

Mr. Doe's trauma and the impact these experiences had in his transition from a shy withdrawn teen to "a crazy man," as Mr. Doe's ex-girlfriend observed. Another friend suggested that Mr. Doe was "like people who come back from Vietnam and could never talk about their time there" (*Doe*, p 456) and how his behavior was constantly "off" after his release from prison. One of the psychological experts, J.C., after reviewing Doe's prison files and interviewing him several times, concluded that Mr. Doe's rapid mental disintegration, when placed into custody following the first burglary, was a result of the rape he had suffered during his juvenile incarceration and the "internalized shame, guilt and rage" that had resulted from these experiences. The court again found that these mitigating circumstances would have likely made some impact on the jury in deciding Mr. Doe's sentence.

The court then reviewed the evidence regarding Mr. Doe's childhood abuse and neglect at the hands of his uncle. Once again, the court found that this evidence would have had a powerful impact on the jury.

The court concluded that:

Doe received profoundly deficient assistance of counsel during the penalty phase of his trial: while very strong mitigating evidence existed, it was never uncovered by J.B., and the resulting presentation was so anemic as to be virtually without value. These failures were due, defense counsel readily admits, not to any sort of strategic judgment, but rather to incompetence [*Doe*, p 465].

Discussion

In addressing the question of ineffective assistance of counsel in the guilt and sentencing phases of Mr. Doe's trial, the court analyzed the use of psychological experts, Mr. Doe's psychological history, and the involvement, or lack thereof, of mental health experts in trial preparation.

The court notes the importance of the retention and use of psychological experts as part of a defense attorney's duties to help establish a defendant's mental condition (including psychological trauma, physical abuse, and sexual assault), in both the guilt and penalty phases of the trial. In this particular case, the court is critical of the lack of attention to Mr. Doe's psychological and psychiatric past for mitigation purposes (as well as the later well-documented, and easily attainable, physical and sexual abuse he suffered throughout his life) and the lack of further assessment by the psychologist retained by counsel beyond a "relatively brief evaluation" (*Doe*, p 440). The

court's careful description of the defendant's long history of mental illness and a lifetime of trauma at the hands of others illustrates the type of mental illness analysis that it expects mental health experts to provide in capital cases.

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Competency to Waive Fifth Amendment Rights During Custodial Interview

Hassan M. Minhas, MD
Fellow in Forensic Psychiatry

Alexander Westphal, MD, PhD
Assistant Professor of Psychiatry

Law and Psychiatry Division
Department of Psychiatry
Yale University School of Medicine
New Haven, CT

During a Custodial Hearing, Invocation of the Right to Counsel Is Waived by Reinitiating Communication with the Police

In *Johnson v. Stephens*, 2015 U.S. App. Lexis 11529 (5th Cir. 2015), the Fifth Circuit Court of Appeals held that Dexter Johnson, a state inmate, was not entitled to *habeas* relief on a Fifth Amendment claim that his statements made during a second investigation should have been inadmissible, despite his revoking his right to counsel during a prior interrogation. The court stated that, even if he had properly invoked his right to counsel, he waived his right by subsequently reinitiating communication with the police. The court had several additional holdings related to procedural law around obtaining a certificate of appealability.

Facts of the Case

On the morning of June 18, 2006, while driving around with the intention to rob someone, Dexter Johnson and four companions came across Maria Aparece and her boyfriend, Huy Ngo, who were sitting inside Ms. Aparece's parked car. Mr. Johnson and Keithron Fields ran up to the car with guns and threatened to shoot if the victims did not open the door. When the victims complied, Mr. Johnson and Mr. Fields forced them into the back of the car and drove them around, demanding money, while their

other companions followed in their car. The victims did not have any money to give their assailants. Mr. Johnson parked the car in a wooded area and raped Ms. Aparece while Mr. Fields held a gun to Mr. Ngo's head and taunted him. Subsequently, Mr. Johnson and Mr. Fields marched the victims into the woods and shot each of them in the head, killing them. Mr. Johnson then went on a shopping spree with his four companions, using Ms. Aparece's credit card.

On June 21, 2006, Mr. Johnson was taken into custody on drug-related charges, and two detectives conducted a recorded interview about Ms. Aparece's stolen car. After Mr. Johnson acknowledged his *Miranda* rights orally and in writing, he was questioned for more than four hours. At one point during the interview he said: "I don't even want to talk no more until I get my lawyer or something" (*Johnson*, p 7). After making this statement, Mr. Johnson made more statements about the facts of the offense, and the detective asked a few more questions about inconsistencies in his statements.

On June 23, 2006, one of Mr. Johnson's companions who had accompanied him on the day of the crime led the police to the victims' bodies. After the remains were recovered, Mr. Johnson was brought in for further questioning. He was read the *Miranda* warning, and he agreed to speak with the detectives. During this interview, Mr. Johnson admitted to raping Ms. Aparece and to firing a pistol near Mr. Ngo, but denied shooting either one.

Before going to trial, Mr. Johnson filed motions to suppress both of his statements. He argued that he had invoked his Fifth Amendment right to counsel during his first recorded statement, which made anything he subsequently said inadmissible. Although agreeing that Mr. Johnson had unambiguously invoked his right to silence and counsel, the trial court ruled that he had revoked these rights by continuing to discuss details of the offense without being prompted to do so. He was subsequently indicted, convicted, and sentenced to death.

The trial court's decision was affirmed on direct appeal, and a writ of *habeas corpus* was denied by the state. The Texas Southern District Court also denied a writ of *habeas corpus*, but issued a Certificate of Appealability (COA) with regard to Mr. Johnson's Fifth Amendment claim, based on which he filed a merits brief to the court of appeals. At the same time, he also requested a separate COA on four other

claims raised in his federal *habeas* petition. One of these was whether he was mentally competent to waive his rights at the time of his custodial interview.

