

Ineffective Counsel and Mental Health Expert Witness Testimony in an Insanity Defense

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In a Capital Murder Case, Defense Counsel Was Found Ineffective for Calling a Psychiatric Expert Witness Whose Testimony Directly Contradicted the Defendant's Insanity Defense

In *Awkal v. Mitchell*, 559 F.3d 456 (6th Cir. 2009), a capital murder case, the Sixth Circuit U.S. Court of Appeals held that defense counsel's decision to call a mental health expert witness whose testimony on cross-examination devastated the defendant's only defense (that he was insane at the time of the crime) constituted ineffective assistance of counsel. The court also found that the Ohio Supreme Court mischaracterized the expert's testimony as helpful and erred in failing to recognize how harmful the decision to call the expert had been to the defense.

Facts of the Case

In 1985, after immigrating to the United States from Lebanon, Abdul Awkal suffered a mental breakdown but never saw a psychiatrist. He married in the spring of 1989 and he and his wife had a daughter in September 1990. Mr. Awkal's wife and her brothers believed that Mr. Awkal was not a good Muslim, and one of his brothers-in-law, Mr. Abdul-Aziz, attempted to teach Mr. Awkal the tenets of their family's religious faith. Mr. Awkal viewed these attempts as interference with his freedom. He felt harassed and threatened by Mr. Abdul-Aziz because of his religious beliefs. After significant marital difficulties, in October 1991, Mr. Awkal's wife filed for divorce with motions for child support and visitation. In November 1991, Mr. Awkal had four counseling sessions because he was depressed and suicidal

about the divorce and harbored beliefs that his brothers-in-law had interfered with his life and marriage.

Before a scheduled divorce case hearing on January 2, 1992, Mr. Awkal shot and killed his wife and Mr. Abdul-Aziz in the Cuyahoga County Domestic Relations Court. While attempting to escape, he grabbed and threatened to kill his daughter and then himself and vowed that nobody was going to take his baby. During a deputy's attempt to disarm him, Mr. Awkal was shot in the back by his own gun and was later taken into custody. While at the hospital the next day, Mr. Awkal told police that he had shot the victims after Mr. Abdul-Aziz refused to "profess that Allah was the only God."

Mr. Awkal was indicted on two counts of aggravated murder with prior calculation and design, including a multiple-murder death penalty specification. He pleaded "not guilty" and "not guilty by reason of insanity."

Several defense witnesses testified during the guilt phase. Dr. Paul Hewitt, a psychologist, testified on the question of prior calculation and design; however, his testimony was stricken from the record after the court learned that he was not licensed to practice in Ohio. Dr. Magdi Rizk, the court psychiatrist who conducted Mr. Awkal's pretrial competency and sanity evaluations, testified that Mr. Awkal was sane at the time of the murders. Dr. Eileen McGee, a psychiatrist who was not board certified, testified that Mr. Awkal was insane, because he did not know that what he did was wrong at the time of the shootings.

In 1992, Mr. Awkal was found guilty of aggravated murder and was sentenced to death. In 2000, he filed a petition for a writ of *habeas corpus* in the U.S. District Court for the Northern District of Ohio. The court denied the petition. However, the Sixth Circuit U.S. Court of Appeals granted a certificate of appealability, allowing him to raise claims of ineffective assistance of counsel at the guilt phase.

Ruling

The court of appeals held that Mr. Awkal's counsel provided ineffective assistance at the guilt phase of trial by calling an expert witness who testified that Mr. Awkal was sane at the time of the murders, an opinion that contradicted Mr. Awkal's only defense. Because of this conclusion, the court of appeals reversed and remanded the case and did not rule on the issue of ineffective assistance at the penalty phase.

