

trolled with medication. He agreed that *Rees* was the correct standard and that clear and convincing evidence was required by Mr. Corcoran to refute the presumption of competency. Justice Williams also agreed with the Indiana Supreme Court, noting that in normal circumstances, Mr. Corcoran's testimony at the hearing may outweigh other testimony. He indicated that the court failed to consider Mr. Corcoran's testimony "in light of his delusions." Justice Williams concluded his dissent saying he would require litigation of Mr. Corcoran's postconviction petition in state court.

Discussion

The present case speaks to the potentially limited role of mental health experts in determining the outcome of legal proceedings surrounding competency to waive postconviction relief in capital cases. In *Rees*, the Supreme Court established the standard that the defendant must make a "rational choice" to discontinue proceedings. The Eighth Circuit in *Smith* observed that mental illness is a potential factor in nearly every death row inmate's choosing to waive postconviction relief, and thus is not, in and of itself, indicative of incompetency. The Supreme Court in *Demosthenes* affirmed the presumption of competency in postconviction proceedings. In *Holmes*, the Seventh Circuit, while emphasizing the importance of enlisting mental health experts, opined that the judge is the final authority in evaluating the mental capacities that a defendant requires to proceed and, as mentioned earlier, observed that challenging competency to waive postconviction relief is a "tougher row to hoe" than challenging competency to stand trial.

Two of three experts found Mr. Corcoran competent to stand trial, whereas three different experts unanimously agreed that he was incompetent to waive postconviction relief. These differences of opinion could reflect variations in the expression of authentic and dynamic psychotic symptoms that fluctuated and changed over the time between the assessments of competency to proceed and competency to waive postconviction relief. Although the legal bar for competency to proceed has been set higher than that for competency to waive postconviction relief, the proximity to a realized capital punishment may influence competency evaluators in the opposite direction. This legal stratification of competency requirements, with waiver of postconviction

relief requiring less, is likely to be experienced as dissonant with medical training and professional ethics by many forensic psychiatrists. For this reason, courts are compelled to reformulate medicolegal opinions in a manner that re-emphasizes legally determined criteria over clinical impressions. The *Corcoran* ruling serves as a reminder that the court has ultimate responsibility to evaluate expert opinion in light of additional information and will depart from expert opinion when psychiatric formulations are not persuasive in the context of the defendant's own testimony.

Disclosures of financial or other potential conflicts of interest: None.

Ineffective Counsel in a Death Penalty Case

Jonathan Boyer, MD
Fellow in Forensic Psychiatry

Hal S. Wortzel, MD
*Assistant Professor, Department of Psychiatry
 Faculty, Forensic Psychiatry Fellowship*

Richard Martinez, MD, MH
*Robert D. Miller Professor of Psychiatry and Law
 Director, Forensic Psychiatry Fellowship*

*Division of Forensic Psychiatry
 Department of Psychiatry
 University of Colorado Denver School of Medicine
 Denver Health Medical Center
 Denver, CO*

Trial Counsel Was Ineffective for Allowing the Prosecution to Review a Report and Allowing Testimony of a Psychiatrist Retained by the Defense

In *Sechrest v. Ignacio*, 549 F.3d 789 (9th Cir. 2008), the U.S. Court of Appeals for the Ninth Circuit affirmed that allowing the prosecution access to a psychiatrist's report retained for the defense and allowing that psychiatrist to testify in the penalty phase of a death penalty case represents ineffective counsel.

Facts of the Case

In May of 1983, Ricky Sechrest kidnapped and murdered 10-year-old Maggie Weaver and 9-year-old Carly Villa. In June of 1983, he was arrested. While waiting to be booked for an unrelated charge he confessed to the murder of both girls. Dr. Lynn

M. Gerow evaluated Mr. Sechrest at defense counsel's request, to determine whether Mr. Sechrest was fit to stand trial and to evaluate the possibility of an insanity defense. Ultimately, after reviewing Dr. Gerow's report, defense counsel decided not to call him as a witness and not to pursue an insanity defense.

The prosecution asked defense counsel to permit the use of Dr. Gerow's report and to permit him to be called as a prosecution witness during the penalty phase of Mr. Sechrest's trial. Defense counsel stipulated to both requests. At the penalty phase, Dr. Gerow testified that Mr. Sechrest "was an 'incurable sociopath' with an extensive criminal record and a history of drug abuse" (*Sechrest*, p 791). During the penalty phase, the prosecutor made several statements to the jury including the claim that the Board of Pardon Commissioners could change Mr. Sechrest's sentence and that prisoners frequently do not serve full life sentences even when life sentence without the possibility of parole is imposed by the jury. Defense counsel did not object to these statements.

In September of 1983, Mr. Sechrest was sentenced to death for each of the two murders. Four aggravating factors were found for each murder: that the murder involved torture, depravity of the mind, or mutilation of the victim; that the murder was committed to prevent or avoid a lawful arrest or to effect an escape from custody; that the murder was committed during the commission or the attempted commission of a kidnapping; and that the murder was committed during the commission or attempted commission of a sexual assault. Mr. Sechrest was also sentenced to two terms of life in prison without the possibility of parole for each of the two kidnappings.

