

Upward Departure in Federal Sentencing Based on Mental Illness

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Upward Departure in Sentencing Due to Designation of Dangerousness, Based on a History of Serious Mental Illness

In *United States v. Pinson*, 542 F.3d 822 (10th Cir. 2008), the United States Court of Appeals for the Tenth Circuit considered an appeal by Jeremy Vaughn Pinson of his conviction in and sentencing by the United States District Court for the Western District of Oklahoma. That court departed upward from the guidelines and sentenced him to the statutory maximum and then handed down consecutive sentences for mailing threatening letters to the President of the United States, as well as a juror and judge at the defendant's trial.

Facts of the Case

In August 2005, while serving a sentence for embezzlement at the Lawton Correctional Facility, Mr. Pinson sent President George W. Bush a letter through the United States mail stating, "You will die soon! Die Bush die." He was indicted for violating 18 U.S.C. § 871 (2000) "knowingly and willfully threaten[ing] the President of the United States by depositing in the United States Mail a letter threatening to kill and inflict bodily harm upon the President" (*Pinson*, p 827). At the time he wrote the letter, he showed symptoms of a mental disorder including hallucinations, and while awaiting trial, he made several suicide attempts and was placed on suicide watch. A competency evaluation determined that he was competent to stand trial. His request for *pro se* representation was granted, and he represented himself at a jury trial in the United States District Court for the Western District of Oklahoma. The jury found Mr. Pinson guilty of one count of threatening

to harm the President of the United States. Before sentencing, he falsely told the district court that another inmate intended to kill the sentencing judge and he wrote a letter to the Chief Judge of the Western District threatening to injure a juror who had served in his trial. He was charged with one count of knowingly and willfully making a materially false statement and one count of mailing threatening communications, and pleaded guilty to both.

Numerous sources indicated that Mr. Pinson had a severe, chronic mental illness. During his competency evaluation, the evaluators determined that "he had not had an effective period of psychological functioning since early childhood" (*Pinson*, p 827). The defense psychologist had testified at trial that Mr. Pinson had a "severe and chronic posttraumatic stress disorder" (*Pinson*, p 828), secondary to childhood physical and psychological abuse, "some signs of malingering, anti-social personality disorder with severe borderline characteristics, and an inability to relax" (*Pinson*, p 828). The psychologist also testified to Mr. Pinson's suicidal tendencies and ideation. Mr. Pinson's mother testified that he had prior diagnoses of bipolar disorder, schizophrenia, attention deficit disorder (ADD), and attention deficit hyperactivity disorder (ADHD). There was also testimony that he had a history of aggressive and threatening behavior (i.e., writing threatening letters, harming animals, and attempting to physically attack his mother), although there was no evidence that he had carried out any of his threats, and his last documented violent incident had occurred when he was 13 years old. Despite his history of persistent mental illness, he had not received intensive, consistent psychological treatment, either in the community or while incarcerated.

During Mr. Pinson's sentencing hearing, the court departed upward and imposed the statutory maximum on all three sentences, to run consecutively, resulting in a 240-month sentence, 135 months above the maximum recommended in the sentencing guidelines. The judge noted that he felt compelled to extend Mr. Pinson's sentence to protect the public and referred to his history of writing threatening letters, violence, and mental instability.

Mr. Pinson appealed his conviction and sentencing to the Tenth Circuit Court of Appeals on three grounds: first, that his Sixth Amendment rights were violated when the court allowed evidence to be introduced about his intent in writing the letter to the

President without granting a continuance for him to present his own witnesses; second, that the district court erred by giving instructions to the jury that impermissibly focused on his intent to threaten the President; and third, that his sentence, significantly above the recommended guidelines, was unreasonable.

Ruling and Reasoning

The United States Court of Appeals for the Tenth Circuit affirmed Mr. Pinson's conviction on the grounds that no judicial errors were committed in the court's application of the law. With regard to Mr. Pinson's claim that a continuance should have been granted him to prepare witnesses to refute his intent to threaten, the court concluded that it was not plain error not to grant a continuance *sua sponte* and that the court did not err in proceeding with trial, because Mr. Pinson did not demonstrate that the testimony he wished to introduce was "material and favorable" to his case. The court also ruled that since the act of making a threat violates the law, regardless of the intent, the trial court's instruction to the jury to focus on the intent of the letter, even if in error, would have increased the burden on the government to prove his intent. The court further held that erroneous instruction that is beneficial to a defendant is not considered prejudicial. With regard to the upward departure in sentencing, the court ruled that the trial court provided substantial rationale for the sentencing ruling and that no plain error was committed in determining the sentence. The court did, however, express concern about the use of an upward variance.

Discussion

The sentencing decision was based on a concern about Mr. Pinson's continued dangerousness, which the court assumed (as evidenced in its upward departure) would extend beyond 84 to 105 months, the sentencing guidelines range for his charges. Mr. Pinson's mental illness was viewed as enhancing risk, although he had not been adequately treated, despite having diagnoses that generally respond to medication. His bizarre and dramatic threats were perceived as more evidence of his dangerousness, even though he had never carried them out and, given his federal incarceration, would have been unable to act on them. Ironically, the court found Mr. Pinson competent enough to defend himself at trial despite his mental illness, but then viewed him as too risky to be

sentenced under the normal sentencing guidelines because of his mental illness.

