case and being able to work with counsel in his defense.

What this means for the courts is that a defendant's ability to meet the bar of competence can change over time, either as his own mental state changes, due to the natural course of an underlying illness or the stress of criminal proceedings, or as the situation changes, perhaps in a case where new and more complex features come into the defense strategy. A prior, even recent, finding of competency is no guarantee of current competency. The corollary is that competency cannot be fairly examined in hindsight, particularly many months to years after the fact, and attempts to do so have been struck down by the courts on numerous occasions as insufficient to protect the due process right to a fair trial.

Although the elements of competence are well-described in case law and statute, the trigger for when a court may or must request an evaluation by a professional is less clear. The state supreme court asserted that the trial court has a requirement to pursue such evaluation under a defined condition, when specific factual allegations have been raised, and that failure to do so represents abuse of discretion. The ruling did, of course, leave the lower courts some latitude in making this determination judiciously, confirming prior rulings that mere legal conclusions (as opposed to facts) are insufficient to trigger this requirement, and that "prisoners are not entitled . . . to make bald charges of incompetency" (*Dort*, p. 290). Regardless, they emphasize that concerns raised by the defendant or defense counsel must be taken seriously, with appropriate action by the court.

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Re-evaluating the Volitional Test for Criminal Responsibility

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Consideration of Diagnostic Categories versus Symptom Severity in Evaluating the Volitional Component of Behavior

In *Maine v. Giroux*, 113 A.3d 229 (2015), the Maine Supreme Court considered Mr. Giroux's appeal of the denial of his motion to withdraw his guilty pleas on the ground that his kleptomania diagnosis was new evidence that raised reasonable doubt related to his intent and should therefore have been admitted.

Facts of the Case

In December 2012, Collin Giroux was on probation from charges originating in 2008. He incurred seven new charges, including two counts of burglary, three counts of theft by unauthorized taking, criminal mischief, and violation of the conditions of release. Mr. Giroux subsequently requested an evaluation to determine his competence to stand trial and his criminal responsibility. He was found competent, able to appreciate the wrongfulness of his behavior, and able to plan his behavior at the time of the offenses.

Thereafter, Mr. Giroux waived indictment and pleaded guilty to all charges and accepted a plea bargain, including a 30-month cap on time to serve. Mr. Giroux's counsel requested that the case be continued for sentencing pending a third evaluation of the impact of Mr. Giroux's kleptomania diagnosis. The request was granted, and a presentence examination report was filed on January 1, 2013.

On August 13, 2013, Mr. Giroux moved to withdraw his guilty pleas, asserting that diagnostic information from the third report was new evidence of a mental abnormality that raised reasonable doubt as to intent pursuant to Maine statute 17-A M.R.S. § 38 (2014). The court denied his motion, finding that kleptomania is not a valid defense to theft under Maine common or statutory law.

Mr. Giroux was sentenced to five years' imprisonment with three years suspended and two years' probation. His earlier probation was partially revoked, and two years of the underlying sentence were to be served concurrent with the new sentence. Mr. Giroux appealed his conviction and was granted a certificate of probable cause to proceed.

Ruling and Reasoning

The Maine Supreme Court upheld the ruling. In considering Mr. Giroux's claim, the supreme court reviewed Maine statutory and common law and

found that both "make clear" that a person who "suffers from a compulsion to perform [a] prohibited act" may still have the requisite intent (*Giroux*, p. 232). In addition, the court noted that Mr. Giroux's argument was in essence an insanity plea; however, the Maine Legislature repealed the statutory volitional test of insanity in 1986. Ultimately, the supreme court found that the trial court did not err in denying Mr. Giroux's motion to withdraw his pleas, as his motion was not supported by common law, and it implicitly relied on Maine's former statutory volitional test for the insanity defense.

The supreme court considered four factors: length of time between entering and moving to withdraw a plea; potential prejudice to the state; Mr. Giroux's assertion of innocence; and deficiency in the proceeding at which the plea was entered (*State v. Newbert*, 928 A.2d 769 (Me. 2007)). The supreme court quickly eliminated the first, second, and fourth factors, while examining the third factor in more detail.

When evaluating the third factor, Mr. Giroux's declaration of innocence, the facts of the case were examined in light of Maine's current statutory and common law. Mr. Giroux admitted he committed the crimes but asserted he was innocent, because his kleptomania prevented him from acting with intent. Nonetheless, legal precedent in Maine does not support a claim that compulsions preclude acting with intent or awareness. Specifically, in *State v. Ellingwood*, 409 A.2d 641 (Me. 1979), the supreme court ruled that although the inability to control one's behavior may serve as an excuse for engaging in that behavior, it "does not negate the existence of a culpable mental state" (Ellingwood, p 646). Thus, an individual can know he or she is engaging in criminal behavior even in the presence of compulsions. Moreover, in *State v. Mishne*, 427 A.2d 450 (Me. 1981), the supreme court found that compulsions do not disprove intent. In fact, responding to a compelling need to act confirms that the individual acts with awareness. Likewise, in *State v. Abbott*, 622 A.2d 723 (Me. 1993), the supreme court ruled that feeling compelled to act does not prevent an individual from acting with purpose.

In further consideration of the third factor, the supreme court went beyond Maine law when it acknowledged that Mr. Giroux's claims that he was compelled to commit illegal acts could be appropriately considered in an insanity plea, pursuant to an insanity statute with a volitional component. Nonetheless, Mr. Giroux did not enter an insanity plea. Even if he had, the plea would have been viable only before 1986, when the volitional test was repealed from Maine's insanity defense statute. Finally, and significantly, Mr. Giroux knew about his diagnosis before entering guilty pleas, as evidenced by background information in the competency evaluation. Accordingly, the third evaluation was not considered new information, which would have influenced his pleas.

