

One issue not discussed by the court that this case raises is the role of experts when testifying to what have traditionally been fact-finder issues. In this case, the psychologist was encouraged to testify on whether a defendant qualified for legal terms of art, such as “mental abnormality” and “sexually violent predator.” The appellant correctly argued that the terms were not validated within the field of psychiatry or psychology. The traditional role of the expert has been to educate the court, not to make legal decisions about who qualifies under a legal definition. Much of the difficulty could have been avoided had the expert limited her testimony to the diagnoses that the defendant had met, the risk factors for recidivism (from the Act and otherwise), and how these relate to his risk.

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Release of Insanity Acquittees

Polysubstance Dependence and Personality Disorder, Not Otherwise Specified, Were Held to Be Mental Diseases for Purposes of Continued Civil Commitment of an Insanity Acquittee

In *State v. Klein*, 124 P.3d 644 (Wash. 2005), the Washington State Supreme Court held that polysubstance dependence and personality disorder, not otherwise specified (NOS), constituted mental disease for the purpose of continued commitment of an insanity acquittee. The court also held that the presence of the same mental disease that formed the basis for the NGRJ acquittal was not necessary for ongoing commitment.

Facts of the Case

The petitioner, Tina Klein, stabbed her 20-month old nephew with a butcher knife while in a cocaine-induced psychosis. The victim’s parents successfully intervened to save his life. Ms. Klein was found not guilty by reason of insanity and granted conditional

release. She repeatedly violated the terms of her conditional release by abusing methamphetamine and marijuana and failing to report to her probation officer.

The trial court revoked Ms. Klein’s conditional release and ordered her admitted to Western State Hospital on November 27, 2001 (eight years after her acquittal). Ms. Klein received diagnoses of polysubstance dependence, in full sustained remission, in a controlled environment and personality disorder, NOS, with borderline, antisocial, and passive-aggressive features.

After unsuccessfully petitioning for transfer to a residential substance abuse treatment program, Ms. Klein petitioned the trial court for full release on the basis that she no longer had a mental disease or defect because her polysubstance dependence was “in remission.” At a hearing on the petition, the experts for the state and defense both reached similar diagnoses but disagreed as to whether Ms. Klein’s diagnoses legally constituted mental diseases. The state’s expert testified that Ms. Klein had a “moderate” risk of reoffending, and the defense expert testified that she had a “low to moderate” risk of reoffending. The state’s expert testified that Ms. Klein had a “rather high” risk of experiencing another psychotic episode if she returned to using drugs and that her risk of reoffending would be “much higher than the average individual” if she returned to using drugs.

The trial court denied Ms. Klein’s petition for full release and held that Ms. Klein “continues to suffer from a mental disease or defect” and “remains a substantial danger to others and presents a substantial likelihood of committing criminal acts jeopardizing public safety, as a consequence of her mental disorder.” Ms. Klein appealed both findings to the court of appeals, which affirmed the trial court’s findings.

Ms. Klein appealed to the Supreme Court of Washington. There were three issues before the court. First, whether there was substantial evidence in the record to support the finding that Ms. Klein continued to have a mental disease or defect; second, whether insanity acquittees with a mental disease other than the one that formed the basis for their acquittal must be unconditionally released; and third, whether there was substantial evidence in the record to support the finding of ongoing dangerousness.

Ruling

The Washington Supreme Court affirmed the court of appeals by a six to three vote. The court held that polysubstance dependence, in remission, constitutes a mental disease and that an insanity acquittee need not continue to have the same mental disease or defect that formed the basis for the acquittal to be eligible for continued commitment. The court held that there was sufficient evidence in the record to support the finding that Ms. Klein presented a substantial danger to others or a "substantial likelihood of committing criminal acts jeopardizing public safety or security."

Reasoning

Whether Ms. Klein had a mental disease is a question of fact. Whether polysubstance dependence is a mental disease is a matter of law. The court noted that the legislature had not defined the terms "mental disease or defect." Thus, courts may apply the dictionary meaning to the term. The court recognized the terms "mental disease or defect" as "often synonymous with" the term "mental disorder," as used in the DSM IV-TR. However, the court included the caveat that not all disorders in the DSM "will rise to the status of 'disease or defect' under our statutes." The court reasoned that there were sufficient statutory safeguards to prevent the definition of "mental disease or defect" from becoming overly inclusive. A finding of NGRI, for example, implicitly requires that the mental disease be of sufficient severity to prevent the defendant from knowing the wrongfulness of his or her act. Continued commitment of an insanity acquittee requires a finding that the individual has a mental disease or defect and poses a danger to others due to mental disease or defect. This implicitly excludes disorders that "do not manifest themselves by dangerous behavior and therefore cannot support continued custody." Furthermore, the court noted that Washington law presumes that an NGRI acquittee "continues to be insane." Therefore, dangerousness, not the presence of mental disease, will continue to be the "primary inquiry" in the release statute.

The court rejected Ms. Klein's argument that a mental disease that is in remission is no longer a mental disease. The court noted that the state's expert testified that Ms. Klein's polysubstance depen-

dence was only in remission because she was in a controlled environment.

