

Ruling and Reasoning

The Supreme Court of Pennsylvania did not find merit in Mr. Puksar's claims and affirmed the ruling of the PCRA court denying postconviction relief.

The Supreme Court of Pennsylvania observed that it had not defined a standard of competence to waive the presentation of mitigating evidence, and neither had the U.S. Supreme Court. However, in the landmark case *Godinez v. Moran*, 509 U.S. 389 (1993), the U.S. Supreme Court held that the competence to plead guilty or waive the right to counsel is the same as competence to stand trial. The Supreme Court of Pennsylvania then held in *Commonwealth v. Starr*, 664 A.2d 1326 (Pa. 1995), that the "competency standard for waiving the right to counsel is precisely the same as the competency standard for standing trial, and is not a higher standard" (*Starr*, p 1339). Specifically, "the focus of a competency inquiry is the defendant's mental capacity; the question is whether he has the ability to understand the proceedings" (*Starr*, p 1339).

The Supreme Court of Pennsylvania did not note any reason in this case to establish a different standard for the competence to waive mitigating evidence. The standard for competence to stand trial in Pennsylvania, as established in *Commonwealth v. Appel*, 689 A.2d 891 (Pa. 1997), is whether the defendant has the ability to consult with counsel with a reasonable degree of understanding and whether the defendant has a rational understanding of the nature of the proceedings.

The Supreme Court of Pennsylvania found that the PCRA court did not err in rejecting Mr. Puksar's claim in light of this standard. The appellant's experts did not assert that Mr. Puksar had lacked the capacity to understand the proceedings and what he was waiving. Instead, his experts had opined that he understood the proceedings but had given up on the system itself. This appraisal did not rise to the level of incompetency to waive mitigating evidence.

The Supreme Court of Pennsylvania also considered the fact that there was no disagreement about Mr. Puksar's competence before the penalty phase of his trial. Mr. Sodomsky could not be faulted for not questioning his client's competence if there was no evidence in Mr. Puksar's behavior that indicated incompetence after a guilty verdict.

The fact that a defendant wished to waive the presentation of mitigating evidence did not automatically necessitate a psychiatric evaluation of his capacity.

Discussion

This case reinforced the concept of a single standard of competence for standing trial, pleading guilty, and waiving the right to counsel. The Supreme Court of Pennsylvania then extended this standard to the waiver of presentation of mitigating evidence.

It is worthwhile to examine the holding in this case given the recent ruling of the U.S. Supreme Court in *Indiana v. Edwards*, 554 U.S. 208 (2008). In that case, the U.S. Supreme Court held that it was not unconstitutional to establish a higher standard of competence for proceeding *pro se* in a trial than for competence to stand trial with the assistance of an attorney. The reasoning for this included the higher requirements placed on a defendant to mount a defense in the absence of counsel. However, it still held to the earlier ruling in *Godinez v. Moran* that the standard of competence to waive assistance of counsel is the same as the standard for competence to stand trial. In light of this, it is unlikely that the U.S. Supreme Court would define a different standard for competence to waive the presentation of mitigating evidence, since the defendant still possesses the assistance of counsel.

About 20 percent of inmates on death row choose to waive the right to appeal, with the intent of hastening execution. Many find that the quality of life on death row does not merit delaying execution and prefer death to serving life in prison. Thus, Mr. Puksar's decision to waive mitigating evidence can be understood without the presence of mental illness.

Forced Medication for Death Penalty Appeals

Arwen Podesta, MD
Fellow in Forensic Psychiatry

D. Clay Kelly, MD
Assistant Professor of Psychiatry

*Department of Psychiatry and Neurology
Tulane University School of Medicine
New Orleans, LA*

The Supreme Court of Pennsylvania Held That the Government Does Not Have to Prove All Four *Sell* Factors if Medicating Inmates Would Promote Their Interests, Such as When They Wish to Participate in Post Conviction Relief Act Proceedings

In *Commonwealth v. Sam*, 952 A.2d 565 (Pa. 2008), the Pennsylvania Supreme Court reversed the Court of Common Pleas of Philadelphia County (the PCRA court) which had denied a request for an order to administer psychiatric medication to an inmate, Thavirak Sam, to render him competent to determine whether to proceed with his appeal under the Post Conviction Relief Act (PCRA).

