interested in self-pleasure, they con and manipulate. They have complete disregard for property and a small percentage [nodding almost imperceptibly in the direction of Oronal] have a complete disregard for others' lives."

...The "most severe" sociopaths, he went on, kill, and treatment "won't help at all in adulthood. . . . As soon as supervision is gone, they revert."

McMahon: "Doctor, is there any way to predict future behavior by past behavior?"

Grigson: "Absolutely. It's like a horse race. You look at a horse's background to see what it might do in the future."

Grigson often gives jurors such simple, folksy explanations of complex psychiatric concepts. In so doing, he tells them, in a way they can understand, that it's okay to sentence someone to death.

Next, McMahon presented a hypothetical case whose facts mirrored those at hand. When asked whether such a person would continue to be a threat regardless of what society he was in, Grigson responded, "Absolutely."

McMahon: "Doctor, on what do you base your opinion?"

Grigson: "Well, you have a disregard for rules. . . . He goes from petty theft to . . . a robbery-type thing . . . evading the police, disregard for authority figures, to a violent act. And the crime itself was a needless, senseless-type killing. The amount of money involved doesn't make a person's life very valuable. It takes a criminal-type mind. They might get a job and pay taxes like the rest of us, but their mind continues to be criminal and they return to kill."

Again, simple, folksy. No psychological mumbo-jumbo. Grigson's power is enhanced by his ability to lend a scientific aura to his opinions.

Now it was Terri Brake's turn, and she was determined that cross-examination not be tame. But she'd have to walk a tightrope, confronting Grigson without playing the nasty, pushy defense-lawyer foil to his polite country doctor.

"Mr. Grigson, are you ethical?"

Grigson: "Yes, ma'am, absolutely."

Brake, showing him a copy of the APA letters of reprimand: "Do you follow the Principles of Medical Ethics?"

Grigson: "Except when they are in conflict with my religion or the laws of the United States of America."

A lawyer in the gallery chuckled quietly. "He got God and the US of A in the same sentence. Amazing."

Brake: "Doctor, did you ever interview or personally examine Mr. Oronal?"

Grigson: "No, ma'am. You wouldn't allow me to."

Brake: "That's right. You bet. Now, when you gave your opinion before, you said you were 100 percent sure, is that right?"

Grigson: "Absolutely. I believe my opinion. I never said I was 100 percent accurate. I don't know if anyone is 100 percent accurate about anything. I believe in my opinion 100 percent. I never said it wasn't my opinion."

An extended period of give and take followed, with Brake and Grigson sparring about the meaning of the *Barefoot* decision.

Grigson: "The US Supreme Court said I was right."

Brake: "They didn't say you were right or accurate, did they? They just said you could testify. And the APA said you were unethical didn't they?"

Grigson: "That was just the group that was in control of the APA then. They were working with the NAACP and the ACLU against the death penalty and saying that homosexuality was not a disease. They knew I disagreed. It was a political thing."

Not too much time passed before Brake entered into evidence a *Vanity Fair* article, in which Grigson's tactics to win over jurors are laid bare. Brake had scored.

Brake: "Doctor, do you recall telling Mr. Rosenbaum, who wrote this article, about how you noticed that a particular juror in a capital murder case seemed to be a holdout, and how you worked on her?"

The jury leaned forward, waiting.

Grigson: "Yes."

Brake: "And during a recess you told the prosecutor to look at the jury questionnaire on this woman and you saw that she had a 14-year-old daughter, and so you told the prosecutor to ask you, 'Is this the kind of man that would rape and kill 14-year-old girls? And you won her over, didn't you?'"

For the first time, Grigson appeared rattled. The jurors frowned. Was Grigson trying to manipulate them?

Grigson: "I do what I can to get my point across to a jury. If that knowledge helped her to understand what was at stake . . . women and children's lives. . . . I never set a trap for anyone or deceived a jury. [To the jury] I'm under oath. They're not."

Clearly, Grigson's credibility had been tarnished. Some jurors looked away.

To conclude, Brake reiterated that Grigson had not personally examined Orona.

Brake: "Are you aware that a psychiatrist and a psychologist who personally examined Mr. Orona both said that he is not antisocial?"

Grigson: "They missed the boat, didn't they?"

As Brake turned to go back to the defense table, Grigson got in one parting shot. Pointing at Orona he said, "This is a sociopath over here."

Appelbaum for the defense

Although Brake had demystified the process by which Grigson wins over jurors, she wasn't home free yet. Much would depend on the strength of the defense's experts, who would testify after the weekend.

On Monday morning, Paul Appelbaum, MD, approached the bench to be sworn in. The passing of two days could not diminish the contrast between him and Grigson. Appelbaum is a slight, bearded man who wears a yarmulke. He looks younger than you'd expect, given his national reputation.

Defense attorneys have come at Grigson over the years with a parade of respected psychiatrists, psychologists, and sociologists. But this was the first time Paul Appelbaum had been called to testify against him.

Appelbaum's list of publications and awards may outweigh him. True, he is a forensic psychiatrist, researcher, and ethicist of the first rank. But what particularly drew the defense to him was his articulate, reasoned testimony, motivated by his career-long quest for fairness and truth. They were also counting on his coolness under cross-examination. They got both.

He began by debunking Grigson's claim that his reprimand by the APA had been a politically motivated statement by ACLU- and NAACP-loving liberals, explaining that any complaint is initially investigated at the district-branch level.

Brake: "So, the complaints against Dr. Grigson were first investigated by local Texas investigators?"

Appelbaum: "Yes."