With regard to Ms. Klein's argument that she must be unconditionally released because she no longer had the same mental disease that formed the basis for her insanity acquittal, the court found this argument unpersuasive for four reasons. First, the court noted that the Washington statute modifies the term "mental disease or defect" with the indefinite article "a." Second, the court noted that Ms. Klein's polysubstance dependence was reasonably related to the condition that formed the basis for her acquittal. Third, requiring the presence of the same mental disease would undermine public safety. An acquittee may recover from the original mental disease but may remain equally dangerous due to a "related disorder." Fourth, requiring the presence of the same mental disease would be impractical because of changing diagnostic terminology and disagreement among examining psychiatrists. The majority observed, "... to mandate release based on mere semantics would lead to absurd results and risks to the patient and the public."

The court rejected Ms. Klein's argument that there was insufficient evidence of dangerousness presented at the hearing. The court noted that Ms. Klein bore the burden of proving the absence of mental disease or lack of dangerousness and that both experts testified that Ms. Klein "did pose a substantial danger if she returned to drugs."

Dissent

In a vigorous dissent, Justice Saunders argued that, as a matter of law, polysubstance dependence is not a mental disease or defect because "it is well-settled that drug addiction is not a legal 'mental disease or defect.'" Therefore, Ms. Klein should have been unconditionally released because she "isn't insane. She's a drug addict."

Discussion

The *Klein* decision is significant because it expanded the definition of "mental disease" to include substance dependence, which is often explicitly excluded from legal definitions of mental disease. Furthermore, by expanding the definition of mental disease, it lowered the threshold for the continued commitment of insanity acquittees.

Courts granted insanity acquittees greater protection during the 1960s and 1970s. For example, in *People v. McQuillan*, 221 N.W.2d 569 (Mich.

1974), the Michigan Supreme Court struck down a statute that provided for the automatic commitment of insanity acquittees. The court held that the statute violated Equal Protection and Due Process. However, fueled by community concern after the *Hinckley* insanity verdict, courts and legislatures have applied increasingly stringent safeguards to the release of insanity acquittees. In *Jones v. United States*, 463 U.S. 354 (1983), the Supreme Court held that it was constitutionally permissible to indefinitely confine NGRI acquittees unless they prove they are no longer mentally ill or dangerous. The *Jones* Court reasoned that the NGRI finding was “sufficiently probative of mental illness and dangerousness” to justify a presumption of ongoing mental illness and dangerousness.

The Insanity Defense Reform Act of 1984 (18 U.S.C. § 4243 (1984)) required federal insanity acquittees who were found NGRI of an offense involving “bodily injury” or “serious” property damage to prove by clear and convincing evidence that release would not “create a substantial risk of bodily injury to another person or serious damage to the property . . . due to a present mental disease or defect.” With respect to all other offenses, the burden of proof is on the acquittee, by preponderance of the evidence.

In an exception to the trend of reducing the threshold for the commitment of insanity acquittees, the Supreme Court held in *Foucha v. Louisiana*, 504 U.S. 71 (1992), that commitment of an insanity acquittee required both the presence of mental disease and dangerousness due to the mental disease. Of note, Washington was among six states that allowed continued commitment of insanity acquittees based on dangerousness alone before *Foucha*. By expanding the definition of “mental disease,” the *Klein* decision granted lower courts greater latitude in continuing the commitment of insanity acquittees.

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Defendants’ Rights

A Defendant’s Right to an Independent Psychiatric Expert Does Not Include the Provision of State Funds to Hire an Expert Chosen by the Defendant

In *Davis v. Norris*, 423 F.3d 868 (8th Cir. 2005), the Eighth Circuit Court of Appeals addressed the claim that a state court’s refusal to provide funds for the defense to hire a psychiatrist to assess potential mitigating factors at the capital sentencing phase of a trial violates due process. In a narrow interpretation of *Ake v. Oklahoma*, 470 U.S. 68 (1985), the court rejected the proposed expansion of rights to which an indigent defendant is entitled.

Facts of the Case

Don William Davis received the death penalty for the murder of Jane Daniel, plus 80 years’ imprisonment for burglary and theft. Mr. Davis, an indigent defendant, pled not guilty by reason of mental disease or defect, and, per Arkansas law, the court suspended proceedings and ordered a psychiatric evaluation. Dr. Jenkins, a psychiatrist at a regional mental health clinic, concluded that Mr. Davis was not incompetent or insane, but that he did show evidence of attention deficit hyperactivity disorder (ADHD). Mr. Davis then underwent a 30-day extensive evaluation at the Arkansas State Hospital in which examiners also concluded that Mr. Davis was competent to stand trial and was not insane at the time of the alleged crime. Mr. Davis subsequently moved for funds (\$2,000) to hire Dr. Marr, a clinical psychologist, to perform an independent psychological evaluation for the purpose of assisting the defense in the delineation of mitigating factors which could be at issue in the penalty phase. The defense cited *Ake v. Oklahoma*, 470 U.S. 68 (1985) as precedent for this additional evaluation. The defense contended that the first two evaluations did not specifically address mitigating factors and were “undertaken on behalf of the court and [were] not protected by physician-patient confidentiality or evidentiary privilege.” The trial court denied the request and the trial proceeded. Since it had no substantiating evidence, the defense did not rely on an insanity defense at trial. Mr. Davis was found guilty. Dr. Jenkins testified during the penalty phase at the request of the defense.

After exhausting his state court remedies, Mr. Davis filed a petition for a writ of *habeas corpus*. The