> evidence must be applied to justify further retention [*Ernst J.*, 452 F.3d, pp 195–6].

The court found merit in the petitioner's argument and viewed the issue of appropriate standard for commitment to be "a close question" in not only this case but in the preceding case of *Francis S. v. Stone*. The court further indicated that the constraints of review for a *habeas* case prevented it from giving full consideration of the questions raised by the petitioner and concluded that although the:

> . . . petitioner is not entitled to habeas relief, we do not endorse the constitutional analysis of the Appellate Division other than to say that it was not objectively unreasonable, nor do we foreclose the possibility that other NRRMDD defendants who are subjected to New York's recommitment procedure may raise constitutional objections to that procedure or seek relief through other legal means [*Ernst J.*, 452 F.3d, p 202].

Discussion

Standards for psychiatric commitment have long been debated in U.S. judicial history. Since *Addington v. Texas*, 441 U.S. 418 (1979) set the threshold for civil commitment at clear and convincing evidence, authorities have debated the abridgment of this standard in various circumstances. In *Jones*, the Supreme Court ruled that differences between potential civil commitment candidates and criminally charged acquittees provided justification for different standards of proof on initial commitment.

However, *Ernst J.* raises the complicated question about how long such differences can be justified: does an insanity acquittee, treated for a psychiatric disorder and then deemed no longer dangerous to self or others and released to the community, remain in the exceptional class when experiencing an exacerbation of mental illness? The question is complicated by the convergence of psychiatric and legal conditions that cloud a logical consideration of both risk and protection of rights. Under New York statute, a person with severe mental illness who, convicted of a violent crime after a failed insanity defense, must be involuntarily committed by a standard of clear and convincing evidence. Had the same person been successful in the insanity defense and released to the community, recommitment would occur at the lower standard of preponderance of the evidence. This outcome based on status as an insanity acquittee could serve as a point of contention, as illustrated by the Second Circuit Court of Appeals, in stating that had the matter been presented as "an initial question of federal constitutional law, unconstrained by section 2254(d)(l), we might well rule that [a constitutional] violation has been shown" (*Ernst J.*, 452 F.3d, p 197).

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Continued Psychiatric Hospitalization After Competency Restoration

Should a Defendant be Committed to a Psychiatric Facility After Restoration of Competence in Order to Maintain Competence Throughout the Legal Proceedings?

In *In re: Tavares*, 885 A.2d 139 (R.I. 2005), the Rhode Island Supreme Court reviewed the superior court's order continuing the commitment of defendant, Anthony Tavares, to the forensic unit of the Department of Mental Health, Retardation and Hospitals (MHRH) after Tavares had been found to be restored to competency by psychiatric examination. MHRH had filed a petition arguing that the superior court had improperly ordered continued commitment of a defendant who had been restored to competency.

Facts of the Case

On November 10, 2001, Tavares was arrested and charged with the murder of Glen Hayes, his social worker. Hayes was making a routine home visit with Victor Moniz, a psychiatric nurse, on November 9, 2001, to deliver psychiatric medication to Tavares, who had a long history of chronic paranoid schizophrenia, substance abuse, and multiple psychiatric hospitalizations. As the visit progressed, the defendant made increasingly bizarre statements and asked the providers if they would pray to Satan with him. As the providers prepared to leave, Tavares stabbed Hayes in the head with a knife and punched Moniz. After the attack, Tavares fled the scene and was arrested the following day.

Shortly after his arrest, the district court judge found Tavares incompetent to stand trial and committed him to the forensic unit at Eleanor Slater Hospital (ESH), a facility under MHRH. After an ex-

tended stay for restoration during which he assaulted a social worker and required forced medication (by court order), he was determined to be restored to competency. Dr. Wall, the MHRH evaluating psychiatrist, had prepared a report and was prepared to testify at the restoration hearing. At the time of the restoration hearing, however, the defense and the state stipulated to the defendant's competency and further stipulated that for Tavares to remain competent, it would be necessary for him to stay at ESH because he probably would decompensate if he returned to the Adult Corrections Institutions (ACI). MHRH objected to the continued commitment and argued that the forensic statute mandated a termination of commitment once competency had been attained.

On September 27, 2002, four months after Tavares was restored to competency, the hearing justice ruled Tavares would remain at ESH, to ensure that he retained his competency throughout the legal proceedings and the remainder of the trial. The superior court rejected MHRH's argument that the section of the Rhode Island forensic statute pertaining to competency to stand trial required immediate discharge upon attaining competency and held that the statute allowed for judicial discretion and that the court had a duty to ensure that Tavares remained competent throughout his trial.

