court of appeals instead concluded that Nevada Courts had based their determination on expert testimony as well as collateral information, such as evidence of his intellectual performance outside of the testing environment and "his 1991 statement about 'having to act crazy' in prison, and the conclusions of other doctors that [Mr.] Ybarra was faking psychological symptoms" (*Ybarra*, p 1091).

Discussion

Based on Nevada law, when a capital defendant seeks death penalty relief in an *Atkins* hearing, the burden of proving intellectual disability lies with the defendant. Nevada established a three-pronged test of intellectual disability that includes evidence of deficits in intellectual and adaptive functioning occurring over the developmental period. When an individual who was not diagnosed with intellectual disability during the development period seeks to prove that these deficits existed, mental health experts are required to extrapolate and interpolate from available data. When doing so, mental health experts may disagree on the crucial question of intellectual disability. The Ninth Circuit's ruling underscores that it is the trier of fact's role to critically assess the persuasiveness of conflicting expert testimony, i.e., "to 'credit one expert over another'" (*Ybarra*, p 1091).

Revocation of Conditional Release of Federal Insanity Acquittees

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Insanity Acquittees Must Overcome Presumption of Dangerousness

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Key words: not guilty by reason of insanity; conditional release; revocation of release; burden of proof

In *United States v. Williams*, 70 F.4th 359 (6th Cir. 2023), the U.S. Court of Appeals for the Sixth Circuit affirmed that after the court establishes that a not guilty by reason of insanity acquittee has violated a condition of release according to 18 U.S.C. § 4243 (g) (2018), the burden is on the acquittee to prove by clear and convincing evidence that release would not be a substantial risk to the public.

Facts of the Case

In 1997, Richard Williams threatened to send a bomb to a brush company, Boucherie, if they did not properly compensate him for a toothbrush he designed. Mr. Williams had a history of schizoaffective disorder, bipolar type. A prominent component of his illness was delusional thinking about a toothbrush he created in the 1980s. He provided samples to Boucherie, but the company declined to purchase the product. Mr. Williams believed that they stole his work without giving him the credit he deserved.

The threat Mr. Williams made in 1997 resulted in a felony charge for sending a threatening message in interstate commerce. The district court found him not guilty by reason of insanity, then civilly committed him for mental health treatment. With this treatment, his mental status improved, resulting in release two years after the initial commitment.

The conditions of his release included taking prescribed medications and refraining from contact with Boucherie. Mr. Williams failed to meet both conditions on multiple occasions. A communication with Boucherie in 2021 led the court to order a mental health evaluation.

The report stated that Mr. Williams experienced "psychosis and manic behavior." In addition, it highlighted a history of aggressive and threatening acts. The report concluded that his release would endanger others and that he would "likely" violate conditions in the future.

The U.S. District Court for the Eastern District of Tennessee at Knoxville determined that releasing him would "pose a significant risk to the community, revoked his release, and committed him for treatment" (*Williams,* p 362). The court allocated the burden of proof to Mr. Williams to show clear and convincing evidence that he was not a substantial risk to the public to obtain release.

Mr. Williams appealed, arguing that the court improperly placed the burden of proof according to 18 U.S.C. § 4243(g) (2018) and misapprehended the evidence.

Ruling and Reasoning

The U.S. Court of Appeals for the Sixth Circuit affirmed in a three to zero decision that, in revoking his conditional release, the burden of proof was properly shifted back to Mr. Williams. As an insanity acquittee, he had to prove by clear and convincing evidence that he was not a substantial risk to the public. The Sixth Circuit also affirmed the district court's finding that Mr. Williams posed a substantial risk based on the cited evidence.

The court's reasoning began with historical context. Prior to 1984, defendants who invoked the insanity defense did not bear the burden of proving their mental state at the time of the act. This burden rested with the prosecution. Notably, John Hinckley Jr., who shot at and injured President Ronald Reagan and three others, was found not guilty by reason of insanity because the government could not prove he was sane at the time of the act.

This led Congress to pass the Insanity Defense Reform Act in 1984. The Act established that pleading not guilty by reason of insanity burdens the defense to establish mental state at the time of the alleged offense (18 U.S.C. § 4242 (b)(3) (2018)). In using an affirmative defense, the defendant has to prove insanity by clear and convincing evidence (18 U.S.C. § 17 (2018)).

The Insanity Defense Reform Act also created a civil-commitment procedure for individuals found not guilty by reason of insanity, which is outlined in 18 U.S.C. § 4243 (2018). Upon receiving this verdict, individuals are civilly committed for mental health treatment. But, at future hearings they may still obtain release or conditional release if they prove by clear and convincing evidence that they are not a substantial risk to the public. The first hearing takes place within 40 days of the verdict and subsequent hearings take place upon improvement of their mental condition. Individuals who are conditionally released must show by the same standard of proof that modifying or eliminating the conditions would not create a substantial risk to the public.

A conditional release can be revoked according to 18 U.S.C. § 4243(g) (2018). The subsection does not explicitly state where the burden of proof lies during the hearing, so the court started by applying the ordinary default rule. Because 18 U.S.C. § 4243 is connected to the affirmative defense of insanity, the burden of proof defaults to the defendant unless otherwise specified.

