

- (1) First, a petitioner must show his mental impairment was an “extra ordinary circumstance” beyond his control, by demonstrating that the impairment was so severe that either
 - (a) petitioner was unable rationally or factually to personally understand the need to timely file or
 - (b) petitioner’s mental state rendered him unable personally to prepare a habeas petition and effectuate its filing.
- (2) Second, the petitioner must show diligence in pursuing the claims to the extent he could understand them, but that the mental impairment made it impossible to meet the filing deadline under the totality of the circumstances, including reasonably available access to assistance [*Bills*, pp 1099–100].

Reasoning

Judge Tymkovich relied in part on the Supreme Court’s ruling in *Holland v. Florida*, 130 S. Ct. 2549 (2010), in which the Court recognized that AEDPA time limits could be extended when the petitioner can show “(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way” (*Bills*, p 1096).

Because no appellate court had yet specifically defined the standard for competency in extending the time limits of a *habeas corpus* petition, Judge Tymkovich then discriminated between the competency standards set by the Supreme Court in *Dusky*; *Godinez v. Moran*, 509 U.S. 389 (1993); and *Indiana v. Edwards*, 554 U.S. 164 (2008). *Dusky* set the standard for competence to stand trial, *Godinez* for pleading guilty, and *Edwards* for representing oneself.

Judge Tymkovich reasoned that:

[The new standard] requires the court to evaluate the petitioner’s ability to do by himself the two functions involved in complying with the AEDPA filing deadlines—i.e., understand the need to file within the limitations period, and submit a minimally adequate habeas petition—and to evaluate the petitioner’s diligence in seeking assistance with what he could not do alone [*Bills*, p 1100].

To evaluate this in practice, the judge wrote that the district court must:

- (1) find the petitioner has made a non-frivolous showing that he had a severe mental impairment during the filing period that would entitle him to an evidentiary hearing;
- (2) determine, after considering the record, whether the petitioner satisfied his burden that he was in fact mentally impaired;
- (3) determine whether petitioner’s mental impairment made it impossible to timely file on his own; and
- (4) consider whether the circumstances demonstrate the

petitioner was otherwise diligent in attempting to comply with the filing requirements [*Bills*, pp 1100–1].

Discussion

Since the AEDPA limited the time allowed for state prisoners to file federal *habeas corpus* petitions to one year, the question of how mental impairment may be a factor in allowing for an extension (equitable tolling) had not been answered by the courts. In this decision, the Ninth Circuit clarified the competence necessary for complying with the time limits set by the AEDPA for filing a federal *habeas corpus* petition.

The standard requires a severe impairment that incorporates the key concepts of a rational and factual understanding from *Dusky* or an inability to prepare the petition. In addition, the petitioner “always remains accountable for diligence in pursuing” his rights due to the totality-of-the-circumstances test.

In addition to intellectual disabilities, disorders that could lead to incompetence for a timely *habeas corpus* filing include psychosis, mania, severe depression, dementia, delirium, and traumatic brain injury. Note that the time that is tolled is subtracted from the one-year limit; therefore, if a defendant is temporarily incompetent for a specific portion of the filing time, that interval would presumably be added to the one-year limit to file for *habeas corpus*.

The key for a mental health professional in evaluating a defendant under this standard appears to be evaluating the presence of such a disorder and its associated symptoms in a defendant that would impair a rational or factual understanding of the need to file in time or prevent the defendant from personally preparing and filing the petition.

As of this writing, the trial court has not ruled on Mr. Bills’ case under the new standard.

Diminished Capacity

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Diminished Capacity Is Only a Defense if the Charge Is a Specific-Intent Crime

In *United States v. Vela*, 624 F.3d 1148 (9th Cir. 2009), the United States Court of Appeals for the Ninth Circuit considered whether a diminished-capacity plea can be used in a general-intent crime and whether one can appeal a finding of not guilty by reason of insanity.

Facts of the Case

Rogelio Vela entered a Port of Entry security office in Ysidro, California, on March 22, 2007, and handed Customs Officer Patrick Wright a note stating that he was suicidal and in fear for his life because he was being persecuted by his family and the Mafia. Officer Wright attempted to communicate with Mr. Vela through handwritten notes. During the exchange, Mr. Vela drew a knife and stabbed Officer Wright in the chest, causing serious injury.

Mr. Vela was issued a first indictment in federal court that charged him with attempted murder and willfully assaulting a federal officer who was performing his official duties. In a second indictment, the attempted murder charge against Mr. Vela was dropped and the wording of his second charge was modified to charge that Mr. Vela did “‘intentionally’ and forcibly assault . . . with a deadly and dangerous weapon . . . a person . . . while . . . engaged in the performance of his official duties.” As a result, the jury instructions stated that to find him guilty, they would have to find that Mr. Vela stabbed Officer Wright intentionally, rather than willfully.

Mr. Vela had planned to use a diminished-capacity defense at trial. He objected to the wording in the second indictment, because it changed the crime from one of specific intent to one of general intent. Before trial, he filed several motions: that the charge be dismissed because it did not state that willfulness was a required element of intent; that if the charge was not dismissed, the jury be instructed that willful intent was a required element of the crime, and he thus be permitted to enter a diminished-capacity defense; and that the new charge be dismissed because the wording “with a deadly and dangerous weapon” brought aggravating factors into the guilt-finding phase of the trial when the proper place was in the sentencing phase of the trial. This, he contended, was fundamentally unfair and violated his constitutional rights contrary to legal precedent because it was at odds with *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

Mr. Vela’s pretrial motions were unsuccessful. He was not allowed to pursue a diminished-capacity defense and instead pleaded not guilty by reason of insanity (NGRI). After hearing the evidence, including the testimony of opposing psychiatric experts, one who opined that he was insane and another who opined that he was sane, the jury found him NGRI. He was ordered hospitalized for psychiatric treatment.

