

*v. McDonnell*. These procedural protections include advance written notice of the claimed violation; a written statement of the fact finders as to the evidence relied on and reasons for the disciplinary action taken; a hearing where the inmate can call witnesses and present evidence; and an impartial decision-maker.

Finally, the court held that polygraph examinations are allowed when used as part of treatment in the IDOC.

#### Discussion

In *Sandin v. Conner*, 515 U.S. 472 (1995), the U.S. Supreme Court identified two situations where an inmate's liberty interests are at risk. The first is when an action causes "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life," (*Sandin*, p 484) and second, when an action "will inevitably affect the duration of [the inmate's] sentence" (*Sandin*, p 487). In *Wolff v. McDonnell*, the Supreme Court outlined procedural due process protections that are required in disciplinary hearings involving forfeiture of sentence reduction.

The Iowa Supreme Court compared Mr. Dykstra's situation to that in *Vitek v. Jones*, 445 U.S. 480 (1980). In *Vitek*, the U.S. Supreme Court held that a Nebraska statute authorizing correctional officers to identify inmates as mentally ill and transfer them to psychiatric hospitals for involuntary treatment involved liberty interests. In *Vitek*, the Court was concerned about the stigmatizing aspect of labeling inmates as mentally ill and subjecting the inmate to mandatory treatment. In *Dykstra*, the Iowa Supreme Court identified stigma and mandatory treatment as two of three concerns. The forfeiture of sentence reduction based on an inmate's refusal to participate in the SOTP was elevated to the third substantive concern. The court turned to the procedural protections in *Wolff* as a remedy to ensure the inmates' liberty interests.

In addition to the procedural questions, central to the Iowa decision is a consideration of the facts on which Mr. Dykstra was classified as a sex offender. He had been classified as a sex offender in 1983. However, the IDOC based its classification decision on elements of his recent conviction found in testimony but never proven in court. The Iowa Supreme Court reasoned that if the classification had been based on his past conviction for a sexual offense,

these procedural protections would not have been necessary, since the adjudication of his previous sexual offense would have occurred under proper procedural due process protections. However, since the IDOC based the decision on information unproven during his plea agreement for a recent nonsexual offense, it was required to create proper procedural safeguards.

In 1976, 30 states had mentally disordered sex offender statutes that allowed those convicted of a sexual offense to be both punished and treated for an indeterminate time. Sex offender law has evolved over time. The Supreme Court, in *Kansas v. Hendricks*, 521 U.S. 346 (1997), and subsequent cases resolved certain constitutional issues involving sexual offenses. The medicalization and mandatory treatment of sex offenders along with the primary concern of protecting children and the public are well-established principles and practices. In *Dykstra*, the Iowa Supreme Court recognized some essential procedural protections for those labeled sex offenders. However, the court made it clear that someone convicted of a sexual offense 22 years before a current non-sex-related crime, can be required to participate in sex offender treatment, and if refused, the inmate can forfeit sentence reduction benefits. In *Dykstra*, we see the court's continued struggle to balance inmates' constitutional protections and rights with crimes that are ambivalently conceptualized as medical in origin and are committed by individuals who are perceived as potentially dangerous for the duration of their lives.

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## Federal District Court's Ordering of Multiple Competency Examinations

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**The Tenth Circuit Court of Appeals Supports the Federal District Court's Ordering of Second Competency Examinations Under 18 U.S.C. § 4247(b)**

In *United States v. Martinez-Haro*, 645 F.3d 1228 (10th Cir. 2011), the United States Court of Appeals for the Tenth Circuit affirmed a federal district court decision to order additional psychological testing to determine the trial competency of a Spanish-speaking defendant, over his objection.

*Facts of the Case*

A grand jury in Utah indicted the appellant, Rigoberto Martinez-Haro, a 42-year-old Spanish-speaking man, charging him with two counts of possession with intent to distribute methamphetamine. Before the trial, the government notified Mr. Martinez-Haro that if he was convicted, he could receive a mandatory minimum sentence of 20 years' imprisonment for the first count of the indictment and a mandatory minimum of 10 years' imprisonment for the second count. Mr. Martinez-Haro's counsel informed the court that he had "some questions about whether [Martinez-Haro] had a mental breakdown." Counsel requested a competency evaluation under 18 U.S.C. § 4241 (2011), and the district court ordered the examination to be conducted by Beverly O'Connor, PhD. Dr. O'Connor reviewed records and conducted an interview in the presence of an interpreter. During the interview, Mr. Martinez-Haro revealed that he had a fifth-grade education, had diabetes, and had experienced physical abuse in childhood. He said he wanted a particular plea agreement and would keep getting a new attorney until he got that agreement. He had the unrealistic opinion that the government should deport him to Mexico in return for his promise that he would not return to the United States. Dr. O'Connor opined that the defendant was incompetent to stand trial, but qualified her opinion. She expressed concern that he had a low IQ and had difficulty with reasoning and comprehension. She noted his history of head trauma and was unclear whether he may have some early-onset dementia. She recommended neuropsychological testing with a Spanish-speaking interpreter to more thoroughly evaluate his cognitive deficits. She re-

