

Discussion

The decision of the Supreme Court of Minnesota to uphold the lower court's ruling in this case was made largely on legalistic grounds. It decided not to consider the issue of M'Naughten's constitutionality because it was procedurally barred from doing so. However, the substantive issue at hand—whether M'Naughten is the right test of legal insanity in adolescents—is an interesting one that may arise again in the coming years. At present, 10 states use a strict M'Naughten rule, and 15 others use a slight variation as the legal test of insanity. Of these states, several, including Florida, Nebraska, and North Carolina, have no statute that defines the test (it is instead based on case law). Given the right combination of a compelling case and a jurisdiction in which the issue cannot be deferred to the legislature, the courts may well be forced to consider whether the M'Naughten rule should be applied to adolescent defendants.

Mr. McLaughlin cited *Roper v. Simmons* as a basis for his argument that adolescents are less able to control their impulses than adults and therefore should not be subject to a test of insanity that is purely cognitive. In *Roper*, the U.S. Supreme Court held that the execution of a defendant for crimes committed before age 18 violates the Eighth Amendment prohibition against cruel and unusual punishment. The Court made this decision in part on the basis of “society's evolving standards of decency” and a “national consensus against the death penalty for juveniles” (*Roper*, p 563). In his majority opinion, Justice Kennedy wrote, “As any parent knows and the sociological and scientific studies . . . tend to confirm, a lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults” (*Roper*, p 569). He further explained that “the susceptibility of juveniles to immature and irresponsible behavior mean[s] that their irresponsible conduct is not as morally reprehensible as that of an adult” (*Roper*, p 570) and stressed the “diminished culpability” of juveniles as a reason not to count them among the worst offenders deserving the death penalty.

Although *Roper* addressed capital punishment rather than the insanity defense, the language and reasoning in the decision opened the door for the attorney in this case to ask the question: if adolescents should not be put to death because their brains are not fully developed, then why should we hold them responsible for their crimes in the same way? Apply-

ing *Roper* in this manner is stretching a bit, even though the AMA *amicus* brief provides some support to the argument by outlining the scientific evidence that adolescent brains are underdeveloped in areas modulating impulse control, risk assessment, and moral reasoning. *Roper* emphasized the “diminished culpability” of adolescents for sentencing purposes but stopped well short of saying that their culpability is diminished enough to qualify for an insanity defense. In fact, if Mr. McLaughlin's argument were taken to its logical conclusion, all adolescents would qualify for an insanity defense simply because of their biological immaturity. His argument assumes that the impulsivity of adolescents outlined in *Roper* meets the standard of the “irresistible impulse” test, which is far from a settled matter for either psychiatrists or legal scholars. As a growing body of evidence accumulates on both sides of the debate, it remains to be seen whether the courts will eventually modify their stance on the insanity defense in adolescents.

Use of Data From Competency Restoration

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Are There Limits to the Use of Information Obtained During Competency Restoration in a Subsequent Insanity Defense?

In *Estes v. State*, 146 P.3d 1114 (Nev. 2006), the Nevada Supreme Court considered an appeal from Donald Estes of his conviction by a jury in Nevada's Eighth Judicial District Court on charges of sexual assault of a minor, kidnapping, battery, coercion, and preventing or dissuading a person from testifying or producing evidence. These charges stemmed from his sexually assaulting a minor (B.C.) near Las Vegas. Mr. Estes appealed this conviction mainly on the grounds that the state erroneously used testimony from staff at the facility where he was evaluated and treated for the purpose of restoring competency to stand trial. The judgment explores the admissibility

of evidence obtained while a defendant is committed for restoration of competency.

Facts of the Case

Mr. Estes was committed to Lake's Crossing Center for Mentally Disordered Offenders under the Nevada Division of Mental Health and Development Services. This commitment was for his restoration of competency after preliminary findings of not competent to stand trial. The district court eventually found Mr. Estes competent based on Lake's Crossing staff evaluations. He pleaded not guilty by reason of insanity, and the case proceeded to a jury trial. There was no expert testimony on behalf of the defendant. Mr. Estes himself testified to his insanity. He admitted to most of the alleged charges in court but maintained that his mental illness and lithium toxicity from treatment of his bipolar disorder caused him to commit the assault.

The state called Elizabeth Neighbors, PhD, forensic psychologist; Hale Henson, MD, psychiatrist; and A. J. Coronella, LCSW, to provide rebuttal testimony to Mr. Estes' claim of insanity. These clinicians had evaluated or treated Mr. Estes while he was committed at Lake's Crossing for restoration of his competency to stand trial. Dr. Neighbors testified that his psychological testing showed occasional malingering, adding that he was never observed to be psychotic or to seem incompetent by her or other members of the treatment team. Dr. Henson opined that Mr. Estes did not suffer from lithium toxicity when he was their patient and that his desire to be medicated seemed to derive from a wish to prove that he had a mental illness.