Reasoning

This summary is focused on the claim of ineffective assistance of counsel at the guilt phase. The court of appeals reviewed the case in light of the “unreasonable application” clause, which states that a federal *habeas* court may grant a writ if the state court unreasonably applies the correct governing legal principle to the facts of the prisoner’s case. The court reasoned that for Mr. Awkal’s Sixth Amendment ineffective assistance claims to be valid, he must show that his “counsel’s representation fell below an objective standard of reasonableness” (*Strickland v. Washington*, 466 U.S. 668, 688 (1984)); that this deficiency resulted in prejudice by “show[ing] that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different” (*Strickland*, p 694); and that the court “applied *Strickland* to the facts of his case in an objectively unreasonable manner” (*Bell v. Cone*, 535 U.S. 685, 699 (2002)).

The court concluded that it was deficient performance for Mr. Awkal’s counsel to call Dr. Rizk to testify at the guilt phase, because it “so devastated [Mr.] Awkal’s sole defense.” The court reasoned that Mr. Awkal’s case was similar to the situation in *Combs v. Coyle*, 205 F.3d 269 (6th Cir. 2000), in which the court held that Mr. Combs received ineffective assistance of counsel because his counsel called only one expert witness, whose testimony was that, contrary to Mr. Combs’ sole defense, he had intentionally killed.

The court reasoned that defense counsel’s decision to call Dr. Rizk “caused such obvious and extensive harm” that there is reasonable probability that, had defense counsel not called Dr. Rizk, the jury’s verdict would have been different. Even though defense counsel called an expert witness, Dr. McGee, who testified that Mr. Awkal was legally insane at the time of the crime, the court concluded that Mr. Awkal had shown prejudice because the two defense experts presented diametrically opposed opinions on the critical guilt phase issue of sanity.

Finally, the court found that the Ohio Supreme Court’s analysis and conclusion regarding the application of *Strickland* to the facts of Mr. Awkal’s case was objectively unreasonable. The court concluded that the Ohio Supreme Court failed to recognize the extent of the obvious harm caused by trial counsel’s decision to call Dr. Rizk and mischaracterized portions of Dr. Rizk’s testimony as helpful in Mr.

Awkal’s defense. Given Mr. Awkal’s sole defense of insanity, the court reasoned that the only relevant question at the guilt phase was whether Mr. Awkal was sane at the time of the crime. Further, even if the decision to call Dr. Rizk was part of an overall defense strategy, once the jury heard one of Mr. Awkal’s own witnesses opine that he was sane, no strategy could have saved his sole defense.

Dissent

Judge Ronald Lee Gilman issued a dissent from the majority’s holding that Mr. Awkal demonstrated ineffective assistance of counsel at the guilt phase. He was not convinced that defense counsel’s performance at the guilt phase was objectively unreasonable and “outside the wide range of professionally competent assistance” when considered “in light of all the circumstances” (*Strickland*, p 690). He drew distinctions between Mr. Awkal’s case and *Combs* in that, in this case, Mr. Awkal’s counsel called three expert witnesses, not just one, and knew Dr. Rizk’s opinion on Mr. Awkal’s sanity, indicating that the decision to call him as a witness was a strategic one.

Furthermore, Judge Gilman concluded that Mr. Awkal had failed to show prejudice. He wrote that “in light of the overwhelming evidence against him, [Mr.] Awkal never had any realistic hope of a successful insanity defense.” In addition, he found that the majority’s opinion that Dr. Rizk’s testimony singlehandedly destroyed Mr. Awkal’s insanity defense ignored the jury’s ability to weigh the testimony of Dr. Rizk against that of Dr. McGee and also against the insanity-related evidence as a whole. Finally, Judge Gilman believed that the majority inadequately accounted for the fact that the prosecution would have called Dr. Rizk to testify that Mr. Awkal was sane at the time of the offenses if the defense had not done so first.

Discussion

The Supreme Court has held that the right to effective assistance of counsel is a Fourteenth Amendment due process right in a capital case (*Reece v. Georgia*, 350 U.S. 85 (1955)) and part of the Sixth Amendment’s guarantee of the right to counsel (*McMann v. Richardson*, 397 U.S. 759 (1970)).

