Exclusion of Psychiatric Diagnosis and Substance Use in Consideration of Death Penalty Case Appeal

Aliana Abascal, MD
Fellow in Forensic Psychiatry

Cheryl Hill, MD, PhD
Associate Professor of Psychiatry

Kari-Beth Law, MD
Assistant Professor of Psychiatry

Department of Behavioral Medicine and Psychiatry
West Virginia University
Morgantown, WV

Failure to Present Evidence of Mental Illness or Substance Use Did Not Represent Ineffective Counsel and Therefore Was Not Grounds for Granting Certificate of Appealability

In the case of *Rockwell v. Davis*, 853 F.3d 758 (5th Cir. 2017), Kwame Rockwell was convicted of murder and sentenced to death. After a federal writ of *habeas corpus* petition was denied by the U.S. District Court for the Northern District of Texas, Mr. Rockwell filed a Certificate of Appealability (COA). He filed the COA on the grounds that his counsel's failure to present evidence in support of his preexisting mental illness and his previous steroid use constituted ineffective counsel. In addition, he argued that sentencing him to the death penalty was unconstitutional under the precedent set forth in *Atkins v. Virginia*, 536 U.S. 304 (2002). The Court of Appeals for the Fifth Circuit denied his application for a COA.

Facts of the Case

Mr. Rockwell was arrested and charged with murder after he fatally shot a store clerk, Daniel Rojas, during the robbery of a Valero gas station in Fort Worth, TX, on March 23, 2010. During his incarceration, Mr. Rockwell began exhibiting symptoms potentially suggestive of a mental illness. He was diagnosed with schizophrenia while incarcerated and was treated with haloperidol, an antipsychotic medication. During the litigation process, he was evaluated by several mental health professionals, including several psychologists and psychiatrists. Information obtained from these mental health evaluations, as well as from family members, friends, and acquaintances, pointed to either an intentional exaggeration of symptoms by Mr. Rockwell or a lack of symptoms supportive of the diagnosis of schizophrenia. In addition, Mr. Rockwell had a history of illegal steroid use, and his attorney retained the services of a forensic toxicologist. It was the opinion of this toxicologist that evidence of his steroid use should not be presented in court, as he stated that Mr. Rockwell's actions were not consistent with those that are typically seen in individuals who use steroids. In addition, his attorney did not wish to introduce evidence that could result in Mr. Rockwell's character being negatively perceived by the jury. Consequently, his attorney focused solely on Mr. Rockwell's character as a defense strategy by including 52 witnesses who testified on Mr. Rockwell's behalf when his sentence was being determined.

In 2012, Mr. Rockwell was convicted of murder and sentenced to death. An automatic direct appeal was submitted to the Texas Court of Criminal Appeals claiming 21 points of error. The appeals court found no reversible error and affirmed the conviction and sentence. Mr. Rockwell filed a state and then a federal petition for a writ of *habeas corpus*, both of which were denied.

Because federal law does not allow for an absolute right to appeal, a COA must first be granted by a circuit justice or judge (*Buck v. Davis*, 137 S. Ct. 759(2017)). After his petition for writ of *habeas corpus* was denied by the federal courts, Mr. Rockwell filed a COA with the Fifth Circuit Court of Appeals. Among multiple claims, he argued that his trial counsel's failure to present evidence of his schizophrenia diagnosis and of his steroid use constituted ineffective assistance of trial counsel. In addition, he felt he was not eligible for the death penalty based on the precedent established in *Atkins.* Finally, he argued that Texas's death penalty statute unconstitutionally forbade juries from considering mitigating evidence.

Ruling and Reasoning

A COA is issued only if the circuit court judge determines that there has been "a substantial showing of the denial of a constitutional right" (28 U.S.C. §2253(c)(2) (2017)). At the time of a COA inquiry, the question is solely whether the petitioner shows that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are ade-

quate to deserve encouragement to proceed further" (*Miler-El v. Cockrell*, 537 U.S. 322(2003)). The Fifth Circuit Court of Appeals denied Mr. Rockwell's COA application based on multiple prongs.

