

tant role of self-reporting in mental health expert examinations.

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## Waiver of *Miranda* Rights

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### Variety of Factors Considered in Determining That a *Miranda* Waiver Was Knowing and Intelligent; Application of Grisso Test Criticized

In *Garner v. Mitchell*, 557 F.3d 257 (6th Cir. 2009), the U.S. Court of Appeals for the Sixth Circuit considered a wide range of evidence about William Garner's capacity to waive his *Miranda* rights knowingly and intelligently before confessing to his crime. They assessed evidence of Mr. Garner's other capacities near the time of his confession, such as his capacity to recognize the criminality of his conduct and his competency to stand trial. They considered expert testimony about Mr. Garner's capacity to understand and waive his *Miranda* rights based on an evaluation conducted years after his confession. The court also focused on the conduct of the police at the time of Mr. Garner's waiver of his *Miranda* rights.

#### Facts of the Case

In 1992 in Cincinnati, Ohio, Mr. Garner burglarized an apartment. He then set it on fire to destroy evidence, killing five children whom he knew were sleeping inside. After his arrest, he received a *Miranda* warning, signed a waiver form, and confessed on tape to setting the fire. He was convicted and sentenced to death for five counts of aggravated murder. He filed a writ of *habeas corpus* and appealed on three claims relating to his *Miranda* waiver. The most substantive was that he did not knowingly and intelligently waive his *Miranda* rights before confessing.

#### Ruling and Reasoning

Affirming the judgment of the district court, the appeals court found that Mr. Garner was not entitled

to *habeas* relief because the totality of the circumstances showed that he had knowingly and intelligently waived his *Miranda* rights before his confession. Therefore, the court determined that his *Miranda* claims lacked merit. The relevant legal questions were whether the defendant knew that he could choose not to talk to police, could talk with counsel present, and could stop talking at any time. The question was not whether he understood every potential consequence of waiving his Fifth Amendment privilege.

To answer these questions, the court focused on evidence of Mr. Garner's mental state and capacities during the crime and during the police interview, the conduct of the police at the time of his confession, and his competency to stand trial. First, the court opined that since Mr. Garner's conduct at the time of his crimes indicated his capacity to understand the criminality and consequences of his acts, he would have had the capacity to understand the consequences of speaking to the police about his crimes during his interrogation the following day. Mr. Garner deceived the taxi driver who took him to the apartment that he burglarized by telling the driver that his girlfriend had thrown him out and he was removing his belongings. Mr. Garner also set the fire to eliminate evidence. Second, he was described as appearing "perfectly normal" and "very coherent" when he waived his rights and gave his confession. After the police read him each provision of the *Miranda* warning they asked him if he understood its meaning, and he answered in the affirmative. He never expressed any misunderstanding of the provisions of the warning.

Third, the court considered the perspective of the police officers at the time of Mr. Garner's confession, opining that the police "had no indication that Garner's 'age, experience, education, background and intelligence' may have prevented him from understanding the *Miranda* warnings" (*Garner*, p 262). The court attached special significance to this finding, since "the original purpose underlying the *Miranda* decision . . . was to 'reduce the likelihood that the suspects would fall victim to constitutionally impermissible practices of police interrogation'" (*Garner*, p 262). Since it was undisputed that the police were reasonable and careful in issuing Mr. Garner his *Miranda* warnings and obtaining his confession, the court said that there was no basis for invalidating Mr. Garner's *Miranda* waiver.

Further, the court did not find sufficient evidence that Mr. Garner had insufficient mental ability to understand his *Miranda* warnings at the time of his interrogation. They considered the assessments of three experts who evaluated him, and all agreed that he “suffered from ‘diminished mental capacity’ [borderline intellectual functioning], a troubled upbringing, and a poor education at the time . . .” of his confession. One expert opined that this information “raise[d] serious questions as to whether [Mr. Garner] could or did understand the consequences of signing the ‘Waiver of Rights,’” but stated that a “more focused assessment” was necessary. A second expert wrote in her competency report that while he was “functioning in the borderline range” of intelligence, on observation he “appeared to be of near average intelligence” and “able to understand all questions and material presented to him. . . .” The court opined that his correct answers to questions regarding competency to stand trial reflected his capacity to understand and knowingly and intelligently waive his *Miranda* rights.

The third expert, Dr. Caroline Everington, examined Mr. Garner six years after his interrogation and, relying heavily on the Grisso test, opined that he would not have had the ability to comprehend his *Miranda* waiver at the time of his interrogation. The court was critical of the Grisso test, which “purports to ‘provide an index of the person’s capacity for understanding the *Miranda* warnings at the time of the evaluation’” (*Garner*, p 266). On the only objectively graded subtest, he obtained a perfect score by identifying whether various interpretations provided by the examiner were the same as or different from the warning presented. On the other subtests, he had difficulty in paraphrasing two of the four provisions of the warning, earning half credit on those two provisions. He had difficulty defining five of six vocabulary words (consult, attorney, interrogation, appoint, entitled, and right) that appear in the version of the *Miranda* warning used in the Grisso test. However, three of the words were not included in the version of the *Miranda* rights that were read to Mr. Garner; police had used simpler terms.