The landmark case, *Ake v. Oklahoma*, 470 U.S. 68 (1985), established that when sanity at the time of the act is in question, the state must provide an indigent criminal defendant with a free psychiatric expert in the preparation of his insanity defense. *In dicta*,

the majority wrote, “the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation and presentation of the defense” (*Ake*, p 83). Most courts have read *Ake* narrowly and appoint experts only when they are essential to the defense. The Ohio Supreme Court held that *Ake* was satisfied by a court clinic psychiatrist.

In *Awkal*, an insanity defense was essential to the defendant’s case. *Awkal* is significant in that it establishes that, irrespective of overall defense strategy, even non-state-appointed counsel may render ineffective assistance in calling a mental health expert whose cross-examination testimony directly contradicts a capital murder defendant’s sole defense of insanity.

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

Reliability of Sleep Parasomnia and the Trustworthiness of Patient Self-Reporting

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Court Found That Patient Self-Reporting to the Testifying Psychiatrist Was Reliable and Trustworthy

In *State v. Scott*, 275 S.W.3d 395 (Tenn. 2009), the Tennessee Supreme Court considered whether the trial court erred in excluding the expert testimony of a physician regarding sleep parasomnia involving the sexual behavior of the defendant.

Facts of the Case

On May 15, 2006, a Tennessee grand jury returned a five-count indictment against Adrian Leroy Scott for alleged criminal sexual contact between Mr. Scott and his stepdaughter (who at the time was a minor). Mr. Scott was charged with three counts of sexual battery by an authority figure in violation of *Tenn. Code Ann.* § 39-13-527 (2006) and two counts

of rape in violation of *Tenn. Code Ann.* § 39-13-503 (2006). Mr. Scott intended to call an expert witness in his defense and provided the state with a report from Dr. J. Brevard Haynes, the Medical Director of the St. Thomas Health Services Center for Sleep. Dr. Haynes opined that “sexual behavior in sleep parasomnia [was] the explanation for [Mr. Scott’s] touching of his step-daughter.” The state filed a pretrial motion to exclude the testimony. Following a hearing, the trial court entered an order excluding Dr. Haynes’ testimony on two grounds. First, the trial court concluded that “intent is not an element of either offense. Therefore, the information which the defendant [sought] to admit through Dr. Haynes as an explanation of the alleged conduct [did] not aid the jury in an understanding of the offense” (*Scott*, p 400). Second, the trial court ruled, without elaboration or explanation, that the “methodology and principles underlying the scientific evidence [were] not sufficiently trustworthy and reliable to be presented to the trier of fact” (*Scott*, p 400). Mr. Scott filed an appeal to the court of criminal appeals, which denied his application. Thereafter, Mr. Scott filed an application under *Tenn. R. App. P. 11*, and the Tennessee Supreme Court granted Mr. Scott’s application for permission to appeal.

On appeal, Mr. Scott argued that the trial court erred by excluding Dr. Haynes’ testimony. Specifically, Mr. Scott argued that Dr. Haynes’ opinion regarding sleep parasomnia was based on reliable scientific methodologies and principles.

Ruling and Reasoning

The Tennessee Supreme Court ruled that the trial court erred by concluding that Dr. Haynes’ testimony was not sufficiently reliable or trustworthy to substantially assist the trier of fact.

The supreme court discussed the factors that determine the admissibility of expert witness testimony, opining that a trial court “must assure itself that the [expert’s] opinions are based on relevant scientific methods, processes, and data, and not upon an expert’s mere speculation” (*McDaniel v. CSX Transp., Inc.*, 955 S.W.2d 257, 265 (Tenn. 1997)). The court’s reliability analysis employed four general inter-related components: assessment of professional qualification; analytical cohesion (i.e., basis for the expert’s opinion); methodological reliability; and foundational reliability (i.e., reliability of the expert’s testimony and opinion).