Right to Waive Competency to Stand Trial

The Issue of Right to Waive Competency Is Not Reached When Competency Has Not Been Challenged

In *U.S. v. Morin*, 338 F.3d 838 (8th Cir. 2003), the United States Court of Appeals, Eighth Circuit, affirmed the ruling of the U.S. District Court for the District of North Dakota, in which Robert J. Morin was convicted of first-degree murder and sentenced to life in prison for a homicide that occurred on Indian lands. The court of appeals rejected Mr. Morin's argument that the district court violated his due process rights (1) by refusing to allow him to waive competency at trial and (2) by failing to order discontinuance of his medication. The court held that whether he was entitled to waive competency to stand trial was not considered because his competency at trial was never challenged. The court of appeals further held that *Riggins v. Nevada*, 504 U.S. 127 (1992), and the recently decided *Sell v. U.S.*, 539 U.S. 166 (2003)—cases that outline standards for permitting court-ordered, forcible medication and cited by Mr. Morin to support his arguments—do not apply.

Facts of the Case

Mr. Morin was arrested on March 31, 2001, and charged with murder in the death of Janice Houle. Within days of his arrest, he exhibited paranoia, auditory hallucinations, and delusional thinking and was prescribed an antipsychotic medication. He filed a motion of intent to present the insanity defense and was transferred by the court to a Federal Medical Center for psychiatric evaluation.

Medical Center physicians examined Mr. Moran and diagnosed various forms of psychosis, anxiety disorder, and polysubstance dependence. He hired his own psychiatrist, Dr. Lawrence Widman, who enlisted the help of Dr. Todd Stull in evaluating and treating him. Dr. Stull weaned Mr. Morin off his antipsychotic medication to evaluate his condition more accurately. During the period his medications were reduced, Mr. Morin assisted another inmate in committing suicide, and within two weeks of the termination of all medication, he assaulted another inmate. Drs. Widman and Stull concluded that he had paranoid schizophrenia; anxiety disorder; and alcohol, marijuana, methamphetamine, and inhalant dependence. Dr. Stull prescribed a different antipsychotic medication, which Mr. Morin began to take on January 17, 2002.

In March 2002, Mr. Morin's lawyer informally requested a hearing to establish that Mr. Morin, while medicated, was competent to waive his right to be competent at the time of trial, to present Mr. Morin in an unmedicated, psychotic state at trial. The court, however, responded that Mr. Morin had already demonstrated himself "to be disruptive and potentially dangerous" while not medicated, that he was taking the medication voluntarily and was free to stop, at which time the court would consider "the issue of whether or not a trial can be held."

On July 19, 2002, Mr. Morin filed a formal motion to waive competency stating that he (1) intended to testify at trial; (2) desired to refuse medication so that his "mental processes [would] not be altered by the medication" during trial; and (3) desired to waive the competency requirement for trial. The government opposed the motion and moved for permission to medicate Mr. Morin forcibly in the event that he discontinued his medication. The detention center indicated that, because of safety and security concerns, they would refuse to house him, a federal pretrial detainee, if he stopped taking his medication.

On August 9, 2002, while the court was still considering these motions, Dr. Widman instructed detention center officials to "wean Morin off his meds" in preparation for the September 9, 2002 trial date, but the detention center staff indicated that they would continue to provide Mr. Morin with his medications until they were instructed to do otherwise by the government. On August 15, 2002, the court denied Mr. Morin's motion to waive competency and the government's motion to medicate the defendant forcibly. Detention center staff discontinued his medication on August 16, 2002, three weeks prior to the trial date.

At trial, the defense initially informed the jury that Mr. Morin had limited recollection about the night of the homicide. However, after hearing the government's witness, Mr. Morin recalled detail and testified. He testified that although he was present at the time of Ms. Houle's homicide, someone else was re-

sponsible for the killing. The jury found Mr. Morin guilty, and he was sentenced to life in prison.

Mr. Morin filed a motion for a new trial arguing that the one-week delay in discontinuing his medication a month before trial had prejudiced his defense. The district court denied his motion, and he appealed.

On appeal, Mr. Morin argued that had the court ordered the detention center to discontinue the medication when Dr. Widman had requested, the "window of clarity" (that period during the trial in which Mr. Morin recollected and testified to events surrounding the murder) would have occurred prior to trial instead of during his testimony. Mr. Morin further argued that a timely court order would have allowed him to assist his attorney more ably in his defense prior to trial and would have allowed the jury to see him in his unmedicated, psychotic state, thereby reinforcing his insanity defense. Mr. Morin also argued that the court violated his constitutionally protected right to waive competency.

Ruling and Reasoning

The court of appeals avoided establishing precedent concerning the right to waive competency by holding that the issue of entitlement to waive competency could not be reached because Mr. Morin's competency at trial was never challenged.

The court acknowledged that the refusal by detention center staff members to stop providing Mr. Morin with medication, as well as their indication that they would refuse to house him if he stopped taking the medication, created a situation in which he might have felt pressure to continue his medication. But the court opined, "That does not equate to court-sanctioned involuntary administration." The court added that *Riggins* and *Sell*, "both outline standards for *permitting* court-ordered forcible medication, simply do not apply to this case" (emphasis in original).

The court ruled Mr. Morin's claim that he was "entitled to the district court's cooperation in producing a strategically timed, and medically unrecognized, 'window of clarity' one week before trial so that he could appear in his natural, psychotic state on the witness stand inventive but at least borderline frivolous." The court also found that Mr. Morin was under no obligation to take his medication, that the ruling for discontinuing medication reached the detention center within seven days of Dr. Widman's order and more than three weeks from the start of trial, and that there had been no indication from Mr. Morin or the psychiatrists that four weeks off of medication was of constitutional importance. The court of appeals noted that it was only after the trial that Dr. Widman and Mr. Morin's lawyer "discussed the possibility that an extra week (off medications) would have produced the desired 'window of clarity' and courtroom insanity at preferred times. It is patently absurd to suggest that the district court should somehow have predicted the interplay of medical science and trial strategy."

Discussion

In his concurring opinion in *Riggins*, Justice Kennedy agreed with the majority that the question of whether a defendant may waive his right to be competent at trial was not the question at issue, but added that, in his view, a general rule permitting waiver would not withstand scrutiny under the Due Process Clause, given the holdings in *Pate v. Robinson*, 383 U.S. 375 (1966), and *Drope v. Missouri*, 420 U.S. 162 (1975). As Justice Kennedy suggested, a decision on the right to waive competence to stand trial requires an analysis of the benefit of demonstrating an impaired state to the jury against the cost of impaired capacity and decreased participation in the defense. Although the district court did not allow Mr. Morin to waive competency, for the court of appeals the issue was moot because his competency was never officially challenged, and the opportunity to waive "the requirement" (of competency) never arrived. The appellate court, however, acknowledged that the issue of the right to waive competence had merit.

Both the decision of the trial court and affirmation of the appellate court, however, sidestepped the question of an advanced directive. If the defendant is at first incompetent to raise waiving competency, then the defendant must be restored to competence before a knowing and informed waiver is possible. There are good reasons for a defendant to want to know if the court will allow the trial to proceed before risking the return of psychotic symptoms. On the other hand, the decision by the district court implied that the court does not want to use a waiver unless the issue is certain. The defendant wants to address the problem before it occurs; the court wants the problem present before it rules.

Morin highlights the procedural and logistical difficulties of presenting what might be called the waiver-of-competency insanity defense. At the outset, the defense is placed in the confusing and somewhat ironic position of seeking the defendant's incompetence to proceed at trial. In pursuing incompetence through the discontinuation of medication, there is a risk that the court may become sidetracked with *Harper*-like concerns of dangerousness (*Washington v. Harper*, 494 U.S. 230 (1990)) or become concerned with procedural due process issues, as discussed in *Pate* and *Drope*. Under those circumstances, the court may allow forced medications which have the potential side effect of creating a negative prejudicial demeanor in the defendant that is unconvincing to a jury considering an insanity defense. In addition, the effect of medication on symptoms does not occur within a precise titration. A defense strategy to stop medication to influence a jury is a gamble that the right symptoms will appear at the right time and make a favorable impression. As the court of appeals acknowledged, it is not easy to time the discontinuation of medication correctly, both to allow for effective assistance of counsel and to create an appearance and demeanor at trial that a jury considering the insanity defense will find most persuasive. Defense attorneys should also consider the difficulties inherent in possibly having to work with an incapacitated, uncooperative, or unruly defendant, who could easily undermine the defense at trial.

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Defining Duty and Foreseeability Between Landowner and Licensee

Mother Negligent in Mentally Ill Son's Crime

In *Volpe v. Gallagher*, 821 A.2d 699 (R.I. 2003), the Rhode Island Supreme Court considered whether the trial court justice erred in ordering a new trial after the jury returned a verdict in favor of the plaintiffs, Volpe *et al.* Volpe accused the homeowner-defendant, Sara Gallagher, of negligently allowing her mentally ill adult son to keep the guns and ammunition that were used to shoot and kill Ronald Volpe on her property. The trial justice decided that she herself had committed an error of law in instructing the jury pursuant to legal standards set forth in the Restatement (Second) of Torts § 18 (1965) because Mr. Gallagher had no prior history of violence.

Facts of the Case

James Gallagher was a 34-year-old man who had resided with his mother in her small North Providence home all his life. He "was plagued by hallucinations, imaginary conversants and a paranoid distrust of others" and was considered by his psychologist sister to have paranoid schizophrenia. On July 3, 1994, for no apparent reason, he emerged from the basement carrying his shotgun and proceeded to shoot his next-door neighbor, Ronald Volpe, three times in the head and body while the victim was trimming his hedges. Mr. Gallagher had no known prior history of violence, and his past interactions with the victim were characterized as normal.

Sara Gallagher heard the gunshots and encountered her son coming into the house. He told her he had shot the victim, but she thought that he might "just be hallucinating again." Troubled by the "fireworks," she called her two daughters who, with the help of a neighbor, found the victim's body and called the police. The police searched the house and found a shotgun, pistol, boxes of ammunition, and related gun paraphernalia.

