"wild eyed" or looking around "in a frenzied manner" did not rise to the level of material evidence that would have changed the mind of any juror to mitigate a capital sentence.

Discussion

In a footnote, the Court cited the ABA Model Rule of Professional Conduct 3.8(d) (2008), which compels a broader obligation from an ethics standpoint for a prosecutor to disclose evidence favorable to the defense. "As we have often observed, the prudent prosecutor will err on the side of transparency, resolving doubtful questions in favor of disclosure" (*Cone*, p 1783).

Justice Roberts in his concurrence specifically noted, "The lower courts should analyze the issue under the constitutional standards . . . not under whatever standards the American Bar Association may have established" (*Cone*, p 1787). "The majority's passing citation of [the ABA model rule] should not be taken to suggest otherwise" (*Cone*, p 1787). The majority opinion of the Court did not further clarify this issue and left unresolved the extent to which courts can grant relief for a prosecutor's failure to abide by this higher ethics-based but not constitutionally mandated standard.

This ruling is relevant to forensic practice. More disclosure by the prosecution may result in more evidence favorable to the defendant's case that the forensic evaluator will have access to for an NGRI evaluation. In the present case, both defense expert opinions were based solely on the defendant's account of his amphetamine use and symptoms of chronic amphetamine psychosis to establish an NGRI defense. This limited source of evidence allowed the prosecution to discredit the reliability of the basis for the opinions.

This case highlights the perils for a forensic expert in basing an evaluation and testimony solely on a party's statements without collateral information and on the importance of pressing to seek any such information from opposing counsel. It is not safe to assume that no such evidence exists or that all such evidence has been properly produced. Prudence dictates, therefore, that the forensic expert should specifically request of counsel any such information and inquire whether there might be collateral information of this type.

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Competent With a Caveat

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Courts Have the Duty to Ensure That a Defendant Is Competent When on Notice of a Troubled History

In United States v. Ruston, 565 F.3d 892 (5th Cir. 2009), the United States Court of Appeals for the Fifth Circuit considered whether the United States District Court for the Northern District of Texas erred in not ordering *sua sponte* a competency evaluation, thus allowing a questionably competent defendant to proceed *pro se* at his postacquittal commitment hearing.

Facts of the Case

In May of 2004, Lester Jon Ruston left a threat-ridden voicemail for the Honorable Irma Ramirez, a federal magistrate judge whom he believed to be involved in a plot to murder him. Upon arrest, he was charged with threatening to assault and murder a federal official in violation of 18 U.S.C. § 115 (2000). Although a federal defender was appointed his counsel in August, Mr. Ruston began filing irrational *pro se* motions, alleging that the district court was attempting to cover up a conspiracy against him. After a competency to stand trial (CST) evaluation was ordered and completed, Mr. Ruston was found not competent and was remanded to the custody of the attorney general on May 4, 2005, for competency restoration. Throughout his 16-month stay at the U.S. Medical Center for Federal Prisoners (MCFP), Mr. Ruston refused treatment, denied he had a mental illness, and continued filing erratic *pro se* motions (telephone communication with James Wolfson, MD, October 26, 2010).

In August 2006, a *Sell* hearing was scheduled to determine whether Mr. Ruston could be involuntarily medicated. Before the hearing, Mr. Ruston's attorney had Mr. Ruston's CST assessed by an independent evaluator, Dr. George Trapp. Dr. Trapp

found that Mr. Ruston's competency had been restored. Dr. James Wolfson, psychiatrist at MCFP, then re-evaluated Mr. Ruston and found that his delusions, unprecedentedly, did not interfere with his present decision-making on how to proceed with his case (Wolfson, October 26, 2010). Therefore, a CST hearing, rather than a *Sell* hearing, was held in September. Dr. Wolfson then testified that Mr. Ruston had "present capacity to proceed," but "delusional material continued . . . and could impair his future capacity" (*Ruston*, p 895). Dr. Wolfson urged the court to proceed to trial "quickly because he could give no assurance that Ruston's level of remission . . . might continue" (*Ruston*, p 895). At the close of the hearing, the district court found Mr. Ruston competent to stand trial. On September 26, 2006, his attorney provided a Notice of Insanity Defense. Within a week, the government stipulated that Mr. Ruston was not guilty by reason of insanity.

On October 12, 2006, the district court found Mr. Ruston not guilty by reason of insanity and committed him to the custody of the attorney general for the purpose of evaluation before release or further commitment under 18 U.S.C. § 4243 (2000), Hospitalization of a Person Found Not Guilty Only by Reason of Insanity.

Five months later, Mr. Ruston's attorney filed a motion requesting the court to determine whether he had waived his right to counsel by indicating that he wished to proceed *pro se* in his § 4243 (postacquittal commitment) hearing, at which he would have "the burden of proving by clear and convincing evidence that his release would not pose a substantial risk of bodily injury to others or damage to property" (*Ruston*, p 896). The magistrate judge found that Mr. Ruston had "the ability to understand . . . the proceedings . . . and consequences of his decision to waive counsel" (*Ruston*, p 895), allowing him to proceed *pro se*.

Mr. Ruston represented himself at the § 4243 hearing on March 27 to 28, 2007. His manner of self-representation suggested that he did not adequately understand the nature or purpose of the proceedings. During the hearing, three expert witnesses provided testimony. The government called Dr. Wolfson, who testified that Mr. Ruston had paranoid schizophrenia and had decompensated since his previous evaluation. Dr. Wolfson further testified that, without treatment, Mr. Ruston posed a risk to others. During his cross-examination of Dr. Wolfson, Mr. Ruston questioned the accuracy of the diagnosis, pointing out that he had been found to be restored to competence without any medication or treatment. Dr. Wolfson explained that, while rare, spontaneous remissions can occur, and stated that Mr. Ruston appeared "more rational" during his competency evaluation than at present.

