Ruling and Reasoning

In deciding what scope of review a federal district court should apply when analyzing a service member's *habeas corpus* petition, the Third Circuit cited *Burns v. Wilson* as the relevant case law. In *Burns v. Wilson*, the Supreme Court held that the standard for such review is "full and fair consideration," which they intended to mean "no more than hearing the petitioner out." The Third Circuit explained that regardless of the rationale in favor of applying a different standard, "it is solely the prerogative of the Supreme Court to depart from its precedents" (*Armann*, p 291). Since the Supreme Court has not abandoned the *Burns* decision, the Third Circuit opines that it is the definitive standard in this case. The decision in *Burns v. Wilson* showed a greater deference to the decisions made in military courts than those of civil courts, and thus only an overt constitutional violation would justify the federal court granting review.

After deciding the appropriate standard for review, the Third Circuit considered Mr. Armann's assertion that the military courts did not consider his competency claim. The Third Circuit cited their ruling in *U.S. ex. Re. Thompson v. Parker*, 399 F.2d 774 (3d Cir. 1968), where they held that the Court of Military Appeals' one-sentence denial of a petition for review, which was accompanied by an extensive brief by the appellant regarding the alleged constitutional violation, satisfied the requirement for full and fair consideration set forth in *Burns*. The Third Circuit pointed out that, although the government failed to address the incompetency claim in detail, it did not ignore it.

Discussion

This case reiterates that decisions made in military courts are subject to a narrower scope of review, affording them greater deference than civil courts. As a result, Mr. Armann's claim of incompetency would be subject to review in federal court only if the military courts manifestly refused to consider the claim. Per *Burns*, the Third Circuit asserted that "Military law, like state law, is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment" (*Burns*, p 140).

Still, this level of deference could leave significant competency issues in Mr. Armann's case unexamined. The potential that the medications received by him on the day of his plea affected the voluntariness of his plea seems significant. Yet, the Third Circuit only mentions it in passing. Although many of the issues he raises in his various appeals seem to lack merit (e.g., the "likely" psychotomimetic effects of Accutane, which he asserts caused him to be insane at the time of his unlawful behavior), the possibility that he may have been oversedated when he pleaded guilty seems a live issue indeed.

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Death Penalty and Mentally Ill Defendants

Franklin J. Bordenave, MD
Fellow in Forensic Psychiatry

D. Clay Kelly, MD
Associate Professor

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

Two State Supreme Courts Hold That Mental Illness Is Not a *Per Se* Bar to Execution

In *Power v. State of Florida*, 992 So.2d 218 (Fla. 2008), and *Hall v. Brannan*, 670 S.E.2d 871 (Ga. 2008), the Supreme Courts of Florida and Georgia each reaffirmed and held that the mere presence of mental illness does not provide one with an Eighth Amendment exemption for execution.

Facts of the Case in Power v. State of Florida

Robert Beeler Power was convicted of first-degree murder, sexual battery, kidnapping of a child under the age of 13, armed burglary of a dwelling, and armed robbery on June 2, 1990. He was subsequently sentenced to death. He made claims of error in both the guilt and penalty phases of his trial. The Supreme Court of Florida affirmed his convictions and sentences. In November 1998, he filed a postconviction motion, but the Supreme Court of Florida affirmed the denial for postconviction relief and denied a petition for writ of *habeas corpus*. He filed another postconviction motion containing four constitutional challenges to Florida's death penalty scheme in December 2006. The circuit court summarily denied all of his challenges. He appealed the

summary denial of relief to the Supreme Court of Florida.

Ruling and Reasoning in Power v. State of Florida

In Mr. Power's appeal of summary denial, he asserted that he was exempted from execution under the Eighth Amendment, because of ongoing mental illness. The Supreme Court of Florida addressed his appeal by reaffirming its previous holding in *Diaz v. State*, 945 So.2d 1136 (Fla. 2006), stating that the "existence of mental illness standing alone does not automatically exempt Power from execution" (*Power*, p 222). The court also asserted that the U.S. Supreme Court had not recognized mental illness as a *per se* bar to execution. The court quoted its holding in *Diaz* that:

> . . .mental illness can be considered as either a statutory mental mitigating circumstance if it meets that definition (i.e., the crime was committed while the defendant "was under the influence of extreme mental or emotional disturbance") or a non-statutory mitigating circumstance. . . . Such mental mitigation is one of the factors to be considered and weighed by the court in imposing a sentence [*Power*, p 222].

Facts of the Case in Hall v. Brannan

Andrew Howard Brannan was convicted and sentenced to death for the January 12, 1998, murder of Laurens County Deputy Sheriff Kyle Dinkheller. Mr. Brannan was stopped by Deputy Dinkheller for driving his truck at 98 miles per hour. The video recorder in Deputy Dinkheller's patrol cruiser captured the incident. As Mr. Brannan got out of his vehicle, he initially appeared cordial toward the deputy. After Deputy Dinkheller ordered Mr. Brannon to take his hands out of his pockets, Mr. Brannan began shouting expletives at the deputy followed by dancing in the street. He began yelling "Here I am, here I am. . . . Shoot me." Deputy Dinkheller called for assistance and Mr. Brennan could be heard coarsely inquiring about who was being called. Mr. Brannan then repeatedly charged the deputy who held him off with his baton. Mr. Brannan then yelled, "I am a god**** Vietnam combat veteran" and that he was in fear for his life. Deputy Dinkheller then stated he was in fear for his life as well. Mr. Brannan took a rifle from behind the seat of his truck and an exchange of gunfire ensued. The deputy was hit and tried to retreat to cover behind his cruiser. Mr. Brannan pursued the deputy firing numerous times and reloading. As Deputy Dinkheller lay unconscious with nine gunshot wounds, Mr. Brannan, who had been shot once in the abdomen, took careful aim and fired the last shot. Mr. Brannon then fled in his truck. The police found him hiding in the woods outside his home. His statements to the Georgia Bureau of Investigation indicated that he regretted what happened, but he believed he had been provoked by the alleged aggressive and disrespectful approach of Deputy Dinkheller.

