had made a prediction that there was significant risk of danger to the community if Hess were released. This case brings attention to the inclusiveness of the statute's language about criteria for psychiatric diagnoses that warrant postponement of parole. The statute has two prongs: first, the diagnosis must be "present and severe"; and second, the disturbance must "constitute a danger to the health or safety of the community." In Mr. Hess' case, his diagnoses of pedophilia and personality disorder with narcissistic and antisocial features met the criteria. Mr. Hess' past offenses were taken as evidence of pedophilia, as he had repeatedly acted on sexual urges involving prepubescent children. By definition, personality disorders are considered "enduring pattern(s) of inner experience and behavior" that manifest in ways including deficient impulse control and interpersonal functioning.

Given the language included in the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV) diagnostic criteria, any disorder that is considered to have an enduring, chronic quality could be deemed "present." Currently, pedophilia and personality disorders are not considered curable psychiatric disturbances. Thus, a psychologist's observation of a lack of "outward signs" of these disturbances may amount to merely a definitional truism. Furthermore, considering the level of dysfunction these diagnoses tend to cause, they can easily be considered "severe." Therefore, these particular diagnoses might always fulfill the first prong of the statutory criteria.

The statutory standard's second prong relates to the fact that certain psychiatric diagnoses carry significant rates of recidivism of dangerous behaviors. In Mr. Hess' case, the behaviors associated with pedophilia would include sexual acts involving children, and more generally a lack of respect for the rights of others and rules of society associated with a personality disorder. His personality disorder diagnoses include features such as interpersonal exploitation, disregard for the rights of others, impulsivity, and failure to conform to social norms regarding lawful behavior. These features could contribute to recidivism, threatening the safety of others. Thus, the psychologist's diagnostic opinion fulfilled the two-pronged criteria of the statute, leading to postponement of parole.

Of importance, in this case the appeals court evaluated only the legal arguments and took the psychologist's opinions at face value. The sufficiency of those opinions and the data that provided their foundation were not considered. The opinions were not subject to cross-examination, to rebuttal by opposing experts, or to the reliability tests of expert testimony as set forth by the U.S. Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)). Thus, the courts hearing Mr. Hess' appeal were unaware of the clinical questions and the limits of scientific evidence concerning the accuracy of predictions of future dangerousness, of the data suggesting relatively low recidivism rates among released pedophiles, or the data on the inter-rater reliability of psychiatric diagnoses. From the record of the case, it seems that nothing in Mr. Hess' current clinical presentation was the basis for the psychologist's diagnoses; instead, they were based on crimes committed some 20 years previously. The record of the case cites little about the clinical evaluation that formed the basis of the expert's clinical opinions. Since those opinions were not the focus of the appeal, there was little reason for the record to focus on clinical foundation or reliability.

It may well be that in parole hearings the prisoner has little opportunity to challenge expert opinions that are adverse to his interests and that may rest on subjective clinical assumptions. It may also be that constitutionally based challenges to statutes that give deference to expert opinions afford the prisoner little chance to prevail, either against law or clinical judgments. The administrative context of parole hearings does not afford the prisoner the full panoply of confrontation tools that are available in criminal proceedings.

In the realm of sexual offenders, it may be that courts, legislatures, and some clinical experts participate in a synchronicity that assures that sex offenders will serve the maximum sentence and perhaps even longer if they come under the reach of state sexual violent predator acts that permit open-ended civil commitments imposed at the end of a maximum term of criminal incarceration (see *Kansas v. Hendricks*, 521 U.S. 346 (1997)).

Mental Health Expert Witness Testimony

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State Supreme Court Overturns the Sanctioning of a Defendant That Arose From the Conduct of His Expert Witnesses

In *State v. Gillespie*, 655 S.E.2d 355 (N.C. 2008), the Supreme Court of North Carolina affirmed the state court of appeals order granting Marion Gillespie a new trial, holding that the trial court erred when it precluded him from introducing the testimony of his mental health experts and subsequently sentenced him to life imprisonment for first-degree murder.

