

4. Listed as aggravating factors were Mr. Zawada's 25 years of experience practicing law, prior known wrongful conduct, and his unwillingness to recognize his misconduct. In mitigation, Mr. Zawada had no prior record of discipline with the Bar.

#### Discussion

This case serves as an affirmation of the significance of mental health expert witness testimony. Much of the prosecutorial misconduct in this case occurred during cross-examination of the mental health expert. At one point during the trial, the prosecuting attorney stated, ". . . I know. . . a lot of people in the legal system think that these people [expert witnesses] have something to add to what's going on; I don't. . . ." Subsequently, the prosecuting attorney moved for a mistrial, a motion that was labeled by the court as "patently frivolous." By assigning sanctions and disciplinary review against the prosecuting attorney, the Supreme Court of Arizona acknowledged that mental health expert witnesses do play a vital role in a fair trial.

The trial process is an adversarial one. It is not uncommon for expert witnesses to feel defensive when their credentials or findings are challenged. In such scenarios, the expert witness' ability to maintain composure is important to the preservation of his or her credibility. During the court trial in this case, however, the expert witness' vocation itself was attacked. The Supreme Court of Arizona made it clear that such an attack falls outside the boundaries of ethical conduct in the adversarial process, as expert witnesses are important participants in the judicial system. The decision is notable in reminding forensic experts that they operate under the assurance that, even as they work in an adversarial context in which their findings may be held to scrutiny, the fundamental nature of their roles is afforded respect by the court. In keeping with the respect that has been afforded them, expert witnesses must also uphold their own ethical boundaries to assist triers-of-fact in a fair and effective manner.

Jennifer L. Farrell, MD  
Resident in Psychiatry

Sharon M. Tisza, MD  
Assistant Clinical Professor of Psychiatry  
Forensic Psychiatry Program  
John A. Burns School of Medicine  
University of Hawaii at Manoa  
Honolulu, HI

## Death Row Inmates and Mental Health

### ***Deliberate Indifference to Mental Health Conditions Poses a Substantial Risk of Serious Harm to Death Row Inmates***

In *Gates v. Cook*, 376 F.3d 323 (5th Cir. 2004), the court considered whether the trial court erred in issuing a "Final Judgment" mandating that the Mississippi Department of Corrections (MDOC) comply with 10 detailed injunctions. These injunctions addressed Eighth Amendment violations for death row prisoners at the Mississippi State Penitentiary in Parchman, Mississippi (Parchman). This appeal was sought by Mississippi prison officials.

#### *Facts of the Case*

Willie Russell, a death row prisoner, brought suit against officials of the MDOC on behalf of himself and others similarly situated on death row, Unit 32-C, at Parchman. Mr. Russell alleged that inmates were knowingly and deliberately subjected to conditions that violated the Eighth Amendment's prohibition against cruel and unusual punishment. These conditions included unsanitary conditions, insect infestations, high temperatures, insufficient mental health care, and exposure to the noise of psychotic inmates.

In May 2003, a magistrate judge found that the conditions violated the Eighth Amendment and entered 10 injunctions for MDOC to address the conditions. When MDOC appealed the district court's decision, the Fifth Circuit Court of Appeals granted a stay of the injunctive order, pending appeal by the MDOC, which argued that the trial court's finding of facts was clearly erroneous.

#### *Ruling and Reasoning*

The court vacated three injunctions in their entirety, as they were found not to be justified by conditions that violated the Eighth Amendment. The remaining seven injunctions were affirmed, although some were affirmed only as they applied to Unit 32-C (death row inmates), as opposed to all of Unit 32. The injunction regarding requirements to alleviate problems stemming from allegedly inadequate mental health care afforded to inmates on death row was affirmed.

