

vere mental illness. Thus, the Fourth Circuit found no clear error in the district court's apparent departure from DSM criteria for the diagnosis of pedophilia and its finding Dr. Plaud's diagnoses and testimony more persuasive. The Fourth Circuit did not find any clear error to support overturning the district court's decision, affirming the rather wide latitude that courts have in making legal determinations of mental illness and in departing from medical criteria for psychiatric illness.

Finally, as to the questions of due process raised in this case, the Supreme Court noted in *Jackson v. Indiana*, 406 U.S. 715 (1972), that the right to due process applies to individuals litigating their confinement under federal civil commitment statutes, and individuals confined under the Walsh Act are now explicitly provided the same protections in *Springer*.

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Expanded Responsibility of the Court to Order Competency Evaluations at Time of Sentencing

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The Ninth Circuit Rules That a California District Court's Failure to Order an Evidentiary Hearing to Evaluate Competency Was Plain Error When Reasonable Doubt of Competency Existed at Sentencing

In *United States v. Dreyer*, 693 F.3d 803 (9th Cir. 2012), the Ninth Circuit Court of Appeals ruled that the District Court had committed a plain error in failing to order a competency hearing at the time of sentencing for Dr. Dreyer who had pleaded guilty to conspiracy to distribute controlled substances. It was asserted that Dr. Dreyer's well-established diagnosis of frontotemporal dementia (FTD) and consequent

inability to regulate his behavior and speech, raised substantial doubt about his ability to assist his defense counsel at time of sentencing. Although Dr. Dreyer's defense attorney asked only for leniency in sentencing, the court erred in failing to order an evidentiary hearing to evaluate competency.

Facts of the Case

In 2007, Joel Dreyer, MD, was indicted on 30 counts related to conspiracy to possess and distribute controlled substances. At the time, he was a licensed psychiatrist and was allegedly writing prescriptions for oxycodone and hydrocodone in exchange for cash payments of \$100 to \$200. These incidences occurred between 2004 and 2007 and involved the illicit dispensation of tens of thousands of pills. Dr. Dreyer accepted a plea agreement in 2009, in which he pleaded guilty to two counts related to conspiracy to distribute and unlawful distribution of oxycodone.

Dr. Dreyer had no criminal history before this incident, and he had been diagnosed with FTD in 2001. Family members described dramatic personality and behavioral changes that had been observed over the previous years. These included a divorce from his wife of 17 years, withdrawal from his family, the use of profane and explicitly sexual language, and inappropriate behavior, such as walking around a hotel lobby without a shirt. Considering this, the defense procured medical and psychological evaluations before sentencing. Two reports from experts retained by the defense and one from an evaluator appointed by the state were submitted to the court.

Of the clinicians who evaluated Dr. Dreyer, all agreed on a diagnosis of FTD. Several experts opined on Dr. Dreyer's cognitive dysfunction in the realms of judgment, memory, language, and executive function. As a result, he had markedly impaired insight into his deficits as well as the consequences of his impulsive actions. Magnetic resonance imaging of his brain was consistent with FTD as well. Although the purpose of the evaluations was not specifically to assess competence, opinions of whether Dr. Dreyer was competent to plead guilty were offered. The defense's expert opined that Dr. Dreyer may not have fully understood the consequences of agreements that he had entered into, whereas the state's expert opined that, although he was competent to plead guilty, his diagnosis might mitigate some culpability.

At the sentencing hearing, Dr. Dreyer's attorney stated that his client would not be speaking on his own behalf, as his unpredictable nature made it impossible to know what he might say. The court sentenced Dr. Dreyer to 120 months. The sentence was subsequently appealed, with Dr. Dreyer's defense attorney contending that the district court erred by failing to order an evidentiary hearing *sua sponte*, to evaluate whether Dr. Dreyer was competent at the time of sentencing.

Ruling and Reasoning

The Ninth Circuit ruled that the district court committed a plain error in not ordering a competency hearing. As a result, the sentence was vacated, and the case was remanded to the district court for an evidentiary hearing.

The court reviewed the statutory duty of the district court to order a competency hearing if there is "reasonable cause to believe the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent. . ." 18 U.S.C § 4241(a) (2012). Citing *United States v. Marks*, 530 F.3d 799 (9th Cir. 2008), the court stated that the matter at hand was not whether the district court could determine competence, but whether the evidence would compel a "reasonable judge" to "experience genuine doubt" about the competence of the defendant.

According to the court, the threshold for such doubt was met in at least two ways. First, there were three independent evaluations of Dr. Dreyer that resulted in diagnoses of FTD and noted impairment of judgment due to disinhibition and impulsivity. Although these evaluations did not all agree on Dr. Dreyer's competency to enter a plea and the purpose of these evaluations was not to establish competency, the evaluation results raised doubt that would necessitate a competency evaluation at that time of sentencing.

Second, Dr. Dreyer's attorney directly communicated to the court that his client could not speak on his own behalf during the sentencing as a result of impairment from his disease. The court quoted *Unites States v. Behrens*, 375 U.S. 162 (1963), which states that allocution is an "elementary right" in assisting in ones own defense.

Discussion

The landmark case, *Dusky v. United States*, 362 U.S. 402 (1960), established a defendant's compe-

tency as requiring "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and a "rational as well as factual understanding of the proceedings against him" (*Dusky*, p 402).

Where the burden lies for determining competence was established in the United States Supreme Court case *Cooper v. Oklahoma*, 517 U.S. 348 (1996), in which the burden of "clear and convincing evidence" was considered too high a threshold for the defendant to prove incompetence. In *Cooper*, the U.S. Supreme Court explained that a lower threshold of preponderance of evidence was the correct threshold to assure that truly incompetent individuals were not wrongly adjudicated competent. The threshold for considering evaluation of the competence of the defendant is similarly low, as established in *Unites States v. Marks*, in which "genuine doubt" of competence is sufficient to necessitate a competency evaluation. This standard was subsequently applied in *Dreyer*. Finally, the decision in *Drope v. Missouri*, 420 U.S. 162 (1975), makes clear that information made available, either before or during a trial, that may cast doubt on a defendant's competence, should prompt an evaluation. This decision places more responsibility on the court to consider the competency of the defendant.

Judge Tallman of the Ninth Circuit offered a dissenting opinion in *Dreyer*. He questioned whether this decision would prompt judges to order unnecessary competency evaluations for any defendant with a medical condition that could impact his ability to speak, regardless of whether in-court behavior indicates that such an evaluation is necessary.

The decision in this case builds on previous cases that have expanded the courts' responsibility to act as gatekeepers in assuring that only competent defendants progress through the many stages and complexities of legal proceedings. The Ninth Circuit's position in *Dreyer*, as in *Drope v. Missouri*, places more responsibility on the court to monitor and assess competency at any stage of the legal proceedings. Such due process protections are vital to the integrity of legal proceedings, and the possible increase in the number of competency assessments seems a small price to pay.

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