Facts of the Case

On July 2, 1991, Thavirak Sam, a Cambodian immigrant, was convicted of three counts of first-degree murder in the deaths of his mother-in-law, brother-in-law, and two-year-old niece. He was given three death sentences. In 1993, the Supreme Court of Pennsylvania upheld his conviction and sentence. In 1994, the U.S. Supreme Court declined to hear his appeal.

On January 16, 1997, attorney Robert Brett Dunham (who was not retained by Sam) from the Center for Legal Education Advocacy and Defense Assistance (CLEADA) filed a petition for postconviction relief, alleging that Mr. Sam was not competent and did not have a rational understanding of postconviction relief proceedings or of his rights. (The case was filed by Dunham on the last day that the petitioner could appeal, as a 1997 amendment to PCRA limits appeals to one year after conviction.) Jules Epstein was subsequently appointed as Mr. Sam's PCRA attorney. On May 10 and 24, 2000, psychologist William F. Russell examined Mr. Sam for the defense. He found him to have bipolar disorder with active delusions. On October 4, 2000, John S. O'Brien II, MD, examined Mr. Sam for the commonwealth, found him to have delusions, and diagnosed schizophrenia (paranoid type). Both found Mr. Sam to be incompetent to proceed in the PCRA hearing.

On January 7, 2002, the commonwealth filed a motion to compel psychiatric medication, quoting the reports of Drs. Russell and O'Brien and citing the need for treatment and history of good response to such treatment. The defense then filed motions intended to forestall a hearing on forced medication. On April 4, 2003, the PCRA court held a hearing on the commonwealth's motion to compel psychiatric

medication. Dr. O'Brien testified, "Mr. Sam would respond to treatment, psychiatric treatment for his current symptoms." He also explained general treatment guidelines of psychiatric disorders, outlined courses of treatment, and described types of medications and their side effects. Dr. Russell also testified, agreeing with Dr. O'Brien that Mr. Sam's delusions are the "predominant issue at the present time that interferes with his competency."

On October 20, 2005, the PCRA court issued an order denying the commonwealth's motion to compel psychiatric medication. The PCRA court reasoned that there was not yet a standard of competency for the purpose of authorizing and pursuing relief under the PCRA. They focused on *Sell v. United States*, 539 U.S. 166 (2003). In accordance with *Sell*, the PCRA court first made a determination as to whether Mr. Sam was a potential danger to himself or others and found no evidence that he posed a risk.

The PCRA court then reviewed the four factors of the *Sell* test: whether an important governmental interest has been established; whether the proposed treatment is substantially likely to render the defendant competent; whether alternative, less intrusive treatments are unlikely to achieve the same results; and whether the administration of the drugs is "medically appropriate." The PCRA court analyzed the relevance of the first, second, and fourth prongs of the *Sell* test in regard to Mr. Sam. They concluded that the court was "prohibited from ordering forced medication solely to render the Defendant competent to proceed with his Petition for Post Conviction Relief." They also asserted that the commonwealth had to provide full details of the type of medication and method of administration, and since none was provided, they found there was no way to predict response, or to monitor side effects. The commonwealth then appealed the ruling.

Ruling and Reasoning

The Pennsylvania Supreme Court reviewed the decisions in *Sell*, citing the four prongs of the *Sell* test, as well as the recognition that "an individual has a 'significant' constitutionally protected 'liberty interest' in 'avoiding the unwanted administration of antipsychotic drugs.'" The Pennsylvania Supreme Court also discussed the Supreme Court's decision in *Washington v. Harper*, 494 U.S. 210 (1990), positing that "the Court did not hold that danger to self or

others was the only permissible basis for involuntarily medicating mentally ill inmates . . . what is required under Harper is ‘a finding of overriding justification’ or an ‘essential state policy.’” The court noted that the *Sell* Court deemed forced antipsychotic medication appropriate when a particular government interest is at stake—chiefly, competency to proceed. The Pennsylvania Supreme Court related that, in the instant case, the commonwealth should not have to meet the four strict *Sell* conditions in their entirety, because the commonwealth is not seeking an end that is against the appellee’s interest. The PCRA court is available for appellees to seek relief, and medicating the appellee to go forward on relief-seeking is not against his interest.

