

to “either release Bell and DeMola or retry them within 120 days of the date of this order” (*Bell*, pp 1057–8). The state immediately appealed the district court’s ruling and obtained an order staying re-trial pending appeal.

*Ruling and Reasoning*

The Ninth Circuit found that Mr. Bell and Ms. DeMola’s claims did not support *habeas* relief. Juror No. 7 had been properly removed because she engaged in misconduct by offering her expert opinion on a defendant’s mental health and by violating the court’s instructions during deliberations. Mr. Bell and Ms. DeMola’s argument that the dismissal of Juror No. 7 was contrary to established federal law because the juror’s use of a dictionary did not justify the extreme need for dismissal failed for three reasons. First, the court of appeals upheld Juror No. 7’s removal, not because she had consulted a dictionary, but because she had violated the trial court’s explicit instructions to “not do any independent research [which includes] . . . looking at a dictionary” (*Bell*, p 1059). The court’s instructions concluded with “if you do that, you will be in violation of your oath, and you will be excused as a juror in the case” (*Bell*, p 1059). Second, the petitioners could not support their contention that the California Court of Appeal’s opinion was contrary to the trial court’s decision. Third, the petitioners relied on cases in which juror misconduct was revealed only in conjunction with a new trial or in *habeas* proceedings.

*Discussion*

A juror may not bring into the jury room evidence developed outside the witness stand. In presenting her analysis, Juror No. 7 directed the jurors to rely on her expert opinion, and concluded that one of the defendants had depression. The Court of Appeals for the Ninth Circuit also held that the sentence did not violate the Eight Amendment as cruel and unusual as to Ms. DeMola, a juvenile offender, because she was not sentenced to life without the possibility of parole, pursuant to a mandatory sentencing scheme that prohibited the court from taking into account potential mitigating circumstances.

Juror misconduct can include communication by a juror with persons outside of the trial or bringing outside evidence into the trial. Information not in evidence can bias jurors and may influence other jurors’ decisions. Juror misconduct threatens the fairness of a trial and implicates due process consider-

ations. This case highlights the importance of jurors’ adhering to the court’s instructions. While a juror’s assessment of the evidence is necessarily informed by life experiences, including education and professional background, specialized information cannot play a role. Where personal liberty is at stake, the jurors play a pivotal role in determining the outcome of a case. In *Bell v. Uribe* the appeals court concluded that retaining Juror No. 7 would have unfairly biased other jurors. The fact that she may have been the lone holdout for acquittal was not the significant consideration.

The *Bell* decision also reinforced the integrity of California’s sentencing scheme. In *Miller v. Alabama*, 132 S. Ct. 2455 (2012), the Court held that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without the possibility of parole for juvenile offenders. However, for states such as California, where the penalty for a defendant found guilty of murder in the first degree who was 16 to 18 years of age at the time of commission of the crime is confinement in the state prison for life without the possibility of parole, or, at the discretion of the court, 25 years to life, a defendant cannot establish an Eighth Amendment violation. The sentencing court could have taken mitigating factors into account when sentencing Ms. DeMola and, because the sentence was not mandatory, *Miller* did not apply.

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## Patient Privilege and Dangerousness: Should Duty to Warn Affect Confidentiality?

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### Physician Testimony on a Patient’s Possession of Cyanide Admitted Erroneously Based on a Dangerous-Patient Exception to Privilege

In *United States v. Ghane*, 673 F.3d 771 (8th Cir. 2012), the United States Court of Appeals for the

Eighth Circuit considered whether the U.S. District Court for the Western District of Missouri erred in denying the defense's motion to dismiss and its motion *in limine*. On appeal, the defense argued first that the chemical weapon statute under which Hessem Ghane was convicted is unconstitutionally vague and second that psychotherapist-patient privilege should have excluded clinical testimony by a physician assistant and psychiatrist involved in his psychiatric hospitalization at the time of his offense. Despite finding that the district court erred in applying a dangerous-patient exception to testimony by a psychiatrist, the appeals court upheld his sentence, affirming that admission of the psychiatrist's testimony resulted in harmless error and that there was sufficient evidence without the psychiatrist's testimony to have convicted Mr. Ghane.

#### Facts of the Case

Hessem Ghane had a significant history of mental illness, including multiple inpatient psychiatric hospitalizations. On February 4, 2003, he called a suicide crisis hotline, and police were dispatched to his home. In response to his request, police then transported him to Overland Park Regional Medical Center (OPRMC), where he was seen in the emergency department for intake by Gleb Gluhovsky, a physician assistant. Mr. Ghane, in the process of seeking admission for psychiatric inpatient hospitalization, reported to Mr. Gluhovsky that he had suicidal ideation, with a possible plan to ingest potassium cyanide, which he had in his house. Mr. Gluhovsky subsequently obtained permission from the hospital's risk management office to contact the police because of the potential for public harm. A detective then obtained written permission from Mr. Ghane to search his apartment, resulting in the seizure of potassium cyanide.

Mr. Ghane was admitted to the hospital's psychiatric ward and placed under the care of Dr. Howard Houghton. On his initial psychiatric examination, Mr. Ghane discussed with Dr. Houghton that he had both suicidal thoughts and thoughts of harming others and that he had access to chemicals. Mr. Ghane did not name any specific individuals, instead referring to people affiliated with the Corps of Engineers. Dr. Houghton, who had cared for Mr. Ghane on previous inpatient admissions, found him to be more paranoid, hostile, and irritable than in previous encounters. He sought counsel from his hospital's risk

management office, which advised him to obtain consent from Mr. Ghane and report the threat to authorities.