Ruling and Reasoning

In reaching its decision, the Fifth Circuit Court of Appeals referenced *Edwards v. Arizona*, 451 U.S. 477 (1981), in which the Supreme Court (as a corollary to *Miranda v. Arizona*, 384 U.S. 436 (1966)) held that once the accused asserts his Fifth Amendment right to counsel, all further interrogation by authorities must cease "until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police" (*Edwards*, pp 484–485).

The court of appeals reasoned that by reinitiating communication, Mr. Johnson waived any rights that he may have invoked. The court also noted that there is no Supreme Court precedent that clearly indicates that an individual who continues to speak with police after invoking his right to counsel or to remain silent has not waived those rights.

In addition, the court denied Mr. Johnson's application for a COA, because it found that, in all four claims, he was unable to make a "substantial showing of the denial of a constitutional right" (*Slack v. McDaniel*, 529 U.S. 473 (2000), p 483), as required by 28 U.S.C.S. § 2253 (c) (2012)). Specifically regarding Mr. Johnson's claim of incompetency to waive his *Miranda* rights, the court stated that Mr. Johnson's failure to bring this claim in state court precluded him from raising this in federal court, as it did not meet the standard set out in *Strickland v. Washington*, 466 U.S. 668 (1984) for determining inadequate assistance of counsel.

Discussion

In *Miranda* the U.S. Supreme Court held that, during interrogations in the absence of an attorney, "a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel" (*Miranda*, p 475). The Court further defined the level of comprehension required as "a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it" (*Moran v. Burbine*, 475 U.S. 412 (1986), p 421).

Edwards set a bright-line rule regarding the waiver of previously invoked rights when the accused continues to communicate. The question of full aware-

ness is an important one. In the present case, Mr. Johnson had significant problems that could affect his mental health, including several head injuries and an IQ in the 70s (Patrick F. McCann, Mr. Johnson's attorney, personal communication, August 18, 2015). Although the court of appeals dismissed Mr. Johnson's claim that the district court erred in rejecting his allegation of incompetency to waive his *Miranda* rights, the question of competency to understand the *Edwards* rule is an important one for forensic psychiatrists.

In *Lego v. Twomey*, 4404 U.S. 477 (1972), the Supreme Court ruled that the burden of proof on the state to determine admissibility of a confession was a preponderance of the evidence. As a demonstration of this holding, in *United States v. Glover*, 431 F.3d 744 (11th Cir. 2005), the defendant argued that he lacked the capacity to comprehend his *Miranda* rights. The Eleventh Circuit Court of Appeals ruled that since the defendant had interacted "normally and intelligently with the arresting agents" (*Glover*, p 748), the government had met its burden, despite the defendant's mother's vague testimony that he had an "IQ of 57 or 67" (*Glover*, p 747). Similarly, in *Colorado v. Connelly*, 479 U.S. 157 (1986), the Supreme Court reaffirmed the burden of proof set in *Lego* and made it clear that, although a defendant's mental condition "may be a significant factor in the 'voluntariness' calculus" (*Connelly*, p 164), it cannot be used as a sole argument in regard to voluntariness.

Competency is situation and issue specific. To evaluate competency in regard to *Miranda* rights in general, instruments such as the *Miranda* Rights Comprehension Instruments (Goldstein NES, Zelle H, Grisso T. Sarasota, FL: Professional Resource Press, 2011) may provide a useful roadmap for the evaluation. In cases such as *Johnson*, forensic psychiatrists may be asked to evaluate specifically the defendant's knowledge of and ability to comprehend the *Edwards* rule. Factors that should be considered are specific to the unique circumstances of the case, but may include an evaluation of intelligence, attention, recall, and abstraction skills. While commenting on language ability, it is important to be mindful that the intent behind the uttered word often varies with the level of cognitive sophistication. This reality takes on special importance when the act of talking may equate to revoking rights that have been invoked. In these situations, the forensic psychiatrist's

opinion may help provide psychiatric context to the court.

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Court Discretion in Evaluating Competency to Stand Trial

Kyle C. Walker, MD
Fellow in Forensic Psychiatry

Kevin V. Trueblood, MD
Assistant Clinical Professor of Psychiatry

Law and Psychiatry Division
Department of Psychiatry
Yale University School of Medicine
New Haven, CT

Connecticut Supreme Court Rules That Trial Court Abused Its Discretion in Not Ordering a Second Competency Evaluation After Defense Counsel Raised New Concerns

In *State v. Dort*, 106 A.3d 277 (2014), the Supreme Court of Connecticut held that a trial court abused its discretion in declining to order a second competency evaluation after defense counsel, at the time of jury selection, raised new concerns to the court regarding his client's ability to understand the proceedings and assist in his defense, in accordance with Conn. Gen. Stat. § 54-56d (2009). The court further delineated the threshold of evidence for trial courts to order an evaluation of competency in criminal proceedings.

Facts of the Case

In 2009, Joel Dort was arrested and charged with burglary in the first degree, kidnapping in the first degree, and strangulation in the second degree after an alleged incident of breaking into a former employer's office building and attacking one of Mr. Dort's prior supervisors there. In November 2009, he was ordered to undergo an evaluation of competency to stand trial, after which both defense and prosecution stipulated as to Mr. Dort's competence to proceed.

In June 2010 (seven months later) the court granted Mr. Dort's motion for a speedy trial and began the jury selection process the next day. On the following morning, defense counsel raised new concerns with respect to Mr. Dort's competence and requested a new evaluation. He reported most notably that "[t]here's a fundamental misunderstanding