

Next, the circuit court considered whether the district court had erred in finding that Mr. Rivera was mentally retarded. The circuit court reviewed the three elements necessary to establish mental retardation, as outlined by the Texas state court decision in *Ex parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App. 2004): a significantly subaverage level of intellectual functioning, related limitations in adaptive functioning, and onset before the age of 18.

The court pointed out that Mr. Rivera had a Wechsler Adult Intelligence Scale III (WAIS-III) score of 68. Texas argued that the test was unreliable in light of cultural factors, since he was bilingual and processed “English and Spanish in competition,” which “dragged down” the WAIS-III score. In rejecting this argument, the circuit court found compelling psychiatric testimony presented to the lower court that he had no difficulties in communicating and that the WAIS-III accounted for bilingual examinees. As such, the circuit court agreed that “the clinician must ultimately make the decision” regarding the circumstances of the administration of the test.

The circuit court also disagreed with the state’s argument that the district court had erred by rejecting Mr. Rivera’s four pre-*Atkins* IQ scores of 70, 85, 92, and 80. Noting that these scores were not from Wechsler tests, but were prison screening tests, the circuit court agreed that correlation with WAIS scoring was questionable. The circuit court found that these scores were not rejected, but were weighed for their significance and lacked “a degree of sufficient reliability to satisfy this Court.”

The circuit court further disagreed with the state’s arguments that Mr. Rivera’s adaptive functioning deficits were due to substance abuse before age 18 and not to mental retardation. The court indicated that mental retardation has numerous etiologies and that since the evidence demonstrated adaptive functioning deficits before age 18, it was plausible that those deficits were due to mental retardation. Consequently, the circuit court held that no error occurred in finding that he was mentally retarded.

Discussion

Rivera provides an instructive perspective on the challenges facing courts adhering to the prohibition of executing mentally retarded individuals. As stated by the court in *Rivera*, *Atkins* provides a blanket prohibition without providing procedural

guidelines to state courts. As such, state courts must mull over what constitutes mental retardation and re-examine preexisting legislation in the context of *Atkins*. In addition, federal provisions, such as the AEDPA, which limit abuse of *habeas* petitions, may become problematic when applied to mentally retarded petitioners. Given the limited intellectual capabilities of mentally retarded petitioners, it is not difficult to imagine their challenge in adhering to such provisions, even with the assistance of counsel.

Rivera also demonstrates the challenge facing courts in defining mental retardation in their respective jurisdictions, especially in states where the legislature has remained silent on the issue. Concerns such as determining the measures that qualify to establish intellectual capacity, as well as the impact of an individual’s specific demographic background on these measures are considered. Further, during determinations of mental retardation, courts must decide what weight should be given to various etiologies, including substance abuse, that affect an individual’s adaptive functioning.

Consequently, forensic psychiatrists must be aware of these various concerns as they navigate the landscape set forth by *Atkins*. Knowledge of the criteria required to establish mental retardation in a particular jurisdiction is critical before offering an opinion on the question. Inevitably, legal objections to mental retardation claims will arise based on an array of issues. Thus, psychiatric reports should consider particular characteristics of the examinee, such as cultural factors and circumstances surrounding IQ testing that may affect the mental retardation claim. As seen in *Rivera*, the psychiatric report is likely to be the linchpin of a mental retardation claim. Careful clinical consideration of these questions may determine whether the mental retardation claim is heard by the courts.

Sum of Errors and Due Process Owed to Mentally Ill Defendant

Elena del Busto, MD
Resident in Psychiatry

Clarence Watson, JD, MD
Assistant Professor of Psychiatry

Department of Psychiatry
 Jefferson Medical College
 Thomas Jefferson University
 Philadelphia, PA

An Appeals Court Holds That the Sum of Errors, Including the Improper Judicial Treatment of Psychiatric Testimony in Determining *Mens Rea*, Violates Due Process

In *Parle v. Runnels*, 505 F.3d 922 (9th Cir. 2007), the United States Court of Appeals for the Ninth Circuit granted *habeas* relief to a petitioner who had been convicted of first degree murder, despite his contesting his state of mind at the time of the killing. *Habeas* relief was granted based on the circuit court's finding that the sum of multiple evidentiary errors, including the exclusion of defense psychiatric expert testimony, rendered the trial "fundamentally unfair" and represented a violation of due process.

Facts of the Case

Timothy Parle killed his wife during a domestic dispute on December 17, 1993. Mr. Parle, who had a diagnosis of bipolar disorder, admitted to the killing, but contested his state of mind at the time of the act. He claimed that he was in the throes of a manic episode during the killing and therefore could not be guilty of first-degree murder. During the trial, the defendant's treating psychiatrist, over his objection, testified that he was not manic at the time of the crime. Furthermore, his expert was not permitted to testify fully on his behalf. In addition, the trial judge excluded evidence of the defendant's wife's previous threats against him and admitted evidence of previous threats by him against police. Subsequently, he was found guilty of first-degree murder.