Mr. Ruston's expert witnesses had also previously evaluated his competency to stand trial. Dr. Lisa Clayton testified that Mr. Ruston was "very psychotic" during her October 2004 evaluation of him. At different points in his direct examination of her, Mr. Ruston accused Dr. Clayton of lying and alleged that she had been ordered to perjure herself. Dr. Trapp testified that during his evaluation of Mr. Ruston in August 2006, Mr. Ruston demonstrated that he was in remission sufficient to be found competent to stand trial. On direct examination by Mr. Ruston, Dr. Trapp agreed that Mr. Ruston would not be a danger to people living in the United States if he were living in Scotland, where Mr. Ruston had indicated he would be living, having applied for political asylum there.

During closing arguments, the government argued that Mr. Ruston failed to prove by clear and convincing evidence that his release would not pose a risk to others, and Mr. Ruston called himself as a witness. His testimony included denying allegations from a 1991 arrest, offering the address of a purported hit man hired to kill him, and maintaining that he did not have a mental illness. On cross-examination, Mr. Ruston argued that the doctors who testified to the contrary had been tampered with. After finding that Mr. Ruston failed to meet the burden of proof by clear and convincing evidence that he would not pose a risk to persons or property as defined in 18 U.S.C. § 4243 (2000), the district court ordered that he remain in the custody of the attorney general until he could be safely released into the community.

Mr. Ruston appealed the district court's ruling on two grounds. He argued that the court had erred in not *sua sponte* ordering a competency evaluation based on his behavior during the § 4243 hearing and that it also erred in finding him competent to waive his right to counsel for this hearing.

Ruling and Reasoning

The United States Court of Appeals for the Fifth Circuit reversed and remanded the decision of the district court. In doing so, it reviewed whether the district court abused its discretion in not *sua sponte* holding a competency hearing for Mr. Ruston. While the appellate court found no precedent for what a district court must do when a defendant's competency seems questionable during a § 4243 (civil) hearing, it noted the relevance of an earlier criminal case, *Mata v. Johnson*, 210 F.3d 324 (5th Cir. 2000). In *Mata*, the appellate court ruled that a defendant has been denied a fair trial if the "court received evidence, [that when] viewed objectively . . . should have raised a reasonable doubt as to competency, yet failed to make further inquiry" (*Mata*, p 329).

In its analysis, the appellate court also reviewed the statutory requirements for determination of a defendant's mental competency to stand trial. 18 U.S.C. § 4241 (2000) states, "The court shall . . . order . . . a [competency] hearing on its own motion, if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent." In *United States v. Messervey*, 317 F.3d 457 (5th Cir. 2002), the Fifth Circuit described a three-factor analysis for interpreting "reasonable cause": "(1) any history of irrational behavior, (2) the defendant's demeanor at trial, and (3) prior medical opinion on competency" (*Messervey*, p 463). The appellate court reasoned that each of these three factors was met in Mr. Ruston's case. The appellate court stated that the district court had been put on notice of Mr. Ruston's history of irrational behavior and psychotic diagnoses. Considering this in conjunction with Dr. Wolfson's testimony, the appellate court concluded that there was reasonable cause to believe Mr. Ruston was having persecutory delusions during the § 4243 hearing. The court further concluded that Mr. Ruston's conduct during the hearing should have raised concerns about his competency to proceed. Specifically, the appellate court opined that his objections and questioning suggested that he did not have a "rational as well as factual understanding of the proceedings against him" (*Ruston*, p 902).

The appellate court held that the district court abused its discretion in not *sua sponte* holding a competency hearing. It then reversed the district court's decision and remanded the case for further proceedings.

The appellate court declined to review Mr. Ruston's second claim of error, reasoning that the lower court's next step was to determine whether Mr. Ruston was competent to stand trial, even if represented by counsel. *In dicta*, the court considered *Indiana v. Edwards*, 554 U.S. 164 (2008), in which the U. S. Supreme Court held that it is not unconstitutional for states to require representation by counsel for defendants they find competent to stand trial but not competent to represent themselves. Although this case involved legal representation during a criminal trial (and not during a commitment proceeding, as here), the appellate court stated that the holding in *Edwards* could be applied to Mr. Ruston's case.

Discussion

This case highlights the understanding of competency as a present ability. Further, it underscores the importance of expert witness testimony in educating the court about the propensity for this ability to vacillate in the context of mental illness. Though previously found not competent to stand trial, Mr. Ruston briefly attained competence through restoration efforts. As this did not involve treatment of the underlying psychotic illness, Dr. Wolfson cautioned the court that Mr. Ruston's competence might not last and advised the court to proceed without delay. Dr. Wolfson's efforts to educate the district court proved integral in the appellate court's reversal.

The outcome of Mr. Ruston's case speaks to the rarity with which the insanity defense is employed in federal court. Before being found competent to stand trial, Mr. Ruston spent almost a year and a half in federal custody, denying mental illness and refusing treatment. Nevertheless, after the district court found him competent, his attorney proceeded with an insanity defense. From a liberty standpoint, this was a risky legal strategy, considering that, if found NGRI, Mr. Ruston's civil commitment back to federal custody could be indefinite if he continued to refuse treatment for the mental illness he denied. Charged with public safety over liberty, the federal prosecutor quickly stipulated that Mr. Ruston was NGRI rather than take the case to trial, where the charge carried a maximum sentence of 10 years' imprisonment.

Disclosures of financial or other conflicts of interest: None.