Charged with first-degree murder by the state, Mr. Gallagher first considered an insanity defense but then pleaded *nolo contendere* to a reduced criminal charge of second-degree murder.

The plaintiffs subsequently brought the wrongful-death lawsuit against Mrs. Gallagher, accusing her of negligence in allowing her mentally ill son to keep guns and ammunition on her property. They also attempted to sue Mr. Gallagher, but, being incarcerated, he did not testify or otherwise participate in the trial of this civil case. The plaintiffs settled claims with the defendant's adult daughters before the trial.

The plaintiffs claimed that the defendant knew or should have known that, by allowing her mentally ill son to possess guns and ammunition while he was residing with her at her house and exhibiting paranoid and delusional behavior, she created an unreasonable risk of bodily harm to others. The defendant

claimed that although she knew her son was mentally disturbed, she did not know that he possessed any guns or ammunition or that he kept such in her house. Moreover, she argued that because her son had no history of violence, she could not have foreseen that one day he would shoot their next-door neighbor using the guns and ammunition kept in her house.

After listening to testimony and other evidence presented at trial, the jury rejected the defendant's denial of knowledge of guns on her property as incredible and returned a verdict in favor of the victim's family.

Despite denying the defendant's motions for judgment as a matter of law on three occasions, the trial justice ultimately changed her mind and concluded that absent any evidence of previous violent behavior on Mr. Gallagher's part, the defendant breached no duty that she owed her next-door neighbors when she failed to disarm her son or otherwise control his arms-bearing activity on her property. The trial justice thus granted the defendant's motion for a new trial, overturning the verdict. She ruled that she had erred as a matter of law in letting this case go to the jury, because it was not foreseeable that the defendant's son would use the guns and ammunition he kept on the defendant's property in such a violent and deadly manner; therefore, a negligence finding was not possible.

The plaintiffs appealed from the order granting the defendant a new trial, citing the defendant's breach of common-law duties that property possessors have to prevent licensees such as Mr. Gallagher from conducting themselves on a possessor's property in a manner that would create an unreasonable risk of bodily harm to others and to maintain their property in a reasonably safe condition.

Ruling

The Rhode Island Supreme Court concluded that the trial justice erred as a matter of law in granting a new trial because she had instructed the jury on the issue of foreseeability. When a negligence verdict was returned, the trial justice usurped the jury's fact-finding role by concluding that in the absence of prior incidents of violence, the defendant breached no duty to the victim when she let her son keep munitions in her home. The trial court's order granting a new trial was vacated, and the matter was remanded for entry of judgment in favor of the survivors, consistent with the jury's verdict.

Reasoning

Citing the Restatement (Second) of Torts § 318 (1965), the court concluded that the defendant, as a possessor of residential property, owed a duty to her next-door neighbor concerning dangerous activities conducted on her property by a third party. The court next turned its attention to the issue of foreseeability and concluded that the absence of any evidence of past violent behavior on Mr. Gallagher's part did not render the shooting incident unforeseeable.

Both the trial and supreme courts used the legal principles set forth in § 318 of the Restatement entitled, "Duty of Possessor of Land or Chattels to Control Conduct of Licensee," to determine a land possessor's liability to visitors and to those outside the property for maintaining dangerous conditions on their land. This section reads:

> If the actor permits a third person to use land or chattels in his possession. . .he is, if present, under a duty to exercise reasonable care so to control the conduct of the third person as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if the actor (a) knows or has reason to know that he has the ability to control the third person, and (b) knows or should know of the necessity and opportunity for exercising such control.

The supreme court concluded that the defendant was "present" within the meaning of the term used in § 318 because she was present in the house when her son engaged in his gun possession activity, despite the fact that at the precise moment of the shooting, the defendant was reading a newspaper in the living room of her house, unaware of the event taking place outside.

The court also held that the jury was entitled to conclude that the defendant knew or had reason to know that she had the ability to control her son with respect to this use of her property. In addition to the fact that he was living at her house "only with her permission," the defendant also stated that if she had known about the gun, "I would have told him to get rid of it. If he didn't, I would have." The court noted that this is not a strict liability case, as the jury may have concluded that the defendant did not know she could control her son's conduct, if, for example, Mr. Gallagher had dominated the defendant by threatening or physically or psychologically abusing her or otherwise compromising her ability to control his

possession of guns on her property. To the contrary, in this case, the defendant testified that if she had known about the guns, she would have gotten rid of them.

In addition, despite the defendant's professed lack of knowledge vis-à-vis her son's possession of guns and ammunition, the court likewise found the jury was entitled to conclude that she either knew or should have known about her son's possession of such, given, among other things, that the shotgun had been purchased nine years prior to the shooting and that after the murder, the shotgun and ammunition boxes as well as the .32-caliber gun were all found throughout the close confines of the house in easily observable or locatable places.

Furthermore, given the defendant's knowledge of her son's paranoia, hallucinations and delusions, the court found the jury entitled to conclude that because she failed to prohibit his gun possession on her property, she thereby created an unreasonable risk of bodily harm to the victim.

The court rejected the defendant's argument that it was not gun storage or possession on the defendant's property that injured the victim but rather Mr. Gallagher's independent, criminal, and unforeseeable act of discharging a firearm to kill the victim that caused the victim's demise, adding that "this argument overlooks and unduly minimizes the crucial role that the proximate location of the guns and ammunition stored on defendant's property played in bringing about this victim's murder."

The court went on to clarify that the duty that arises in this case stems not from the defendant's relationship as parent to adult child, but rather as the defendant's status as a possessor of property.

In determining foreseeability, the court emphasized that courts should look to the totality of the circumstances, "applying a balancing approach that acknowledges that duty is a flexible concept that seeks to balance the degree of foreseeability of harm against the burden of the duty to be imposed" (*McClung v. Delta Square Ltd. P'Ship*, 937 S.W.2d 891 (Tenn. 1996). The court noted that in this case, because the defendant testified that had she known about the guns, she would have told her son to get rid of them or done so herself, "the burden of exercising control in this case by effecting removal of the guns was a relatively light and inexpensive one to implement."

The court assumed that a mentally ill individual in possession of firearms creates an inherently dangerous situation, stating the jury was entitled to conclude that:

> . . .a reasonably prudent and informed homeowner. . .should not have allowed such a mentally unstable person to keep and maintain deadly weapons on her property because she should have known that, even without a violent past history, he was not the type of individual who was capable of possessing and using such dangerous instrumentalities in a reasonably safe manner.

Furthermore, referencing the trial judge's decision that the absence of prior similar incidents of violence negated foreseeability and, hence, negligence, the court stated, "We reject such a rigid adherence to a 'prior similar incidents' rule. . .. When negligence occurs, we are simply unwilling to sacrifice the first victim's rights to life and liberty upon the altar of an inflexible prior-similar incidents rule." The court concluded by noting that once it is shown that a duty is owed, "generally the question of foreseeability constitutes an issue of fact that is properly submitted to the jury," hence vacating the order for a new trial and remanding for entry of judgment in favor of the plaintiffs, consistent with the jury's verdict.

Dissent

Justice Shea begins his dissent by contesting the notion that the defendant was automatically conferred with an ability to control her son "merely by granting permission" for him to live in her home and cites two prior cases (*McDonald v. Lavery*, 534 N.E.2d 1190 (Mass. App. Ct. 1989) and *Kaminski v. Town of Fairfield*, 578 A.2d 1048 (Conn. 1990)). In *McDonald*, summary judgment affirmed that the defendants were not liable for the action of their 27-year-old son who, while intoxicated and living in his parents' house, shot the victim, even though the defendants knew their son had been violent while intoxicated. In *Kaminski*, the defendants were not liable when their schizophrenic son attacked with an ax the police officer escorting the crisis team called to evaluate their son's mental status. Citing Restatement (Second) of Torts § 319 (1965), the *Kaminski* court stated that the duty to control was usually limited to "professional custodians with special competence to control the behavior of those in their charge" and that "merely. . .making a home for an adult child who is a mental patient" did not constitute the capacity and duty to control.

Justice Shea also asserted that the defendant had no duty or authority to investigate her son's mental illness, "nor was she competent to make her own

assessment of that mental illness," citing the complexity that even highly trained mental health professionals face in such a situation (*Gill v. New York City Housing Auth.*, 519 N.Y.S.2d 364 (N.Y. App. Div. 1987). Likewise, the dissent maintains that the event was not foreseeable, as Mr. Gallagher had no prior untoward interactions with the victim, no prior violent episodes, and no prior episodes of discharging a firearm since being treated for his mental illness.

The dissent recognized the broader implications of the decision in this case that created "a new cause of action allowing tort liability for parents who fail to control the conduct of adult offspring." The implications affect broad public policy with potential societal consequences vis-à-vis parents who shelter adult mentally ill children: "Either they must reject their troubled children whose actions they are expected to control, or else face harsh legal consequences even in the absence of any previous incidents." Furthermore, the dissent notes that "procedural safeguards surrounding involuntary commitment further attenuates attempts by parents to control or seek community assistance to control adult [children with] mental illness," because often (and specifically, in Rhode Island) imminent danger is required for commitment.

Discussion

The defendant's statement that, if she had known about her son's guns, she would have disarmed him herself if he refused to get rid of the guns was heavily relied on in the majority opinion to establish the crucial ability-to-control prong of duty and hence liability in this case. However, given the disparaging language used to describe the mentally ill in the majority opinion (including a quotation from Longfellow, "Whom the Gods would destroy, they first make mad"), one suspects that the defendant's statement served as a convenient legal conduit to act on biases and stigma regarding the mentally ill. The majority opinion never specifically explicates the link between the son's mental illness and dangerousness, ostensibly assuming as self-evident that mentally ill individuals create an ultrahazardous situation if they are in possession of firearms, even in the absence of any past violent behavior.

The finding in *Volpe*, especially considering past violent behavior, is in sharp contrast to that in *McDonald*, which involved an intoxicated individual with a prior history of violence. Despite multiple studies showing that substance abuse/intoxication is a stronger predictor of future violence than mental illness, it seems a different standard was applied when judging the perceived threat inherent in the defendant's son's mental illness in this case than when the defendant's son suffered from intoxication in *McDonald*. Regardless of the legal merits present in this case, it remains disheartening to see assumptions and stigma regarding the mentally ill so clearly illustrated.

