sequent investigation, and attempts to make restitution, an actual example in the USSG of a situation in which the acceptance-of-responsibility departure is warranted. The sentencing guidelines are explicit: "[An acceptance-of-responsibility reduction] is not intended to apply to a defendant who puts the government to its burden of proof at trial. . . ."

Mr. Sam also appealed the district court's denial of a downward departure for diminished mental capacity. According to the USSG, if an offense was committed while a defendant was suffering from diminished mental capacity, a downward departure may be warranted to the extent that the reduced capacity contributed to the offense. However, this departure is forbidden under some circumstances, including an offense that "involved actual violence or a serious threat of violence." The Fifth Circuit found that the district court erred in considering bank robbery a *de facto* violent crime. Instead, the court should have considered the particular circumstances of the robbery and made its own determination as to whether the crime was violent. By this ruling, Mr. Sam obtained minor (and temporary) relief from the Fifth Circuit: his conviction was affirmed but his sentence was vacated and the matter was remanded for resentencing. On February 15, 2005, Mr. Sam was resentenced to 92 months imprisonment, the bottom end of the guideline range of 92 to 115 months.

Discussion

Although their status changed from mandatory to advisory after the Supreme Court's *Booker* ruling, it appears that Congress, and therefore the Sentencing Commission, intends for judges to stay within the guidelines in most cases. Given the strictures of the federal Insanity Defense Reform Act of 1984 (enacted in response to John Hinckley, Jr.'s successful use of the insanity defense after he attempted to kill President Reagan), a federal insanity defense requires that the defendant prove that he did not know the wrongfulness of his conduct, a high burden for the defense. Diminished capacity, which has a standard two-prong test, is the only sentencing allowance made for situations in which mental illness contributed to an offense. But as we see in *Sam*, this allowance applies only to nonviolent offenses.

Adolescents and the Insanity Defense

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Roper Decision Not a Sufficient Basis for Challenging Constitutionality of the M'Naughten Rule

In *State v. McLaughlin*, 725 N.W.2d 703 (Minn. 2007), the Supreme Court of Minnesota reviewed the district court's conviction of a 15-year-old defendant for the murders of two fellow high school students. The appellant, who had asserted an insanity defense, argued that the M'Naughten rule is unconstitutional as applied to adolescents and cited *Roper v. Simmons*, 543 U.S. 551 (2005), in support of this claim.

Facts of the Case

John Jason McLaughlin was a 15-year-old high school freshman when he shot and killed two fellow students, Seth Bartell and Aaron Rollins, on September 24, 2003. According to facts established at trial, Mr. McLaughlin took his father's semiautomatic .22-caliber pistol to school that day with the intent to "shoot some people." He waited for Mr. Bartell in physical education class, followed him down the hallway, and shot at him. When this shot only grazed the intended victim, Mr. McLaughlin fired again and hit a bystander, Aaron Rollins. Mr. McLaughlin then followed Mr. Bartell into the gymnasium, where he fired a third shot from point-blank range that hit his victim in the forehead. He surrendered to school officials, who immediately called the police. Mr. Rollins was pronounced dead on arrival at the local hospital, and Mr. Bartell remained unconscious until his death 16 days later.

During the initial interrogation by police, Mr. McLaughlin admitted shooting one victim, though he claimed not to know that he had shot Mr. Rollins. When asked whether he had done anything wrong that day, Mr. McLaughlin responded, "Yeah." He reported that he had planned the attack for several days in advance, and he had checked the school for

metal detectors and security cameras. He told police that he didn't think that the gun would do "very much" harm, and he did not intend to kill anyone. He simply wanted to "hurt [Mr. Bartell]" because he had been teased and bullied by him for years.

Mr. McLaughlin was charged with first- and second-degree murder, as well as possession of a dangerous weapon on school property, and he was tried as an adult in the Stearns County District Court. He was found guilty of all three counts following the first phase of a bifurcated bench trial. In the second phase (the mental illness phase), the court heard testimony from six mental health experts: three retained by Mr. McLaughlin, one by the State, and two by the court. The three experts hired by Mr. McLaughlin returned a diagnosis of schizophrenia, and the three others a diagnosis of major depression in remission and an "emerging personality disorder." Only one expert (hired by the defense) testified that Mr. McLaughlin did not know right from wrong and met the criteria for insanity under the M'Naughten rule. After six days of testimony, the court concluded that Mr. McLaughlin could not be excused from criminal responsibility because he "had cognitive awareness that shooting the victims was morally wrong" (*McLaughlin*, p 711).

Mr. McLaughlin was sentenced to life in prison for the death of Mr. Bartell, to be served consecutively with a 144-month sentence for the death of Mr. Rollins. Following the trial, he appealed his convictions and sentences to the Supreme Court of Minnesota.

Ruling and Reasoning

The Supreme Court of Minnesota affirmed the district court's convictions and sentences for first- and second-degree murder.

Mr. McLaughlin appealed his convictions based on three arguments: the M'Naughten rule violates the due process clause of the Minnesota Constitution as applied to adolescent defendants; the district court abused its discretion by denying him a mid-trial continuance to procure an expert witness; and the district court abused its discretion by imposing consecutive rather than concurrent sentences. Regarding the second argument, the supreme court rejected Mr. McLaughlin's claim because a continuance for "yet another" expert witness would not have had a significant impact on the outcome of the trial. The court also rejected the third argument after reviewing sentences in similar cases. The remainder of this discussion will focus on the first argument, the issue of M'Naughten's constitutionality.