The court criticized the subjective scoring of most of the Grisso subtests and opined that “how Garner compares to the rest of the population in understanding a particular set of difficultly-phrased *Miranda* warnings has no bearing on the question of whether he understood the constitutionally adequate warn-

ings actually given to him.” Further, the court noted that the “Grisso test itself does not purport to ‘measure the validity of the waiver of *Miranda* rights’ or ‘legal competence to waive *Miranda* rights . . .’ and consequently, a poor score on one or more parts of the test does not . . . lead to a conclusion that the examinee lacks the capacity to knowingly and intelligently waive those rights” (*Garner*, p 268). The court concluded that “there is simply no way of telling whether Garner’s Grisso test scores are an accurate indicator of his ability to understand the warnings. . . in 1992” (*Garner*, p 270).

#### Dissent

In the dissent, the minority focused on the interpretation of precedent in considering the validity of *Miranda* waivers and rebutted the majority’s criticisms of Mr. Garner’s Grisso test results. Judge Nelson opined: “[T]he majority’s approach conflicts with the Supreme Court’s repeated pronouncements that the proper inquiry is whether the defendant actually had the capability to make a knowing and intelligent waiver . . . without any reference to police conduct” (*Garner*, p 275). The dissent pointed out that police conduct only directly influences whether or not a waiver of *Miranda* rights is voluntary and acknowledged that the requirement that a *Miranda* waiver be knowing and intelligent “may . . . put police in the difficult position of having to assess a suspect’s understanding and intellectual capacities at the time of interrogation” (*Garner*, p 276). The dissent argued that the courts face similar challenges when assessing a defendant’s competency to plead or waive counsel and that, if police should question an individual’s capacity to offer a valid *Miranda* waiver, nothing precludes them from seeking such a waiver at a later time (such as after an evaluation by a mental health professional).

#### Discussion

Although the dissent emphasized that Mr. Garner had borderline intellectual functioning, a history of poor school performance, and an adverse background, the majority correctly noted that at the time of the interrogation the police had no reason to suspect that Mr. Garner may have had difficulty in understanding his *Miranda* rights or lacked the ability to waive them knowingly and intelligently. Case law in other circuits indicated that in some cases, limited intellectual capacity led to ineffective waivers if there were observable indications to police that the defen-

dant was incapable of understanding. However, there were no such indications in Mr. Garner's case. In the absence of foreknowledge of a suspect's intellect or the observation of an obvious intellectual or psychological abnormality, it would be unreasonable to expect police to question a suspect's capacity to offer a *Miranda* waiver. Such an expectation would approach a new competency assessment that would be performed by the police. Further, it would counter the presumption that an individual has the capacity to understand and waive *Miranda* rights.

This court was not the first to consider evidence of the defendant's awareness of the criminality of his conduct or his competency to stand trial as proxy evidence of his capacity to understand and waive his *Miranda* rights. Clinicians may take issue with these inferences, but the law supports them nonetheless. A strength of such proxy evidence is that it is contemporaneous, whereas information such as the Grisso test, while more specific to the capacity in question, may have been obtained much later. In this case, the court placed more confidence in contemporaneous evidence than in the results of Mr. Garner's Grisso test results six years later. This ruling suggests that the evidentiary weight of Grisso test results may be substantially devalued if the test is not administered at a point close in time to the confession.

The court considered the Grisso test's grading criteria "subjective and legally questionable." They called one specific item on the test "troubling." They noted other jurisdictions in which the Grisso test has been found inadmissible. The majority offers a reasonable critique of the Grisso test in their discussion of the fact that Mr. Garner was given his *Miranda* warning in more simple language than that used in the test. Although the dissent argued that comparison of Mr. Garner's Grisso test performance to norms still would "provide an indication of the examinee's capacities for understanding relative to other examinees . . ." (*Garner*, p 282), ultimately the only pertinent analysis is about his capacity to understand the specific version of the *Miranda* rights that he was read at the time of his waiver. These critiques focus on aspects of the Grisso test itself rather than the specifics of Mr. Garner's case, and therefore it is reasonable to expect that similar critiques may follow in future cases.

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## Neuroimaging Studies in Diminished-Capacity Defense

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### **PET Scan Expert Testimony Proffered in a Defense of Diminished Capacity Fails Frye Admissibility Test of General Acceptance to Prove Mental Disabilities**

In *Zink v. State*, 278 S.W.3d 170 (Mo. 2009), David Zink appealed the overruling of his motion for post-conviction relief from his conviction of first-degree murder and his death sentence. Mr. Zink claimed that the motion court erred in denying his multiple claims of ineffective assistance of counsel and in violating his constitutional rights. Principal among his claims of ineffective assistance of counsel was the failure of his trial attorney to obtain and utilize at trial and sentencing a PET (positron emission tomography) scan that indicated a brain abnormality. The scan might have bolstered his defense of diminished capacity and mitigated the death sentence he received. The state supreme court concluded that PET scan expert testimony in support of a claim of diminished capacity did not meet the *Frye* standard of admissibility. Hence, defense counsel was not ineffective.

#### *Facts of the Case*

Mr. Zink rear-ended a woman's car and then kidnapped, raped, mutilated, and murdered her. He was soon apprehended and confessed. At the time of this violent crime, he was on parole for rape convictions. He explained the murder saying that he was afraid the victim would alert the authorities about the kidnapping. He was charged with first-degree murder and asserted a voluntary manslaughter and diminished-capacity defense. The jury found him guilty of first-degree murder and sentenced him to death on the basis of the aggravating factors of his two prior convictions for rape and that the murder was committed heinously and to avoid a lawful arrest. He subsequently filed a motion for post-conviction relief claiming ineffective assistance of counsel. The mo-