Following the judge's exclusion of the psychologist's testimony, the parties entered into a plea agreement, wherein Allen pled guilty to the single count against him while reserving the right to bring an appeal from the district court's evidentiary rulings.

Ruling

The United States Court of Appeals for the Tenth Circuit determined that the district court erred both in finding that the insanity defense could not be presented to the jury and in holding that the proffered expert testimony was irrelevant in the prosecution of the general-intent crime. They reversed the district court's decision and remanded the case for further proceedings consistent with their own ruling.

Reasoning

The court of appeals based much of its reasoning on the fact that insanity is an affirmative defense and thus does not need to negate an element of the prosecution's case such as general or specific intent. The court noted that their decision was consistent with their holding in *Brown*, since the barred state of mind testimony in *Brown* had no bearing on criminal responsibility. What *Brown* held was that evidence of mental illness that falls short of establishing insanity could only be used to refute *mens rea* in specific-intent, not general-intent, crimes. Allen's counsel was not attempting to refute *mens rea* but to present an affirmative insanity defense.

Discussion

The central issue in this case is the availability of the insanity defense for general-intent crimes. The district court judge erred in holding that an insanity defense could only be raised in a specific-intent crime. He cited *U.S. v. Brown*, but that decision did not address the insanity defense. Rather, *Brown* dealt with the use of mental health testimony information to refute *mens rea*. The *Brown* court (the same appeals court that heard *Allen*) ruled that mental health information could be used only to refute *mens rea* in specific-intent crimes. It made no ruling on the affirmative defense use of state-of-mind testimony to advance an insanity defense.

Black's Law Dictionary defines specific intent as "the intent to accomplish the precise criminal act that one is later charged with. At common-law these crimes included robbery, assault, larceny, burglary, forgery, false pretenses, embezzlement, solicitation and conspiracy."

A general-intent crime is defined as "the state of mind required for the commission of certain common-law crimes, not requiring a specific intent or imposing strict liability. . . . General intent crimes usually take the form of recklessness or negligence" (Black's Law Dictionary [ed 7], St. Paul, MN: West Group, 1999).

The appeals court does a commendable job of balancing competing interests. One interest is to avoid allowing prosecutors to choose general-intent charges to preclude the use of an insanity defense. The competing interest is a defense strategy of using mental health evidence to refute *mens rea* in cases that do not meet a threshold for an insanity defense. This issue was recently addressed in the decision in *Clark v. Arizona,* 126 S. Ct. 2709 (2006), where the U.S. Supreme Court upheld the ruling that the defendant, Clark, could not present evidence of his mental illness to negate *mens rea* because his illness fell short of meeting the requirements for insanity in Arizona.

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Implications for the Peer Review Process

Appellate Court Requires Disclosure of Peer Review Records to Office of Protection and Advocacy

During its investigation into the deaths of two patients with disabilities who were residing in state-administered hospitals, the Connecticut Office of Protection and Advocacy for Persons with Disability (OPA) requested that the Connecticut Department of Mental Health and Addictions Services (DMHAS) grant access to peer review records. DMHAS denied the request, citing Connecticut law. The U.S. District Court for the District of Connecticut entered a declaratory judg-

ment and injunction that required DMHAS to release the records.

In *Protection & Advocacy for Persons With Disabilities v. Mental Health & Addiction Services*, 448 F.3d 119 (2nd Cir. 2006), the U.S. Court of Appeals for the Second Circuit considered an appeal of that ruling brought by DMHAS.

Facts of the Case

The State of Connecticut created the OPA to serve as the state's protection and advocacy system pursuant to the Protection and Advocacy for Individuals with Mental Illness Act (PAIMI), U.S.C.S. §§ 10801-10851, to monitor the care of individuals with disabilities and mental illness who are hospitalized or in residential settings.

On January 1, 2000, Rose Marie Cinami, a patient with schizophrenia admitted to Cedarcrest Hospital, died after choking on her breakfast. Cinami's estate gave the OPA authorization to access all of her hospital records, and Cedarcrest released all records except peer review records created by the peer review committee at the hospital. On April 3, 2002, James Bell, a patient at Whiting Forensic Division of Connecticut Valley Hospital (CVH), died in restraints while being transported. Because the OPA had made a probable cause determination that Bell had been subject to abuse or neglect related to his death, it could request directly Bell's medical records that related to the case. CVH released all records except the peer review records. DMHAS withheld the peer review records in both cases "on the ground that peer review documents are privileged under Connecticut law."