Both the psychiatrist and the psychologist testified to a reasonable degree of medical certainty that under the M'Naughten standard Mr. Estes knew right from wrong. They stated also that he had no mental condition that would have impaired his judgment at the time of the crime. They based their testimony on police reports and statements to the police made by Mr. Estes and B.C. and not from a direct assessment of his mental status at the time of the crime.

Ms. Coronella's evidence suggested malingering. Mr. Estes had stated when on the witness stand that he had divorced his wife due to his mental illness. Ms. Coronella testified that in an interview with her, Mr. Estes had stated that he and his wife divorced because of his wife's affair with Mr. Estes' brother. Ms. Coronella also testified that Mr. Estes had ex-

pressed an interest in preparing for an insanity defense while he was attending her "legal process" class during his restoration of competency.

The jury convicted Mr. Estes. He was sentenced to 40 years' imprisonment and ordered to register as a sex offender after his release. Mr. Estes appealed this decision to the Supreme Court of Nevada. Most significantly, among other claims, he challenged the admissibility of the mental health professionals' testimony.

Ruling

The Supreme Court of Nevada affirmed most of the judgments of the district court, while dismissing and remanding a few counts on legal technicalities. In its substantial holding, the court opined unanimously that the use of information from Mr. Estes' competency restoration was permissible in rebuttal of his insanity defense.

Reasoning

The most significant issue raised by the appellant is the admissibility of evidence that was gathered from a court-ordered commitment for restoration of competency. Mr. Estes claimed violation of his due process and Fifth Amendment rights in allowing testimony from Lake's Crossing staff to rebut his insanity defense. Noting that these objections had not been raised at the trial court, the Supreme Court of Nevada assessed his claim under a "plain error review," a review that examines whether any clear or plain error by the trial court affected Mr. Estes' substantial rights.

In clarifying the jurisprudence and establishing the framework for analyzing the appellant's claim, the Nevada Supreme Court referenced *Buchanan v. Kentucky*, 483 U.S. 402 (1987). In that decision, the U.S. Supreme Court held that the prosecution's use of psychiatric evaluation did not violate the Fifth Amendment, when limited to the purpose of rebutting the petitioner's claim of extreme emotional disturbance and the defendant had requested the evaluation and had relied on part of that evaluation. In *Estes*, the Nevada Supreme Court further referenced *DePasquale v. State*, 803 P.2d 218 (Nev. 1990), in which it had relied on *Buchanan* in noting that the Fifth Amendment was not implicated by the limited use of psychiatric examination to rebut an insanity defense.

The Nevada Supreme Court concluded that:

[A] defendant is generally entitled to protection from admission of un-Mirandized incriminating statements made to health care professionals in the context of a court-ordered evaluation or examination. But, if the defendant seeks to introduce the evaluation or portions of it in support of a defense implicating his or her mental state, the prosecution may also rely upon the evaluation for the limited purpose of rebuttal [*Estes*, p 1121].

The court then examined the testimony provided by the Lake's Crossing staff using this framework.

With respect to the testimony of Drs. Neighbors and Henson, Mr. Estes claimed that their testimony should not have been allowed based on: (1) *Esquivel v. State*, 617 P.2d 587 (Nev. 1980), in which a conviction was reversed due to the state's use of the defendant's statement made during a court-ordered mental examination to impeach his denial of charges, and (2) *Winiarz v. State*, 752 P.2d 761 (Nev. 1988), in which a psychiatrist who had performed a competency-to-stand-trial evaluation testified that the defendant was "lying," "faking," and a "cold-blooded" murderer. The court in *Winiarz* ruled that the testimony was highly prejudicial, went to the ultimate issue in the case, and was beyond permissible expert testimony. The Nevada Supreme Court made the distinction that, in both of these cases, the defendants had not placed "their sanity at issue." The Court held that the testimony of Drs. Neighbors and Henson was permissible, as it did not relay any incriminating statements related to the crime that Mr. Estes was charged with and that it was "primarily related to their general observations of his mental state" (*Estes*, p 1122).

With regard to the testimony of Ms. Coronella, the Court determined that her testimony was admissible also. It determined that the statements were not directly incriminating or obtained through interrogation and held: "this testimony violates neither the *Fifth* nor the *Fourteenth Amendments* because Estes placed his sanity in issue and because the testimony does not describe any statements by Estes regarding the underlying crimes" (*Estes*, p 1121).

The Nevada Supreme Court made a distinction between those portions of the court-ordered psychiatric evaluation that were inadmissible because they contained "defendant's statements that directly relate to culpability for the crimes charged," (unless the defendant waived his Fifth Amendment rights) and the other portions of the evaluation that are admis-

sible "to rebut an insanity defense" (*Estes*, p 1123). It concluded that Mr. Estes' rights were not violated.

Discussion

An evaluation of competency to stand trial is a central part of protecting a defendant from an unfair trial. The process safeguards the rights to effective counsel, to present evidence, and to confront witnesses, as guaranteed by the Sixth Amendment. Detailed investigation of the ability of the defendant to understand the legal proceedings and to assist counsel in his or her defense are central to this process.