Facts of the Case

On June 15, 2003, Marion Gillespie approached a local deputy sheriff. Mr. Gillespie was wearing bloodstained clothing and stated that he had stabbed his girlfriend, Linda Smith, and was concerned that he had caused her serious injury. He was read and waived his *Miranda* rights. Law enforcement was dispatched to his residence and found Ms. Smith dead in the bathtub; a knife was found nearby. Mr. Gillespie again waived his *Miranda* rights and gave his consent to searches of his residence and vehicle. He also provided a statement to authorities saying that during a heated argument in the bathroom of their shared residence, Ms. Smith had threatened to have her brothers kill him, and when he threatened to leave the residence, she attacked him with a knife. He then claimed that he took the knife from Ms. Smith, pushed her, and inadvertently cut her on the arm. He also claimed that he had diabetes and was taking a cancer medication, peginterferon, the last dose self-administered within several hours before the incident.

On June 23, 2003, the Rowan County Grand Jury charged Mr. Gillespie with the first-degree murder of Ms. Smith. The state elected to try him for noncapital murder. Trial was set for November 29, 2004. On October 14, 2004, Mr. Gillespie gave the state notice of his intent to raise defenses of insanity and diminished capacity. Pursuant to several motions filed by the state and the defense, several orders were issued in a hearing held on October 21, 2004. The state moved that the defense provide information pertaining to any expert witnesses expected to be called at trial. The trial court granted the state's discovery motion and verbally instructed the defense to comply by November 15, 2004. In addition, the court granted a motion by Mr. Gillespie ordering the state to turn over "exculpatory material from all doctors, social workers, law enforcement personnel, state's witnesses, or other persons or sources which are available to the state" (*Gillespie*, 655 S.E.2d, p 357), with orders to comply by November 15, 2004. Finally, the trial court issued an order committing Mr. Gillespie to Dorothea Dix Hospital for evaluation of his mental condition.

On November 23, 2004, Mr. Gillespie filed a motion for a continuance because defense counsel was continuing to receive discovery documents from the district attorney, and neither party had received any reports from Dorothea Dix Hospital or any other experts. Ultimately, a hospital report was received, but it addressed only competency to stand trial. The report did not address Mr. Gillespie's mental status at the time of the offense because the state had not received any mental health reports from the defense. On November 23, 2004, the state moved to prohibit Mr. Gillespie from presenting any mental health defense or, alternatively, to require him to provide the requested documentation to the Dorothea Dix Hospital staff.

On the day of the trial, November 29, 2004, the trial court entered an order prohibiting Mr. Gillespie from introducing testimony from his two expert witnesses, a psychiatrist and a clinical psychologist, concerning the mental health defense. The trial court in part barred the defense expert testimony by citing the state's statue that permits sanctioning of parties for noncompliance with discovery orders. The court heard arguments on Mr. Gillespie's motion for a continuance and then denied the motion. On December 8, 2004, the jury found Mr. Gillespie guilty of first-degree murder, and he was sentenced to life imprisonment without parole.

Mr. Gillespie appealed his conviction to the state court of appeals claiming trial court errors of law. The court of appeals found that the trial court had made several errors of law, including a violation of Mr. Gillespie's Sixth Amendment rights, a misapplication of the state's statute governing sanctions related to pretrial discovery, and legal errors concerning the scope of the discovery required from defense experts relating to the mental health defense. The appeals court held, on each of these several grounds, that the trial court had abused its discretion in barring Mr. Gillespie from introducing the testimony of his mental health experts. The court of appeals ordered a new trial. The state sought review of this

order by appeal to the state supreme court. Discretionary review was granted.

Ruling and Reasoning

The North Carolina Supreme Court reviewed the decision of the court of appeals. After careful parsing of the sanction provision of the discovery statute used at trial to bar the defense experts' testimony, the supreme court held that the trial court had exceeded its authority in sanctioning Mr. Gillespie. The discovery statute states that:

> If at any time during the course of the proceedings the court determines that a party has failed to comply with this Article or with an order issued pursuant to the Article, the court in addition to exercising its contempt powers may prohibit the party from introducing evidence not disclosed [N.C. Gen. Stat. § 15A-910 (a)(3)(2005)].

The supreme court noted that nothing in the language of the statute indicates that the court has authority to impose sanctions against a "party," either the state or a criminal defendant, because of the actions of expert witnesses, who are nonparties. The court held that the proper and literal reading of the statute makes it clear that only "parties" can be sanctioned for discovery noncompliance. If there was any question as to whether Mr. Gillespie's possible noncompliance factored into the trial court's decision, it was clarified by the transcript of the hearing:

> . . . But the court's going to find, basically, that Doctor Strahl and Doctor Noble [expert witnesses] have violated the Court's order, violated the discovery statute . . . the court finds that the defendant, again, not through counsel, but through these physicians . . . that those persons have failed to comply with the discovery statute and/or with the orders of this Court issued pursuant to the statutes, and the Court therefore prohibits the defendant from introducing evidence relating to a mental health or insanity defense . . . [*Gillespie*, 655 S.E.2d, p 358].