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Pretrial Mental Retardation Assessment in Capital Punishment Cases

Defendant's Burden of Proving Mental Retardation by Clear and Convincing Evidence Does Not Offend Atkins

In *People v. Vasquez*, 84 P.3d 1019 (Colo. 2004), the Colorado Supreme Court affirmed the constitutionality of its statue that imposes on the defendant the burden of proving mental retardation by clear and convincing evidence in capital punishment cases. The U.S. Supreme Court in *Atkins v. Virginia*, 536 U.S. 304 (2002), ruled that the Eighth Amendment prohibition against cruel and unusual punishment bars execution of the mentally retarded. Given the substantive prohibition announced in *Atkins*, Vasquez argued first that the Colorado statute impermissibly places an unconstitutional burden of proof on the defendant to prove mental retardation. Second, he argued that if mental retardation must be proved by the defense, the standard of proof is impermissibly high and should be reduced from "clear and convincing" evidence to a "preponderance" of the evidence. The Colorado Supreme Court disagreed on both points.

Facts of the Case

On September 5, 2002, Jimmy Joseph Vasquez was charged in Adams County, Colorado, with the first-degree murder of his wife, Angela Marie Vasquez. Vasquez pleaded not guilty, and the prosecution filed a notice of intent to seek the death pen-

alty. Subsequently, Mr. Vasquez filed "notice of mental retardation," which, if proved, would exempt him from execution. He then filed a motion challenging the constitutionality of Colo. Rev. Stat. § 18-1.3-1102, which outlines the procedure to be followed when a defendant raises the issue of mental retardation in a death penalty case. The statute states in part that upon notice of intent to show mental retardation, the court shall hold a pretrial hearing during which "the defendant shall have the burden of proof to show by clear and convincing evidence that such defendant is mentally retarded." Mr. Vasquez argued that the statute places an unconstitutional burden on the defendant to prove his mental retardation, given the substantive prohibition against the execution of the mentally retarded announced in *Atkins.* The trial court agreed with Mr. Vasquez and ordered the prosecution to prove that he was not mentally retarded by a preponderance of the evidence. Following the ruling of the trial court, the prosecution filed a petition to the Colorado Supreme Court for a rule to show cause why the trial court's order should not be vacated.

During the hearing, Mr. Vasquez reiterated his argument that § 18-1.3-1102 is unconstitutional because requiring the defendant to bear the burden of proof concerning the fact of mental retardation offended the substantive prohibition outlined in *Atkins*. In addition, he argued that if the burden must fall on the defendant, the standard of proof must be lowered from clear and convincing evidence to a preponderance of the evidence. In defense of this second argument, Mr. Vasquez cited the U.S. Supreme Court case *Cooper v. Oklahoma*, 517 U.S. 348 (1996), which struck down an Oklahoma statute requiring a defendant to prove his incompetence to stand trial by clear and convincing evidence. At issue in *Cooper* was the fundamental right of a defendant not to be tried should he be found incompetent by only a preponderance of the evidence. Mr. Vasquez argued that he shared a similar fundamental right not to be executed should he be found mentally retarded by only a preponderance of the evidence.

Ruling and Reasoning

The Colorado Supreme Court ruled that § 18-1.3-1102, which places on the defendant the burden of proving mental retardation by clear and convincing evidence in capital punishment trials, is "constitutionally sufficient under all applicable standards." The rule to show cause was made absolute, and the case was remanded back to the trial court for further proceedings.

In its reasoning, the court held that the ruling in *Atkins* merely declared that the Eighth Amendment prohibition against cruel and unusual punishment barred the execution of the mentally retarded. It did not, however, describe the process by which the defendant might be found to be mentally retarded. This process, outlining both the allocation of burden and the standard of proof, was to be left to the states. Several states, including Colorado, had already passed legislation prior to *Atkins* that barred the execution of the mentally retarded and had such a process in place. Therefore, according to the court, § 18-1.3-1102 set forth the process to implement the substantive restriction declared by *Atkins* and did not offend any constitutional mandate.

With regard to the standard of proof necessary to show mental retardation, Mr. Vasquez argued that the standard should be compared with that required to prove incompetence to stand trial. In *Cooper*, the U.S. Supreme Court decided that due to the fundamental right at issue—that an incompetent defendant should not be tried—the standard of proof should be no more than a preponderance of the evidence to protect that right at all cost. Mr. Vasquez argued that the protection of the mentally retarded from execution was equally as fundamental and should be held to the standard outlined in *Cooper*. The Colorado Supreme Court disagreed, however, and reasoned that the concerns outlined in *Cooper* were "simply not implicated" in this case, presumably because the issue involved pretrial procedures rather than the ultimate issue of capital punishment.

Discussion

The Colorado Supreme Court's ruling that the state statute at issue is indeed constitutionally permissible was based on *Atkins*'s deference to the states to create their own procedures for determining mental retardation in capital punishment cases. The question not addressed by the Colorado court, however, is whether the current allocation of burden and standard of proof is indeed fair. Whether the burden should fall on the prosecution to prove that every defendant facing the death penalty is not mentally retarded is debatable. The argument, however, posed by Mr. Vasquez with regard to the standard of proof is compelling. If the U.S. Supreme Court has explicitly barred the execution of the mentally retarded, is

it not the duty of the state to prevent that from happening at all cost? One can imagine a scenario similar to the situation in *Cooper* in which a defendant may be found mentally retarded by a preponderance of the evidence, but not by the clear and convincing standard. Is the intention of the *Atkins* Court served by the execution of such an individual? If not, then perhaps the standard of proof should be lowered to a preponderance of the evidence to protect the now fundamental right of the mentally retarded not to be executed. The *Vasquez* court did not offer an explanation for its ruling that the issues outlined in *Cooper* "are not indicated here."

How the court defines mental retardation, what methods should be used during the assessment of that determination, and how the standard of proof relates to the findings are significant issues facing forensic psychiatrists and psychologists. In its ruling in *Atkins*, the Supreme Court recognized the role of the professionals when it declared that "to the extent there is serious disagreement about the execution of mentally retarded offenders, it is in determining which offenders are in fact retarded." Because the Court did not provide explicit guidance to the states for this determination, state statutes have varied widely in this regard.

To address variation among the states, the American Psychiatric Association (APA) released a resource document on mental retardation and capital sentencing recommending how the ruling in *Atkins* should be implemented. Specifically, the document addresses the definition of mental retardation, the specific procedure to be followed when assessing whether capital defendants have mental retardation, and the qualification of experts selected to conduct these evaluations.

Most state statutes use a diagnostic approach to mental retardation, as opposed to a diminished-capacity approach. The two main sources used for definitional guidance are the manual of the American Association of Mental Retardation (AAMR) and the APA's *Diagnostic and Statistical Manual*. Although these sources use different wording, their concepts are similar, requiring limitations in intellectual functioning and adaptive behavior, with a developmental onset prior to age 18. States may choose to use one or the other in framing their definition of mental retardation, or may choose to use a combination of both. With regard to the limitation in intellectual functioning criteria, the APA recommends defining limited intellectual ability as scores on an approved test that are at least two standard deviations below the mean. Limitation in adaptive behavior is assessed within three basic domains of adaptive functioning—conceptual, social, and practical. The AAMR manual provides an explanation of how currently available instruments operationalize and measure adaptive behavior through the assessment of skills in these three domains.

Given what is at stake in capital punishment cases, reliability during mental retardation assessment is essential and requires practice standards. The APA recommends at least one standardized test of intellectual functioning, one standardized test of adaptive behavior, and collateral information for the assessment of developmental origin in the form of pertinent records, prior disability assessments, and parental or caregiver reports. The APA also recommends that mental health professionals skilled in the administration, scoring, and interpretation of intelligence tests and measures of adaptive behavior conduct the standardized tests.

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Editor's Note: The APA Resource Document on Mental Retardation and Capital Sentencing was printed in full in this journal (J Am Acad Psychiatry Law 32;304–16, 2004) with clinical and legal commentaries.

Defining Counsel's Role in Discovery and Disclosure of Mental Illness

Defense Counsel's Failure to Investigate and Present Defendant's Mental Health History in a Death Penalty Trial

In *Hamblin v. Mitchell*, 335 F.3d 482 (6th Cir. 2003), the Sixth Circuit Court of Appeals reversed the decision of the U.S. District Court for the Northern District of Ohio at Youngstown to deny the defendant's petition for a writ of *habeas corpus*, finding that the counsel's performance at the penalty phase fell below the standards required for effective assistance.

Facts of the Case

A jury in the Common Pleas Court of Cuyahoga County sentenced David Hamblin to death after his conviction for aggravated murder, aggravated robbery, attempted murder, and having a weapon while under disability. His case involved the nonfatal shooting of Metropolitan Park Ranger John English and the fatal beating of Lillian Merrick in Cleveland, Ohio, in 1983. On the day of the shooting, Ranger English was investigating alleged homosexual activity in a local park when Mr. Hamblin shot him in the leg. Prior to the shooting, Mr. Hamblin had been seen by the ranger and other witnesses sitting in his car at the park. Twenty minutes after the shooting, Lillian Park was found unconscious in a nearby parking lot, having been robbed of her purse and groceries. She had sustained a blow to the head by a blunt object and a wound to her hand. She never regained consciousness and died three days later.

Fred Jurek and Arthur Lambros were attorneys appointed by the court to defend Mr. Hamblin. Neither had any experience in trying a capital case. In an affidavit, Attorney Jurek later stated that he did not investigate the case or pursue expert consultation under the assumption that the case would not go to trial. He further reported that he did nothing in preparation for the penalty phase of the trial until after the guilty verdict had been returned.