In his COA application, Mr. Rockwell claimed that his counsel had provided ineffective assistance, as they did not present evidence regarding his purported diagnosis of schizophrenia which caused him prejudice. In rejecting Mr. Rockwell's claim, the court reviewed information obtained over the course of litigation. This included evidence that Mr. Rockwell was exaggerating his symptoms and the diagnosis of schizophrenia was called into question by several mental health professionals. If the information regarding the initial diagnosis of schizophrenia had been introduced by his trial counsel, the evidence of possible malingering would also be discoverable. In addition, further potentially damaging information would have been discoverable, including the fact that Mr. Rockwell had once choked a woman, leaving her unconscious.

Mr. Rockwell also claimed ineffective assistance by counsel because evidence was not given regarding his illicit steroid use. The trial counsel retained a forensic toxicologist to evaluate the potential effects of his use of the drug. This expert advised that evidence regarding his steroid use should not be presented, as his use would not cause the violent act of which he was accused. In addition, Mr. Rockwell had procured these steroids illegally, and it was postulated that this behavior could be viewed negatively and contradict the positive character reports. Furthermore, although his counsel could have retained a more favorable expert, his counsel was not required to "shop for an expert" who would be more supportive of their claim (*Perry v. Quarterman,* 314 F. App'x 663 (5th Cir. 2009)). As a result, this aspect of Mr. Rockwell's COA was denied.

Mr. Rockwell also argued that, because of his proclaimed mental illness and in light of rulings in *Atkins,* he was not eligible for the death penalty. In *Atkins*, the U.S. Supreme Court ruled that executing an individual with an intellectual disability (previously termed mental retardation) constituted cruel and unusual punishment prohibited by the Eighth Amendment; however, it does not comment on those diagnosed with mental illness in this prohibition. Furthermore, in *Mays v. Stephens*, 757 F.3d 211, 219 (5th Cir. 2014), it was stated that no previous federal rulings have determined the execution of mentally ill individuals to be unconstitutional. This case delineated the difference between executing the mentally ill and the insane. Thus, the court declined to extend the *Atkins* precedent to Mr. Rockwell's case.

Finally, Mr. Rockwell claimed that a Texas statute unconstitutionally bars juries from considering mitigating evidence that does not reduce a defendants "moral blameworthiness." (Tex. Code Crim. Proc. Ann. art. 37.071, §2(f)(4) (West 2013)). The Fifth Circuit rejected this claim.

Discussion

The findings in this case are directly relevant to the criminal prosecution and sentencing of persons with mental illness. The case suggests that it is reasonable to withhold information regarding the diagnosis of mental illness and substance use in certain circumstances, particularly when the evidence obtained from various mental health evaluations presents contradictory and possibly pejorative information. In addition, when a mental health professional opines that there is not a causal link between the defendant's diagnosis and behavior, it is reasonable to exclude this information.

In the case of *Strickland v. Washington*, 466 U.S. 668 (1984), the high standards for determining whether a defendant's right to counsel were violated were established. The *Strickland* test resulted in a two-part test to prove ineffective assistance of counsel, including that the counsel's performance fell below an objective reasonableness standard. In addition, it requires that proof be presented that if the counsel had not been deficient, the outcome of the case would have changed. The decision to exclude mental illness in a counsel's defense of the death penalty does not immediately constitute a deficiency of counsel. This case also again addressed obtaining expert witnesses. As previously set forth in *Perryman,* if counsel obtains an expert witness whose opinion is not favorable to the defendant, counsel is not required to seek a more favorable one.

Finally, the Eight Amendment of the U. S. Constitution prohibits "cruel and unusual" punishment. This right has been extended to the prohibition of the execution of the "mentally retarded" in *Atkins* and the "insane" in *Ford v. Wainwright,* 477 U.S. 399 (1986). An individual with a diagnosed mental illness who is deemed neither "insane" nor to have an

intellectual disability is not currently offered the same reprieve.