Mr. Vela appealed the trial court’s decision, claiming that the court erred in not granting his three pretrial motions. The government responded to Mr. Vela’s appeal by stating that he had no cause for appealing a finding of NGRI, because it was not a final judgment but a verdict that accepted his own chosen defense. It requested that the appeals court dismiss the case for lack of jurisdiction.

Ruling and Reasoning

The United States Court of Appeals for the Ninth Circuit found that Mr. Vela had a right to appeal his NGRI. The appeals court rejected the government’s assertion that his NGRI was not a final judgment, stating that it was in fact the decision that brought his criminal proceedings to an end. Second, the appeals court found that, because he was challenging errors that prevented him from using his preferred legal strategy of diminished capacity thereby forcing him into using an NGRI, the government’s assertion that the court accepted his chosen defense was incorrect.

On the merits of the appeal, the court held by a two-to-one majority that Mr. Vela’s motions to dismiss the indictment, instruct the jury on willfulness, and permit a diminished-capacity defense were properly denied. Diminished capacity can be entered as a defense only when a person is charged with a specific-intent crime. However, in this case, Mr. Vela was charged with a crime that was clearly defined both by statute and case law as one of general intent. In regard to his argument that the inclusion of “with a dangerous and deadly weapon” rendered the charge fundamentally unfair, the appeals court noted that this inclusion served to define necessary elements of his crime and thus was proper.

Dissent

Judge Smith disagreed with the majority, instead agreeing with the government’s contention that Mr. Vela had no basis for an appeal. Judge Smith referenced the Supreme Court’s decision in *Flanagan v. United States* (465 U.S. 259 (1984): “In a criminal

case the [final judgment] rule prohibits appellate review until conviction and imposition of sentence” (*Vela*, p 1159). Judge Smith noted that Mr. Vela’s case did not end in conviction but in an acquittal and no sentence, and thus the judge opined that he had no legal standing to appeal the verdict, because he won his case through a defense that he himself chose.

Judge Smith stated that the majority’s decision to hear Mr. Vela’s appeal set a dangerous precedent. He pointed out that when the defendant’s pretrial motions were denied, which rendered him unable to enter a diminished-capacity defense, he had two options: to plead not guilty, and if convicted, appeal on the issue of the denial of his motions, or to change his plea to NGRI, knowing that if he succeeded in getting an acquittal, he would not be able to appeal. Mr. Vela chose to plead NGRI; however, after he was acquitted, instead of accepting the loss of ability to appeal inherent in his chosen strategy, he appealed his verdict. By agreeing to hear his appeal, Judge Smith believed that the majority allowed him to take advantage of the legal system, and wrote, “Now Vela wants to have his cake and eat it too by appealing one failed affirmative defense, while keeping his acquittal verdict as a back up. We ought not act as a guarantor against defendant’s strategic trial decisions” (*Vela*, p 1160).

Discussion

The legal system ideally serves to punish individuals if they are culpable for their crimes. Crimes therefore require two elements: the *actus reus*, or forbidden act, and *mens rea*, or guilty mind. The prosecution must prove both elements.

Statutory definitions of crimes include not only what specific act constitutes the crime, but also what level of *mens rea* must have been present. Some crimes are defined as general-intent crimes, for which intentional commission of an act must be proved. Thus, if a prosecutor can show that a defendant committed an act intentionally, with knowledge that his act would lead to harm, he has proven the *mens rea* for a general-intent crime.

Specific-intent crimes, carry a higher level of *mens rea*. For such a crime, the prosecutor must prove that the defendant knowingly or purposefully committed an act, requiring a higher degree of understanding of the circumstances of the crime and the consequences of his actions. If an individual charged with a specific-intent crime had a condition such as psychosis that

interfered with the ability to interpret the reality of the circumstances surrounding the offense, that factor can be relevant to the defense. The defendant can raise a diminished-capacity defense. Through this defense, the defendant seeks to prove that his mental state at the time of the crime prevented formation of the requisite *mens rea*. If the trier-of-fact concurs, the defendant is usually found guilty of a lesser included offense and, occasionally, is acquitted outright.

In *United States. v. Vela*, a psychotic criminal defendant had two legal strategies in mind at the outset of his trial: a diminished-capacity defense, which, if successful, would result in an unconditional acquittal of any charge requiring specific intent, or a plea of NGRI, which, if successful, would result in an acquittal that carried consequences. When one considers the consequences of a successful NGRI, including loss of liberty through civil commitment and the stigma of having been found legally insane, it is easy to understand why Mr. Vela fought to have his crime defined as a specific-intent crime and to be allowed to enter a diminished-capacity defense. The court’s findings about general-intent crimes flow logically in this case by statutory definition. It is noteworthy that the court allowed his appeal to be heard after a finding of NGRI, despite that being his stated plea. However, the groundwork had been laid in advance that he preferred to plead diminished capacity.

Exclusion of Expert Psychiatric Testimony

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No Error in Barring Expert Testimony on Asperger’s Disorder When Defendant Did Not Assert a Mental Illness Defense

In *State v. Anderson*, 789 N.W.2d 227 (Minn. 2010), the Minnesota Supreme Court held that it was not an abuse of discretion to bar a defendant in