In preparing for the penalty phase of the trial, Mr. Hamblin's attorneys did not obtain information regarding his family and social history and did not evaluate his mental condition, believing that the only admissible psychological evidence for mitigation purposes was competency to stand trial. As a result, the jury did not learn of his unstable upbringing, including an emotionally and physically abusive home in a setting of extreme poverty. His father had been physically abusive toward him. His mother, a reported prostitute, had been arrested for child neglect and public intoxication and had on occasion abandoned her children. Mr. Hamblin turned to stealing at a very young age to provide for himself and his sister. He was not educated beyond the seventh grade, had a criminal record as a juvenile, and left home at the age of 16, when he was already showing evidence of a mental disorder.

Also missing from the penalty phase presentation was any information regarding Mr. Hamblin's mental health, including an evaluation report prepared for a previous criminal case in 1964. There was no consultation with a mental health professional.

Attorney Jurek did not contact Mr. Hamblin's relatives, even after 22 family members and friends submitted affidavits expressing willingness to testify about his long history of childhood deprivation and violence. As its only witness, the defense attorneys called Rhonda Lezark, the mother of Mr. Hamblin's daughter and a witness for the prosecution. They had not prepared her for the testimony, and she informed the jury that she did not wish to testify on Mr. Hamblin's behalf, stating only that his relationship with his daughter was good. The only other testimony was Mr. Hamblin's brief and incoherent personal statement.

On appeal, the district court upheld the death penalty, identifying two justifications for counsel's performance. First, it found that for "strategic" reasons the defense counsel chose not to investigate Mr. Hamblin's mental condition further because that evidence could have been used to hurt him as well as help him. Second, it found that counsel did not prepare or investigate for the mitigation phase of the case, because his client instructed him not to present evidence in mitigation. The district court's decision was upheld in the Cuyahoga County Court of Appeals and the Ohio Supreme Court.

In November 1995, Mr. Hamblin filed a petition for *habeas* review. The U.S. District Court for the Northern District of Ohio denied his request, holding that counsel had not been ineffective and the lack of investigation by counsel had been strategic. Mr. Hamblin appealed the decision to the Sixth Circuit Court of Appeals.

Ruling

The U.S. Court of Appeals for the Sixth Circuit reversed the judgment of the district court and ordered that the defendant's petition for *habeas* review be granted unless Mr. Hamblin received a new penalty phase trial within 180 days of the order.

Reasoning

In its reasoning, the court harkened to the 1932 decision in *Powell v. Alabama*, 287 U.S. 45 (1932), in which the Supreme Court ruled that the right to effective counsel in capital punishment cases is a constitutionally protected right under the Due Process Clause of the Fourteenth Amendment. The court also cited *Strickland v. Washington*, 466 U.S. 668 (1984), which defined "effective assistance of coun-

sel" and set the standard for effective counsel as representation with "reasonableness under prevailing professional norms. . .guided [by] American Bar Association standards and the like," with the caveat that the defendant must overcome "a strong presumption" that counsel's action is reasonable.

In further explicating the benchmark for effective counsel, the appellate court looked at the most recent ruling on ineffective assistance in *Wiggins v. Smith*, 539 U.S. 510 (2003), in which it was held that counsel's work "fell short of the standards for capital defense work articulated by the American Bar Association. . . , standards to which we have long referred as 'guides to determining what is reasonable.' " The appellate court reasoned that, even prior to the *Wiggins* ruling, it had consistently upheld such standards of investigation into mitigating evidence at the penalty phase, as evidenced by a series of cases dealing with ineffective counsel. In *Glenn v. Tate*, 71 F.3d 1204 (6th Cir. 1995), the court set aside the death verdict after finding evidence of ineffective counsel at the penalty phase. It held that counsel was required to conduct a thorough investigation of mitigating evidence, including defendant's "history, background, and organic brain damage" and that counsel had indeed failed to make any "systematic effort to acquaint themselves with their client's social history." Similarly in *Austin v. Bell*, 126 F.3d 843 (6th Cir. 1997) and *Coleman v. Mitchell*, 268 F.3d 417 (6th Cir. 2001), the court found that prevailing professional norms required full investigation of mitigating evidence.

The appellate court noted that the present case was tried prior to publication of the 1989 American Bar Association (ABA) Guidelines; therefore, counsel's performance needed to be considered against prevailing standards at the time of the case. The court held that the guidelines had simply codified well-established "common-sense" principles of representation by competent counsel in capital cases. No new law or newly discovered norms were developed in these guidelines, and indeed these long-standing norms had been cited in *Strickland* and *Glenn* concerning cases adjudicated prior to *Hamblin.*

The appellate court found defense counsel's representation of Mr. Hamblin at the penalty phase grossly inadequate. The court cited counsel's failure to investigate background, to obtain available records, to obtain and use available records, to seek expert advice, and to prepare Mr. Hamblin for his statement in the penalty phase as falling far short of prevailing standards of effective assistance of counsel.

Further, the appellate court rejected the trial court's two justifications for counsel's failure to investigate mitigating evidence. First, it rejected counsel's proposition that the failure to investigate was a "strategic" ploy, that is, that counsel had anticipated that such an investigation would be negative for psychological problems or organic brain injuries and would thereby preclude an argument for mitigation based on those circumstances. The court ruled that counsel had a duty to unearth facts, not to guess or assume their relevance or value to the defense.

Secondly, the appellate court rejected the trial court's ruling that counsel's failure to investigate was justified because the defendant had allegedly asked him not to present mitigating evidence. The appellate court ruled that even if the defendant posed such a request, neither counsel nor defendant is capable of making informed decisions regarding appropriate courses of action without first conducting an exhaustive investigation. The court further ruled that it is impossible for counsel to establish with confidence the competence of his client to make a decision regarding mitigation efforts without first having the facts on which such a decision would be made.

Equally as important as finding substantial evidence of failure of counsel to provide effective assistance was the court's determination that such failure would have changed the outcome with reasonable probability, as required by the second or "prejudice" prong established by *Strickland*. The appellate court found that counsel's failure to investigate and present mitigating evidence at the penalty phase was significant enough to prejudice the defendant and "undermine confidence in the outcome." The court deemed that there was substantial enough mitigating evidence in Mr. Hamblin's background that "there is a reasonable probability that at least one juror would have struck a different balance," thereby changing the outcome and preventing the death penalty. Such a reasonable probability entitled the defendant to a new trial at the penalty phase.

The appellate court denied the request for a new trial at the culpability phase, despite additional evidence of ineffective assistance of counsel and other errors it deemed substantially harmless in balance against the overwhelming physical evidence. These errors included evidence of inappropriate remarks made by the prosecutor and failure of the prosecu-

tion to hand over exculpatory evidence as required by *Brady v. Maryland*, 373 U.S. 83 (1963). The appellate court found that the jury would have likely convicted based on substantial damning physical evidence, even in the absence of the prosecution's inappropriate remarks. Regarding the prosecution's failure to turn over exculpatory evidence, the court found no bad faith and deemed that the evidence would not have changed the outcome with reasonable probability.

Mr. Hamblin challenged the admission of his taped police interrogation, arguing that the questioning occurred after he had requested a lawyer and was informed he could not have one until after the weekend. Although the court agreed that the tapes were inappropriately admitted into evidence, the information contained in the tapes was deemed not substantial and the physical evidence otherwise so overwhelming that the verdict was not likely affected by the tapes. The court ruled the admission of the tapes a harmless error and did not overturn the conviction.

Discussion

This case joins recent U.S. Supreme Court and circuit court rulings that delineate the standards for effective representation of defendants facing the death penalty. The appellate rulings have established death penalty cases as a unique genre of cases in which the role of forensic psychiatry is extensive and relevant during the penalty phase of the trial. The Supreme Court has defined and more recently clarified the specific meaning of "effective assistance of counsel." This process began in *Strickland*, where it was determined that counsel in such death penalty cases was required to act according to ABA standards, including counsel's "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." That ruling essentially embraced two principals in determining whether ineffective counsel occurred: (1) to determine if counsel's actions were deficient and (2), if such actions were deficient, whether they prejudiced the defense. The Supreme Court decided at that time, however, to refrain from delineating any further standard-of-duty clarifications in an effort to avoid the escalation of ineffective assistance of counsel challenges in death penalty cases and preferred to adhere to the broad ABA standards for defining dereliction of duty by counsel.

More recently, in *Wiggins*, the U.S. Supreme Court held that ineffective assistance of counsel had occurred in that counsel did not adequately present mitigating evidence concerning the defendant's personal history and background. That Court decided, in an effort to move away from the vague, antiquated, and generalized language in *Strickland*, to adopt an additional ABA Guideline 11.8.6 to further suggest what the detailed content of counsel's investigative efforts should contain, including "medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences." The *Wiggins* clarification opens the arena for psychiatric analysis even in the absence of specific diagnosis.

In *Bryan v. Mullin*, 335 F.3d 1207 (10th Cir. 2003), another capital case in which the defendant had a history of mental illness, the court held that counsel had not rendered ineffective assistance and denied *habeas corpus* relief. That case was complicated by the adamant request made of counsel by the defendant and his family that evidence concerning the defendant's psychiatric history and background not be presented. What sets *Bryan* off from the present case is that, in *Bryan*, counsel investigated and pursued the relevant mental health questions prior to making a decision to act in accordance with the wishes of the defendant and his family.

The decisions in these cases begin to delineate the exceptions to presenting mitigating evidence in a death penalty trial—namely, strategy and acting on a competent defendant's insistence that personal history or background not be presented as mitigating evidence. As with most capital cases, the question of mitigation is complex. The role of forensic psychiatry becomes increasingly relevant as the standard for mitigation investigation develops. The translation of background, cultural, family, and mental health history into a personal narrative becomes a tool of mitigation. Regardless of how counsel decides to proceed with the presentation of mitigating evidence, what is clearly outlined in current ABA Guidelines and highlighted in these capital cases is that counsel must first investigate a defendant's personal history and background to make the determination to stra-

tegically present or withhold the content of what the investigation reveals.

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Editor's Note: The *Wiggins* and *Bryan* decisions were reviewed in the "Legal Digest" of the last issue of the journal (J Am Acad Psychiatry Law 32:452–4, 456–7, 2004).