The court’s opinion addresses all four *Sell* test prongs. The Pennsylvania Supreme Court found that governmental interests in finality are indeed at stake and that Mr. Sam’s crime was very serious. They emphasized that Mr. Sam was in virtual limbo on his PCRA hearing and it is in the government’s (and the appellee’s) interest to assist him in moving it forward. The commonwealth argues that normally one assumes that counsel speaks for the appellee, yet in this case the PCRA petition was filed on his behalf without his initiation or consent. In fact, Mr. Sam never sought relief and apparently stated to the PCRA court that he would rather be executed than spend the rest of his life in prison. The Pennsylvania Supreme Court concluded that, for the purposes of appeal, Mr. Sam, if left untreated, would never be competent to decide whether to pursue postconviction relief.

Relying on testimony by a psychiatrist and psychologist, the Pennsylvania Supreme Court determined that the involuntary administration of antipsychotic medications was unlikely to have side effects that would significantly interfere with Mr. Sam’s ability to assist counsel and that less intrusive treatment options were not likely to be efficacious. Further, the Pennsylvania Supreme Court held that the PCRA court erred in requiring the commonwealth to provide, as part of their forced-medication treatment plan, “concrete details” of medications and dosages to satisfy the second prong of the *Sell* test. Further, the Pennsylvania Supreme Court found that if such stringent requirements stood, the commonwealth would be presented with virtually insurmountable obstacles on all similar cases. Regarding the fourth prong of the *Sell* test, the Penn-

sylvania Supreme Court reiterated that treatment is appropriate if it would be in Mr. Sam’s “best interest in light of his medical condition” (*Sell*, p 181).

The Pennsylvania Supreme Court concluded that forced medication of the appellee to determine whether he wishes to pursue PCRA relief and to assist the appointed counsel does not violate the federal Due Process Clause. Further inquiry was made regarding defense counsel’s argument that the Pennsylvania Mental Health Procedures Act (MHPA) requires that the commonwealth’s motion to compel medication be denied. The MHPA governs the provision of inpatient psychiatric treatment and involuntary outpatient treatment, to assure “the availability of adequate treatment to persons who are mentally ill, and to establish procedures to effectuate this purpose” (Section 102 of the MHPA, 50 Pa. Stat. Ann. 7102). The Pennsylvania Supreme Court also examined two previous cases, *Commonwealth v. Jermyn*, 652 A.2d 821 (Pa. 1995), and *Commonwealth v. Edmunds*, 586 A.2d 887 (Pa. 1991), and held that the MHPA does not provide alternate grounds to affirm the decision of the PCRA court.

Discussion

Another question looming over this case is competency to be executed (CTBE). The Pennsylvania Supreme Court refers to it early in the majority opinion as “a distinct and unripe question we do not address here.” But the court does return to CTBE indirectly late in the opinion. The court refers to *Singleton v. State of S. Carolina*, 437 S.E.2d 53 (S.C. 1993), and *State of Louisiana v. Perry*, 610 So.2d 746 (La. 1992), cases in which South Carolina and Louisiana, respectively, sought the right of involuntarily administering antipsychotic drugs to death row inmates, solely for the purpose of rendering said prisoners competent to be executed. The Pennsylvania Supreme Court posits that the sole aim of the proposed state action in these cases was the restoration of death row inmates to competency to be executed. The court asserted that the instant case separated from these other cases on the basis of aims. The commonwealth sought a forced medication order for the purpose of restoring a prisoner to competency to make decisions regarding available appeals. The question of Mr. Sam’s competency to be executed was unripe at the time of this case. Still, as Mr. Sam’s attorney later pointed out, this decision may mark the first occasion that an appellate court has ap-

proved the forcible medication of a death row inmate who does not pose a risk to himself or others.