The OPA sought an injunction in the U.S. District Court for the District of Connecticut for release of the records. The injunction was denied, but the court heard arguments from both sides requesting summary judgment. The OPA argued that its right to obtain the peer review records derived from PAIMI, which both authorizes access "to all records of . . . any individual" once criteria for access have been established and defines records to include "reports prepared by any staff of a facility rendering care and treatment." DMHAS argued that because the PAIMI language of "all records of . . . any individual" was ambiguous, the court was required to defer to the regulations by the United States Department of Health and Human Services (HHS), which had given specific instructions to include release of peer review records except when the release would preempt state law protecting such records. DMHAS further argued that Connecticut law made peer review privileged and thus protected those records from release.

The district court referenced the decisions by the Third and Tenth Circuit Courts and ruled that the PAIMI language of "all records of . . . any individual" was unambiguous and so did not defer to regulations of HHS. The district court further ruled that PAIMI preempts Connecticut law protecting peer review records in civil cases. DMHAS appealed the ruling.

Ruling and Reasoning

The U.S. Court of Appeals for the Second Circuit affirmed the judgment of the district court and largely reiterated the reasoning of the district court in the decision. In considering the relationship between an act of Congress and the policy of a regulatory agency when the language of both is contradictory, the appellate court relied on two cases—*Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) and *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305 (2nd Cir. 2005). In *Chevron,* the U.S. Supreme Court ruled that both courts and agencies must "give effect to the unambiguously expressed intent of Congress." In *Wachovia,* the U.S. Court of Appeals for the Second Circuit held that if "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on permissible construction of the issue." The appellate court determined that the intent of Congress in PAIMI was unambiguous on making all records available. The court cited the decisions of the Third and Tenth Circuit Courts, which had also ruled that the language was unambiguous.

DMHAS advanced two additional arguments. First, DMHAS argued that the New Hampshire Supreme Court in *Disabilities Rights Center, Inc. v. Commissioner, N.H. Dep't of Corrections*, 732 A.2d 1021 (N.H. 1999) upheld HHS's regulatory interpretation of §§ 10805 and 10806 of PAIMI. Second, DMHAS argued that the legislative history of the 1991 reauthorization of PAIMI indicated that the legislators intended peer review records to be protected.

The court responded to the DMHAS arguments by holding that the New Hampshire Supreme Court had not considered whether the statutory language of

PAIMI was ambiguous and so did not apply in this case. In reference to the second argument, the court ruled that despite available references to avoiding preemption in the legislative history, Congress had not amended the language to implement that goal in the 1991 reauthorization.

The court further held that no actual conflict existed between PAIMI and Connecticut law based on the circumstances presented in this case, because Connecticut's peer review privilege law did not absolutely prohibit release of peer review records, but only prohibited disclosure in the context of a civil action against a health care provider in certain circumstances. In the case before the court, the OPA is a state agency seeking peer review records as part of a statutorily authorized investigation. Nevertheless, the court ruled that to the extent that there is a conflict, PAIMI, as a federal statute, governs.

Discussion

Although this case was decided on a strictly legal analysis of factors in which a federal act preempts a state law, the decision has far-reaching implications for health care, medical practice, and the peer review process. The decisions by the U.S. Courts of Appeal for the Third Circuit (Delaware, New Jersey, Pennsylvania, and the U.S. Virgin Islands); the Tenth Circuit (Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming); and now the Second Circuit (Connecticut, New York, and Vermont) have at least partially eroded the privileged protection of the peer review process in 12 states and one territory.

The peer review process has been mandated by the Joint Commissions on Accreditation of Health Care Organizations (JCAHO) to improve the quality of patient care. To maintain accreditation, all adverse events must be reviewed and scrutinized in an effort to identify errors with an eye toward prevention and improved quality of care. The protection of peer review records was instituted to assure frank and open explorations of mistakes and errors in judgment. The privilege was designed to protect the process and ultimately protect the clients. Without assurance of confidentiality of this critical process designed to expose mistakes, health care organizations and their members may be unwilling to provide an unbiased assessment of matters brought before it for review. Concerns of increased liability may influence members of peer review committees and ultimately undermine the purpose of the process—improvement in the quality of care of the patients. In effect, not protecting peer review reports may have the consequence of diminishing effectiveness in improving patient care; PAIMI's goal of protecting patients may, in fact, harm them.