During the trial, Mr. Brannan's trial counsel presented the testimony of three psychologists. One testified Mr. Brannan had not shown signs of malingering and had scored high on a test for paranoia. A second psychologist testified that Mr. Brannan had a 12- to 15-year psychiatric history that documented diagnoses of posttraumatic stress disorder and bipolar disorder. He testified that he believed Mr. Brannan was experiencing a flashback and was in a hypomanic state and did not know right from wrong when he committed the murder. The third psychologist also testified that he believed Mr. Brannan committed the murder while experiencing a flashback. In contrast, a trial court-appointed psychiatrist testified that Mr. Brannan was not in a flashback at the time of the murder and that Mr. Brannan's dancing in the street was similar to behavior he had exhibited in the past to diffuse an encounter with an armed individual. Other aspects of the psychiatrist's testimony were effectively contradicted by Mr. Brannan's trial counsel.

On direct appeal, the Supreme Court of Georgia unanimously affirmed Mr. Brannan's conviction and sentence. After filing a petition for writ of *habeas corpus*, the *habeas* court, based on numerous findings of ineffective assistance of counsel, filed a final order on March 17, 2008, that vacated Mr. Brannan's death sentence, but was unclear as to whether it also vacated Mr. Brannan's conviction. In this decision, the Supreme Court of Georgia considered the warden's appeal and Mr. Brannan's cross-appeal. The warden argued that the *habeas* court was in error when it granted Mr. Brannan relief based on numerous claims of ineffective assistance of trial counsel. Mr. Brannan in his cross-appeal argued that the *habeas* court erred by not granting relief based on additional instances of ineffective assistance and that it would be unconstitutional to execute him, because it is unconstitutional to execute anyone who is severely mentally ill.

Ruling and Reasoning in Hall v. Brannan

The Supreme Court of Georgia reinstated Mr. Brannan's conviction and death sentence. The court found no instances of ineffective assistance of counsel and concluded as a matter of law that the absence of counsel's proposed deficiencies would not have led to a different verdict or sentence in Mr. Brannan's case.

The court also issued an independent, alternative holding in response to the merits of Mr. Brannan's argument that his death sentence was unconstitutional because it is unconstitutional to execute persons who have severe mental illness. The court cited *Roper v. Simmons*, 543 U.S. 551 (2005), which held the execution of juvenile offenders as unconstitutional and *Atkins v. Virginia*, 536 U.S. 304 (2002), which held the execution of mentally retarded offenders as unconstitutional, when it noted that unlike those cases, there was no consensus in the United States or Georgia that illustrates that evolving standards of decency necessitate any constitutional ban on executing all persons with mental illness. The court provided a caveat that recognized the unconstitutionality of executing those who are insane at the time of their execution, as per the holding in *Ford v. Wainright*, 477 U.S. 399 (1986).

Discussion

Both courts focused on the issue of a *per se* ban on the execution of any "mentally ill" capital defendant. Specifically, the courts concerned themselves with the issues of whether the execution of mentally ill inmates was unconstitutional or whether such executions violated an emerging national consensus. At present, neither of these lines of inquiry yields support for such a broad approach.

A broad ban on the execution of mentally ill capital defendants would be likely to result in a significant volume of evaluative work for forensic psychiatrists, but the administration of such a ban would be problematic and expensive. Given the high prevalence of at least some sort of mental illness among criminal defendants, the ban would be likely to result in the near abolition of capital punishment. Certainly an end to the death penalty would be celebrated in many quarters, but the fact remains that in some states the idea of the abolition of the death penalty is a "third rail" that politicians (and judges) are loath to approach.

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Knowing Moral and Legal Wrong in an Insanity Defense

Elaine Martin, MD
Fellow in Forensic Psychiatry

Kenneth J. Weiss, MD
Associate Director

Forensic Psychiatry Fellowship Program
University of Pennsylvania
Philadelphia, PA

The Court Is Not Required to Give Jury Instruction Distinguishing Moral and Legal Wrong in an Insanity Defense Case Where They Are Coextensive

In *State v. Winder*, 979 A.2d 312 (N.J. 2009), the Supreme Court of New Jersey reversed a trial court's denial of a defense request for a modified jury charge for insanity in a murder case. Mr. Winder advanced the affirmative defense of insanity on the basis of schizophrenia with command delusions. The delusions did not deprive him of knowing his act was unlawful, although he believed he was doing what was right. The jury found him guilty of first-degree murder and he was sentenced to 55 years' imprisonment with 30 years' parole ineligibility. He appealed, claiming that the trial court had erred in denying his request for a variation of the jury instructions for insanity—namely, that an insane person may comprehend that an act is legally wrong without knowing it to be morally wrong.

Facts of the Case

On April 18, 2003, after being released from an involuntary commitment at a Philadelphia hospital, Lavar Winder went to Atlantic City where he shot and killed a cab driver in front of a police station. Afterward, he walked to a nearby police car, informing the officer inside, "Officer, I just shot someone in that cab over there." He was immediately arrested, and he then confessed that he had to kill the cab driver so that he could go to prison for the rest of his life, because that would be the only place he would be safe from his persecutors. Although he selected the victim randomly, he mentioned he would not have killed his parents or a child to accomplish his goal. Moreover, he apologized to the victim before killing him. The officers who interviewed Mr. Winder testified that he did not seem to be under the influence of drugs or alcohol but that he did admit to recent use