Mr. Parle appealed his conviction and, on review, the California Court of Appeal found that numerous evidentiary errors had occurred during the trial. These errors included: violation of the doctor-patient privilege, exclusion of rebuttal testimony from his medical expert regarding his mental state at the time of the killing, exclusion of evidence regarding his wife's tendency toward violence, exclusion of his father's testimony regarding his demeanor at the time of the crime, and inclusion of character testimony related to his threats toward police five years before the crime.

Despite identifying these errors, the California Court of Appeal upheld the conviction, concluding that the errors were "individually and collectively" harmless. The state appellate court ruled that he had

received a fair trial and that the errors did not represent a "serious flaw" that would have influenced the jury's decision. Subsequently, Mr. Parle sought federal *habeas* relief. Upon review, the federal district court granted *habeas* relief and overturned his conviction, holding that the "cumulative effect . . . [of the] evidentiary errors deprived the petitioner of his due process rights to a fair trial" (*Parle*, p 925). This decision was later reversed on appeal and remanded back and forth on several issues. On second remand, the district court again granted *habeas* relief, finding that the sum of errors "infected" the trial to such a degree that it represented a due process violation. Consequently, the State of California again appealed the grant of *habeas* relief.

Rulings and Reasoning

The Ninth Circuit Court of Appeals upheld the district court's ruling, finding that the cumulative sum of the evidentiary errors "infected" the trial with such unfairness that it constituted a due process violation. In support of its holding, the circuit court first considered the U.S. Supreme Court's decision in *Chambers v. Mississippi*, 410 U.S. 284 (1973). In that case, Leon Chambers was charged with killing a police officer. Before Mr. Chambers' trial, Gable McDonald confessed to the killing, but later recanted his confession. At trial, Mr. Chambers called Mr. McDonald as a defense witness and Mr. McDonald's confession was read to the jury. On cross examination Mr. McDonald stated that he had falsely confessed. The trial judge then prevented Mr. Chambers from cross-examining Mr. McDonald as an adverse witness, since Mr. McDonald's testimony had not "specifically implicated Chambers." In addition, testimony by three witnesses, to whom Mr. McDonald had confessed, was excluded as hearsay evidence. The Supreme Court found that the combined effect of preventing Mr. Chambers' cross-examination of Mr. McDonald and the exclusion of the three witnesses amounted to a denial of "a trial in accord with traditional and fundamental standards of due process" (*Parle*, p 927).

In applying the due process principles of *Chambers*, the Ninth Circuit Court of Appeals found that the state appellate court's decision that the errors in Mr. Parle's trial did not result in unfairness was an "objectively unreasonable application of clearly established due process law." In reaching its decision, the circuit court examined the impact of each error

separately before considering the overall effect of the errors collectively. First, the court considered the issue of erroneous admission and exclusion of medical testimony. Despite the defendant's assertion of the doctor-patient privilege, the trial judge admitted adverse testimony by his treating psychiatrist. In addition, his psychiatric expert was not permitted to provide rebuttal testimony that addressed the adverse testimony by the treating psychiatrist. The trial judge's treatment of the proffered psychiatric testimony was critical in this case, since the testimony was central to the question of the *mens rea* required to support a finding of first-degree murder.

His treating psychiatrist testified that Mr. Parle had Type II bipolar disorder, the milder form of the illness, and was not experiencing a manic episode at the time of the crime. Further, the psychiatrist disclosed confidential statements regarding the defendant's violent feelings toward his wife. This testimony supported the prosecution's assertion that the killing was premeditated. The circuit court found that the wrongful admission of this testimony violated his Fourteenth Amendment right to privacy, despite the state appellate court's view of harmless error and viewing the evidence as cumulative (i.e., presented through other admissible evidence). The circuit court agreed with the district court that the treating psychiatrist's testimony was not cumulative and that it was the only testimony affirming the prosecution's theory regarding premeditation.

Next, the circuit court considered the erroneous exclusion of rebuttal testimony by the defendant's psychiatric expert. Although the defense's expert testified that Mr. Parle had Type I bipolar disorder and was manic during the killing, he was prohibited from testifying about the adverse effects of mania on the general state of mind and premeditation capability. The trial court specifically struck from the record the expert's testimony regarding the impulsivity, poor judgment, and impaired ability to consider consequences and alternatives during manic episodes. The circuit court disagreed with the state appellate court's characterization of this exclusion as harmless error. The circuit court also disagreed with the assertion that the exclusion did not violate Mr. Parle's due process rights since he "was permitted to present some expert testimony about his mental disorder." According to the circuit court, the excluded testimony addressed the only contested issue at trial (state

of mind), and its absence clearly undermined his defense.

While the circuit court's opinion briefly addressed the other errors identified in Mr. Parle's trial, the court quickly indicated that the cumulative effect of the erroneous admission and exclusion of psychiatric testimony alone violated his due process and rendered his trial unfair, especially since the psychiatric testimony addressed the only significantly relevant issue, his mental state at the time of the crime. Consequently, the two errors augmented the other's prejudice against his defense and resulted in a trial "infected" with unfairness. Therefore, the circuit court affirmed the district court's decision to grant *habeas* relief.