Daubert and Suicide Risk of Antidepressants in Children

Admissibility of Evidence in an Area of Emerging Evidence and Escalating Controversy

In *Miller v. Pfizer, Inc.*, 356 F.3d 1326 (10th Cir. 2004), the U.S. Court of Appeals for the 10th Circuit affirmed the trial court's judgment in favor of the defendant pharmaceutical company, finding that the trial court did not abuse its discretion in restricting the information made available to the court-appointed independent experts, did not err in excluding the testimony of the plaintiff's expert, and did not err in granting summary judgment to Pfizer.

Facts and History of the Case

In the spring of 1997, Matthew Miller, 13 years of age, disclosed to his teacher and peers his thoughts of suicide. The school contacted Matthew's parents and urged them to seek mental health treatment. On June 30, 1997, the Millers took their son to Dr. Douglas Geenens, a child and adolescent psychiatrist who diagnosed Matthew as having "depression not otherwise specified." After three weeks, in which Matthew showed little improvement, Dr. Geenens prescribed sertraline, a selective serotonin reuptake inhibitor (SSRI) marketed as Zoloft by Pfizer, Inc. One week later, Matthew hanged himself.

The Millers sought to hold Pfizer liable for their son's death, claiming both that the company had influenced Dr. Geenens to prescribe Zoloft through aggressive marketing practices that misrepresented the medication, and that it had failed to test the drug adequately and to warn of its potential to induce akathisia and suicide. The Miller's case required demonstrating both general causation linking Zoloft and suicide and specific causation in the case of Matthew Miller.

The details of the case's procedural history provide the context for the appellate court's eventual decision. The Millers filed the initial civil complaint on July 27, 1999. Shortly thereafter, they submitted a preliminary report prepared by their expert witness on causation, Dr. David Healy, a neuropsychopharmacologist and vocal critic of the pharmaceutical industry. In his report, Dr. Healy opined that Zoloft and other SSRIs cause akathisia, which in turn can lead to suicide in some patients. The Millers then filed a motion to appoint independent experts in October, in anticipation of challenges from Pfizer.

The U.S District Court for the Twelfth District (trial court) set initial deadlines for the Millers to provide Pfizer with disclosures in accordance with Federal Rule of Civil Procedure 26 governing discovery of evidence and to provide disclosures of rebuttal experts in December 1999 and February 2000, respectively. Pfizer's motion to limit revisions to expert opinions was granted in part in January 2000, so that the Millers were limited to filing a final supplemental expert report by March 7 and final rebuttal expert disclosures by March 28.

After Dr. Healy was deposed on March 27–28, 2000, the Millers provided Pfizer with supplemental responses explaining a statistical analysis Dr. Healy had used in forming his opinion. In April, Pfizer filed an emergency motion, arguing that the responses were untimely and that Dr. Healy should be barred from supplementing his opinion. The district court denied this motion the following day, reasoning that the new information did not substantially depart from the previous disclosures. On the same day, Pfizer filed to exclude Dr. Healy's testimony as failing to meet the *Daubert* standard for expert testimony.

Of note, Pfizer also moved to exclude other plaintiff's experts under *Daubert*. It sought to exclude Dr. Morton Silverman, a suicidologist who was to testify that Zoloft can cause akathisia and that Matthew Miller may have had akathisia, and Dr. Donald Marks, an expert on the pharmaceutical industry who was to testify that Pfizer had a duty to warn about suicide risk and conduct further testing on the matter. In June, the court denied both of Pfizer's motions to exclude the testimony altogether, but

ruled to exclude Dr. Silverman's opinion about Pfizer's duty to warn.

Pfizer's counsel became ill, delaying proceedings for several months. The district court issued an order in August staying all proceedings and directing the parties to show cause why independent experts should not be appointed to assist the court in determining the admissibility of Dr. Healy's testimony. Then, in December 2000, the court ordered the parties to submit either a joint nomination for an independent expert or separate lists, each proposing three experts.

Finally, in April 2001, the court appointed Drs. John Concato and John M. Davis as independent experts. They were charged with determining the quality of Dr. Healy's methodology and whether its application to the question of general and specific causation represented valid, scientifically reliable reasoning. The independent experts submitted their report in September, and a *Daubert* hearing was held in November 2001.

Informed by the findings of the independent experts, the district court ruled that Dr. Healy's testimony was inadmissible in February 2002. The court noted that Dr. Healy's views on general causation were "a distinctly minority view" and that he relied on case reports and his own studies over randomized controlled trials (RCTs) and large-scale epidemiological studies. The court held that, though RCTs and epidemiological studies were not essential to the formation of an expert opinion, Dr. Healy's calculation of relative risk of suicide for persons taking Zoloft could not be replicated by the independent experts and that his method had not been subject to peer review. In addition, the court ruled that the design and methodology of Dr. Healy's own studies fell short of the *Daubert* standard.

As for specific causation, the trial court found that Dr. Healy had relied too narrowly on "preselected information from interested parties" and that this method in forming his opinion was not generally accepted practice. It also deemed inadmissible Dr. Healy's opinions on suicidology, warning labels, and Food and Drug Administration (FDA) regulations.

Given that the opinions of the plaintiff's expert on causation had been deemed inadmissible, the court granted Pfizer's motion for summary judgment on February 11, 2002. The Millers appealed this decision to the 10th Circuit Court of Appeals, claiming that the trial court had not given them a fair opportunity to make a proper record supporting Dr. Healy's conclusions and had abused its discretion in evaluating expert testimony.

Ruling

The 10th Circuit Court affirmed the trial court's summary judgment, holding that the trial court did not abuse its discretion in limiting the information provided to the independent experts and that the scope of its *Daubert* inquiry into Dr. Healy's opinions was appropriate.

Reasoning

In its reasoning, the 10th Circuit Court rejected the Millers' argument that the district court had misapplied Federal Rule of Civil Procedure 26. The Millers objected to the restrictions placed on their responses to the report of the independent experts, claiming that the trial court did not offer an adequate opportunity to present and defend Dr. Healy's opinions. The court ruled to the contrary, delineating the procedural history of the case and highlighting the numerous opportunities Dr. Healy had to revise and supplement his opinion. The court acknowledged case law in which district courts had been found to have abused their discretion (*Dodge v. Cotter Corp.*, 328 F.3d 1212 (10th Cir. 2003)) but ruled that such an abuse had not occurred in this case, citing the trial's court allowance of Dr. Healy's revision of his original opinion and his supplemental responses.

The circuit court addressed three specific concerns raised by the Millers. First, it took on the Millers' assertion that the district court had improperly limited the information supplied to the independent experts and, in doing so, had allowed Pfizer to prevail based on a procedural technicality rather than on the science. The court recognized that revisions to an expert's initial Rule 26 report are permitted and may be required, but ruled that Dr. Healy had ample opportunity to update his opinion and respond to critiques. Noting that "the orderly conduct of litigation demands that expert opinions reach closure," the court ruled that the trial court did not abuse its discretion and had acted with "patience and concern for fairness." Second, the Millers argued that the trial court had gone beyond its gatekeeper function, addressing questions relevant to the weight rather than the admissibility of Dr. Healy's testimony. The circuit court disagreed, finding that the scope of the district court's investigation was appropriate for a

Daubert inquiry. It noted several examples of case law supporting "careful and meticulous review" of scientific evidence as within the scope of *Daubert*. Last, the Millers contended at oral argument on appeal that the trial court erred in granting summary judgment because it had sufficient evidence without Dr. Healy's testimony to go forward. The circuit court declined to consider this argument, however, because the plaintiffs had not raised it at the trial court level or in appellate briefs.

Discussion

The trial court applied the *Daubert* standard to expert opinion on an issue that has come under increasing scientific and public scrutiny: antidepressants and suicide risk in children. The circuit court's opinion deals with the problem of marshaling scientific debate in the legal arena. Specifically, it addresses the extent to which expert opinions can be refined and updated in an area of evolving research. The opinion emphasizes the differing nature of scientific and legal inquiry. While scientific knowledge is continually evolving, the legal arena demands a level of certainty and peer-reviewed acceptance that often preclude leading-edge science in rapidly evolving areas of research. The legitimacy of a technique or method may turn on the results of one study; what is hypothetical today may be textbook science in a month. Ironically, in this case, the science necessary for demonstration of general causation may have matured to meet *Daubert* standards of testability, peer review, and general acceptance over the procedural history of the case.

Recently, the body of evidence supporting a link between antidepressants and suicide risk in children has grown. Governmental agencies have responded with increased surveillance and warnings. In June 2003, the Medicine and Health Care Products Regulatory Agency of the British Department of Health warned against the off-label use of paroxetine in children. Subsequently, the British Committee on Safety of Medicines recommended that only fluoxetine be prescribed in pediatric populations. In the United States, the FDA issued a talk paper in October 2003, emphasizing the lack of certainty about the safety of antidepressants in children. In February 2004, the FDA asked manufacturers of 10 antidepressants to include a warning that patients be observed for treatment-emergent suicidality. In August 2004, the agency released results of a meta-analysis of pharmaceutical company clinical trials that showed an increased relative risk of suicidal behavior in children receiving the drugs. Such developments invite speculation about whether Dr. Healy's opinions, supplemented with the above-mentioned studies, might have passed *Daubert* muster.

Controversy has also emerged over suppression of research data, recalling Miller's contention that Pfizer had misrepresented the dangers of its drug and failed to test it adequately. In September 2004, a congressional panel examining antidepressant use in children criticized the FDA for silencing Dr. Andrew Mosholder, a researcher it had charged with investigating a link between the drugs and suicide. The panel found evidence that the FDA had suppressed Dr. Mosholder's findings in February 2004 and that, as early as September 2003, data were available suggesting a link. The apparent intentional obfuscation of risk by a regulatory agency does little to reassure the public that a drug manufacturer might not do the same.