Mr. Sechrest appealed his convictions and sentences to the Nevada Supreme Court. In August of 1985, the Nevada Supreme Court affirmed both his convictions and sentences. He then filed a petition for postconviction relief in 1985 in the Nevada state district court arguing that he had been denied effective counsel. The Nevada state district court agreed but noted that he had failed to demonstrate "prejudice" and denied the petition. Beginning in August of 1992, he filed several federal petitions for writs of *habeas corpus*. The district court held that several of his claims had been exhausted in state court but that several had not. As such, his petition was "a mixed petition," which prohibited its consideration. Mr. Sechrest continued to appeal his convictions and sen-

tences throughout the 1990s. In December of 2004, the district court granted *certiorari* for his appeal. He presented several claims in his appeal including that his claims dismissed by the Nevada Supreme Court were improperly barred from federal *habeas* review; that his *Miranda* rights were violated; that his Sixth and Fourteenth Amendment rights were violated by the prosecution's statements regarding the likelihood of his release from prison; and that his defense counsel provided ineffective counsel by allowing the prosecution to call Dr. Gerow as a witness.

Ruling and Reasoning

In its decision, the U.S. Court of Appeals for the Ninth Circuit affirmed in part, reversed in part, and remanded for proceedings for Mr. Sechrest's appeal. The Ninth Circuit found that his claims should not have been barred from federal *habeas* review. These claims were then remanded so that the district court could consider them. In regard to his claim that his *Miranda* rights had been violated, the Ninth Circuit affirmed that his rights had not been violated. In the Ninth Circuit's review, it noted that he had never explicitly invoked his right to remain silent or his right to an attorney when he confessed to the two murders and kidnappings. Because he did not explicitly invoke his right to remain silent or his right to have an attorney present during his conversation with police, the Ninth Circuit held that he had knowingly and voluntarily waived these rights when he agreed to speak with Nevada police. In reviewing his claim that his Sixth and Fourteenth Amendment rights had been violated by prosecutorial misconduct, the court found that his right to a fair trial had indeed been violated. In addition, the court found that the violation constituted a "substantial and injurious effect" contributing to the jury's verdict to impose the death penalty. In reaching this conclusion the court noted that the prosecution's statement that a life sentence would not actually lead to life imprisonment was false. In addition, the court found that the prosecutor compounded his false statements by "vouching for the truthfulness of his own unsupported, inaccurate assertions" (*Sechrest*, p 799).

The Ninth Circuit held that Mr. Sechrest's defense counsel provided ineffective counsel by allowing the prosecution to call Dr. Gerow as a penalty phase witness. In its decision, the court used the *Strickland* criteria set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *Strickland* criteria for in-

effectiveness of counsel include that trial counsel's performance "fell below an objective standard of reasonableness"; had the error not been present, the outcome of the proceedings would have been different. In the Ninth Circuit's discussion it noted three specific instances that fulfilled the first criteria and that the second consideration of "prejudice" had also been met. The three instances in which defense counsel fell below an objective standard of reasonableness included: counsel should not have allowed the prosecution to review Dr. Gerow's report; counsel should not have stipulated to the prosecution's request to call him as a penalty-phase witness; and counsel's level of preparation for his testimony fell below a reasonable standard, as most of Dr. Gerow's most damaging testimony was elicited by defense counsel. The second criterion set forth in *Strickland* was also met: Dr. Gerow's testimony most likely played an important role in the jury's decision to sentence Mr. Sechrest to death.

Discussion

For purposes of this analysis, the central topic is defense counsel's decision to allow the prosecution access to the expert's confidential psychiatric evaluation, and the damaging testimony that followed. In *Estelle v. Smith*, 451 U.S. 454 (1981), the U.S. Supreme Court held: when a defendant is not advised of his right to remain silent before a psychiatric evaluation, subsequent statements made during that evaluation cannot not be used during a capital sentencing proceeding, and defense counsel must be notified in advance of a psychiatric evaluation of the client.

The main parallel with the current case exists in regard to the first ruling in *Estelle v. Smith*—namely, violating an individual's Fifth Amendment protection. Mr. Sechrest's Fifth Amendment protection from self-incrimination was violated, as he was unaware that the information that he shared with Dr. Gerow would later be used against him at the penalty phase of his hearing. While Dr. Gerow's involvement

with Mr. Sechrest was not court ordered and hence not a "neutral" evaluation, an expectation of any forensic evaluation involves a component of informed disclosure. It remains unclear what, if any, statement was offered to Mr. Sechrest by way of informed disclosure. However, it is not uncommon for experts retained by the defense to indicate that their opinions will manifest as reports and/or testimony only if judged favorable to their interests by the retaining attorney. It would be implausible for a defense expert to inform the defendant that unfavorable testimony during the sentencing phase could result from the examination.

While officers of the courts are charged with protecting constitutional rights, forensic psychiatrists must remain attuned to professional ethics, including the principle of informed disclosure. If the opinions generated from an evaluation are to be reported in court whether favorable or harmful to the defendant's case, the evaluatee should be advised of such. If the evaluatee is informed that an opinion will be offered in court only if he and his attorney elect to engage such testimony, then the evaluating expert should attempt to honor that notice by alerting the court when requested testimony is contrary to the disclosure provided at the time of evaluation.

This case focused on a lawyer's failure to protect a client's constitutional right, but it also serves as a reminder of the forensic psychiatrist's professional role and the ethics-related obligations inherent in forensic practice. Informed disclosure ought to be included in all forensic psychiatric evaluations. Even when examinations are court ordered, evaluatees are entitled to know the nature of the examination and the potential outcomes. Experts should offer advisements at the outset of all forensic evaluations and strive to ensure that professional activities performed subsequent to evaluations comport with advisements offered to evaluatees.

Disclosures of financial or other potential conflicts of interest: None.