

however, did not offer any argument that it withheld the Dynavox based on medical judgment. Thus, it could be argued that withholding the device was a violation of reasonable accommodation, thereby precluding summary dismissal of claim.

Discussion

Reversal of the district court's decision in *Reed* was largely due to procedural factors; however, there are important implications for the practice of inpatient psychiatry. Ms. Reed argued that being placed in seclusion during her hospitalization was due to intentional discrimination. By reversing the district court's decision, the court of appeals concluded that a reasonable jury could have credited Ms. Reed's account of the seclusion event and found that the hospital discriminated against her on the basis of her disability.

Psychiatric providers must proceed with caution to ensure that seclusion is necessary to avoid a risk of harm to self or others, is not done punitively, and that the clinical judgment for deciding to use seclusion is fully documented. As always, compliance with established procedures and appropriate monitoring are important to ensure appropriate use and legal protection if using seclusion. Ms. Reed's hospitalization resulted in discord between her and staff regarding access to and use of her Dynavox. In these scenarios seclusion could potentially qualify as discrimination solely due to a disability. The importance of documentation manifested most significantly in the material fact disputes between Ms. Reed's and the hospital staff's testimony regarding the precipitating events for seclusion. It is important to note that the appeals court reversed primarily on procedural factors and did not opine that the hospital had necessarily committed the above offenses.

The importance of documentation also predominated in Ms. Reed's reasonable accommodation claims. Both patient and hospital testified that the Dynavox was withheld, but the hospital's testimony did not identify a corresponding medical justification or rationale. Decisions related to patient safety and actions to reduce possible harm are crucial to providing appropriate inpatient psychiatric care; however, these decisions should not override reasonable accommodations without appropriate clinical justification and documentation.

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A Lack of Adequate Background Investigation and Presentation of Mitigating Factors During the Penalty Phase of a Capital Case Could Constitute Ineffective Counsel

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In *Abdul-Salaam v. Secretary of Pennsylvania Department of Corrections*, 895 F.3d 254 (3d Cir. 2018), the Third Circuit Court of Appeals reversed the denial of *habeas* relief for Seifullah Abdul-Salaam, who had been convicted in state court of murder, robbery, and conspiracy. He argued ineffective assistance of counsel, stating that his attorney did not have a reason for failing to acquire a mental health evaluation, among other things. The Third Circuit ruled that there was a reasonable probability that such evidence, had it been presented, would have caused at least one juror to vote differently in his sentencing.

Facts of the Case

On August 19, 1994 in New Cumberland, Pennsylvania, Mr. Abdul-Salaam and Scott Anderson attempted to rob a store. When Officer Willis Cole arrived on scene, Mr. Abdul-Salaam was able to escape, but Mr. Anderson was captured. As Officer Cole was placing Mr. Anderson in handcuffs, Mr. Abdul-Salaam returned to the scene and fired his gun at Officer Cole, who ultimately died as a result of his injuries. Following a six-day jury trial in March 1995, Mr. Abdul-Salaam was found guilty of murder, robbery, and conspiracy. During the one-day penalty phase of the trial, jurors were instructed to consider four statutory aggravating factors that had to be proven beyond a reasonable doubt by the Commonwealth of Pennsylvania to sentence someone to death. Mr. Abdul-Salaam's trial counsel presented three witnesses (his mother and two of his sisters) to provide evidence of mitigating factors. His mother

testified that Mr. Abdul-Salaam's father subjected him to emotional and physical abuse. She highlighted school and behavioral problems for Mr. Abdul-Salaam, including difficulty with attention, placement in a special school, and enrollment in an Alternative Rehabilitation Communities program due to juvenile adjudication. Mr. Abdul-Salaam's sisters recalled verbal and physical abuse toward Mr. Abdul-Salaam and domestic violence against their mother perpetrated by their father, as well as times in their childhood that food was scarce. Despite this testimony, the jury found the aggravating factors outweighed the mitigating factors, and Mr. Abdul-Salaam was sentenced to death.

Mr. Abdul-Salaam appealed to the Pennsylvania Supreme Court, although he did not raise the claim of ineffective counsel, and his conviction and sentence were affirmed. The U.S. Supreme Court denied *certiorari*. He filed a petition under Pennsylvania's Post-Conviction Relief Act (PCRA), citing ineffective counsel. During subsequent hearings, ten family members recalled frequent physical abuse perpetrated by Mr. Abdul-Salaam's father, as well as times in which the family did not have sufficient resources and lived in extreme poverty. His father also testified and admitted to drug use and perpetrating physical abuse. His trial counsel, Spero Lappas, testified that he retained a psychiatrist to conduct an evaluation of Mr. Abdul-Salaam, but he did not investigate potential mental health concerns any further, as he believed doing so would not be a wise strategic move. He did not remember if he was aware of Mr. Abdul-Salaam's difficulties with attention, nor did he attempt to obtain school or juvenile records. Ann Ariano, Mr. Lappas' associate, also testified; she remembered interviewing Mr. Abdul-Salaam's mother and two sisters prior to the trial, but she did not remember interviewing any additional family members.