On May 22, 2003, the Rhode Island Supreme Court granted MHRH's petition for *certiorari*. In October 2004, Tavares was found not guilty by reason of insanity for the murder of Hayes in a bench trial in superior court and was subsequently committed to ESH under a different section of the forensic statute relevant to insanity acquittees. Because of Tavares' commitment under that section of the statute, the supreme court asked both parties to consider whether the issue raised by MHRH was now moot. Both sides conceded that the court's ruling to continue Tavares' commitment as a defendant had become moot by reason of his acquittal and subsequent committal under the insanity provision of the forensic statute; however, both parties contended that the issue was of significant public importance and was likely to occur in other cases and therefore requested that it be resolved. The supreme court agreed and held that "although moot with respect to Tavares, [it] presents an issue of great importance that warrants our review at this time."

Ruling

On November 10, 2005, the Rhode Island Supreme Court affirmed the order of the superior court for the continued commitment to MHRH of the defendant who had been restored to competency.

Reasoning

The Rhode Island Supreme Court presented its reasoning around three constructs: an overview of forensic commitment, of legislative intent, and of judicial responsibility to ensure competency. The Rhode Island statute regarding forensic commitment provides that persons being committed or transferred have a right to receive care that is appropriate, necessary, and based on individual needs. MHRH argued that the superior court erred when it ruled that the statute permits exercise of judicial discretion to consider Tavares' special treatment needs and that because the provision is "clear and unambiguous," and not in conflict with other areas of the statute, it is improper for the hearing justice to consider the rationale of the chapter as a whole, in that it neither requires nor allows a judge to consider a defendant's continued competence to stand trial after restoration.

Although the supreme court agreed with MHRH that the wording "commitment . . . shall terminate" is unambiguous, the court disagreed with MHRH's strict interpretation that would prohibit the hearing justice of the superior court from proactively taking necessary steps to prevent a psychiatrically fragile defendant from decompensating. Such an interpretation would force the judge to ignore legitimate concerns regarding the maintenance of competency and allow him to act only when the defendant decompensates to the point of once again becoming incompetent, thus forcing the trial to halt until competency is restored. The supreme court opined that the rigid and formalistic interpretation of the statute would frustrate the dual purpose of legislative intent to protect the defendant's right to be competent during the trial and to serve the public's interest in prosecuting crimes. In its opinion, the court considered "the legislative scheme to be remedial in nature," and the legislative intent of the treatment of incompetency to be for the purpose of assuring that "competent defendants would be tried." The court held, first, that there was ample evidence from the record to support the hearing justice's ruling that Tavares' competence "would be fleeting without the specialized treatment

he was receiving at ESH," and that decompensation to the point of incompetency was likely and, second, that judicial discretion to assure continued competency was appropriate:

> We [the Rhode Island Supreme Court] are loath to tie justices' hands by precluding them, in proper cases, from taking steps to ensure a defendant's competency. . . . [It] is therefore reasonable for judges, charged with the responsibility of ensuring a defendant's competency, to make legal assessments about whether a defendant's competency is likely to continue during the trial [*In re: Tavares*, 885 A.2d, p 151].

In response to the MHRH's argument that the statutory provision for immediate release from hospitalization of a competent defendant both protects the liberty interests of defendants by ensuring that they are not held indefinitely when they could be treated in a less restrictive environment (e.g., corrections) and also prevents a drain of mental health system resources, the court agreed that protection of defendants' rights is an appropriate concern but held that any concern around the protection of resources is "merely incidental to the statutory framework's paramount goal of protecting the rights of the accused" (*In re: Tavares*, 885 A.2d, p 149). The MHRH argued that "restoration of competency never comes with a guarantee," and judges may be acting on "amateur clinical assessment and unfounded speculation," in ordering commitment beyond a finding of competency. The supreme court disagreed, emphasizing that although the courts often rely on expert psychiatric testimony regarding the initial question of competency and the restoration of competency, it is ultimately a judicial, not a medical, responsibility to both find and ensure competency.

Discussion

The Rhode Island Supreme Court's decision in *Tavares* exemplifies the complex interface between psychiatry and the law at the levels of both practice and policy. Several factors converged to make this case unique. The length of time from arrest of Tavares to the resolution of the MHRH petition to the supreme court was around four years. Indeed, the decision was moot to Tavares' case because his trial had been completed, and he had been committed as an insanity acquittee before the supreme court deliberated. The case continued because of the second factor central to *Tavares*—the policy-level concern related to the cost and availability of forensic psychiatric services in the state hospital. From the MHRH perspective, both the practice of holding defendants in the hospital to maintain competency and the judicial discretion to order such a stay impinge on the power of the MHRH to control access and treatment decisions. The MHRH had recently challenged other court decisions on the same issue of control of access to inpatient services. In *In re: Shehan*, 1997 R.I. Super. Lexis 117 (R.I. 1997), an inmate transferred to the MHRH by a corrections psychiatrist for inpatient treatment challenged the right of the MHRH to return the inmate to prison after treatment without a court hearing. The superior court of Rhode Island agreed with the inmate and ruled that proper care and treatment of all persons in the custody of the MHRH was a fundamental benefit conferred on a defendant and thus fell within the categories of rights required by due process and equal protection principles, which mandated a hearing before the termination of that benefit.