The court described the practical application of the law to show that placing the burden on the government would be counterintuitive. On pleading not guilty by reason of insanity, the defense takes on the burden to prove insanity at the time of the act. If found not guilty by reason of insanity, individuals are presumed dangerous and civilly committed. As established in *United States v. Gutierrez,* 704 F.3d 442 (5th Cir. 2013), the burden does not shift to the government upon commitment. It remains with acquittees to prove they would not be a substantial risk to the public if finally released or conditionally released. If conditionally released, the burden does not change as they seek to alter conditions or secure final release. Because the burden remains with acquittees through the entire process, violating the terms of their conditional release would not relieve them of this burden.

The court clarified that the government first bears the burden of establishing that an individual violated a condition of release. Only after a violation has been established does the court hold a hearing to determine whether "continued release would create a substantial risk" to the public (18 U.S.C. § 4243(g) (2018)). At his hearing, Mr. Williams faced the same options: he could convince the court that he would not be a substantial risk to the public if released with conditions or finally released. But, the court noted that "[r]arely does the law give more favorable treatment to those who seek forgiveness than those who ask permission" (*Williams,* p 365).

With this in mind, the Sixth Circuit determined that the district court did not err in revoking Mr. Williams conditional release. The court utilized a mental health report, testimony, and other records. Other than the cross-examination of a probation officer, Mr. Williams presented "no evidence at all. With such a lopsided record, the court did not err, let alone clearly err, in finding that Williams posed 'a substantial risk' to the public" (*Williams,* p 368).

Discussion

The Sixth Circuit affirmed the district court's decision to revoke Mr. Williams' conditional release under 18 U.S.C. § 4243(g). *Williams* clarified that § 4243(g) places the burden on the government to prove a condition of release has been violated. But, at the subsequent hearing, the burden returns to the acquittee who must prove by clear and convincing evidence that release would not be a substantial risk to the public.

This ruling is an extension of the ruling in *Gutierrez,* which established that the burden to overcome a presumption of dangerousness is placed on the acquittee when committed after being found not guilty by reason of insanity. Together, *Gutierrez* and *Williams* establish that the burden to overcome a presumption of dangerousness remains with the acquittee from initial civil commitment until final release. Depending on the charge, this process may extend beyond the maximum sentence if an individual were instead found guilty. While *Williams* addressed federal insanity defense law, individual states have their own laws related to the insanity defense. It remains to be seen how this ruling may or may not affect such state law where applicable.

Interpretation of the "One-Expert Rule" in Malpractice Litigation

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Arizona Supreme Court Considers Whether a Treating Physician Can Answer Hypothetical Questions as a Fact Witness

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In *McDaniel v. Payson Healthcare Management, Inc.*, 512 P.3d 998 (Ariz. 2022), the Supreme Court of Arizona considered whether a treating physician called as a fact witness may offer expert opinion testimony without violating the state's One-Expert Rule.

Facts of the Case

In July 2011, Dallas Haught injured his knee in a dirt bike accident. His injury was evaluated and treated by Dr. Darnell, a surgeon "affiliated with defendant Payson Healthcare Management" (*McDaniel*, p 1001). As part of his workup, a lab test was performed for C-reactive protein (CRP), a nonspecific marker for inflammation. Dr. Darnell incorrectly documented the CRP test result to be lower than the true value.

Mr. Haught's medical condition continued to deteriorate, so he was transferred to another facility for further treatment. The physicians at this facility did not note the CRP test result, and additional CRP tests were not ordered. Eventually, Mr. Haught developed necrotizing fasciitis, "resulting in the surgical removal of all the skin on his right leg" (*McDaniel*, p 1001).

Mr. Haught (through his conservator, Ronnie McDaniel) then sued several health-care providers, alleging medical malpractice. Mr. Haught argued that his providers were delayed in diagnosing necrotizing fasciitis because of the "failure to accurately communicate the CRP test result" (*McDaniel*, p 1001). Mr. Haught asserted that the delayed diagnosis necessitated additional surgical intervention, causing "permanent injuries and disfigurement" (*McDaniel*, p 1001).

At trial, the defendants called several physicians to testify as fact witnesses about the medical care they provided to Mr. Haught. The defense clearly stated that none of these physicians were paid experts. But, Mr. Haught argued that the treating physicians became expert witnesses after they answered hypothetical questions "concerning the CRP result and infectious disease," and therefore "went beyond [their] personal knowledge of the care they provided" (*McDaniel*, p 1002). Mr. Haught asserted that because the defense "elicited expert testimony from the treating physicians," (*McDaniel*, p 1002) they violated Arizona's "One-Expert Rule." The trial court returned a verdict for the defendants.

Mr. Haught then moved for a new trial based on multiple factors, including the alleged violation of the One-Expert Rule. The trial court denied his motion for a new trial. The trial court concluded that the treating physicians were fact witnesses because "how to diagnose necrotizing fasciitis" was "relevant" in their testimony (*McDaniel*, p 1002), and therefore did not violate the One-Expert Rule. Mr. Haught appealed.

The Court of Appeals reversed the trial court's determination and held that the defense's witnesses provided "expert testimony related to the standard of care" (*McDaniel*, p 1002) and thus violated Arizona's One-Expert Rule. The Supreme Court of Arizona granted review to address whether the Court of