In responding to Grigson's statement that his type of testimony is legal, Appelbaum explained to the jury the difference between law and ethics. "Laws tell us what is legal or not legal. Medical ethics determine what doctors should or shouldn't do. Let me give you an example. In my state it is not currently illegal for a psychiatrist to have sex with a patient, yet it is clearly unethical and is barred by the Principles of Medical Ethics."

Engaged, the jurors nodded. The assistant prosecutor, Dan Zook, exhaled and rolled his eyes. He obviously knew that Appelbaum was getting through.

"Dr. Grigson's type of testimony may be constitutionally admissible, but it is clearly unethical to diagnose someone without examining him or to predict future behavior with 100 percent certainty," Appelbaum continued. "The problem is that psychiatric diagnoses and opinions can often have enormous consequences for people, so psychiatrists are obligated to be as reliable as possible." He went on to synopsise the relevant literature on predictions of dangerousness, adding, "The reliability of diagnoses made without ever examining the person personally is very low . . . just about nil. The very terms he [Grigson] used indicate that he can't even use his own criteria. For instance, he stated that having no conscience was a factor in predicting future behavior. Whether or not a person has a conscience is inordinately difficult to know, but it certainly can't be answered from a piece of paper or a hypothetical question in court. You need direct, face-to-face evaluation."

Brake: "Doctor, what is Dr. Grigson's reputation in the psychiatric community?"

Appelbaum: "He is an embarrassment to psychiatrists around the country. . . . He puts a medical seal of approval on his personal opinion that a particular person deserves death."

Brake's strategy to have her experts discredit Grigson was having an effect.

When asked his personal opinion about the death penalty, Appelbaum responded: "I am not personally opposed to the death penalty."

The jury looked impressed. The DA was not smiling. Dan Zook took a crack at Appelbaum.

"Doctor, wasn't your argument rejected by the US Supreme Court?"

Appelbaum: "I'm not making a constitutional argument. I'm making an ethical argument."

Zook had made a bad choice in splitting legal hairs with Appelbaum. The jury already knew that Grigson had not done anything illegal, just unethical. But Zook continued this line of questioning for several minutes before noticing that some jurors were yawning and turning away, uninterested. He tried another tack.

Zook: "Doctor, didn't the person described in the hypothetical presented earlier meet the diagnostic criteria for antisocial personality disorder?"

Appelbaum: "You'd need to rule out other possible causes for behavior and you need to examine the person before you can do that. Otherwise you could make a diagnosis by mail."

Appelbaum was followed by Henry Steadman, a well-known sociologist who has conducted some of the best research in the country on predictions of dangerousness. He offered a brief summary of two of his larger research projects, concluding that clinicians have a "generally consistent tendency to overpredict future violent behavior" and are wrong "two out of three times." When asked how Grigson could claim to be 100 percent certain of his opinion, Steadman responded, "There is no empirical evidence to support that any person can do that. The belief that you're right isn't the same as the fact that you are."

Also testifying for the defense was James Marquart, a sociologist and professor of criminology at Sam Houston State, in Huntsville, Texas. He was also a prison guard in Texas for two years.

Marquart has conducted follow-up studies on Death Row inmates (some of whom Grigson had predicted would kill again) who for various reasons have had their sentences commuted to life in prison or been paroled. He testified not only that murderers with life sentences make good inmates ("They adapt to penitentiary life. That's the only life they have and they want to make it as good as they can.") but also that his research indicates that former Death Row inmates have lower rates of assault and murder while in jail than other prisoners. He reiterated Steadman's opinion that predictions of future violence are "iffy at best."

The final defense expert was Michael Radelet, a University of Florida sociologist currently on sabbatical at the University of New Hampshire. Radelet has conducted numerous research studies on the death penalty, including its effect as a deterrent and public opinion regarding it. He pointed out that if given life, Orona would not be eligible for parole until he was 69 years old. He then cited actuarial statistics, noting, "The probability that a 69-year-old man will behave violently is almost zero."

After court recessed for the day, Judge Hall rode the elevator to the first floor. He was tired and he exhaled slowly. "I guess this is what they had in mind with the *Barefoot* decision," he said. Then he asked, "Is this the first time a defense has gone after Dr. Grigson like this?" he asked. No, he was told, but it might be the most effective job yet.

In the days that followed, the defense called a number of witnesses who spoke about Orona's good character and how unlikely it would be for him to act violently again.

The verdict

Still, at the fulcrum of this life-or-death decision sat the experts. On Tuesday, December 11, a spokesman from the Colorado Springs Public Defenders' Office called me at UMass Medical Center with the verdict.

"The jury was out for a while," he said, "but they came back a hung jury. We don't know how many held out, but in Colorado you only need one to get a verdict of life. When we spoke to them afterwards, it seemed they were about evenly split. They said they didn't believe a word Dr. Death said, and they said that the expert testimony was crucial for them in reaching their decision."

Grigson returned to Texas immediately after testifying and meeting with the press. As a rule, forensic psychiatrists are reticent about publicity. But, as usual, Grigson was extremely outgoing with the media and praised everyone in the courtroom from the defense attorney ("I think she's brilliant") to the judge ("one of the finest jurists I've had the privilege to testify before").

I caught up with him outside the courtroom and asked what he would say to those critics who claim that he has been inaccurate in his assessments, that there are people who he said would kill again but have not. Grigson smiled and said, "Well, let's be realistic about time here. We'll see. Out here the price of a life might be \$350. But they're going to do the same thing in the pen over a pack of cigarettes."

Then Grigson excused himself to do a local television interview. □