

ticular social group” for the determination of refugee status. Prior rulings have found that mental illness has not met the criteria of “a collection of people closely affiliated with each other, who are actuated by some common impulse or interest” (*Raffington v. I.N.S.*, 340 F.3d 720 (8th Cir. 2003), quoting *Safaie v. I.N.S.*, 25 F.3d 636, 640 (8th Cir. 1994)). In *Kholyavskiy v. Mukasey*, the court considered psychiatric evidence that his mental illness was refractory to treatment and most likely permanent. The permanence of such a mental disability would appear to be a first step in meeting the definition of a social group. Other relevant factors would be visibility and persecution of the group. The analysis did not proceed in this case because the court found that he had not presented sufficient evidence that Russia persecutes the mentally ill. Going forward, important factors for consideration in psychiatric evaluations for asylum include prognosis, outward signs of a disorder, and evidence of persecution in the country of origin.

The consideration of serious harm in determining humanitarian asylum in this case is an important precedent. The Court of Appeals for the Third Circuit has cited *Kholyavskiy v. Mukasey* in its recent remand of a case in which serious harm upon removal was a consideration (*Sheriff v. Attorney General U.S.*, 587 F.3d 584 (3d Cir. 2009)). The Third Circuit pointed out that *Kholyavskiy v. Mukasey* is one of the only cases that has discussed what constitutes serious harm under humanitarian asylum law. Factors considered in the case included access to medication, access to mental health treatment, and the impact that these would have on functioning. This case is important to forensic psychiatrists, as it establishes the importance of mental health concerns in asylum proceedings. Forensic evaluations should describe the predicted impact of removal on the mental health of potential deportees.

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Competence to Waive Miranda Rights

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Competency to Stand Trial Concerns Do Not Require Hearings *Sua Sponte* on Competence to Waive *Miranda* Rights

The United States Court of Appeals for the Ninth Circuit decided the case of *Cox v. Del Papa*, 542 F.3d 669 (9th Cir. 2008) on September 4, 2008. At issue was whether the Constitution requires that a trial court conduct a *sua sponte* examination of a criminal defendant’s competence to waive *Miranda* rights when questions about the defendant’s competence to stand trial have been raised.

Facts of the Case

In March 1990, Steve Cox stopped in Las Vegas, Nevada, to repair his truck during a cross-country trip. He became involved with Carita Wilson. Ms. Wilson’s body was later found in Mr. Cox’s hotel room. She had a telephone cord wrapped around her wrist and a towel around her throat. Arizona Highway Patrol officers arrested Mr. Cox and read him his *Miranda* rights from a department-issued card. Mr. Cox acknowledged that he understood the *Miranda* warning. When asked if he knew why he was being arrested, Mr. Cox stated he “was framed, that it was self-defense. . .the girl had come to him with fangs and fingernails and that he only choked her around the neck long enough to subdue her” (*Cox*, p 672). Mr. Cox continued to talk “a lot” for the next 10 minutes. He was booked into the county jail.

One week later, North Las Vegas detectives interviewed Mr. Cox in Arizona. They advised him of his rights, and he chose not to talk with them. The detectives returned to Arizona with a warrant to drive him back to Nevada. Before departure, his *Miranda* rights were again read to him. He again acknowledged that he understood the rights. During the drive to Las Vegas, he spontaneously spoke. Among other things, he described details about how and why he had restrained Ms. Wilson with a towel at the time of her death. Nevada prosecutors charged him with first-degree murder.

The trial judge held a competency hearing after two psychiatrists opined that Mr. Cox was competent to stand trial and two others opined that he was not. The judge found him incompetent to stand trial, and he was transferred to a mental health facility. His trial began one year later, after his competency had been restored. The jury found him guilty of first-degree murder and sentenced him to life in prison without the possibility of parole. Following his filing

of multiple appeals seeking relief in state court, he petitioned for *habeas corpus* relief in federal court, asserting various constitutional violations. Among the claims, he argued that given the doubts about his competency to stand trial, the trial court should also have ordered, *sua sponte*, a hearing on his cognitive abilities to waive his *Miranda* rights. Although the district court denied the *habeas* petition and his request for a certificate of appealability, the Ninth Circuit granted the certificate.

Ruling and Reasoning

A three-judge panel of the Ninth Circuit Court of Appeals affirmed the decision of the United States District Court for the District of Nevada that the trial court was not required to order, on its own initiative, a hearing to ensure that a *Miranda* waiver was knowing and intelligent, because a defendant's competency to stand trial had been questioned. The court of appeals rejected Mr. Cox's claim that *Johnson v. Zerbst*, 304 U.S. 458 (1938), supports the argument that a trial court has a protective duty to hold a hearing to determine whether a *Miranda* waiver is valid.

The Ninth Circuit cited *Rhode Island v. Innis*, 446 U.S. 291 (1980), in deciding to limit their analysis to periods "where a subject in custody is subjected to interrogation" (*Innis*, p 676). Mr. Cox claimed that lack of mental capacity barred admission of his statements to the Arizona officers upon his arrest as well as the North Las Vegas detectives during his ride to Nevada. The court of appeals determined that the statements he spontaneously made while being driven to Nevada did not constitute an interrogation and therefore were not protected under *Miranda*. As such, only the statements he made to Arizona officers immediately following his arrest were to be included in the analysis.

The court of appeals noted that Mr. Cox was contesting his mental capacity only at the time he made self-incriminating statements and not the "external factors" associated with voluntariness and police coercion. Therefore, they limited their analysis to the cognitive component of the two-pronged criteria required for valid *Miranda* waivers. The court of appeals pointed to *Moran v. Burbine*, 475 U.S. 412 (1986), to define further this cognitive component as "a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it" (*Moran*, p 421).

