

This has significant implication for psychiatry. For instance, as clinical knowledge regarding human behavior expands, factors may be discovered that could qualify as mitigating evidence. Forensic psychiatrists will have the opportunity to educate the courts regarding such recent discoveries in medicine and psychiatry that are pertinent to the legal system. On the other hand, as there are no predetermined criteria to define or limit mitigating evidence, it places a great responsibility on forensic psychiatrists and other evaluators for the court to be as comprehensive and exhaustive as practically possible in their assessments. This will provide the jury with as much of a complete picture of the evaluatee as can be presented and allow it to give full consideration to an array of factors that a fair carriage of justice would seem to entail.

Furthermore, as the definition of accepted mitigation evidence evolves, certain factors that currently hold a somewhat dubious place in the court system regarding their mitigating status—such as childhood abuse—may also have their status clarified. Though ultimately the courts decide what constitutes mitigating evidence and what does not, forensic psychiatrists and other evaluators for the court can advise attorneys about the importance of relevant factors and how they may be best presented. The consultative role of forensic psychiatry is also critical in cases in which evidence may be best offered in lay rather than expert testimony.

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Mitigating Factors in the Death Penalty

Jury Instructions Must Directly Address Mitigating Factors in Death Penalty Cases

In *Bigby v. Dretke*, 402 F.3d 551 (5th Cir. 2005), the U.S. Court of Appeals for the Fifth Circuit heard a case appealed from the Northern Court of Texas (trial court) on the issue of jury instruction in death penalty sentencing in light of recent U.S. Supreme Court decisions concerning the relevance of mitigating evidence.

Facts of the Case

James Bigby was charged with capital murder in the shooting death of a man and the drowning of the man's infant son on December 24, 1987. He was an acquaintance of the victims, and the mother of the murdered infant identified Mr. Bigby as having had contact with her son just prior to his death. Following a standoff with police in a Texas motel, Mr. Bigby surrendered without incident. Two days later, he gave a written statement to police confessing to the killings.

Mr. Bigby offered an insanity defense at trial. Several defense psychiatrists were called to testify regarding his mental illness, including Dr. James Grigson (the same psychiatrist whose testimony on future dangerousness at a sentencing hearing in a capital murder case was the basis for the U.S. Supreme Court ruling on the accuracy of psychiatric assessments in *Barefoot v. Estelle*, 463 U.S. 880 (1983)). At Mr. Bigby's trial, Dr. Grigson testified that the defendant had medically intractable chronic paranoid schizophrenia with paranoid delusions that rendered him unable to discriminate between right and wrong. Dr. Grigson concluded that the murders were committed as a direct result of Mr. Bigby's mental illness.

During a trial recess, Mr. Bigby took a gun from the unoccupied bench of the judge, entered the judge's chambers, pointed the gun to the judge's head, and said, "Let's go." Mr. Bigby was then subdued by the judge. Defense motions for mistrial and for the judge's recusal were denied. After the defense rested, the judge allowed the state, in rebuttal, to introduce testimony regarding Mr. Bigby's attempted escape, characterizing the event as evidence of "consciousness of guilt." The jury found Mr. Bigby guilty of capital murder and imposed the death penalty.

A direct appeal filed by Mr. Bigby in 1994 to the Texas Court of Criminal Appeals included a point of error stating that the trial court gave the jury unconstitutional instructions, in violation of the U.S. Supreme Court's decision in *Penry v. Lynaugh*, 492 U.S. 302 (1989) (*Penry I*). In *Penry I*, the jury was instructed to address three "special issues": whether the death of the victim was deliberate, whether there was probability that the defendant would constitute a continued threat to society, and whether the conduct was an unreasonable response to provocation by the victim. The U.S. Supreme Court determined that Mr. Penry's Eighth Amendment rights were violated because the three special issues were not broad

enough for the jury to consider and give effect to mitigating evidence. Despite almost identical jury instructions given at the sentencing phase of Mr. Bigby's trial, the Texas Court of Criminal Appeals affirmed the conviction and sentence.

After several denials of appeal and a denial of a writ of *habeas corpus* by the trial court, Mr. Bigby appealed to the Fifth Circuit, which granted a certificate of appealability (COA) to examine the petitioner's claim of denial of the right to a trial presided over by a fair and impartial judge and other claims, including the *Penry* claim complaint, for which the district court did not grant a COA.

Ruling

The Fifth Circuit Court offered two decisions, because relevant U.S. Supreme Court decisions occurred as the first decision was handed down. The circuit court first decided the case in *Bigby v. Cockrell*, 340 F.3d 259 (5th Cir. 2003) in July 2003. However, in light of *Tennard v. Dretke*, 542 U.S. 274 (2004); *Smith v. Texas*, 543 U.S. 37 (2004); and *Penry v. Johnson*, 532 U.S. 782 (2001) (*Penry II*), a rehearing was granted in December 2004. At that time the circuit court found "the merits of the COA *Penry* claim. . .[were] ripe for decision." The Fifth Circuit overturned the district court, granted a COA based on Mr. Bigby's *Penry* claim, vacated his sentence, and remanded the case to the district court with instructions to grant *habeas* relief.

