

veracity of these claims may vary substantially and our ability to investigate such claims is limited, it is important nonetheless to communicate this information to attorneys. As psychiatrists, we may also obtain reports of other potentially mitigating evidence during examinations of criminal defendants (e.g., physical abuse and deprivation). As with reports of sexual abuse, the psychiatrist must communicate this information to the retaining attorney. The net that must be cast when investigating mitigating factors in capital cases is very wide. However, psychiatrists must also be cognizant that the attorney has to take other considerations about trial strategy into account when determining whether to present the mitigating evidence that he unearths. This need for attorneys to balance competing factors when determining trial strategy will continue to allow for appeals regarding the presentation of mitigating evidence in ongoing and future capital cases.

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Conditional Release Revocation of Federal Insanity Acquittee

Thomas Oden, III, MD
Fellow in Forensic Psychiatry

D. Clay Kelly, MD
Associate Professor of Psychiatry

*Department of Psychiatry and Behavioral Sciences
Tulane University School of Medicine
New Orleans, LA*

Insanity Acquittee's Eviction From Assigned Group Home Is Sufficient Justification for Revocation of His Conditional Release

In *United States v. Washington*, 764 F.3d 491 (5th Cir. 2014), the United States Court of Appeals for the Fifth Circuit considered whether the United States District Court for the Western District of Texas ruled in error in revoking an insanity acquittee's conditional release on the grounds that he was evicted from a group home, thereby violating his prescribed treatment regimen. The court rejected the defendant's claim that the required residence at Guidance House was not a component of his physician-prescribed treatment regimen and agreed with the district court's finding that the

defendant's continued release posed a substantial risk to the public.

Facts of the Case

In January 2008, Marvin Goodlow Washington was arrested and charged with bank robbery by force and violence after entering a bank in Waco, Texas, where he threatened a teller with the statement "Don't make me stab you." He left the bank with \$2,711 in cash. After being apprehended by law enforcement, Mr. Washington was later examined by doctors who reported that the rationale for the robbery was based on a delusion that he was married (when in fact he was not), and that he had to carry out the crime to attract media attention so that his missing wife could be found.

After arraignment, Mr. Washington's defense counsel motioned for a competency evaluation, after which Mr. Washington was found incompetent to proceed to trial. He was then transferred to the Federal Medical Center in Butner, North Carolina (FMC-Butner) where he resided for several months. At FMC-Butner, he refused treatment with psychotropic medications, but his refusal was overridden by a court-issued forced medication order. In June 2009, the FMC-Butner staff concluded that he was competent to proceed to trial.

After a bench trial in October 2009, he was found not guilty by reason of insanity and was remanded to a mental health facility for evaluation and treatment. In 2012, the Bureau of Prisons certified that he had recovered from his mental disease or defect and was eligible for conditional release. The decision was eventually approved after a hearing by the district court, which ruled that by clear and convincing evidence Mr. Washington "would not pose a substantial risk of bodily injury to another person or serious damage to property of another" (*Washington*, p. 493).

The court set conditional release parameters (under 18 U.S. Code § 4243), which included his remaining under the supervision of the probation office, participating in routine mental health services, remaining adherent to his prescribed medication regimen, and maintaining residence at Guidance House, a group home located in Burlington, North Carolina. According to the release agreement, Mr. Washington would not be able to relocate from Guidance House without the court's approval. In July 2013, 15 months into his condi-

tional release, Mr. Washington was evicted from Guidance House. The district court, deeming the eviction itself as a violation of his conditional release arrangement, issued an arrest warrant for Mr. Washington.

At Mr. Washington's conditional-release-revocation hearing, Karen Tremblay (his probation officer) was the sole witness. Two letters written by Jean Majors, the Program Director of Guidance House, were also accepted into evidence. The letters (addressed to Mr. Washington and Ms. Tremblay) detailed grievances voiced by Mr. Washington concerning regulations imposed by the group home, his aggressive and threatening behavior toward other residents and personnel, and his refusal to comply with the rules, especially the curfew. He had also refused to sign a document committing him to follow the Guidance House rules while knowing that the refusal would result in his eviction.

Karen Tremblay's testimony at the hearing was primarily focused on nonmedical evidence. Mr. Washington's treating physician was not consulted concerning the attempt to recommit him. Ms. Tremblay testified that Mr. Washington should be re-evaluated by medical professionals because of his increasing hostility, limited insight into his mental illness, increased compulsive behaviors, and disregard for established group home regulations. In response, Mr. Washington asserted that since his release from the hospital, he had been consistently employed, had remained compliant with medications, and had even attended classes at a community college. Although he had not physically harmed anyone or been arrested during his conditional release, the district court ultimately agreed with the government's recommendation that Mr. Washington's conditional release should be revoked as a result of failure to comply with the "prescribed regimen of medical, psychiatric, or psychological care or treatment," and its argument that "his continued release will create a substantial risk of bodily injury to another person or serious damage to property of another" (*Washington*, p. 496). Mr. Washington appealed.

Ruling and Reasoning

The Fifth Circuit's opinion focused on the provisions in 18 U.S.C. § 4243(g) (2009) allowing for the revocation of a conditional release if the acquittee fails to comply with his treatment regimen and his

continued release would create a substantial risk to society. Mr. Washington had contended that the district court erroneously considered residence at Guidance House to be part of his prescribed regimen and that there was no indication that he posed a risk of property damage or bodily injury to anyone. His appeal relied on *United States v. Crape*, 603 F.3d 1237 (11th Cir. 2010), in which the Eleventh Circuit held that § 4243 does not empower district courts to implement additional conditions for insanity acquittees beyond the prescribed regimen instituted at the time of their conditional release. However, The Fifth Circuit ruled that Mr. Washington's reliance on *Crape* was incorrect, since compliance with group home placement was in fact an express component of his prerelease, physician-prescribed treatment regimen.