Discussion

In this case, the Ninth Circuit granted *habeas* relief because the cumulative impact of errors caused an unfair trial and, ultimately, a due process violation. Central to this case was whether the defendant's mental state rose to the level necessary for conviction of first-degree murder. The judicial treatment of the psychiatric evidence in this case brought about a quality of one-sidedness in favor of the prosecution. These errors run afoul of constitutional principles enacted to protect criminal defendants. The trial court's dismissal of the doctor-patient privilege owed to the defendant violated his right to privacy as provided by the Fourteenth Amendment. Compounding that error was the exclusion of rebuttal psychiatric testimony, which effectively crippled the defendant's ability to present a complete defense, thereby leaving the jury with a slanted view of the defendant's mental state at the time of the crime.

The ruling in this case illustrates important psychiatric concerns, as applied in the legal setting: the doctor-patient privilege and mental illness in relation to criminal responsibility. The doctor-patient privilege protects communications between patients and their physicians from courtroom intrusions. This protection promotes open communication between patients and their doctors in the furtherance of medical treatment and hinders the use of these communications to incriminate individuals in legal settings. With some exceptions, this privilege may be waived only by the patient.

This case also demonstrates that the mental state at the time of the crime is a necessary element in establishing criminal responsibility and determining the

degree of culpability. A defendant's history of mental illness requires critical consideration of the presence and significance of psychiatric symptoms during the crime. In these cases, testimony by forensic psychiatrists often serves as the key in determining *mens rea*. The court's decision reemphasized the importance of psychiatric testimony in such cases.

Termination of Parental Rights

Sarah Rasco, MD

Fellow in Forensic Psychiatry

Heidi Vermette, MD

Medical Director for Mental Health

Veterans Affairs North Texas Health Care System

Assistant Professor of Psychiatry

Director, Law and Psychiatry Fellowship

*University of Texas Southwestern School of Medicine
Dallas, Texas*

Termination of Parental Rights of a Mother With Borderline Personality Disorder and Chronic Depression Who Was Absent at Trial and Was Found to Have Deliberately Delayed Trial and Not to Have Remedied the Causes and Conditions That Resulted in Substantial Risk of Harm to Her Daughter

In the case of *Alyssa B. v. State*, 165 P.3d 605 (Alaska 2007), the Alaska Supreme Court considered whether a mother's due process rights were violated by the judicial proceedings that terminated her parental rights. The trial court's hearing was repeatedly delayed by Ms. B.'s refusal to work with court-appointed attorneys and her filing of numerous motions and requests for continuances. When the trial was held, Ms. B. did not appear in court. The trial proceeded in her absence, and her parental rights were terminated after the court ruled that she had failed to remedy the causes or conditions that created a risk of harm to her daughter.

Facts of the Case

In October 2003, Jaelyn (pseudonym) was adjudicated a child in need of aid. She was committed to the Department of Health and Social Services' custody in February 2004. In March 2005, the department petitioned to terminate the parental rights of her mother, Ms. B. The trial date was postponed several times to match Ms. B. with an attorney who was acceptable to her. She ultimately declined legal

representation by her court-appointed attorney and chose to represent herself *pro se*. The court appointed an attorney to serve as her advisory counsel. Ms. B. filed numerous motions and requests for continuances.

Ms. B. was notified by mail of the termination hearing but failed to appear in court in August 2006. She informed the court by phone that she was vacationing in Mexico and requested a continuance so that she could participate in court at a later date. When the superior court judge refused to delay the trial and suggested that she participate by phone, she objected, disconnected the call, and did not call back. The trial proceeded, and a department social worker testified that Ms. B. had not had contact with her daughter since February 2003 and had failed to complete a single goal of the case plan created to help her regain custody of her daughter. The social worker recommended that Jaelyn be adopted by her foster parents because she was thriving in their care. A clinical psychology expert testified that a review of Ms. B.'s history showed that she had severe psychological problems and was socially maladjusted and that it would not be in her daughter's best interest to be returned to her custody.

To terminate parental rights pursuant to Alaska Stat. § 47.10.088 (2005), it must be found by clear and convincing evidence that the child is in need of aid as described by Alaska Stat. § 47.10.011 (2005), that the parent has not remedied the conduct or conditions in the home that place the child at substantial risk of harm, and that the Department of Health and Social Services has made reasonable efforts to restore custody under the provisions of Alaska Stat. § 47.10.086 (2005). The court must also find by a preponderance of the evidence that termination of parental rights is in the child's best interest. In this case, the court ruled that Ms. B. had abandoned her daughter by not complying with the reunification plan, refusing all services, and making a minimal effort to communicate with Jaelyn. The court also ruled that Ms. B. had a mental illness that if not remedied would result in substantial risk of harm to Jaelyn should she be returned to her mother's custody. The court found that the department's efforts to reunite Ms. B. and Jaelyn were reasonable and had failed because Ms. B. repeatedly refused the department's offers of assistance. Finally, the court decided it was in Jaelyn's best interest that Ms. B.'s parental rights be terminated. A final order was issued in September 2006.