

## Discussion

One of the interesting dimensions of *Grass* is that the appeals court ruled that the Warren County court's determination that Mr. Grass was not likely to commit another violent crime in the foreseeable future was not supported by the evidence. The district court reappraised the testimony of a forensic psychologist, Dr. Richard Gowdy, that although Mr. Grass's original symptoms were in remission, they could re-emerge. Thus, the district court disagreed with the county court that there was no potential for future dangerousness based on mental illness. Judge Colloton's concurrence in the Eighth Circuit decision noted that the Tenth Circuit had upheld a finding that an acquittee had a present mental illness, even though he was at the time asymptomatic (*United States v. Weed*, 389 F.3d 1060 (10th Cir. 2004)).

The county court granted Mr. Grass conditional release, concluding that he was not likely now or in the foreseeable future to commit another crime. That court made no specific finding about "whether Mr. Grass currently suffers from a mental disease or defect" (*Grass*, p 583). The county court apparently did not appreciate the relationship between the potential re-emergence of symptoms (as per the expert testimony) and potential future dangerousness.

Mr. Grass was unable to advance the *Foucha* argument successfully, in part because the circuit court did not make an explicit finding about the current presence of mental disease or defect in his situation. Even if a finding of no present mental illness had been made and upheld, the concurrence by Judge Colloton suggests that *Foucha* would not necessarily have required release.

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## Does Refraining From Using Mental Health Evidence Constitute Ineffective Counsel?

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## A Reasonable Professional Decision to Refrain from Using Mental Health Evidence Does Not Violate the Sixth Amendment

In *Dunlap v. Clements*, 476 F. App'x 162 (10th Cir. 2012), the United States Court of Appeals for the Tenth Circuit considered Nathan Dunlap's appeal of a denial of his *habeas corpus* petition by the United States District Court for the District of Colorado. In his appeal, Mr. Dunlap argued that his Sixth Amendment right to counsel was violated because trial counsel terminated the investigation into his possible mental illness.

### Facts of the Case

In July 1993, Nathan Dunlap had been fired from his job as a cook at Chuck E. Cheese in Aurora, Colorado, and he wanted to "get even." On the night of December 14, 1993, he hid in a bathroom until the restaurant closed, and after emerging, shot and killed four employees, and shot and injured another.

After Mr. Dunlap began acting strangely in jail and was moved to a mental hospital in February 1994, Forrest Lewis, his attorney, had an independent psychiatrist, Dr. Robert Fairbairn, evaluate Mr. Dunlap to help plan a mental health mitigation case. Dr. Fairbairn determined that Mr. Dunlap was normal or malingering approximately 90 percent of the time and was experiencing psychotic symptoms for only 10 to 20 percent of the time. Mr. Dunlap's treating psychiatrist and psychologist at the state hospital each submitted reports indicating that Mr. Dunlap did not have a major mental illness, that he was abusive and offensive toward staff and other patients, that he showed no remorse and repeatedly bragged about his crime, that he said he would kill again, and that he was malingering.

Mr. Lewis hired a mitigation expert, psychiatrist Dr. Rebecca Barkhorn, in February 1995. She diagnosed narcissistic personality disorder with antisocial traits on the basis of her interview with Mr. Dunlap and reports from his state hospital clinicians, but was not provided the full hospital records. Mr. Lewis feared that the full hospital records would taint Dr. Barkhorn's evaluation of Mr. Dunlap and that the complete hospital would be made available to the prosecution. Mr. Lewis believed that the hospital records were so negative that they could have given the jury additional grounds for a death sentence and instead decided to stop the mental health investigation and focus on Mr. Dunlap's family dysfunction and

troubled childhood for purposes of mitigation. Dr. Barkhorn later testified that her diagnosis would have been bipolar disorder with psychotic features had she received the complete hospital record; however, there was no determination of his mental state at the time of the crime. Mr. Lewis felt this was still insufficient to assist Mr. Dunlap's defense.

In February 1996, Mr. Dunlap was convicted of four counts of capital murder and various other crimes in connection with the Chuck E. Cheese shootings. In May 1996, he was sentenced to death on the four murder counts and consecutive terms totaling 113 years on the other counts.

Mr. Dunlap's sentence was upheld by the Colorado Supreme Court on direct review. The court also affirmed the denial of a motion for resentencing consideration and the denial of a motion for postconviction relief. The federal district court denied *habeas* relief.

The district court granted a certificate of appealability (COA) on whether the jury improperly considered a nonstatutory aggravator. The court also expanded the COA to include whether counsel was ineffective on three grounds: terminating a mental illness investigation, laboring under a conflict of interest, and failing to exhaust all peremptory challenges.

#### *Ruling and Reasoning*

The Tenth Circuit Court of Appeals affirmed the judgment of the district court in denying Mr. Dunlap's *habeas corpus* petition. The appeals court noted that there is a high bar in establishing ineffective assistance after a state court decides to the contrary, because of the great intrusion on state sovereignty as well as the possibility of undermining the integrity of the adversarial system with a posttrial inquiry. In cases in which the U.S. Supreme Court has determined that the Sixth Amendment right to counsel was violated, there was extraordinary neglect. Attorneys may disagree on trial strategy, but a disagreement in strategy is not grounds for a finding of ineffective assistance of counsel. Although Mr. Dunlap's current counsel disagree with the decision made by his trial counsel, it does not indicate ineffectiveness of the trial counsel. Mr. Lewis made a decision based on his experience and the available evidence; his decision was reasonable, and not a violation of the Sixth Amendment.

#### *Discussion*

In *Strickland v. Washington*, 466 U.S. 668 (1984), the U.S. Supreme Court noted that the right to counsel is the right to the effective assistance of counsel. A claim of ineffective counsel must show that counsel's performance was deficient in such a way that it deprived the defendant of a fair trial. Counsel's performance is deficient if it falls below an objective standard of reasonableness. The standard includes making reasonable investigations or making a reasonable decision that certain investigations are unnecessary. Strategic choices made after incomplete investigations are reasonable if they are based on professional judgments that substantiate ending the investigation prematurely.

It is important to note, however, that even if an error is made, it must have actually prejudiced the ability for a defendant to receive a fair trial to constitute a violation of the Sixth Amendment. The *Strickland* Court stated that there should be a strong presumption that counsel's performance fell within the wide range of reasonable professional assistance. This makes a claim of ineffective assistance of counsel very challenging for defendants to pursue. An analogous situation occurs in medicine where multiple physicians may make different medical decisions that still fall within the accepted standard of practice.

Although Mr. Dunlap's current counsel believe his mental health evidence is not damaging, and actually serves as an explanation for his behavior at the time of the crime, the high bar for proving ineffective counsel effectively silences this viewpoint. Although the decision in this case does not seem unreasonable, given the extensive records documenting malingering and antisocial traits, one wonders how many defendants with a mental illness are not afforded the opportunity to provide evidence of their illness as part of their defense by counsel and then are unable to make a successful claim of ineffective counsel.

This case highlights how incomplete records can affect diagnostic impressions, and it is always important to keep in mind that expert opinions are limited by the available data. The case also highlights that complete records and revised opinions do not necessarily change the outcome.

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