Would *Miller v. Pfizer* have had a different outcome had it been litigated today? Certainly, public outcry over the FDA's failure to disclose promptly the risks of antidepressant use in children would have made for a different climate for the case. However, despite some evidence supporting a general causal link between antidepressants and suicidal behavior in children, showing specific causation in the case of a child with depression is complicated by the inherent risk of suicide due to the disorder itself. A more robust argument for specific causation might be made in a case involving a child's suicide during antidepressant treatment for an indication with less intrinsic suicide risk, like obsessive-compulsive disorder or generalized anxiety disorder. However, since the purported increased relative risk of suicide with these agents has only been gleaned from studies of depressed children, the case for general causation might be hampered by a lack of research sufficient to meet the requirements of *Daubert*.

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Federal Insanity Acquittees

Person Found Not Guilty by Reason of Insanity May Not Attack His Successful Insanity Defense in Habeas *Petition*

In *Archuleta v. Hedrick*, 365 F.3d 644 (8th Cir. 2004), the U.S. Court of Appeals for the Eighth Circuit addresses the *habeas* and other remedies available to federal insanity acquittees who want to challenge their confinement, including whether insanity acquittees may attack their initial successful insanity defense.

Facts of the Case

Benjamin Archuleta was charged with assaulting a federal officer on July 23, 1999. The U.S. District Court of Utah found him not guilty by reason of insanity. Mr. Archuleta was examined by a psychiatrist who indicated that his release would "create a substantial risk of bodily injury to another because of his present mental disease." Pursuant to 18 U.S.C. § 4243(a) through (e), he was committed to the custody of the U.S. Attorney General and transferred to the Federal Medical Center (FMC) in Springfield, Missouri. Mr. Archuleta was conditionally released, but the trial court in Utah revoked his release on July 8, 2002, and recommitted him to the same FMC "for hospitalization and further placement until such a time as he may be eligible for conditional release under a prescribed regimen of medical, psychiatric or psychological treatment, pursuant to 18 U.S.C. § 4243(e) and (f)."

In October 2002, Mr. Archuleta filed a *pro se* petition for *habeas corpus* relief in the U.S. Court of Appeals for the Western District of Missouri. He pleaded for "an unconditional discharge and constitutional release." He argued, among other things, that the statute pursuant to which he was committed is unconstitutional, that administrative remedies cannot redress this constitutional violation, and that his treatment after being found not guilty by reason of insanity may not lawfully exceed the sentence he would have received if found guilty. He also advanced the argument that relocating him to a distant prison facility "amounts to banishment and exile."

The magistrate judge construed the petition as challenging "the administration of involuntary medication and Archuleta's mental health commitment" and recommended that it be dismissed for failure to exhaust administrative remedies. Mr. Archuleta filed a *pro se* objection. The appellate court agreed with the magistrate judge and dismissed the petition without prejudice, for failure to exhaust administrative remedies. Mr. Archuleta filed a *pro se* notice of appeal. The Eighth Circuit Court granted *in forma pauperis* status and appointed a federal public defender to defend Mr. Archuleta.

On appeal, the counsel for both parties accepted the appellate court's interpretation of the *pro se* petition as primarily challenging the involuntary administration of psychotropic medication by FMC mental health professionals. Counsel also described this as a "28 U.S.C. § 2241 (the power to grant writ) conditions of confinement case."

Ruling and Reasoning

The U.S. Court of Appeals for the Eighth Circuit began by noting that counsel's framing of the dispute would raise "several complex and difficult threshold issues." Among these were whether Mr. Archuleta could be considered a "prisoner" subject to the statutory exhaustion requirements of the Prison Litigation Reform Act and whether he may seek *habeas corpus* relief for a condition of confinement claim as a "federal inmate." The court, however, concluded that counsel and the magistrate judge had "seriously misconstrued the gravamen" of the *pro se habeas* petition. Therefore, it reasoned that it did not need to resolve these issues.

Instead, the court perceived the theme of the petition to be related to the constitutionality of his continuing detention. Exercising its discretion to construe *pro se habeas* petitions liberally, it decided to consider the unlawful-detention questions because "substantial public interests are involved." It indicated that relief from unlawful custody is a proper role of the Great Writ, as congress recognized when it provided that 18 U.S.C. § 4243 (the statute under which Mr. Archuleta was committed) does not preclude a person "from establishing by writ of *habeas corpus* the illegality of his detention."

The circuit court indicated that, because he was in custody in the Western District of Missouri, Mr. Archuleta invoked the right statute and chose the right forum for a § 2241 claim. However, it did not accept his claim of a right to discharge by relitigating the initial finding that he was not guilty by reason of insanity. Citing *Curry v. Overholser*, 287 F.2d 137 (D.C. Cir. 1960), the court explained that Mr. Archuleta may not collaterally attack his decision to

assert a successful insanity defense. It characterized Mr. Archuleta's belief that he had been held in medical custody longer than he would have been sentenced if found guilty of the charged offense as a "misconception." The court explained that under 18 U.S.C. § 4246, a federal inmate who has completed his sentence may be committed for a longer period on the ground that he is dangerous because of mental illness. The court also noted that the statutory procedure and substantive standard under 18 U.S.C. § 4243, on which Mr. Archuleta was committed, are clearly constitutional.

The circuit court noted that Mr. Archuleta's petition for conditional or constitutional release under 28 U.S.C. § 4243 is a cognizable claim because 28 U.S.C. § 2241 authorizes the *habeas* court to determine whether the petitioner is in custody in violation of the constitution, laws, or treaties of the United States. It also noted that *habeas corpus* is an extraordinary remedy typically available only when the "petitioner has no other remedy." It indicated that through 18 U.S.C § 4247(g) and (h), the court, not the FMC, could grant Mr. Archuleta the relief that he sought. The district court of Utah has discretion and jurisdiction to decide the motion brought under these statutes and therefore has jurisdiction over Mr. Archuleta's *pro se* petition. The circuit court indicated that in these circumstances, a transfer of the petition under 28 U.S.C. § 1406 (a) is both permissible and appropriate.

The U.S. Court of Appeals for the Eighth Circuit vacated the dismissal order and remanded to the U.S. Court of Appeals for the Western District of Missouri, with directions to transfer the case to the U.S. District Court for the District of Utah, pursuant to 28 U.S.C. § 1406(a). This statute allows the appellate court in which a case is wrongly filed to dismiss, or if it were in the interest of justice, transfer such case to any district in which it could have been brought.

Discussion

Among many technical legal issues, this case brings to light the infrequently addressed question of whether insanity acquittees may withdraw their original insanity defense.

In the aforementioned *Curry* case, the appellant, through a complicated process, was found not guilty by reason of insanity of the charges of assault and mayhem and committed to St. Elizabeth's Hospital. Mr. Curry filed a *habeas corpus* petition, arguing that his confinement was unconstitutional—largely because he claimed that he did not have the opportunity to petition for a new trial at which he might be entirely acquitted. The appellate court denied his *habeas corpus* petition for release from St. Elizabeth's, and he appealed. The appellate court affirmed the lower court's judgment: "Having thus elected to make himself a member of that 'exceptional class' of persons who seek verdicts of not guilty by reason of insanity. . .he cannot now be heard to complain of the statutory consequences of his election." The court held that no direct attack upon the final judgment of acquittal by reason of insanity was possible. It also held that the collateral attack that he was not informed that a possible alternative to his commitment was to ask for a new trial was not a meaningful alternative.

By contrast, at least two insanity acquittees in Connecticut have been able to attack their insanity acquittals successfully via *habeas corpus* petitions. In *State v. Connelly*, 700 A.2d 694 (Conn. App. Ct. 1997) the petitioner had originally been found not guilty by reason of insanity of kidnapping and assault and was committed to the jurisdiction of the Psychiatric Security Review Board for a period of 10 years. Mr. Connelly filed a *pro se* writ of *habeas corpus* to vacate his insanity acquittal, arguing that he was not aware of his right to a trial without the use of an insanity defense. His insanity acquittal was vacated, and he was granted a new trial, at which he was found guilty of the same charges and was sentenced to 40 years of incarceration.

In the case of *Miller v. Angliker*, 848 F.2d 1312 (2nd Cir. 1988), the petitioner, after having been found not guilty by reason of insanity of multiple murder charges, petitioned the federal district court for a writ of *habeas corpus*. He contended that his confinement resulted from violation of his Sixth Amendment right to the effective assistance of counsel as well as his due process right to be provided with exculpatory information in the possession of the state. He indicated that both of these affected his decision to plead not guilty by reason of insanity rather than simply not guilty. The Second Circuit Court reversed the dismissal order and remanded the case to the district court to grant the writ unless, within a reasonable time, the state brought Mr. Miller to trial.

These cases illustrate that the issue of whether insanity acquittees may withdraw their original insan-

ity plea in pursuit of some other alternative is not clearly settled. The Court of Appeals for the District of Columbia has certainly been less sympathetic to an acquittee's claim that he did not know he had other options than has the Second Circuit or the Connecticut Appellate Court. In the present case, the Eighth Circuit saw no reason to allow Archuleta the right to relitigate his insanity defense case.

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Departure Rulings Must Be Hitched to Sentencing Guidelines

Defendant's Reduced Mental Capacity Alone Cannot Justify Downward Departure of 15 Levels from the Range in the U.S. Sentencing Guidelines Manual

In *U.S. v. Cordova*, 338 F.3d 838 (10th Cir. 2003), the U.S. Tenth Circuit Court of Appeals found that the U.S. District Court for the District of New Mexico, which granted a downward departure of 15 levels on the basis of reduced mental capacity to a woman convicted on drug charges, failed to articulate reasons for the degree of downward departure from the Federal Sentencing Guidelines that differed from those reasons used to justify the departure itself. The United States appealed the sentence.

History of the Case

The history for this case lies in the unique way in which sentences are determined in federal courts. The United States Sentencing Commission, created in response to the Sentencing Reform Act of 1984, is an independent agency in the judicial branch empowered to develop federal sentencing guidelines for courts to use when sentencing offenders convicted of federal crimes. These guidelines were meant to correct past racial and geographical inequalities in sentences in federal courts. The first edition of the guidelines became effective in 1987. They have been amended periodically to include 43 levels of offense seriousness, with the highest levels receiving the harshest sentences. Each type of federal crime is assigned a base offense level, from which sentencing courts are allowed some discretion in departing upward or downward, according to specifically outlined types of mitigating circumstances.