Mr. Abdul-Salaam presented school and juvenile records, which outlined emotional problems, possible cognitive deficits and brain damage, and physical and emotional abuse at home. Additional experts testified to Mr. Abdul-Salaam's mental health, and they debated the presence of emotional and cognitive problems. Ultimately, the court denied his request for post-conviction relief, noting that his trial counsel's decision to not present mental health concerns was strategic in nature and did not represent ineffective counsel, nor was the presented mental health evidence persuasive.

The Pennsylvania Supreme Court affirmed this holding, and Mr. Abdul-Salaam filed for a writ of *habeas corpus*. He disputed his sentence, based upon provision of inadequate counsel, and he argued his trial counsel did not investigate his background sufficiently or provide adequate evidence of mitigation at sentencing. His petition was denied by the U.S. District Court for the Middle District of Pennsylvania. The argument that the strategic decision made by Mr. Abdul-Salaam's counsel was not ineffective was echoed by the district court. Additionally, the district court found that Mr. Abdul-Salaam was not prejudiced by his trial counsel's performance, given that the jury heard testimony about Mr. Abdul-Salaam's childhood, and additional testimony would have been cumulative and unlikely to have altered sentencing. Mr. Abdul-Salaam filed an appeal, and the U.S. Court of Appeals for the Third Circuit granted a Certificate of Appealability.

Ruling and Reasoning

The order of the district court was reversed in part and remanded, and a provisional writ of *habeas corpus* was granted and directed to the penalty phase.

The Third Circuit reviewed the claim of ineffective assistance of counsel based on the *Strickland* test, citing *Strickland v. Washington*, 466 U.S. 688 (1984): if counsel's performance is below an objective standard of reasonableness (the "reasonableness prong"), and if counsel had performed in an adequate manner, the outcome would have been different (the "prejudice prong"). The court stated that counsel can choose to conclude an investigation if proper investigative procedures were completed; however, decisions to not investigate certain information cannot be considered a case strategy in the event counsel fails to gather basic background information. Further, it is customary for counsel to obtain information that may be essential to inform case preparation, and not obtaining these records can amount to inadequate performance, regardless of whether the data obtained are beneficial to the defendant.

The court noted that the argument made by Mr. Abdul-Salaam's trial counsel (i.e., that testimony by mental health experts would negatively influence the case) was not logical because counsel did not have sufficient information to support the claim that expert testimony would have any negative impact on his client. Even if counsel's decision to not seek the testimony of a mental health expert could be viewed as strategic, this decision did not defend counsel's failure to perform a thorough background investiga-

tion or obtain relevant records. Conducting background investigations is considered a professional norm. Further, according to the guidelines of the American Bar Association, trial counsel should obtain all mitigating evidence in capital cases, whether or not the evidence will be presented at trial. Mr. Abdul-Salaam's trial counsel only contacted three of many members of his family, and the court concluded this fact represented a lack of investigation, rather than case strategy.

Although the evidence regarding Mr. Abdul-Salaam's upbringing during his trial highlighted abuse perpetuated by his father, the evidence presented at the PCRA provided significantly more detailed information about the abuse and adverse conditions. This history was detailed in school and juvenile records obtained for the PCRA. The court stated that the evidence presented at the PCRA provided stronger rationale for mitigation than what was originally presented at sentencing. If this evidence had been presented to the jury at the time of Mr. Abdul-Salaam's trial, it is plausible that the information could have swayed at least one juror and subsequently changed the jury's sentence during the penalty phase of the trial. As a result, Mr. Abdul-Salaam was prejudiced by the errors of counsel at the time of trial, which included counsel's failure to adequately investigate and introduce potentially mitigating factors concerning Mr. Abdul-Salaam's background. It was determined that his appeal met the two *Strickland* prongs, and he was therefore entitled to *habeas* relief.

Discussion

This case highlights the importance of defense counsel's role in conducting a thorough background investigation to determine the presence of mitigating factors. When the death penalty is a potential sentence for a defendant, the court concluded that defense counsel should take special care to investigate all areas of a defendant's background, including any history of childhood abuse and mental health concerns, regardless of whether this information is used in any phase of the trial. In the event such an investigation is not conducted in an adequate manner, this fact has the potential to significantly impact the outcome of the penalty phase of a capital case. For the mental health practitioner, this case highlights the importance of accurate record keeping, as treatment records may serve a crucial role in bolstering the court's understanding of an individual

when faced with high-stakes decisions, such as those inherent in a capital case.

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Moral Character Inquiry for Washington State Bar Admission

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Moral Character Inquiry Should Be Individualized and Without Categorical Exclusion of Applicants with Criminal or Problematic Substance Use History

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In *Matter of Simmons*, 414 P.3d 1111 (Wash. 2018), Tarra Simmons, a recent law school graduate, appealed to the Washington Supreme Court after the Washington State Bar Association's (WSBA) Character and Fitness Board ("the Board") recommended by majority vote that her application be denied. The State Supreme Court ruled that the moral character inquiry should be individualized and considered Ms. Simmons' history of problematic substance use, criminal convictions, and bankruptcies, along with her more recent record of sobriety, financial stability, and professional conduct. The court affirmed that there is no categorical exclusion of an applicant with such history. The court held that Ms. Simmons met the burden of proof demonstrating that she was of good moral character and fit to practice law and granted her application to sit for the bar examination.

Facts of the Case

Ms. Simmons was raised in an environment characterized by poverty, crime, substance abuse, and sexual