In a similar case, *In re: Nem*, 2002 R.I. Super. Lexis 40 (R.I. 2002), the MHRH petitioned to transfer a defendant from the forensic unit of a hospital back to the ACI while the defendant still needed treatment, stating that he could be treated adequately in the ACI. The court held that a defendant had the right to a hearing on any petition filed by the MHRH to transfer back to corrections; in the court's opinion, the defendant, although improved, continued to require specialized mental health services that could not be provided in prison; therefore, the petition was denied.

Collectively, the three cases reflect a trend, at least in Rhode Island, toward legal determination of discharge from mental health services for criminal defendants. The court decision creates a schism between the usual practice of psychiatry, which controls admission and discharge in civil cases, and forensic psychiatric services, for which courts decide the lengths of stay for the treatment of mentally ill defendants. The MHRH's concern is appreciated. In a time of limited psychiatric resources, court-controlled access to limited inpatient beds for often lengthy hospitalizations increases the tension between the criminal justice system concerned with justice and the rights of mentally ill defendants and the mental health system charged with the care of all citizens who have psychiatric disorders. Legal battles and decisions tend to polarize the perspectives as one side loses and one wins. More effective might be a collaboration between state agencies to create effec-

tive psychiatric care units within corrections settings to serve defendants and sentenced prisoners.

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The Scope of Mitigation in the Death Penalty

Court Rules on Limits of Mitigation

In *Moore v. Parker*, 425 F.3d 250 (6th Cir. 2005), the U.S. Court of Appeals for the Sixth Circuit reviewed the denial by the U.S. District Court for the Western District of Kentucky at Louisville of Keith Moore's petition for a writ of *habeas corpus* based on ineffective assistance of counsel in a capital murder case.

Facts of the Case

In 1984, a Kentucky jury convicted Brian Moore of the 1979 kidnapping, first-degree robbery, and murder of a 77-year-old man, Virgil Harris. A mitigation psychologist, Dr. Bresler, was to testify during the penalty phase of the trial but was exposed for fraudulent practices and was not called during sentencing. Moore was sentenced to death, and the Kentucky Supreme Court affirmed his conviction in 1988. Moore appealed to the United States Supreme Court, which denied *certiorari* in 1990. Moore then filed a motion to vacate his sentence in state criminal (trial) court citing ineffective assistance of counsel. While that motion was pending, Moore filed a motion for a new trial in the state civil court based on new evidence. In considering the second motion, the trial court allowed Moore to present the new evidence, which included the testimony of a mitigation expert, a master's level psychologist, Dr. Veltkamp, who interviewed Moore for three to four hours. Both of Moore's motions were denied in January 1997. The Kentucky Supreme Court affirmed this decision in 1998, and the United States Supreme Court denied *certiorari* in 1999.

In November 1999, Moore filed a petition for *habeas corpus* in the district court on the basis of ineffective assistance of counsel, trial errors, prosecutorial misconduct, a due process violation, and violation of *Miranda* rights. The district court ruled that Moore's claims were either meritless or procedurally defaulted. Moore then appealed to the Sixth Circuit, which granted him a certificate of appealability to examine five claims. In one of those claims, he argued that his counsel was ineffective because he had inadequately prepared for the penalty phase, as evidenced in three ways: he had spent only three percent of the preparation time on the penalty phase of the trial, he had failed to conduct a thorough investigation of Moore's background for mitigation, and he was negligent in not replacing the first mitigation psychologist who had been dismissed for fraud.

Ruling

The Sixth Circuit Court ruled to affirm the district court's denial of Moore's writ of *habeas corpus*.

Reasoning

The court reviewed the case in accordance with the standard set forth by the Antiterrorism and Effective Death Penalty Act (AEDPA), which allows *habeas* relief only if the district court's decision "was contrary to, or involved an unreasonable application of clearly established federal law, or was based on an unreasonable determination of the facts." *Strickland v. Washington*, 466 U.S. 668 (1984) established the standards for adjudicating ineffective assistance claims, requiring that a claimant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defense such that, but for counsel's deficiencies, there was a reasonable probability that the outcome would have been different.

The court ruled that Moore's counsel had adequately prepared for the penalty phase, in that sufficient mitigation evidence had been presented at sentencing. It cited several witnesses (Moore's aunt and cousin, two reverends, and his prison "boss"), who testified at his sentencing hearing and offered mitigation regarding his childhood and potential for rehabilitation. The court further held that Moore's expert, who testified at a hearing after the sentencing, had given testimony to the district court, which characterized the testimony as presenting "Moore as an easily angered, impulsive, out-of-control emotional leech with poor judgment." The court reasoned that more mitigation would underscore his dangerousness and generate even less sympathy among the jury