Reasoning

At his appeal before the Fifth Circuit, Mr. Bigby relied on the Supreme Court decision in *Penry I*, which held that the inability to present mitigating factors in a death penalty case was a violation of the Eighth Amendment. The circuit court also considered the decision in *Penry II*, which came after Mr. Bigby had presented his case to the circuit court. In *Penry II*, the jury was presented with the same three special issues described in *Penry I*. The *Penry II* jury also received a verbal supplemental instruction that directed it to change its answer on a special issue question from "yes" to "no," if after considering the special issues, the jury considered a life sentence more appropriate than the death penalty in the setting of relevant mitigating factors. The jury, however, was also instructed to answer "yes" to a special issue if it found that issue true beyond a reasonable doubt. The supplemental instruction placed the jury at risk of violating its oath to deliver a true verdict by asking it to nullify an affirmative answer. The Supreme Court

deemed this nullification instruction unconstitutional because its broadness hindered the jury's responsibility to give a "reasoned moral response."

In his appeal, Mr. Bigby contended that, because his jury was given virtually identical instructions as were given in *Penry I*, his Eighth Amendment rights were subject to "an element of capriciousness in making the jurors' power to avoid the death penalty dependent on their willingness" to give a false verdict. The potential neglect of mitigating evidence by the jury, Mr. Bigby argued, hindered his right to have an individualized assessment of the appropriateness of the death penalty.

A second question in Mr. Bigby's case was the determination of relevant mitigating evidence. During the first hearing in July 2003, prior to the *Tennard* decision, the Fifth Circuit applied the test for relevance of mitigating evidence that required a nexus between the evidence and the crime committed. The Fifth Circuit Court used this test to determine the relevance of Mr. Bigby's chronic paranoid schizophrenia.

The *Tennard* decision accepted the broader definition of relevant mitigating evidence set forth in *McKoy v. North Carolina*, 494 U.S. 433 (1990): ". . .any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." The Supreme Court concluded that the jury was bound by the Eighth Amendment to consider and give effect to mitigating evidence meeting this low threshold for relevance in death penalty cases.

On rehearing Mr. Bigby's case in 2004, the circuit court concluded the petitioner's chronic paranoid schizophrenia was relevant mitigating evidence without regard to any link between his mental illness and his conduct at the time of the murders.

Discussion

Bigby v. Dreke represents the latest decision in a series of cases in which the courts have attempted to define the parameters of mitigating evidence in death penalty cases. As demonstrated by the *Penry I* and *II*, *Tennard*, and *Smith* cases, the Supreme Court's rulings have broadened the definition of mitigating evidence and systematically removed the procedural barriers to jury consideration and weight of that evidence.

The broader definition of mitigation by mental illness is consistent with psychiatric and psychological views of the effects of these disorders. Even in the

absence of a direct nexus between the illness and the action, as required in the guilt phase of affirmative mental defect defenses, the effects of a severe mental illness are pervasive in a person's life and can alter circumstances that may be relevant in death penalty considerations.

In Mr. Bigby's case, the broadened definition of mitigating evidence allowed the relevance of paranoid schizophrenia to be considered by the jury, regardless of its connection with the crime in question. A jury may decide that a life sentence is more appropriate, given this information. To give effect to this type of mitigating evidence, the forensic psychiatrist has a significant role in educating the jury about the effects of mental illness on thinking, behavior, and judgment and in translating professional jargon into comprehensible information that is useful to its deliberations. As in this case, psychiatric evidence presented in the guilt phase may prove to be useful data in the sentencing phase.

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Competence for Waiver of Appeals in the Death Penalty: Timing, Standard and Standing

Competency to Forgo Postconviction Relief in a Death Penalty Case

In *Corcoran v. State*, 820 N.E.2d 655 (Ind. 2005), the Indiana Supreme Court upheld the trial court's ruling that the defendant was competent to waive review of his murder conviction and denied his request for a dismissal of the appeal court's decision to allow him to pursue postconviction relief (PCR).

Facts of the Case

Joseph E. Corcoran, who had a diagnosis of paranoid schizophrenia, was sentenced to death after conviction for four murders committed in May 1999. He appealed the death sentence but did not challenge the convictions. In March 2003, the Indiana Supreme Court affirmed the 2002 sentence and denied a petition for a rehearing.

In April 2003, within 30 days of the decision, as required by Indiana law, the state public defender

requested that the Indiana Supreme Court extend a stay of execution of the death sentence to petition for PCR. The court granted the request, and, according to procedure, directed the trial court to submit a case management schedule requiring that the petition, signed by the petitioner, Mr. Corcoran, be filed by September 9, 2003.

Mr. Corcoran refused to sign the PCR petition, indicating that he believed that he should be put to death for his crimes and that he wanted to waive any further reviews of his case. On September 9, 2003, the public defender filed with the trial court both the PCR petition without Mr. Corcoran's signature and a request for a competency evaluation of the defendant. The trial court rejected the unsigned PCR petition and scheduled a competency hearing, held in October 2003. In December 2003, the trial court ruled on competency and found Mr. Corcoran competent to waive further challenge to his sentence and to be executed. The state public defender petitioned the Indiana Supreme Court to review the trial court's decision. That court accepted the request, ruling that the public defender had standing to appeal only the competency decision and no other.

While the appeal was before the state supreme court, Mr. Corcoran filed a request to dismiss the appeal on the competency decision because he wanted to recant his waiver and intended to pursue PCR, which would render the issue of his competence to waive PCR moot.

Ruling

The Indiana Supreme Court denied the request to dismiss the appeal of the competency ruling as moot because Mr. Corcoran had not previously filed for PCR within the 30-day deadline and, with one justice dissenting, affirmed the finding that Mr. Corcoran was competent to forgo PCR.

Reasoning

The Indiana Supreme Court addressed the three arguments proffered by the state public defender: (1) the trial court had failed to use the proper competency standard found in *Rees v. Peyton*, 384 U.S. 312 (1966), in which the Supreme Court held that a capital defendant may withdraw a petition for *certiorari* only after it determined whether "he has capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises"; (2)