the risk of harm, the court approved the jury instructions allowing for consideration of the student's contributory negligence.

Discussion

Gregoire is a case of first impression in Washington. The supreme court decided whether an inmate should be held responsible at least partially for his self-injurious behavior and whether that leads to the jailer's being relieved of his duty to the inmate. Although Washington courts have long recognized the special relationship between jailer and inmate, this was the first case in the state to deal with the responsibility of the inmate as against that of the jailer when the inmate commits suicide. The majority reached its holding by citing previous cases such as *Hunt* and *Christensen* where, owing to the special relationship, the defense of contributory negligence was not allowed. Also, the majority cited cases from other states, including Oregon and Minnesota, where the courts ruled that contributory negligence could not be used as a defense in jail-related attempted or completed suicides. As in the holdings of other courts, the *Gregoire* opinion points out the logical oddity of a defense that acknowledges that jailers have a duty of care to protect inmates, but then argues that that duty should be abrogated when jailers fail to protect inmates from their own deliberate or negligent acts. The opinion cites the 2007 update of the World Health Organization paper, "Preventing Suicides in Jails and Prisons" (http://whqlibdoc.who.int/publications/2007/9789241595506_eng.pdf), which states that suicide is often the single most common cause of death in correctional settings. The opinion states that jail suicides are frequent and thus are eminently foreseeable. This foreseeability makes for the case that liability for an inmate's suicide rests with the jailer.

Perhaps implicit in the reasoning in this case was the question of whether a mentally ill individual should be legally responsible for his self-injurious actions. The facts of the case point to Mr. Gregoire's fragile state of mind at the time of his arrest and his demonstrated behavior, suggestive of an individual with a mental illness. The question is whether society should hold a person with a mental illness responsible for his actions, albeit partially, if that person most likely lacks the capacity to act deliberately and in a rational manner while undertaking his suicide.

The differing views of the majority and dissent in *Gregoire* directly relate to fundamentally differing views concerning the apportionment of risk between state actors and private citizens. The majority apportioned continuing and primary risk to the state when it assumes some responsibility for vulnerable individuals. Thus, in the majority view it was the immaturity of the 13-year-old plaintiff (*Christensen*), the mental disability of the psychiatric patient (*Hunt*), and the inmate's loss of liberty in *Gregoire* that immunized each of them against the duty of self-care, thus defeating the defense of assumption of risk. For the dissent, the view was that individual responsibility should be preserved and governmental liability should be tempered by each person's continuing duty of self-care.

Conflicting Expert Opinions Concerning Insanity

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The Failure of Defense Counsel to Obtain a Third Expert Opinion Concerning an Insanity Defense Claim in Which Two Experts Disagree Does Not Constitute Inadequate Representation by Defense Counsel: Opposing Opinions Between Two Experts Is Not "a Stalemate" Requiring Appointment of a Third Expert.

In the case of *State v. McGhee*, 787 N.W.2d 700 (Neb. 2010), Eric McGhee appealed his convictions for first-degree murder and use of a weapon to commit a felony. He filed a petition for postconviction relief and based his appeal on ineffective assistance of counsel. Mr. McGhee's primary complaint was that his attorney did not acquire a third expert opinion regarding his competency to stand trial and his defense of legal insanity in the face of conflicting expert opinions. He contended that a third expert opinion was necessary to break the "stalemate" between the two opposing experts. The district court denied his appeal without an evidentiary hearing, and he then appealed to the Nebraska Supreme Court.

Facts of the Case

On January 30, 2003, Eric McGhee shot his friend Ezra Lowry to death. Mr. McGhee, Mr. Lowry, and their friends had been partying at Mr. McGhee's home. Mr. McGhee, who had a history of smoking marijuana laced with PCP, was reported by witnesses to display odd behavior during the course of the evening, including pacing and making statements implying that he was God. He later shot Mr. Lowry to death and told Mr. Lowry's girlfriend, Nadeena Washington, that he had "saved" her. Mr. McGhee then took her and her 4-year-old son to his aunt's home, commenting en route that Mr. Lowry had been "bad" and "not pure." His comments to Ms. Washington suggested that he believed he had fathered her son, although she testified that they had never had a physical relationship.

Mr. McGhee was initially found incompetent to stand trial and was committed to the Lincoln Regional Center for restoration-to-competency treatment. Two years later, he was found to have been restored to competency and proceeded to trial. He then offered the defense of not responsible by reason of insanity. Two experts testified at the trial. The state's witness was Dr. Louis Martin, who had been Mr. McGhee's treating psychiatrist at the Lincoln Regional Center. Dr. Martin testified that, although Mr. McGhee was mentally ill at the time of the offense, he still could discern right from wrong. Dr. Martin's opinion focused on conduct by Mr. McGhee that suggested that he knew the legal wrongfulness of his actions, including isolating himself and the victim at the time of the shooting, playing music very loudly just before the shooting, and disabling the phones in his home so that no one could call the police. Mr. McGhee's expert, Dr. Bruce Gutnik, testified that Mr. McGhee had paranoid schizophrenia and possible dementia and abused alcohol and cannabis. Dr. Gutnik testified that the defendant could not determine right from wrong at the time he shot Mr. Lowry and that Mr. McGhee believed that he had acted in self-defense and had done a "good deed and expected people to pat him on the back and say way to go" (*State v. McGhee*, 742 N.W.2d 497, p 505 (Neb. 2007)).