Disclosures of financial or other potential conflicts of interest: None.

Must Attorneys Use Forensic Mental Health Experts in Psychiatric Cases?

Donald Brown, MD
Fellow in Forensic Psychiatry

John M. Stalberg, MD, JD
Forensic Psychiatrist

Department of Forensic Psychiatry
Institute of Psychiatry, Law, and Behavioral Science
University of Southern California
Los Angeles, CA

Court Denies Petition for New Trial Based on Claims of Ineffective Assistance of Counsel for Failure to Call a Forensic Mental Health Expert

In *Ellis v. Raemisch*, 856 F.3d 766 (10th Cir. 2017), the Tenth Circuit Court of Appeals deliberated whether a federal district court erred in finding that a defendant had exhausted state remedies in his appeals process and was prejudiced by ineffective assistance of counsel in his initial trial. Mark Stephen Ellis, the defendant, argued that his defense was inadequate because his attorney did not to call a forensic psychologist to testify on [his] behalf. The Tenth Circuit upheld a previous ruling that the attorney's decision not to call or consult an expert forensic psychologist was not unreasonable.

Facts of the Case

A jury convicted Mr. Ellis of five felonies and one misdemeanor involving child sexual assault on his adopted daughter, V.E. The sexual assaults occurred when V.E. was approximately 8 to 10 years old, from 1999 to 2001. In 2000, Kari Ellis, Mr. Ellis' wife, filed for divorce after learning that Mr. Ellis was having an affair. The divorce proceedings were contentious, and during this period V.E.'s older brother, M.E., told Ms. Ellis that his father had "screwed" V.E. (*Ellis*, p 777, citing Aplt.'s App. Vol. III, p 154). Ms. Ellis contacted the police, and their investigation resulted in finding semen on one of V.E.'s blankets. Shortly thereafter, V.E. revealed for the first time that M.E. also had been sexually assaulting her, for which he pleaded guilty. M.E. later testified at his father's trial that he had assaulted her after hearing that Mr. Ellis had.

Mr. Ellis's trial occurred in 2002, and he was represented by Rowe Stayton, a criminal defense lawyer who was experienced in child sexual assault cases. However, Mr. Stayton had stressful family matters, as well as being occupied with concurrent trials leading up to Mr. Ellis's court date. This notion was one of the elements in Mr. Ellis's claim of ineffective assistance, which he would pursue in higher courts. During Mr. Ellis's trial, Mr. Stayton's defense strategy entailed showing how his wife despised him by "put[ting] this hatred over from her into the children." (*Ellis*, p 771, citing Aplt.'s App. Vol. II, p 32 (Opening Statement)). He proved this claim by cross-examination of state witnesses: V.E., who stated that she was angry with her father and felt closer to her mother; V.E.'s sisters, of which one allied with her mother and the other with her father; M.E., who was also angry with Mr. Ellis; and a forensic scientist who claimed that the semen on V.E.'s blanket was a minute sample and could have been transferred by touching the object after already having semen on one's hands. The jury convicted Mr. Ellis on all counts.

Five years into serving his sentence, in 2007, Mr. Ellis filed a motion alleging ineffective assistance of counsel for postconviction relief in the Colorado state district court. He argued that Mr. Stayton failed to call an expert forensic psychologist to testify about family dynamics and childhood memories; failed to call lay witnesses who could have alleged themes of witness coaching, parental alienation, and collusion; and committed other errors, such as weak cross-examination and mishandling of prejudicial evidence. Mr. Stayton countered this claim by stating that not only was he adequately prepared but that he was well versed in psychological principles involved in child sexual assault cases through his vast experience in trying these cases, as well as giving lectures to his counterparts across the country. The themes disputed by Mr. Ellis were adequately conveyed through his cross-examination of various witnesses. Not calling in an expert was a deliberate tactic used by Mr. Stayton, not only because the testimony would have been redundant, but also because it would have left the defense exposed to attack by the