Discussion

This case raises the question of which diagnoses are eligible for use in an insanity plea. As a result of the repeal of the volitional test in 1986, the state of Maine considers a defendant not criminally responsible by reason of insanity only if, due to mental disease or defect, the defendant establishes lack of capacity to appreciate the wrongfulness of his act at the time of the crime. Many states repealed the volitional test in response to the successful, but perceived unjust, use of the defense by John Hinckley, Jr., in his trial for attempting to assassinate President Reagan (see, Robinson PH, Dubber MD: The American model penal code: a brief overview. *New Crim L Rev* 10:3, 2007). The Maine Legislature repealed the volitional test in 1986, with one senator referring to it as the "devil made me do it defense" (*Giroux*, p. 234). While many states have limited their definitions of the insanity defense, some states continue to include the volitional test (e.g., Colorado, Connecticut, New Hampshire, New Mexico, Texas, and Virginia). In these states, a court may consider whether a defendant was able to control his behavior at the time of the crime. In Mr. Giroux's case, the court would have to determine whether he was able to control the impulse to steal.

On its face, kleptomania is not a particularly sympathetic diagnosis, given that a person acknowledges repetitive stealing. Is this person simply a savvy thief who was finally caught? The reader may also ask if this is the type of diagnosis the drafters of the Model Penal Code had in mind when articulating the insanity defense. In the present case, Mr. Giroux took extreme measures to avoid stealing; he handcuffed himself and considered tasing himself. Given his behavior, this case leads us to ask whether there is a level of irresistible impulse that negates the specific intent to steal.

Depending on the state, "repeated criminal or otherwise antisocial conduct" may be excluded from the insanity defense (for example, Gen. Stat. § 53a-13 (2015)), giving rise to the question of whether

kleptomania falls within this exclusion. The Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5), however, classifies kleptomania as an impulse-control disorder, distinguishing it from antisocial personality disorder. This distinction suggests that kleptomania may be considered as not falling within the exclusion to the volitional test used in some states.

Perhaps a larger question is whether courts should examine symptom severity, rather than ruling out entire diagnoses. The current diagnostic trend, as reflected in DSM-5, is to move away from categorical diagnosis toward recognizing illness on a continuum, with various levels of symptom severity and dysfunction. For example, substance use disorders include severity specifiers (i.e., mild, moderate, and severe) based on the number of criteria met. Proponents of the dimensional approach point out that it allows for more precise diagnoses and the identification of individuals who would benefit from more targeted treatment strategies (Andrews G, *et al*: Dimensionality and . . . . *Int J Methods Psychiatr Res* 16: S41–S51, 2007; see also, Frances A: DSM-5 and dimensional diagnosis. *Psychiatric Times* March 22, 2010). The understanding that individuals with a diagnosis of the same disorder may experience widely disparate levels of impairment leads us to the question of whether courts should also consider a dimensional approach, as opposed to strict diagnoses, when evaluating whether insanity defense criteria are met. In regard to the questions posed in *Giroux*, is there a level of severity in kleptomania at which an individual cannot control himself in the eyes of the law?

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Capital Punishment and Eighth Amendment Rights

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Oklahoma's Lethal Injection Protocol Does Not Violate the Eighth Amendment's Prohibition Against Cruel and Unusual Punishment

In *Glossip v. Gross*, 135 S. Ct. 2726 (2015), the U.S. Supreme Court denied the 42 U.S.C. § 1983 action of three Oklahoma state death row inmates, which alleged that the use of the sedative drug midazolam was a violation of the Eighth Amendment because it creates an unacceptable risk of severe pain. While citing precedent holdings as the basis for its opinion, the Court moved beyond the narrow question of method of execution to focus much of its energy on the constitutionality of the death penalty.

Facts of the Case

The State of Oklahoma has historically used three specific drugs for its lethal injection protocol: sodium thiopental, pancuronium bromide, and potassium chloride, a combination that was found to be constitutional by the U.S. Supreme Court in *Baze v. Rees*, 553 U.S. 35 (2008). In response to pressure from anti-death penalty advocates, the manufacturers of sodium thiopental and its closest substitute, pentobarbital, made them unavailable in the United States. Lacking a viable means of obtaining either drug, Oklahoma modified its lethal injection protocol to incorporate the long-acting benzodiazepine midazolam instead.

In April 2014, Oklahoma executed its first inmate, Clayton Lockett, using the new three-drug protocol. Mr. Lockett died shortly after the medication was administered, but he did not remain sedated during the entirety of the execution. After a public outcry, an investigation concluded that the primary reason for the failure of the medication to keep Mr. Lockett sedated was infiltration of the intravenous line. Consequently, Oklahoma instituted several procedural changes and amended its protocol to use a higher dose (500 mg) of midazolam.

In response, 21 Oklahoma death row inmates filed an action under 42 U.S.C. § 1983 (2012) alleging that the "use of midazolam violates the Eighth Amendment's prohibition of cruel and unusual punishment" (*Glossip*, p 2735). Four of the plaintiffs, having exhausted legal channels for challenging their convictions and sentences, then filed a motion for preliminary injunction against the drug protocol, arguing that the use of 500 mg of midazolam did not render an individual insensate to pain once the second and third drugs in the protocol are administered.