Consequently, the supreme court affirmed the order of the court of appeals to grant Mr. Gillespie a new trial. The supreme court, however, modified the court of appeal's decision by holding that the trial judge's error of law on the application of N.C. Gen. Stat. § 15A-910 (a)(3) was sufficient legal grounds to order a new trial and the additional errors of the trial judge cited need not have been reached by the court of appeals to resolve the appeal.

Discussion

The North Carolina Supreme Court based its affirmation of the court of appeals' awarding a new trial on only one of the four errors of law that the court of appeals cited in its decision. The court relied only on the trial judge's misapprehension of the discovery statute's sanctioning provision. The court's reliance on only one error of law leaves the impression that the defense experts were uncooperative with the state's experts, defiant of the trial court's orders and remiss in their own work on behalf of the defense. However, a reading of the court of appeals' decision conveys a rather different and more critical view of the trial judge's management of the proffered mental health testimony.

The court of appeals in *State v. Gillespie*, 638 S.E.2d 481 (N.C. Ct. App. 2006), reviewed four "conclusions of law" that the trial judge entered and relied on to reach his ruling that barred the defense experts from offering trial testimony. The court found each of them to be in error, noting that both the state and the defense experts had not complied with the discovery deadlines that the trial court had set. Indeed, the court noted that the trial court had not entered its discovery deadlines in a written order. Since courts speak only with their written orders, no court order setting a discovery deadline actually existed. A more troubling error that the court of appeals noted, but the supreme court did not discuss, was that the defense experts' reports were provided to the state by defense counsel on November 24, 2004, and on November 25, 2004. (The state's expert report was not written until November 22, 2004, and so the state too was not in compliance with the supposed November 15, 2004, discovery deadline verbally set by the trial court.)

Mr. Gillespie's trial began on November 29, 2004, and, as reported in the court of appeals decision:

> On 29 November 2004, the trial court entered an order prohibiting defendant from introducing evidence at trial from Dr. Noble or Dr. Strahl concerning a mental health defense. Although defense counsel attempted to make an offer of proof of Dr. Noble's and Dr. Strahl's prohibited testimony before opening statements at trial, the trial court allowed *voir dire* for Dr. Noble and Dr. Strahl after the close of the evidence. The *voir dire* testimony provided that: (1) defendant's taking Peg Interferon [sic] caused defendant to become severely depressed; (2) at the time of the attack, defendant did not know right from wrong; (3) he did not premeditate or deliberate before the killing; (4) the killing was without malice; and (5) defendant was involuntarily intoxicated during the attack [*State v. Gillespie*, 638 S.E. 2d, p 484].

The court of appeals went on to note that the trial judge's four conclusions of law made in support of the bar to the mental health defense testimony were all in error. The court held that the defense experts

had not violated any of the bases that the trial court relied on to bar their testimony and that each error of law made by the trial judge was sufficient to warrant a new trial. Most important, the court of appeals found that denying Mr. Gillespie his mental health defense violated his federal Sixth Amendment rights. Unlike the supreme court, the court of appeals made broad holdings concerning a defendant's right to put on expert witnesses in a mental health defense. The supreme court, finding that the single error of law concerning the discovery statute's sanctions was sufficient to warrant a new trial, modified the court of appeals' holding. In doing so, it negated its other more substantially founded bases for granting a new trial.

This negation had the effect of avoiding setting a state precedent for permitting a mental health expert defense based on Sixth Amendment grounds. By relying only on the narrow statutory interpretation of the state's discovery statute as the sole grounds for awarding a new trial, the supreme court sidestepped the opportunity to base the right to a mental health defense on broad federal constitutional grounds. Whether this is an example of judicial economy or a distaste for the mental health defense remains unclear at this point. What is puzzling is that a clearly mentally disturbed defendant who had credible mental health experts and was prepared to offer a *mens rea* defense was prohibited from doing so by a trial judge who made four errors of law in excluding such a defense. The court of appeals on broad grounds and the supreme court on a narrow ground allowed Mr. Gillespie a new trial, fortified with his mental health defense expert testimony.