In reviewing the question of whether the conditions on death row violated the Eighth Amendment,

the court first reviewed the Eighth Amendment Standard and observed:

The Constitution does not mandate comfortable prisons, but neither does it permit inhumane ones [citation omitted]. Prison officials must provide humane conditions of confinement; they must ensure that inmates receive adequate food, clothing, shelter, and medical care and must take reasonable measure to ensure the safety of the inmates [citation omitted]. This circuit has worded the test as requiring extreme deprivation of any “minimal civilized measure of life’s necessities” [citation omitted]. Further, mental health needs are no less serious than physical needs (at 332).

In addition, the court reviewed the standard for Eighth Amendment violations by a prison official, as enumerated by *Farmer v. Brennan*, 511 U.S. 825 (1994): subjective deliberate indifference to conditions posing substantial risk of serious harm. Additive effects of deprivations and the interaction of such deprivations over extended lengths of time were noted to create conditions that might meet the level of an Eighth Amendment violation.

The court addressed the MDOC’s challenge to each of the 10 injunctions. Injunctions 1 and 2 related to the sanitary conditions of the cells of Unit 32-C. Because the unsanitary conditions were not atypical and were easily observable, they rose to the level of deliberate indifference on the part of MDOC officials. These injunctions were affirmed. Injunctions 3, 8, and 10 were vacated. They related to a requirement that the MDOC produce a written preventative-maintenance program, to circumstances surrounding the inmates’ laundry, and to conditions of inmates’ exercise, respectively. The court found that, although changes in these areas would be desirable, they did not meet a standard of violation of the Eighth Amendment.

Injunctions 4 and 5 related to high temperatures and limited ventilation during the months of May through September and pest control in Unit 32. The court noted that Mr. Russell did not need to show that death or serious illness had yet occurred to obtain relief and that the conditions of high heat rose to the level of deliberate indifference by MDOC officials. The injunctions were affirmed. The extension of the injunctions to non-death row inmates who were not represented by Mr. Russell was found to exceed the scope of the litigation and therefore to be invalid.

Injunction 6 related to plumbing problems in Unit 32 resulting in “ping-pong toilets,” where waste flushed down one toilet would reappear in the toilet

in the adjoining cell. The court found that the MDOC officials had been warned of the problem for more than 10 years and that this met the level of deliberate indifference, despite any attempts at corrective action. In addition, Mr. Russell had proven substantial risk of serious harm. This injunction was also affirmed.

Injunction 7 related to dim lighting in the cells. The court found that MDOC’s assertions that they were in the process of remedying the problem were insufficient to moot the issue. This injunction was supported by injunctions 1, 2 (that adequate lighting was necessary for hygiene), and 9 (that adequate lighting was necessary for mental health). The injunction was affirmed as it related to Unit 32-C.

Injunction 9 related to mental health services. The injunction ordered compliance with correctional medical and mental health standards. The injunction also required annual comprehensive mental health examinations in a private setting for all death row inmates. The MDOC was ordered to house separately inmates with psychosis and other severe mental illnesses and to monitor psychotropic medications according to medical standards. Although MDOC argued that it was already in compliance with American Correctional Association (ACA) standards, the court found that the testimony from the trial court provided ample evidence that the environment of death row was “toxic” to the mental health of the inmates. The injunction was affirmed.

The court reaffirmed mental health parity (“[M]ental health needs are no less serious than physical needs.” [at 328]) and cited two previous decisions by the Fifth Circuit on the issue. The court did not require evidence that harm had already occurred, only that “the substantial risk of serious harm” existed.

#### Discussion

This case illustrates the importance of mental health treatment for prisoners and the false reassurance an institution may have in meeting the standard of a correctional accrediting agency. The court found that absence of regular and private mental health evaluations and exposure to psychotic inmates constitute cruel and unusual punishment. Poor hygiene, isolation, sleep deprivation, high temperatures, and dim lighting were all considered to be contributing factors to the risk of mental health deterioration. Compliance with ACA standards was found to be

“incongruous,” since the mental health conditions on death row were “grossly inadequate.” A 1994 report by Amnesty International (“Conditions of Death Row Prisoners in H-Unit, Oklahoma State Penitentiary,” May 1994) also questions whether the ACA standards are adequate.