The legal test of insanity in Minnesota is the M'Naughten rule, which is codified in Minn. Stat. § 611.026 (2004):

> [A] person shall not be excused from criminal liability except upon proof that at the time of committing the alleged criminal act the person was laboring under such a defect of reason, from one of these causes, as not to know the nature of the act, or that it was wrong (*McLaughlin*, p 712).

In his appeal, Mr. McLaughlin argued that, on the basis of recent brain development research, the application of the M'Naughten rule to adolescents violates the Due Process Clause of the Minnesota Constitution. To support this contention, he cited a brief filed by *amici curiae* American Medical Association, *et al.*, 2003 U.S. Briefs 633, in *Roper v. Simmons*, 543 U.S. 551 (2005), the landmark U.S. Supreme Court case holding that the execution of defendants for offenses committed before age 18 is unconstitutional. He asserted that, despite having a cognitive appreciation of wrongfulness, adolescents cannot control their actions in the same way as adults, and therefore M'Naughten is the wrong test of insanity in this population. He urged the court to adopt an alternative test to M'Naughten that would recognize the unique vulnerability of young persons to the "irresistible impulse."

The Supreme Court of Minnesota upheld the district court's ruling, primarily because the issue of the constitutionality of the M'Naughten rule was raised by Mr. McLaughlin for the first time on appeal. The constitutionality of a statute cannot be raised for the first time on appeal, and so the court was "procedurally barred from reviewing a defendant's constitutional challenge" (*McLaughlin*, p 713) in this case. It stated that the validity of Mr. McLaughlin's claim depended entirely on highly technical facts that were not raised before the district court, and therefore no factual record on the issue existed for the supreme court to consider on appeal. It stated further that the *Roper* brief was not directly related to the issue of the constitutionality of M'Naughten in adolescents and it therefore could not substitute for such a record. Furthermore, the court declined to issue a judicial ruling on the insanity defense because in the past it has "stated unambiguously that any changes to M'Naughten must come from the legislature" (*McLaughlin*, p 713, n. 10).

Discussion

The decision of the Supreme Court of Minnesota to uphold the lower court's ruling in this case was made largely on legalistic grounds. It decided not to consider the issue of M'Naughten's constitutionality because it was procedurally barred from doing so. However, the substantive issue at hand—whether M'Naughten is the right test of legal insanity in adolescents—is an interesting one that may arise again in the coming years. At present, 10 states use a strict M'Naughten rule, and 15 others use a slight variation as the legal test of insanity. Of these states, several, including Florida, Nebraska, and North Carolina, have no statute that defines the test (it is instead based on case law). Given the right combination of a compelling case and a jurisdiction in which the issue cannot be deferred to the legislature, the courts may well be forced to consider whether the M'Naughten rule should be applied to adolescent defendants.

Mr. McLaughlin cited *Roper v. Simmons* as a basis for his argument that adolescents are less able to control their impulses than adults and therefore should not be subject to a test of insanity that is purely cognitive. In *Roper*, the U.S. Supreme Court held that the execution of a defendant for crimes committed before age 18 violates the Eighth Amendment prohibition against cruel and unusual punishment. The Court made this decision in part on the basis of "society's evolving standards of decency" and a "national consensus against the death penalty for juveniles" (*Roper*, p 563). In his majority opinion, Justice Kennedy wrote, "As any parent knows and the sociological and scientific studies. . .tend to confirm, a lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults" (*Roper*, p 569). He further explained that "the susceptibility of juveniles to immature and irresponsible behavior mean[s] that their irresponsible conduct is not as morally reprehensible as that of an adult" (*Roper*, p 570) and stressed the "diminished culpability" of juveniles as a reason not to count them among the worst offenders deserving the death penalty.

Although *Roper* addressed capital punishment rather than the insanity defense, the language and reasoning in the decision opened the door for the attorney in this case to ask the question: if adolescents should not be put to death because their brains are not fully developed, then why should we hold them responsible for their crimes in the same way? Applying *Roper* in this manner is stretching a bit, even though the AMA *amicus* brief provides some support to the argument by outlining the scientific evidence that adolescent brains are underdeveloped in areas modulating impulse control, risk assessment, and moral reasoning. *Roper* emphasized the "diminished culpability" of adolescents for sentencing purposes but stopped well short of saying that their culpability is diminished enough to qualify for an insanity defense. In fact, if Mr. McLaughlin's argument were taken to its logical conclusion, all adolescents would qualify for an insanity defense simply because of their biological immaturity. His argument assumes that the impulsivity of adolescents outlined in *Roper* meets the standard of the "irresistible impulse" test, which is far from a settled matter for either psychiatrists or legal scholars. As a growing body of evidence accumulates on both sides of the debate, it remains to be seen whether the courts will eventually modify their stance on the insanity defense in adolescents.

Use of Data From Competency Restoration

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Are There Limits to the Use of Information Obtained During Competency Restoration in a Subsequent Insanity Defense?

In *Estes v. State*, 146 P.3d 1114 (Nev. 2006), the Nevada Supreme Court considered an appeal from Donald Estes of his conviction by a jury in Nevada's Eighth Judicial District Court on charges of sexual assault of a minor, kidnapping, battery, coercion, and preventing or dissuading a person from testifying or producing evidence. These charges stemmed from his sexually assaulting a minor (B.C.) near Las Vegas. Mr. Estes appealed this conviction mainly on the grounds that the state erroneously used testimony from staff at the facility where he was evaluated and treated for the purpose of restoring competency to stand trial. The judgment explores the admissibility