To demonstrate a valid *Miranda* waiver, the government had offered an Arizona officer's testimony that indicated that Mr. Cox had "acknowledge[d] that he understood the *Miranda* warnings." Mr. Cox did not present evidence in lower courts to suggest otherwise. He had not claimed in lower courts that his *Miranda* waiver was invalid. Rather, he simply complained in his appeal that there was never a formal evaluation of its validity and that such an evaluation should have occurred given that his mental state was impaired, as evidenced by his being found incompetent to stand trial.

The court of appeals rejected Mr. Cox's reliance on *Zerbst* to support his view that the trial court had a protective duty to hold a hearing on whether he had validly waived his *Miranda* rights. In *Zerbst*, the U.S. Supreme Court reversed and remanded the convictions and sentences of defendants because the trial court made no finding that the defendants knowingly and intelligently waived their Sixth Amendment right to counsel. Mr. Cox invoked the "*Zerbst* standard" to argue his case by leaning on *Minnick v. Mississippi*, 498 U.S. 146 (1990), which stated, "nothing less than the *Zerbst* standard for the waiver of constitutional rights applies to the waiver of *Miranda* rights" (*Minnick*, p 160). The court of appeals rejected this argument on two fronts. First, they stated that the need for court assistance with respect to waiver of trial counsel does not suggest a similar need for court assistance when a defendant already has the assistance of counsel. Second, they noted that the "so-called" *Zerbst* standard merely refers to a trial judge's protective duty to ensure waivers be voluntary, knowing, and intelligent. How judges apply this protective duty depends on the particular facts and circumstances of the case at hand. They concluded that *Zerbst* alone "cannot support Cox's claim that the trial judge had a protective duty to order a hearing to ensure that his waiver was knowing and intelligent, rather than determining simply whether the government had met its burden of proof" (*Cox*, p 678).

Given that the U.S. Supreme Court had never held that a trial court must order *sua sponte* a hearing regarding the defendant's cognitive ability to waive his *Miranda* rights, the Ninth Circuit held that the lower courts did not unreasonably apply clearly established Federal law. Mr. Cox was not entitled to *habeas* relief on his *sua sponte* hearing claim. The

decision of the district court to deny *habeas* relief was affirmed.

Discussion

This case brings up concerns that are important in the practice of forensic psychiatry. *Cox v. Del Papa* demonstrates that a trial court is not required to order *sua sponte* (i.e., on its own initiative) a hearing to ensure that a *Miranda* waiver was knowing and intelligent, simply because a defendant's competence to stand trial has been questioned.

The original intent of *Miranda v. Arizona*, 384 U.S. 436 (1966), was to emphasize that procedural safeguards are necessary to protect a defendant's Fifth Amendment privilege against self-incrimination while in custody and being interrogated. To find that a person has properly waived *Miranda* rights, it must be determined that the individual has done so knowingly, intelligently, and voluntarily. Thus, competence to waive *Miranda* rights encompasses both a cognitive and volitional prong. In *Cox*, the court of appeals limited their analysis to the cognitive prong but did not explicitly differentiate knowingly (the capacity to understand that rights are being waived) from intelligently (understanding the significance of the rights being waived). However, it is apparent that both components were considered in their decision.

An assessment of competency is both time-specific and situation-specific. The individual's lack of competence in one area does not show that he lacks competence in others. If more than one type of competence is questioned, each competency must be separately assessed. The U.S. Supreme Court has recently recognized that mental illness may impair certain capabilities, but not others, during criminal proceedings. In *Indiana v. Edwards*, 554 U.S. 164 (2008), for example, the Court differentiated between competency to stand trial with assistance of counsel and competency to represent oneself at trial.

Had Mr. Cox successfully argued his case, it would be conceivable that forensic psychiatrists conducting evaluations of competency to stand trial would also be required to evaluate concurrently the validity of a defendant's waiver of *Miranda* rights. Evaluations of competency to waive *Miranda* rights involve retrospective assessments of both the defendant's "mental state at the time of the interrogation" and whether interactions with law enforcement were overly coercive. This evaluation is in contrast to that of a defendant's present ability to provide rational assistance to

counsel and understand court proceedings. In *Cox*, the Ninth Circuit's decision affirmed that psychiatrists need not pair these two very different competency evaluations unless explicitly requested to do so. The decision reinforces the importance of forensic psychiatrists' clarifying the specific questions that they are being asked to address before conducting competency evaluations.

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Legal Rights for Members of the Armed Forces

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"Full and Fair Consideration" the Correct Standard for Federal Civilian Court Review of Armed Forces Member's Petitions for Habeas Corpus and Evidentiary Hearings to Consider Issue of Competency to Stand Trial

In the case of *Armann v. McKean*, 549 F.3d 279 (3d Cir. 2008), the Third Circuit Court of Appeals considered what legal standard should be used when a federal civilian court reviews a *habeas corpus* petition of an armed service member convicted in the military courts. In this case, the district court ruled that the military courts did not adjudicate the service member's mental incompetency claim "on the merits" under 28 U.S.C. § 2254 (d), and as a result, he was entitled to a *de novo* evidentiary hearing. After granting the Government's Petition for Permission to Appeal, the Third Circuit reversed the decision of the district court, holding that the correct standard for such review was the "full and fair consideration" standard set forth in the United States Supreme Court Case of *Burns v. Wilson*, 346 U.S. 137 (1953).

Facts of the Case

In October 1998, Kurtis Armann, a private in the U.S. Army, attempted to shoot and kill Private Toni Bell. Dressed all in black and armed with a makeshift rifle equipped with a scope, Private Armann waited