Facts of the Case

On three occasions in the spring of 2001, Agnes M. Cordova sold crack cocaine to undercover police officers in Pojoaque, New Mexico. During the third transaction, she was arrested and confessed to dealing drugs for approximately three months. She was found to be in personal possession of 45.6 grams of crack cocaine at the time of her arrest.

A federal grand jury found Ms. Cordova in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(B) and indicted her on one count of distribution of more than five grams of crack cocaine and one count of possession with intent to distribute more than five grams of cocaine. On October 30, 2001, she pleaded guilty to both counts under a plea agreement. The conditions of the plea agreement provided that she would be eligible for (1) a three-level reduction for acceptance of responsibility under Guideline § 3E1.1, (2) a four-level reduction for being a minimal participant under Guideline § 3B1.2, and (3) a two-level, safety-valve reduction under Guideline § 2D1.1(b)(6). The presentence report recommended the acceptance of responsibility and safety-valve reductions, but recommended against the minimal participant reduction. However, at sentencing, the district court chose to grant all three reductions, lowering Ms. Cordova's offense level to 23 and resulting in a sentencing range of 46 to 57 months in federal prison.

Ms. Cordova then moved for a downward departure of 15 levels, to offense level 8, on the basis of her age, mental and physical condition, family responsibilities, and diminished capacity. She produced two expert witnesses, a clinical counselor and a board-certified neuropsychologist, to testify to her level of impairment and psychosocial needs. The district court, citing her reduced mental capacity and physical ailments, granted the 15-level downward departure, and she was sentenced to time already served in jail and five years of supervised release. While acknowledging that 15 levels was a "significant departure," the district court justified the degree of its departure as follows:

> The reason for the departure to [offense level] 8 is to be able to punish Ms. Cordova for. . .[her] conduct. . .but punish her in a

> way that is not irreversibly detrimental to her health. She needs to be able to have a consistent availability of the medications and monitoring of the medications, and she needs the support of her family. The extent of the departure is also justified by Dr. Thompson's opinion in his report and in his testimony today that indicated that the reduced mental capacity significantly contributed to the commission of this crime. It wasn't a peripheral issue or a marginal issue. It was a significant reason for the commission of this offense.

The government conceded Ms. Cordova's reduced mental capacity and did not object to some amount of downward departure from the offense level reached in the plea agreement. The government, however, believed that the degree of departure in sentencing from offense level 23 to level 8 was unreasonable and filed an appeal.

Ruling

The Tenth Circuit Court of Appeals ruled in favor of the government's appeal and vacated the district court's sentence, remanding the case for resentencing. While acknowledging that it is not the role of the appellate court to usurp the district court's role in determining the proper degree of departure on remand, the appeals court noted that the record did not support a downward departure in excess of the two to four levels recommended by the government at oral argument.

Reasoning

In oral arguments, the United States did not dispute that some degree of downward departure was warranted based on the defendant's reduced mental capacity, a factor for which the sentencing guidelines allows such a departure. As stated in Guideline § 5K2.13, "A sentence below that applicable guideline may be warranted if the defendant committed the offense while suffering from a significantly reduced mental capacity." The government, rather, took issue with the degree of downward departure and argued that the reduction of 15 levels was extreme and therefore an abuse of the sentencing court's discretion.

The appellate court concurred, ruling that the sentencing court had failed to provide a reasonable explanation for the degree of departure. Citing *U.S. v. Hannah*, 268 F.3d 937 (10th Cir. 2001), the appellate court found that while justification for the degree of departure does not require "mathematical exactitude," the sentencing court must explain its reasoning "using any reasonable methodology hitched to the Sentencing Guidelines, including extrapolation from or analogy to the Guidelines." In the current case, the appellate court found the sentencing court to be deficient to the point of being "inconsistent with the Guideline's fundamental goal of promoting uniformity in sentencing." The sentencing court had not demonstrated a clear pattern of decision making that can be readily projected from the guidelines.

The Tenth Circuit also held that the sentencing court has a responsibility both to explain why a sentencing departure may be justified and to defend separately the extent of the departure from the base offense level. As outlined in *U.S. v. Whiteskunk*, 162 F.3d 1244 (10th Cir. 1998), the district court is obligated to provide specific reasons for the degree of departure that are independent and distinct from the required explanation of why a departure is warranted. Furthermore, such reasons must be linked to the guidelines so that "the sentencing court should attempt to predict what sentencing range the sentencing commission would have established had it considered the circumstances."

While the guidelines permit downward departure for reduced mental capacity, they clearly state that "the extent of departure should reflect the extent to which the reduced mental capacity contributed to the commission of the offense." Reasoning that the defendant had to be found to be suffering from reduced mental capacity to be eligible for any downward departure, the Tenth Circuit found that "the district court's explanation for the degree of departure essentially restates the justification for departure in the first place" and therefore does not meet the separate requirement for explanation of the particular sentencing decision.

The Tenth Circuit ruled that the district court was also in violation of the decision in *U.S. v. Goldberg*, 295 F.3d 1133 (10th Cir. 2002), which specifically forbids choosing the degree of departure solely to achieve a desired sentence. In Ms. Cordova's case, the district court significantly departed downward so that she could avoid further incarceration and could continue to interact with her therapist and her family, a move that the Tenth Circuit referred to as "extraordinary and essentially unjustified." The *Goldberg* decision had disallowed a result-oriented, eight-level sentencing departure on the basis that the court's methodology was "inconsistent with the Guidelines' fundamental goal of promoting uniformity in sentencing." In Ms. Cordova's case, the departure, almost twice as large as that rejected in *Goldberg*, was result oriented and was not clearly

extrapolated from the guidelines. Thus, the Tenth Circuit was compelled to remand for determination of the appropriate degree of departure.

Discussion

The ruling in this case highlights the way in which sentences are determined in federal court as opposed to those in state court. Two important differences can be discerned from the ruling. First, in federal court, the presence of a psychiatric illness and mental defect is not in and of itself sufficient for mitigation. The Federal Sentencing Guidelines require that there be a nexus between the disorder and the criminal behavior. The presence of a disorder meets the first requirement to even consider a downward departure. For a departure to occur, however, the court must rule that the disorder had an effect on the crime and how much an effect it had. According to this ruling, the amount of the effect must be correlated to the degree of departure.

For psychiatrists and psychologists involved as experts in downward departure evaluations, establishing the nexus becomes part of the assessment. In forensic psychiatry, this task is not unique. State of mind cases require the explication of how a disturbance of thought or emotion or a lack of control relates to the criminal behavior.

A more difficult task is determining the degree of effect in a numerically derived expression. The role of the mental health expert, however, stops before that determination, which belongs solely to the court.

The second characteristic unique to federal sentencing is the requirement that the sentence not be result based. In an effort to mandate fairness, the sentencing guidelines may be introducing a bias by not considering the effect of the sentence on the individual. Fairness in sentencing is a desirous but complex goal derived not only by how much punishment is given out, but also by what effect the punishment will have. Life circumstances may magnify or mitigate the actual sentence. In the pursuit of fairness, the requirement that sentencing ignore the impact that the imposed sentence will have on the individual defendant has the potential of increasing the bias that the guidelines were designed to reduce.

The primary *raison d'être* of the Federal Sentencing Guidelines is to prevent disparity in the sentencing for criminal behavior. Accordingly, the guidelines specifically discourage consideration of certain factors, including mental and emotional impairments, as a basis for departure. The commission does not view discouraged factors "as necessarily inappropriate" bases for departure but says they should be relied on only "in exceptional cases." The guidelines provide a specific definition of "significantly reduced mental capacity" as "a significantly impaired ability to (A) understand the wrongfulness of the behavior comprising the offense or to exercise the power of reason; or (B) control behavior that the defendant knows is wrongful" (U.S. Sentencing Guidelines Manual § 5K2.13(1998)).

Thus, our profession bears the burden of identifying, as specifically and accurately as possible, the unique aspects of an individual defendant's circumstances that may or may not make that individual eligible for a departure from the sentencing guidelines. It is also helpful to comment on the severity and magnitude of all relevant factors.

In *Cordova*, the district court determined that the defendant had a reduced mental capacity but failed to justify how this validated a downward departure of 15 levels. At resentencing (as learned through personal communication with Jacquelyn Robins, Esq., September, 2004), the defense team presented an evaluation by a neuropsychiatrist that found the defendant to be suffering from "a chronic, severe, and fixed psychosis" and that the defendant's mental condition, "compared with a population of similarly affected individuals, is at the extreme low end of a bell-shaped curve." The defense further presented testimony from a neuropsychologist who stated that the defendant "is a significantly compromised individual with major psychiatric and chronic health problems. There has been a deterioration of psychosocial functioning. Neuropsychological deficits that have multiple etiological factors continue to impair her functioning. . . ." Subsequently, the government agreed to a downward departure of seven levels. As of this writing, the case remains in process, but it is evident that the more clearly the court understands the defendant's life circumstances, the better qualified it will be to determine, impose, and justify a given sentence.

Family concerns and obligations are other areas that the guidelines specifically discourage as reasons for departure. Nevertheless, there are several precedents of courts' allowing lesser sentences in cases involving "exceptional" family situations. Essentially all of these cases granted downward departure on the presumption that the lesser sentence would be easier

on the defendant's family, particularly children and other financial dependents, if the defendant were incarcerated for a lesser time. In *Cordova*, the district court granted departure, in part, on the basis that the defendant would benefit from continued exposure to her family. While there might be merit to this argument, the Tenth Circuit made clear that it is not the obligation of the court to protect the defendant's relationship with her family when meting out a sentence.

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Murder Conviction of Minor Reversed Due to Illegally Obtained Confession

Federal Appellate Review Finds Admission of Confession Not Harmless

At issue in *Taylor v. Maddox*, 366 F.3d 992 (9th Cir. 2004) was whether the district court erred in finding that a child defendant's confession was voluntarily and lawfully obtained. Leif Taylor, age 16 at the time of the crimes, was convicted of first-degree felony murder and second-degree robbery and sentenced to life without the possibility of parole. Mr. Taylor filed a *pro se habeas corpus* motion challenging the admissibility of his confession. He asserted his confession was coerced and obtained in violation of *Miranda* and *Edwards v. Arizona*, 451 U.S. 477 (1981). The United States Court of Appeals, Ninth Circuit, ruled that the defendant's confession was not voluntarily and lawfully obtained and remanded the case to the district court.