The use of incarceration and the enhanced length of sentencing for a person showing evidence of a severe mental disorder is a reflection of the common assumption of a direct correlation between psychiatric disorders and risk of violence. What was missing from this case was a comprehensive forensic psychiatric or psychological risk assessment. The psychology expert testimony provided an equivocal message to the court: "On cross examination he stated that without medication, treatment, and incarceration, Mr. Pinson had the potential to be dangerous and that the danger was moderately high" (*Pinson*, 829). The assessment of risk before someone is adequately treated and the projection of a trajectory of risk over years have limited utility. In this case, however, the opinion contributed to a sentence of 20 years.

A comprehensive forensic psychiatric or psychological risk assessment should include a clarification of diagnoses, the use of risk assessment measures when making determinations about level of risk for violence (demonstrated in the literature to be superior to clinical judgment alone), and the use of empirically supported data from the scientific literature to guide clinical judgment (e.g., in Mr. Pinson's case, attention to the literature on threatening public figures as it relates to incidents of future violence). Comprehensive forensic risk assessments are critical to conveying not only an accurate appraisal of the risk factors but also the limitations of risk predictions.

Another compelling issue raised in this case is that the court employed an upward departure instead of relying on the federal civil commitment statute that allows a federal inmate who has reached the end of a sentence to be civilly committed to an inpatient treatment facility if there is "clear and convincing evidence" that the defendant poses a risk to the public because of a mental abnormality or personality disorder that is beyond his control (18 U.S.C. § 4246 (2000)). The civil commitment procedure provides the means of inpatient treatment and protection of the public and evaluates the inmate's risk after receiving treatment while incarcerated. In this case, the court assumed continued risk and bypassed the civil process.

This case sets a dangerous precedent that was recognized by the court of appeals: longer sentences for persons with mental illness because they are mentally

ill will neither help the rehabilitation process nor protect the public. Sentencing belongs to the criminal court, but commitment based on dangerousness from mental illness should remain a civil and psychiatric matter.

Compulsory Psychiatric Testing

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Compulsory Psychiatric Testing Does Not Violate a Defendant's Rights Against Self-Incrimination When a Not Guilty Plea Is Entered Secondary to Posttraumatic Stress Disorder

In *Mitchell v. State*, 192 P.3d 721 (Nev. 2008), the Nevada Supreme Court reviewed the appeal of a judgment of conviction in a bench trial for second-degree murder with the use of a deadly weapon. The appeal was based primarily on the argument that the district court violated the appellant's Fifth and Fourteenth Amendment rights against self-incrimination when it ordered him to undergo a compulsory psychiatric examination after he claimed that he justifiably fired in self-defense because of hyperarousal symptoms brought on by posttraumatic stress disorder (PTSD).

Facts of the Case

In 2005, the State of Nevada charged Donald Mitchell with second-degree murder with the use of a deadly weapon for discharging a firearm numerous times and killing Edward Charles at a pool party in Las Vegas on July 24 of that year. Shortly after his arrival at the pool party, Mr. Mitchell, who was intoxicated, became involved in a heated discussion with the victim. Mr. Mitchell left the party for a few minutes and returned with a pistol. Mr. Mitchell and Mr. Charles again exchanged words, and thereafter,

shots were fired. Mr. Mitchell repeatedly fired his pistol, and Mr. Charles was killed.

Before the trial commenced, the defense requested a psychiatric examination, and Mr. Mitchell was evaluated by Dr. Thomas Bittker and Dr. Louis Mortillaro. Both experts diagnosed posttraumatic stress disorder, including symptoms of hyperarousal. Mr. Mitchell pleaded not guilty, claiming that he fired in self-defense, as his hyperarousal symptoms caused him to overestimate the threat of attack and inhibited his ability to form the requisite *mens rea* to be guilty of murder. He waived his right to a jury trial, and the case proceeded as a bench trial.

The state asked the district court to order that Mr. Mitchell be examined by an independent psychiatric expert. Over defense objections, the district court granted the state's motion. After reviewing the results from two days of examination, independent expert Dr. David Schmidt concluded that Mr. Mitchell malingered during the psychiatric examination so that he would appear excessively pathological.

In 2005, the district court ruled that Mr. Mitchell murdered Mr. Charles with malice aforethought, did not shoot in self-defense, and thus was guilty of second-degree murder with the use of a deadly weapon. He was sentenced to life imprisonment with parole eligibility after 10 years for the second-degree murder conviction and received an equal and consecutive sentence for use of a deadly weapon. He appealed the case and asserted numerous procedural errors. Arguably, the most pertinent points were that the district court violated his Fifth and Fourteenth Amendment rights when it ordered him to undergo a compulsory psychiatric examination by an independent psychiatrist and, furthermore, allowed that expert to testify about the results of the examination at trial.

Ruling and Reasoning

The Nevada Supreme Court affirmed the ruling of the district court of second-degree murder with the use of a deadly weapon. The court concluded that because Mr. Mitchell placed his mental state directly at issue, the district court did not violate his Fifth Amendment rights when it ordered him to undergo an independent psychiatric examination to evaluate his claim that symptoms of PTSD led to his actions in the death of Mr. Charles. Further, the supreme court decided that the district court did not err in allowing the state to cross-examine the defense re-