After an initial trial resulted in a hung jury and a mistrial, a jury convicted Mr. Ghane of stockpiling, retaining, and possessing a chemical weapon. The U.S. District Court for the Western District of Missouri denied his pretrial motion to dismiss and his motion *in limine*. He appealed to the Eighth Circuit, arguing against the constitutionality of the chemical weapons statute and arguing that the district court erred in admitting testimony by Mr. Gluhovsky and Dr. Houghton.

#### Ruling and Reasoning

In his first argument, Mr. Ghane cited vagueness and overbreadth of the chemical weapon statute that he was charged with violating. The statute bars stockpiling, retaining, or possessing chemical weapons and states that possession of such substances for peaceful purposes is not prohibited. He argued that not only are the terms chemical weapon and toxic chemical vague as defined in the statute, but the term peaceful purpose is also unclear. At trial, he argued that suicide should be considered a peaceful purpose. To this point, the court of appeals agreed with the district court and argued that the wording of the statute is not unconstitutionally broad and that the language used in the statute provides adequate notice of what is and is not considered a chemical weapon.

Mr. Ghane next argued that the district court erred in denying his motion *in limine* by admitting the testimony of Mr. Gluhovsky and Dr. Houghton. The court of appeals ruled on this argument by first reviewing standards for privilege and then addressing each clinician encounter as to whether privilege applied. The court's analysis pointed out that testimonial privilege is the exception and not the rule and that the privilege asserted by Federal Rule of Evidence 501 is therefore distinct and not to be generalized. One such evidentiary exception was recognized by the Supreme Court in *Jaffee v. Redmond*, 518 U.S. 1 (1996), holding that confidential communications between a licensed psychotherapist and his patient in the course of diagnosis and treatment are protected, to facilitate and ensure that meaningful treatment can occur. In this case, Mr. Ghane argued that the psychotherapist-patient privilege as defined by the Court in *Jaffee* applies to testimony by both the physician assistant who performed the in-

take examination of Mr. Ghane in the emergency room and to the psychiatrist who treated him in the psychiatric unit.

The court of appeals agreed with the district court in admitting testimony by Mr. Gluhovsky, asserting that the clinical encounter with Mr. Gluhovsky was not protected by this privilege, because he was not a licensed psychotherapist and he was not providing either diagnosis or treatment for Mr. Ghane; therefore, *Jaffee* did not apply. However, the court of appeals believed that the district court erred in applying a dangerousness exception and therefore in admitting the testimony of Dr. Houghton, although they found the error to be harmless. In their analysis, the court cited the Sixth Circuit's decision in *United States v. Hayes*, 227 F.3d 578 (6th Cir. 2000), which rejects a dangerous-patient exception to psychotherapist-patient privilege in criminal proceedings. They stated further that individual states' standard of care for duty to protect should not be tied to or confused with an individual's right to invoke privilege in criminal proceedings with regard to communication in the context of a psychotherapist-patient relationship. In their decision, the court of appeals pointed out that the consent obtained by Dr. Houghton was insufficient for the purpose of waiving privilege for criminal proceedings. Such consent must clarify the consequences of disclosure for subsequent criminal prosecution to meet the standards for a knowing and intelligent waiver.

#### Discussion

Although it is certainly of psychiatric (and philosophical) interest to debate whether suicide is, indeed, a peaceful purpose, we found that the findings related to privilege in this case had the most relevance for forensic psychiatric practice. In this ruling, the court clarifies the important distinction between a clinician's duty to report and compulsion to testify. As psychiatrists, it is imperative to evaluate for dangerousness in our patients. Although it is the psychiatrist's responsibility to report in cases of specific threats, the therapeutic relationship can still be maintained with a patient's ability to retain therapeutic privilege in legal proceedings.

From a treating psychiatrist's perspective, we found it troubling that the questions of decision-making capacity and informed consent were not addressed more fully by the clinicians involved. The court of appeals noted that the consent obtained by

the physician to contact authorities was not sufficient and did not equate with waiving privilege. Given that the standard for a knowing and intelligent waiver includes awareness of the nature of the right and the consequences of the decision to abandon the right, it is unlikely that most non-forensically trained clinicians would be in a position to obtain informed consent in such a situation. The clinician should be familiar with the specifics of informed consent in such complicated cases.

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## Lack of Volitional Control and Culpability

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### Lack of Volitional Control Is Not a Plausible Defense for Culpability in Federal Cases

In *United States v. Rendelman*, 495 F. App'x 727 (7th Cir. 2012), Scott Rendelman appealed his conviction of contempt of court, retaliating against federal officials for the performance of their duties, and threatening the President of the United States. He argued, among other things, that the Southern District Court of Illinois abused its discretion by refusing to authorize a psychological evaluation of his mental state at the time of the offense and by excluding evidence from mental health evaluations conducted during prior prosecutions. He further argued that evidence from these sources would have shown that he was not culpable, because he was unable to stop himself from writing threatening letters to various government officials.

#### Facts of the Case

Mr. Rendelman had been writing obscene and threatening letters to prosecutors, judges, and presidents for over 20 years. While incarcerated in the federal penitentiary in Marion, Illinois, for threatening public officials, he wrote threatening letters to the President, which were intercepted by staff and given