ported that if the examination could be accomplished, it would give the court more complete information on which to base its opinion regarding competency. She offered to review the results of further testing and was willing to reconsider her opinion after conducting the review. Because of her expressed clinical uncertainties, the government filed a motion seeking a second competency examination. The court ordered Mr. Martinez-Haro to be committed to a suitable bureau of prisons facility for the purpose of this examination. He objected and appealed to the Tenth Circuit.

*Ruling and Reasoning*

The United States Court of Appeals for the Tenth Circuit affirmed the ruling of the district court. The court first analyzed the jurisdictional question of whether this case met criteria for appeal before final judgment in the district court. In *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), the U.S. Supreme Court set forth criteria that an order must meet to be appealable before a final judgment. Under this "collateral order doctrine," circumstances for an immediate review of a court order include that the issue would be unreviewable on appeal from a final judgment. The Tenth Circuit had previously held that a district court order committing a defendant for the purposes of a competency examination met the *Cohen* criteria and was therefore immediately appealable. The court stated that Mr. Martinez-Haro's liberty interest in not being confined for a competency evaluation was wholly separate from the merits of his criminal case.

The appeals court then turned to the analysis of 18 U.S.C. § 4247(b), which states that the court can order that a competency examination be performed by an appropriate psychiatrist or psychologist. Furthermore, the statute notes that "if the court finds it appropriate," a competency examination can be conducted "by more than one such examiner." Mr. Martinez-Haro contended that "a" psychiatric evaluation meant that there could only be one examination (although multiple examiners could be used during that examination), but that more than one examination could not be allowed. The court did not find this argument persuasive.

The Tenth Circuit reviews a district court's interpretation of statutes *de novo* and uses an abuse-of-discretion standard for decisions to order competency evaluations. In the analysis of the statutory

language, the court stated that if the language of the statute were clear and unambiguous, it would end the inquiry and provide an opinion based on the “plain language of the statute.” The court opined that the statute ordered district courts to order competency hearings as need be and that nothing in the language prohibited the court from ordering a second evaluation. Furthermore, nothing in the statute restricts the court from ordering multiple hearings to adjudicate the question of competency.

The appeals court then turned to the question of whether the district court abused its discretion by ordering a second competency evaluation. The court expressed concern that in a situation in which the government was “shopping” for a psychologist or psychiatrist to find a defendant competent after an initial finding of incompetency, a second court-ordered government evaluation could be questioned. However, that was not the case with Mr. Martinez-Haro. The Tenth Circuit noted that the psychologist who examined him requested further testing and said that she would be willing to reconsider her opinion after reviewing the results of further testing. Therefore, the court of appeals could not say that the district court abused its discretion in taking steps to ensure that it had sufficient information to evaluate Mr. Martinez-Haro’s competency. In fact, the court of appeals thought it prudent for the district court to order another evaluation.

The Tenth Circuit Court of Appeals concluded its opinion by discussing two types of cases that support the appropriateness of multiple competency hearings. It reviewed several cases in which multiple competency evaluations involved both defense- and government-requested evaluations in the same case. It then characterized a second group of cases in which the question of the court’s abuse of discretion was considered because the court failed to order a second evaluation.

#### Discussion

In *Martinez-Haro*, the U. S. Tenth Circuit provides further clarification of conditions that may warrant second competency evaluations in criminal cases. *Martinez-Haro* is consistent with previous court decisions in which constitutional protections for the incompetent defendant have been identified. Forensic psychiatrists are familiar with the historical origins of competency-to-proceed assessments and subsequent cases like *Drope v. Missouri*, 420 U.S. 162 (1975), which established the court as a gatekeeper to assure that only competent defendants are tried in criminal proceedings. *Martinez-Haro* highlights the often encountered problem where there is insufficient information to render a confident and defensible opinion on competency. The case reflects the changing demographics of American society and the growing experience of forensic experts who face the complications of language and culture that can confound the evaluation process. Dr. O’Connor’s report and opinion provide a model for transparency, humility, and honesty that should be present in all forensic opinions. The district court appropriately acted on its responsibility to gather enough information to make the correct decision about this defendant’s competency. Appropriately, the Tenth Circuit, in both its interpretation of the federal statute guiding the issues of multiple competency evaluations and the district court’s discretion, supported a process by which the court can gather the information necessary to make correct judgments involving these important constitutional protections. In brief, the Tenth Circuit in *Martinez-Haro* provides further support for court officers who have the responsibility to assure that a defendant be properly evaluated when the question of competency is before the court.

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