In addressing Mr. Washington's claim that there was no indication that he posed a substantial risk to the public, the Fifth Circuit relied on its own opinions in *United States v. Mitchell*, 709 F.3d 436 (5th Cir. 2013) and *United States v. Boggs*, 68 F.3d 467 (5th Cir. 1995). In both *Mitchell* and *Boggs*, the Fifth Circuit affirmed lower court revocations of conditional release agreements based on the failure of the respective acquittees to meet prerelease treatment guidelines. The court opined that such failures could result in a worsening or return of, mental health symptoms that would increase the risk posed to the public. The court ruled that Mr. Washington's increased verbal aggressiveness and disregard for group home rules was a sign of re-emerging mental illness.

Discussion

In *Washington*, the Fifth Circuit made a bright-line distinction between prerelease conditions and any postrelease modifications of said conditions. Those responsible for supervising conditionally released acquittees should bear in mind this *ex post facto* approach. In *Crape*, the Eleventh Circuit reversed the district court's revocation because the lower court had added a condition that was not a part of the originally prescribed regimen. The Fifth Circuit contrasted this ruling with its own prior opinions in *Mitchell* and *Boggs*. The court also reviewed three other cases (decided in circuit courts of appeal) in which revocation orders were affirmed. In all of these cases the acquittees had failed to comply with prerelease conditions. Accordingly, those assigned the task

of crafting prerelease conditions should be particularly careful to include any restrictions believed necessary to reduce the risk to society. Conditions applied *post hoc*, at least in federal cases of release for not guilty by reason of insanity (NGRI), are likely to be rejected at the appellate court level.

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Threshold for Ordering an Evaluation of Competency to Stand Trial

Katherine Michaelsen, MASc, MD
Fellow in Forensic Psychiatry

Reena Kapoor, MD
Assistant Professor of Psychiatry

Department of Psychiatry
Yale School of Medicine
New Haven, CT

Defense Attorney's Observations Are Insufficient to Prompt Ordering a Competency Evaluation

In *United States v. Villareal*, No. 13–2367, No. 13–2586, 2014 WL 2869658 (8th Cir. June 25, 2014), the Eighth Circuit Court of Appeals affirmed the trial court's decision to deny the defendant's motions for a competency evaluation and assistance of a mental health expert at trial, because they were based solely on the attorney's description of the defendant, without medical records or court observation of disorganized behavior.

Facts of the Case

On August 22, 2012, Javier Villarreal was indicted along with 16 co-defendants for methamphetamine-related offenses. He was charged with one count of conspiracy to distribute methamphetamine and two counts of aiding and abetting in the distribution of more than five grams of the drug. On December 4, 2012 Mr. Villarreal filed a motion requesting a psychiatric evaluation to aid in determining his intelligence level, understanding, decision-making ability, and competence to stand trial. In the motion, Mr. Villarreal's attorney documented her observations of Mr. Villarreal's mental state and her knowledge of his mental health history. Mr. Villarreal himself was unable to clarify the nature of his mental health prob-

lems, but stated that he had attended special education classes in school and worked closely with his father as an adult. His sister confirmed this report and also stated that he had significant memory problems. The attorney noted that during their meetings, Mr. Villarreal repeatedly made conflicting statements about matters related to the case. He also had difficulty remembering the content of their previous discussions—both information reviewed and his own statements—and could not recall what he had told police officers upon his arrest.

After reviewing the motion, the district court found insufficient evidence to order the requested evaluation under 18 U.S.C. § 4241 (2009) and therefore held a hearing on December 20, 2012, to determine whether to order a competency evaluation. During the hearing, the court asked Mr. Villarreal three yes/no questions, and two of the questions had to be repeated to him (*United States v. Villareal*, No. 2:12-cr-20043-011 (W.D. Ark. 2012), Transcript of the Proceedings Before the Honorable P.K. Holmes, III, USDC Judge, Fort Smith, Arkansas, December 20, 2012). The court concluded that the evidence failed to establish an active mental disorder or raise sufficient doubts about his competence. The court stated that “defense counsel's observations that the Defendant may have a below-average intelligence level, memory problems, and a history of attending special education classes in school do not indicate that Defendant is presently incompetent” (*United States v. Villareal*, No. 2:12-cr-20043-PKH (W.D. Ark. 2012), document 165, filed December 21, 2012, page ID 702). The court noted that there was no inquiry into his medical history, that there was no indication of irrational behavior, and that he had “responded suitably to questions . . . and behaved appropriately” during the hearing (*United States v. Villareal*, No. 2:12-cr-20043-PKH (W.D. Ark. 2012), document 165, filed December 21, 2012, page ID 702). The court concluded that the only evidence in support of his incompetence was the opinion of his attorney, which “[did] not establish sufficient doubt to warrant a competency hearing and/or a mental evaluation” (*United States v. Villareal*, No. 2:12-cr-20043-PKH (W.D. Ark. 2012), document 165, filed December 21, 2012, page ID 703).

On January 30, 2013, Mr. Villarreal pleaded guilty to one count of aiding and abetting metham-