A jury convicted Mr. McGhee and sentenced him to life imprisonment for murder and 5 to 10 years' imprisonment for the weapons charge. He filed unsuccessful direct appeals to the trial court and then to the Nebraska Supreme Court (*McGhee*, 742 Neb. 742 N.W.2d 497 (2007)). On the direct appeal, the Nebraska Supreme Court ruled that the expert testimony in Mr. McGhee's trial had been "sufficient admissible evidence" for the jury to reach their conclusions. He then filed in district court for postconviction relief, claiming ineffective assistance of counsel. The district court denied his appeal for postconviction relief without holding an evidentiary hearing. He appealed the district court's denial of his petition to the Nebraska Supreme Court, which in the instant opinion, affirmed the district court's dismissal of the his motion for postconviction relief.

Ruling and Reasoning

In its opinion, the Nebraska Supreme Court noted that for a motion to be granted for an evidentiary hearing for postconviction relief, it must contain factual allegations which, if proved, constitute an infringement on the movant's constitutional rights. In the case of Mr. McGhee's motion, he made no specific allegations regarding the testimony that would have been given by a third expert witness. In fact, he did not identify another expert who would have testified, nor did he offer any evidence that such testimony would have by reasonable probability led to different determinations about his competency or sanity.

The court pointed out that the trier-of-fact determines the weight and credibility of an expert's opinion and furthermore that the trier-of-fact is not bound to accept the opinion of an expert. Therefore, the court reasoned that, even if a third expert had testified in Mr. McGhee's case, there was no assurance that the judge or jury would have been persuaded by that witness's opinion and broken the "stalemate." Indeed, the court dismissed his claim that two differing expert opinions constituted a "stalemate" Instead, the court said:

> He alleges only that if another expert had been consulted, his or her opinions would have served to "break and mitigate the stalemate between Dr. Gutnik and Dr. Martin." Both McGhee's premise and his conclusion are incorrect. There was no "stalemate," only conflicting expert testimony on disputed issues. And even if a second expert had testified in support of McGhee's position, it does not follow that the competency and sanity determinations would necessarily or even probably have been different. The weight and credibility of an expert's testimony are a question for the trier of fact, and triers of fact are not required to take opinions of experts as binding upon them [*McGhee*, 787 N.W.2d, p 705].

A claim of ineffective assistance of counsel requires the defendant to demonstrate that his counsel's per-

formance was deficient and that the deficiency prejudiced the defense such that there was a reasonable probability that the outcome of the proceeding would have been different but for the deficient performance. Since Mr. McGhee's allegations on appeal did not satisfy this test of prejudice as a result of his counsel's performance, the supreme court affirmed the district court's denial of his appeal without an evidentiary hearing.

Discussion

Defendants are typically and constitutionally afforded the right to a psychiatric examination when there is a legitimate question as to their state of mind at the time of a serious offense and thus regarding their eligibility for an insanity defense (*Ake v. Oklahoma*, 470 U.S. 68 (1985)). However, they are not afforded the right to "extra" examinations or typically to their choice of experts. These restrictions reflect some of the reasoning laid out by the Nebraska Supreme Court in this case, which is the principle that the trier-of-fact will determine the impact of an expert witness's testimony and is not beholden to agree with the expert's opinion. It would not necessarily have made a difference if Mr. McGhee had been able to produce an expert whose opinion was favorable to his defense. Juries are naturally skeptical of the insanity defense and cannot be expected to base their verdicts merely on which side produces more experts. This is notwithstanding the fact that Mr. McGhee had not even identified an expert who would have supported his claims of incompetency or insanity; Mr. McGhee was asserting that a third expert should have been appointed, regardless of the opinion that he may have offered. The supreme court's commentary noted that conflicting opinions from a balanced number of experts between the two sides is a commonplace scenario in our legal system.

One concern that was not addressed in the court's opinion was that the state's expert witness, Dr. Martin, was Mr. McGhee's treating psychiatrist for two years while he was undergoing intermittent competency reviews. Much has been written about the conflict in ethics of having doctors fulfill the dual roles of treating physician and forensic examiner. The "American Academy of Psychiatry and the Law Ethical Guidelines for the Practice of Forensic Psychiatry" (May 2005) states:

> Psychiatrists who take on a forensic role for patients whom they are treating may adversely affect the therapeutic relationship with them. Forensic evaluations usually require interviewing corroborative sources, exposing information to public scrutiny, and subjecting evaluees and the treatment itself to potentially damaging cross-examination. The forensic evaluation and the credibility of the practitioner may also be undermined by conflicts inherent in the differing clinical and forensic roles. Treating psychiatrists should therefore generally avoid acting as an expert witness for their patients or performing evaluations of their patients for legal purposes [American Academy of Psychiatry and the Law: Ethics Guidelines for the Practice of Forensic Psychiatry. May 2005. Available at: http://www.aapl.org/ethics.htm. Accessed July 18, 2012].

Unfortunately, these guidelines are difficult to enforce, given that psychiatric care is often delivered in public institutions such as state hospitals or prisons where various obstacles including staffing shortages force physicians into wearing two hats. In these settings, the mental health provider has an obligation to both the patient and society; thus, the line between mental health provider and potential expert witness is blurred from the moment treatment is initiated. The conflict is most often described in terms of how the treating doctor, serving as an expert, could damage the therapeutic relationship through adversarial testimony, but there are other potential influences. Negative countertransference, such as may develop when the treating psychiatrist thinks the patient is malingering (which was a consideration in the case of Dr. Martin and Mr. McGhee), may influence expert opinion and testimony in a manner that is biased against the patient. In contrast, positive countertransference, whatever the basis for it, has the potential to influence the treating doctor-turned-expert such that opinion and testimony are overly favorable. Clearly, there are ample reasons to avoid this conflict if at all possible.