A second difficulty that arises from release of the peer review records is the questionable belief that confidentiality of the records can still be maintained. Once these reports are released to the OPA, the agency is charged with maintaining the confidentiality of the records. However, it is unclear whether any findings of the agency based on these peer review reports are subject to the same protection. Even if the results of the OPA's investigation are "confidential," what does the term mean in an age when records are managed electronically? Paper files and locked filing cabinets have given way to "paperless" information storage. The days in which a breach of confidentiality required an overt act to provide physical copies of records are over. A hacker can obtain confidential files from the comfort of his own home. A well-intended employee can inadvertently release confidential information by typing an e-mail address incorrectly. The OPA itself offers remote access on its Web site by "login," which makes it more susceptible to hacking than restricting access to computers on-site at the agency offices.

Addressing the problems that arise from PAIMI's interpretation that mandates disclosure of peer review reports, is difficult. Obviously, it is a balancing act between the protection of patients with disabilities and the protection of all patients by maintaining the mechanism of improving quality of care provided by peer review. Any solution would require the amendment of existing law or ratification of new law. Because findings of peer review reports are based on the facts of a specific case but include analysis and recommendations that if publicized may place the health care provider/facility in a position of liability, it would seem reasonable to provide an investigating agency such as the OPA with a summary report of the facts of the case without any analysis or recommendations. Doing so would alleviate the concern over breach of confidentiality of the peer review reports. It would place the burden of interpretation of the facts on the investigating agency charged with protection of and advocacy for the patient. In addition, the peer review process, without fear of disclosing a position of liability, may maintain the function of quality assurance and improvement.

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Downward Departures in the Post-*Booker* Era

How Is Diminished Capacity Defined?

In *U.S. v. Valdez*, 426 F.3d 178 (2nd Cir. 2005), the United States Court of Appeals for the Second Circuit reviewed the sentencing of Felix Valdez by the District (trial) Court for the Southern District of New York to determine if the court had incorrectly applied the insanity defense legal standard rather than the diminished-capacity downward-departure legal standard when denying the defendant's request for a downward departure.

Facts of the Case

Valdez confessed to obtaining and selling telephone calling cards in other people's names. He was recorded on a public pay phone while opening calling card accounts by offering various false explanations such as posing as a building owner attempting to obtain numbers on behalf of his tenants. The government estimated that Valdez had obtained over 1,176 calling card numbers and suggested that he was even able to obtain phone access to countries that had fraud protection mechanisms in place.

Upon his guilty plea, Valdez was convicted of wire fraud by the U. S. District Court for the Southern District of New York. At sentencing he requested a downward departure from the recommended sentence secondary to his diminished capacity. He based his petition for a diminished-capacity departure on his IQ of 55, documented learning difficulties, history of special education classes provided as a result of brain injury and severe emotional disturbance, history of dependency on others, and family psychiatric history. The defense's psychiatric expert opined that as a result of Valdez's generalized anxiety disorder, "marked dependency needs . . . overly compliant" behavior, low IQ, and essential illiteracy, he was easily manipulated by his coconspirator (Guillermo) into performing the fraud with the belief that he, the defendant, would then have access to calling cards to call his son. The defense asserted that without Guillermo, Valdez would have been incapable of developing the fraud that led to his indictment; therefore, Valdez's diminished capacity was causally linked to the commission of the offense as a result of his vulnerability to Guillermo's manipulation. However, on cross-examination the defense's expert psychiatrist testified that Valdez knew that what he was doing was wrong and that he could have written the hundreds of names and calling card numbers himself. The expert's report also documented that Valdez had refused to pay his co-conspirator, Guillermo.

The district court denied Valdez's petition for a downward departure and sentenced the defendant according to the Federal Sentencing Guidelines. The court concluded that the defendant did not meet the definition of "significantly reduced mental capacity" (one prong necessary in defining diminished capacity) as evidenced by information that contradicted the defendant's contention that he had trouble understanding the wrongfulness of his actions. The court also dismissed the validity of the nexus between any psychiatric or cognitive impairment that Valdez had and his fraudulent behavior.

Valdez appealed this decision to the U. S. Court of Appeals for the Second Circuit. He contended that the district court had incorrectly applied the criteria for the insanity defense rather than the criteria for the diminished capacity departure when considering him for a downward departure from the Federal Sentencing Guidelines. Valdez asserted that the court, in doing so, had thereby failed to make use of the availability of this departure when a defendant understands the stark difference between right and wrong but has significantly impaired ability to understand the wrongfulness of his conduct.

Valdez also appealed on the grounds that the court's holding was based on clearly erroneous fact finding, asserting that the court based its holding on its own lay opinion of Valdez's mental capacity, which was contrary to evidence submitted by medical professionals.

Ruling

The U. S. Court of Appeals for the Second Circuit affirmed the district court's calculation of the defendant's sentence and found that the district court did not apply an incorrect legal standard in denying a downward departure and had not erred in fact finding. The court remanded the case to the district court