Facts of the Case

In 1993, the state charged 16-year-old Leif Taylor with first-degree felony murder and second-degree robbery. Mr. Taylor was named as one of two defendants who attempted to steal a bicycle from William Shadden in Long Beach, California, on May 31, 1993. Mr. Shadden resisted their efforts, causing the two would-be robbers to flee. Regrettably, he chose to pursue his assailants and was shot and killed by one of them. Three months later, Detectives Craig Remine and William MacLyman had developed Mr. Taylor as a key suspect. They obtained search and arrest warrants.

Detectives Remine and MacLyman and at least two other officers entered Mr. Taylor's home on September 1, 1993, at approximately 11:30 p.m. With their flashlights on and guns drawn, they found Mr. Taylor home alone sleeping on the sofa. His mother, the only residential parent, was not home at the time. The boy was arrested and transported to the police station for questioning. He was first placed alone in a small interrogation room for 30 minutes. Detectives MacLyman and Remine then entered and interrogated him for over three hours.

Neither his mother nor his attorney was present during the interrogation, and no offer of food or a break was given. Detective MacLyman reportedly thrust his "187" ring, the police code for murder, in Mr. Taylor's face and insisted that the youth knew why he was there. He also diagrammed Mr. Taylor's future by drawing two lines of uneven length on a piece of paper. The longer of the two lines symbolized the rest of his life in prison, whereas the shorter one represented the time he would spend in prison if he would tell them what they wanted to hear. One of the detectives told Mr. Taylor he knew he didn't "deliberately" kill the victim and that it must have been done "unintentionally." The boy nevertheless denied involvement for over two-and-one-half hours.

According to Mr. Taylor, he repeatedly asked for permission to call his mother and an attorney, Arthur Close, beginning just after he arrived at the station. In fact, he knew Mr. Close's phone number by heart because they each had been involved in neighborhood activities, including community clean-ups and a gang baseball team, and he had also worked for Mr. Close doing chores.

At 3:02 a.m., after nearly three hours of interrogation, Mr. Taylor broke down and provided the detectives with an 11-minute confession. This was the only portion of the interrogation that was tape recorded, despite there having been recording equipment installed and available in the room. Detective Remine took notes during the questioning but discarded them prior to the trial. Besides the 11-minute tape, no other record existed of what transpired in the interrogation room.

After the interrogation ended and Mr. Taylor was booked, he was given the chance to use a phone and called Mr. Close at approximately 4:00 a.m. Mr. Close would later recall at the suppression hearing that the youth was "in tears and highly agitated." Mr. Taylor explained to Mr. Close that he had asked to be allowed to call him while being escorted to the interview room, again had asked to call him four or more times during the interrogation, and also had requested that both his attorney and his mother be present. He finally confessed to the murder to end the interrogation so he could use the phone, believing he could "get it straightened out" later, since he was innocent.

Mr. Taylor's attorney moved to have an evidentiary hearing before trial to suppress the defendant's inculpatory statements. Testimony was heard from Mr. Taylor, Detective Remine, and Arthur Close (there is no mention in the record of why Detective MacLyman or the officer who escorted Mr. Taylor did not testify). Mr. Taylor testified that he repeatedly asked to call both his attorney and his mother, before and during the interrogation, but his requests were denied. Mr. Close's testimony of his telephone conversation with Mr. Taylor corroborated the boy's recollection of events. Detective Remine's testimony was in stark contrast to Mr. Taylor's testimony. He stated the youth had never asked for counsel prior to questioning or to speak to his mother and that he had indeed been advised of his *Miranda* rights. He could not recall if Mr. Taylor had asked for an attorney or his mother during the questioning. The state court was not persuaded by the defense testimony. Ruling from the bench, Judge Sheldon simply declared that he believed the testimony of Detective Remine versus that of Mr. Taylor and denied the suppression motion:

> I am the fact finder first, and I have to decide and say who I believe. I conclude, in this case, that I clearly believe, beyond a reasonable doubt, Officer Ramine [sic] and not the testimony of the defendant. . . (Record, p 5899 (*Taylor*, no. 02–55560)).

At trial, the jury heard the taped confession, the only substantial evidence in the case and not the testimony of Mr. Close. They convicted Mr. Taylor of first-degree felony murder and second-degree robbery, and he was sentenced to life without parole. No physical evidence linking him to the crime existed.

Mr. Taylor appealed, and the California Court of Appeals, Second District, in an unpublished opinion, merely noted that "the evidence found credible by the trial court supports the determination that the waiver and confession were voluntary," and affirmed. Mr. Taylor petitioned the verdict of the appellate court. The California Supreme Court denied his petition for review without comment or citation. The United States Court of Appeals for the Ninth Circuit subsequently granted a certificate of appealability as to "whether appellant's *Miranda* rights were violated, and whether his confession was voluntary."

Ruling

The United States Court of Appeals, Ninth Circuit, based on their "independent review of the record," concluded that the district court had erred and reversed its decision. The state courts were "objectively unreasonable" in finding that the defendant's confession was voluntarily and lawfully obtained. Taylor was entitled to *habeas* relief and a conditional writ of *habeas corpus* was granted. On remand, the district court was ordered to release Taylor unless the State of California notified the district court that it would commence a retrial of Taylor, on evidence other than the illegally obtained confession, within 70 days of the issue of the mandate.

Reasoning

The Ninth Circuit cited several factors supporting their determination that the district court had erred and that Mr. Taylor was entitled to *habeas* relief:

1. The court found clear and convincing evidence that the confession was taken in violation of *Miranda*. Specifically, Mr. Taylor asked to speak to his attorney prior to entering the interrogation room, and therefore the interrogation should never have started. The prosecution offered no witnesses or evidence to refute this claim. This superseded the issue of his repeated requests for counsel in the interview room. Although Detective Remine weakly disputed the latter, he was the only state witness, his recall was ambiguous, and he was not present for the entirety of the interrogation. As the Ninth Circuit noted, it would be fair to infer that the state presented neither of the other officers as corroborating witnesses because their testimonies would have been unfavorable to the state's case. Regardless, Mr. Taylor's original invocation of *Miranda* rights to the escorting officer should have precluded any interrogation, and these rights were not validly waived because he continued to respond to questioning. The admission of the interrogation violated the youth's Fifth and Fourteenth Amendment rights.

2. The confession was inadmissible because it was involuntary. The detectives' conduct was found to be "coercive and constitutionally unacceptable," which rendered the confession involuntary. The Ninth Circuit considered the inherently coercive nature of the

totality of the circumstances, including the length of the interrogation; its location; its continuity; the absence of an attorney or parent; the defendant's maturity and age, education, physical condition (he was allowed no food or rest), and mental health; denial of requests to speak with his mother or attorney; and the threatening activities of Detective MacLyman. Mr. Taylor's account of the intimidating nature of the environment was consistent with the detectives' choice, without compelling rationale, to execute the arrest and interrogation at hours during which the defendant's mental defenses and clarity were likely to be compromised.

3. By virtually omitting relevant evidence (i.e., Mr. Close's testimony), the state court tainted its fact-finding process. The resultant factual determination was therefore "unreasonable," and a presumption of correctness could not follow. The decision to undermine a state's fact-finding process necessarily includes that the overlooked evidence be central to the petitioner's claim and highly probative. In this case, the state court judge's choice to believe Detective Remine rather than Mr. Taylor at the suppression hearing, without further investigation, resulted in Attorney Close's testimony being essentially ignored by both the state and appellate courts. The major error was the failure to consider and weigh relevant evidence that was part of the state court record. This violates the "unreasonable determination" standard of section 2254(d)(2) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).

4. In disregarding the existence of a key aspect of the record, Attorney Close's testimony, the quality of this piece of evidence was left unscrutinized. Whereas the testimony of Detective Remine was at times ambiguous and inaccurate, the Ninth Circuit found the testimony of Mr. Close reliable, highly probative, internally consistent, and plausible. Furthermore, the Ninth Circuit, like the state courts, found no motive for Attorney Close to perjure himself. They subsequently dismissed the possibility of fabrication:

> We think it highly improbable that a 16-year-old boy, of limited mental acuity and with a minimal police record. . .had the wherewithal to concoct a tale of police intimidation, filled with graphic details, in the short span between the end of his interrogation and his phone call to Close. Taylor was a teenager without a parent, attorney or friend, taken from his home at gunpoint in the dead of night and then questioned at length by two police officers, and thus was particularly vulnerable to the inherently coercive environment in which he found himself [Record, p 5921-2 (*Taylor*, no. 02–55560)].

5. Admission of the confession was not harmless. It was the only solid evidence against Mr. Taylor and also the most damaging. There was neither eyewitness identification nor physical evidence. The jury did not hear Mr. Close's testimony, which closely corroborated many details of Mr. Taylor's account of events. The admission of the confession arose from disbelief of the defendant. The court's decision not to lend credibility to Mr. Taylor precluded a consideration of defense testimony, which in turn constituted trial error and therefore probably had a "substantial and injurious" impact on the outcome of the case.

Discussion

Taylor v. Maddox demonstrates the complexity that exists when certain adult legal standards are routinely applied to juveniles without consideration of accompanying developmental issues. Many states do not allow minor suspects to be questioned without permission from a parent. While persons of all ages are vulnerable to coercive interrogation tactics, coercion is of even greater concern with child suspects. Developmental considerations should inform the decision as to whether a child can understand, much less invoke or waive, his or her *Miranda* rights. Parents are arguably in the best position to help with this determination. The safest course to ensure protection of *Miranda* rights for child suspects and to minimize the specter of false confessions would be to have all states (1) obtain parental authorization prior to a child's being interrogated or provide documentation of reasonable efforts to contact the legal guardians if they are unavailable and (2) create and preserve adequate documentation (i.e., videotaping) of the entire law enforcement interview process.

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