It is generally understood that competency evaluation and restoration records are not used to establish guilt or to help in sentencing (Melton GB, Pettila J, Poythress NG, *et al.*: *Psychological Evaluations for the Courts: A Handbook for Mental Health Professionals and Lawyers*. 3rd ed. New York: The Guilford Press, 2007). In line with this understanding, no Miranda warnings are given to the defendant before the evaluation or during the restoration of competency. The rather weak warning about the nonconfidential nature of this evaluation is often ineffective. Perhaps for this reason, psychiatrists frequently omit material that is self-incriminatory and peripheral from their reports.

In the case of Mr. Estes, this competency evaluation and restoration process became central to his insanity defense. Mr. Estes, the patient who is also the forensic evaluatee, is likely to assume that his treatment team is acting in his best therapeutic interest, and this may have led him to disregard any nonconfidentiality warnings he may have received about the nature and scope of his restoration evaluation and treatment.

This case is troubling, as it does not address this conflict of ethics and the resultant ineffectiveness of any nonconfidentiality warning that Mr. Estes may have received. Instead, this case tries to parse out direct incriminating statements relating to his crime from statements that merely speak to his sanity, with the court disallowing the former while allowing the latter. Should defendants now be warned that information gathered from a competency evaluation or restoration may be used for other purposes? One effective way to avoid this situation would be to limit strictly the information gathered from competency evaluations and restoration processes to the question of competency alone. The state-of-mind evaluation, for the explicit purpose of an insanity defense, should

be an independent forensic assessment by a nontreating forensic psychiatrist or psychologist. Such an approach would be one way to preserve the distinction between forensic assessments and therapeutic assessments.

Competence to Waive the Insanity Defense

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The Implications of a Frendak Inquiry

In *Phenis v. United States*, 909 A.2d 138 (D.C. Cir. 2006), Jamar Phenis, convicted of arson, malicious destruction of property, and second-degree cruelty to children in the Superior Court of the District of Columbia, appealed to the Court of Appeals of the District of Columbia, on the grounds (among others) that his bizarre behavior during the trial should have prompted the court to stop the trial and conduct an additional competency evaluation and that the court should have conducted an inquiry to determine whether he had intelligently and voluntarily waived the insanity defense.

Facts of the Case

In June 2000, Mr. Phenis set fire to his mother's apartment, where he lived with her and his six-year-old niece. Minutes before the fire, maintenance staff had observed Mr. Phenis arguing with his mother and threatening to break the balcony window. The staff then saw him throw a recliner that was afire from the balcony to the sidewalk below. Shortly thereafter, the niece came running out of the apartment, stating that her uncle had "gone crazy." The police apprehended him as he walked out of the complex.

The arresting police officer later testified that Mr. Phenis was behaving erratically at the crime scene. He did not exhibit "normal behavior," had rambling speech, and was singing in the back of the police car. During the initial interrogation, he admitted to hav-

ing set his mother's apartment on fire, but gave a bizarre statement: "I feel it was an accident. But when I get the power I am going to do it right. The thing will—and I am not tripping" (*Phenis*, p 143). He was charged with arson, malicious destruction of property, and second-degree cruelty to children.

In the months preceding his trial, Mr. Phenis underwent a series of psychiatric examinations. Dr. Lawrence Oliver, a clinical psychologist, conducted a competency screening nine days after the offense but was not able to determine if the defendant's behavior was "the result of volitional characterological traits, mental illness, substance abuse, or some combination of these factors" (*Phenis*, p 144), and was ordered to conduct a complete evaluation of Mr. Phenis' competency to stand trial. Dr. Oliver's report of that (five-minute) evaluation noted that Mr. Phenis spoke in a rapid, disjointed manner, was malodorous and disheveled, and had refused to comply with treatment at the mental health unit. Dr. Oliver opined that Mr. Phenis' condition had deteriorated, and he was found not competent to stand trial and was transferred to St. Elizabeth's Hospital for restoration to competency.

In September 2000, Dr. Mitchell Hugonnet, a staff psychologist at St. Elizabeth's Hospital, completed the restoration evaluation and opined that Mr. Phenis was competent to stand trial. Dr. Hugonnet diagnosed "PCP dependence, PCP-Induced Psychotic Disorder, Alcohol Dependence and Personality Disorder NOS. . .with Antisocial Features" (*Phenis*, p 145). The report stated that Mr. Phenis was receiving treatment with Haldol and Cogentin and "should remain on medication pending trial to assure continued competency" (*Phenis*, p 145). After some pretrial motions, Mr. Phenis remained at St. Elizabeth's and in January 2001, he underwent a fourth competency evaluation and was again deemed competent.

At a status hearing in June 2001, the defense requested a criminal responsibility test. The defense counsel reiterated that because Mr. Phenis refused to consider an insanity plea but was willing to use it as a mitigating factor, the defense planned to use mental illness as a mitigating factor in a second defense, the first defense being his innocence.

In August 2001, the Forensic Inpatient Services Division issued the Criminal Responsibility Examination report by Dr. William Richie, a staff psychiatrist. It stated that at the time of the alleged offense,