Although the court in this case affirmed the injunction related to mental health, the feasibility of the injunction’s terms may be questionable. Regarding the injunction that MDOC must provide annual mental health evaluations and follow-up in a private setting, the feasibility of privacy in correctional facilities in general is questionable if they were not designed with accessible, soundproof interview rooms. The feasibility of housing death row inmates with psychosis separately from other inmates is also questionable. Perhaps this case, with others in which prisoners file suit to improve living conditions, will have an impact on the design of correctional facilities and raise the standards of the ACA, thereby facilitating the role of the correctional psychiatrist.

Melissa Piasecki, MD  
Fellow in Forensic Psychiatry  
John A. Burns School of Medicine  
University of Hawaii at Manoa  
Honolulu, HI

## Competence to Waive Death Penalty Appeals

### ***Prisoner’s Decision to Waive Death Penalty Appeals Does Not Constitute Incompetence***

In *Dennis v. Budge*, 378 F.3d 880 (9th Cir. 2004), the court reviewed the denial of a “next friend” petition for *habeas corpus* and of a motion for stay of execution. The petition had been filed by the former attorney of an inmate who was scheduled to be executed, who had denied his appeals, and who had previously been found competent to waive appeals despite an opinion to the contrary by a state district court-appointed psychiatrist. The U.S. Court of Appeals for the Ninth Circuit affirmed the order and denied the stay of execution, ruling that, because the state’s finding of competency to waive appeals had not been rebutted, “next friend” standing did not apply.

### *Facts of the Case*

Terry Dennis pled guilty in state district court to first-degree murder, for which the state intended to seek the death penalty. After undergoing a psychiatric evaluation, Mr. Dennis was found by the court to be competent to stand trial and to enter a guilty plea. At the penalty phase, Mr. Dennis’s background of family abuse and his history of bipolar disorder, post-traumatic stress disorder, and suicide attempts were presented. Mr. Dennis was sentenced to death, and the Nevada Supreme Court affirmed.

Mr. Dennis’s petition for writ of *habeas corpus* was dismissed without an evidentiary hearing. With his appointed *habeas* counsel, Karla Butko, Mr. Dennis appealed to the Nevada Supreme Court. Before the appeal was heard, Mr. Dennis withdrew his appeal, explaining in a written letter to the court that he had met with his attorney and that “I no longer wish to pursue any appeals and want my sentence to be carried out.”

Ms. Butko nevertheless filed an opening brief. Mr. Dennis then wrote the District Attorney to reiterate his wish to discontinue his appeals. Ms. Butko continued the appeals process because she was unsure whether Mr. Dennis was “ready to make a knowing, intelligent and voluntary relinquishment of his right to appeal.” On October 22, 2003, the Nevada Supreme Court granted a motion for an evidentiary hearing on the question of Mr. Dennis’s competency to waive his appeal.

On November 7, 2003, Ms. Butko moved to withdraw from Mr. Dennis’s case because his desire to waive his appeal was “repugnant to her.” The motion was granted.

On November 24, 2003, a court-appointed psychiatrist, Dr. Thomas E. Bittker, examined Mr. Dennis and obtained collateral information. In addressing questions posed by the court, Dr. Bittker’s report indicated that Mr. Dennis had sufficient present ability to consult with his attorney with a reasonable degree of rational understanding; that Mr. Dennis had a rational and factual understanding of the proceedings, including the death penalty; and that, for his bipolar disorder, Mr. Dennis was taking appropriate medications that did not impair his capacity to make decisions. However, Dr. Bittker maintained with a reasonable degree of medical certainty that Mr. Dennis’s desire to seek the death penalty and to refuse appeals were more likely to be based, not on a realistic desire for atonement, but on