Of note, after Mr. Sam's PCRA hearing, the Delaware Supreme Court defined competence for pursuing postconviction relief as having the ability to "understand the process and goals of PCRA proceedings and. . .to assist in that process to the extent required given the specific legal and factual issues which remain to be litigated" (quoted in *Commonwealth v. Zook*, 887 A.2d 1218 (Pa. 2005), pp 1224–5).

Ineffective Counsel

Mehdi Qalbani, MD, MSPH
Fellow in Forensic Psychiatry

D. Clay Kelly, MD
Assistant Professor of Psychiatry

Department of Psychiatry and Neurology
Tulane University School of Medicine
New Orleans, LA

Defense Counsel in Capital Cases Must Attempt to Discover All Mitigating Evidence, Including Mental Impairment, Even Though the Defendant Rejects Such a Defense

In *Gray v. Branker*, 529 F.3d 220 (4th Cir. 2008), the United States Fourth Circuit Court of Appeals held that counsel was ineffective for failing to investigate and develop evidence that their client, a capital murder defendant, had significant mental illness.

Facts of the Case

William Robert Gray, Jr., was convicted of first-degree murder and sentenced to death in North Carolina for the murder of his wife. In February 1992, Mrs. Gray told her husband that she was divorcing him after 22 years of marriage. During contentious divorce proceedings, Mr. Gray was awarded temporary custody of the former couple's two children and was allowed to stay in the family home. As the case progressed, Mr. Gray displayed worsening signs of emotional instability. His friends described him as not having a "grasp of what was going on" and as "not in his right mind." His behavior worsened to the point that he interrogated his wife's gynecologist, his marital counselor refused to work with him, and his initial divorce attorney withdrew from the case citing "irreconcilable differences." Divorce proceedings were continuing when, on November 24, 1992,

Mr. Gray assaulted Mrs. Gray in the street when she dropped off the children at his house. A witness who observed the assault said that Mrs. Gray pleaded with him (the witness) not to leave the scene. There was a gunshot, Mr. Gray fled, and Mrs. Gray was left in the street with a bullet wound to the head, as well as wounds from a stun gun and from apparently being beaten with the butt of a pistol. She died in the hospital.

That day, Mr. Gray was arrested and charged with first-degree murder. He formally asked his divorce attorney, Bob Worthington, to represent him in this trial. Mr. Worthington had no previous experience with capital murder trials.

During his detainment, Mr. Gray's mental state deteriorated. He was placed on suicide watch. At the jailer's suggestion, Mr. Gray was committed for evaluation at Dorothea Dix Hospital. Patricio Lara, MD, completed an evaluation of Mr. Gray but emphasized that the information provided to him about Gray's "condition before the incident in question [was] quite limited." Dr. Lara reported that stress on Mr. Gray "may have contributed to regression in behavior and reduction in impulse control." He ultimately found Mr. Gray competent to stand trial and diagnosed adjustment disorder with mixed disturbance of emotions and conduct. He commented that Mr. Gray was guarded during the evaluation and suggested ongoing psychiatric counseling with pharmacologic intervention as a possibility. He further stated that, should other information become available, he would be able to expand his opinion. Mr. Gray was returned to Lenoir County Jail where he had "anxiety attacks" and a "fainting spell" and was housed in the juvenile wing because of his "physical and mental condition." Mr. Worthington chose to focus, not on Mr. Gray's continuing mental deterioration, but on the alibi he had proffered to the police during his arrest. For his part, Mr. Gray resisted the investigation of (and presentation of) mental health evidence.

During the trial, the state presented evidence that Mr. Gray had previously psychologically and physically abused Mrs. Gray, that he had related a false alibi when arrested, and that the blunt force injury to her face was consistent with a blow from the butt of a handgun. The defense presented no mental health evidence. The jury convicted Mr. Gray of first-degree murder. At the sentencing phase, no mental health evidence (expert or lay) was presented. Mr. Gray was sentenced to death.