

. . . [O]ne who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal power of self-protection or to subject him to association with persons likely to harm him, is under a duty to exercise reasonable care so to control the conduct of third persons as to prevent them from intentionally harming the other or so conducting themselves as to create an unreasonable risk of harm to him, if the actor

a. knows or has reason to know that he has the ability to control the conduct of the third persons, and

b. knows or should know of the necessity and opportunity for exercising such control.

Despite a common reliance on the principles articulated in the Restatements of Torts § 315 and related sections, comparing *Adams* with decisions from other states, such as California's *Tarasoff*, demonstrates the widely divergent approaches that courts have taken to interpreting special relationships as they relate to controlling psychiatric patients and protecting third parties in different jurisdictions. Although the instant case may be comforting to psychiatrists, the take-home message, now as ever, is that they must know the law in jurisdictions where they practice.

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

Suicide by Cop Mental Health Expert Testimony Meets Daubert Standards

Omri Berger, MD

Fellow in Forensic Psychiatry

John R. Chamberlain, MD

Associate Clinical Professor of Psychiatry

Department of Psychiatry

University of California, San Francisco

San Francisco, CA

In a Wrongful Death Suit Involving a Police Shooting, Mental Health Expert Testimony on a Defense Theory of Suicide by Cop Was Found to Meet the Daubert Standard

In *Boyd v. City & County of San Francisco*, 576 F.3d 938 (9th Cir. 2009), the Ninth Circuit U.S. Court of Appeals held that the district court's admission of mental health expert testimony on a suicide by cop defense theory did not constitute an abuse of discretion, as this testimony met the *Daubert* standard and was admissible under Federal Rule of Evidence 702.

Facts of the Case

On May 5, 2004, Cammerin Boyd attempted two separate kidnappings at gunpoint. One victim contacted a San Francisco police officer, leading to a high-speed chase, during which Mr. Boyd leaned out of the window of his vehicle and fired twice at the pursuing officers. He eventually stopped his vehicle and was quickly surrounded by San Francisco police officers, who ordered him to exit his vehicle, put his hands up, and lie down on the ground. According to witnesses, he exited the vehicle and put his hands up, but he did not get on the ground. Instead, he walked toward officers and then back toward his vehicle. San Francisco police officer Timothy Paine reportedly perceived Mr. Boyd to be reaching back into his vehicle, at which point he fired three shots, striking Mr. Boyd twice and fatally wounding him.

Two weeks before Mr. Boyd's death, Oakland police officers had performed an investigative stop on his vehicle, during which they discovered rap lyrics and a newspaper article regarding the murder of an Oakland police officer. Three days before Mr. Boyd's death, Oakland police had arrested him for reckless driving. Officers ordered him out of his car and then commanded him to show his hands and get down on the ground, all of which he did without assistance, despite having two prosthetic legs. His legs had been amputated following a motor vehicle accident in 1993, in which he ran into a light pole while attempting to evade a California Highway Patrol officer. During his arrest by Oakland police, Mr. Boyd reportedly struggled with officers, repeatedly screaming "kill me" and calling them "filthy white racists."

Mr. Boyd's family brought a wrongful death suit against the city and county of San Francisco under 42 U.S.C. § 1983 (2006). The defense presented the expert witness testimony of Dr. Emily Keram, a forensic psychiatrist. Dr. Keram stated that her analysis of the circumstances surrounding Mr. Boyd's death determined that he had attempted to commit suicide by cop and had purposefully drawn police fire to accomplish that end. The Boyd family objected to the admission of Dr. Keram's testimony, as well as to other evidence regarding Mr. Boyd's past. However, the district court allowed her testimony, and after a six-week trial, a jury ruled in favor of the city and county of San Francisco. The Boyd family appealed the judgment on the basis that the district court abused its discretion in allowing the admission of

improper evidence at trial, in particular Dr. Keram's testimony.

Ruling

The court of appeals held that the expert witness testimony of Dr. Keram about the defense's suicide by cop theory met the *Daubert* standard and that the district court's admission of this evidence did not constitute abuse of discretion. The court also agreed with the admission by the district court of other evidence about Mr. Boyd's past, and as such the verdict was affirmed.

Reasoning

The court of appeals examined the district court's admission of Dr. Keram's testimony based on Federal Rule of Evidence 702 and the *Daubert* standard, established in a series of three United States Supreme Court decisions. The Federal Rules of Evidence allow expert witness testimony so long as "(1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case" (Fed. R. Evid. 702 (2009)).

In *Daubert*, the U.S. Supreme Court determined that it is the trial judge's responsibility to ensure "that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand" (*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597 (1993)). The Court further held that, in making this determination, the judge must make "a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and . . . whether that reasoning or methodology properly can be applied to the facts in issue" (*Daubert*, pp 592-3). Some of the assessments considered relevant by the Court, neither necessarily nor exclusively, included whether the theory or technique has been tested, whether the theory or technique has been subjected to peer review and publication, the known or potential rate of error for the technique, and the theory or technique's general degree of acceptance in the relevant scientific community. In a related case, the Supreme Court held that it is the role of the courts to "make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field"

(*Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999)).

In examining the district court's admission of Dr. Keram's testimony, the court of appeals first noted that the district court held a lengthy hearing outside the presence of the jury, based on which the trial judge determined that Dr. Keram was a principled, qualified, and objective expert. The court of appeals further noted that the district court examined Dr. Keram's testimony using each of the four *Daubert* factors. In doing so, the trial judge determined that although the suicide by cop theory could not be tested, several studies existed that supported the validity of the theory, and those studies involved methods used in forensic psychiatry to attempt to reconstruct an individual's state of mind after the fact. The trial judge noted that according to Dr. Keram, these studies were extremely strict in their requirements, so as to avoid inclusion of false positives. The trial judge further noted that Dr. Keram was careful to tie her conclusions in the case to the literature on suicide by cop. Furthermore, the trial judge referenced Dr. Keram's testimony that she knew of approximately 10 peer-reviewed articles and 4 non-peer-reviewed publications on the subject. Finally, the district court noted that the suicide by cop theory appeared to be generally accepted in the relevant professional community, given the number of publications written in support of the theory and there being no contrary articles or studies. On the basis of these factors, the district court concluded that the testimony satisfied *Daubert's* requirements for admission.

The court of appeals agreed with the district court's reasoning and decision with respect to Dr. Keram's testimony. In addition, the court ruled that while the Boyd family challenged the validity of Dr. Keram's testimony, the methodology that she used, and her conclusions, they did not offer in their appeal a scientific opinion, alternative methodology, or expert witness testimony to support these assertions. The court of appeals concluded that based on its review, it agreed with the district court's assessment and decision to admit Dr. Keram's testimony.

Discussion

Through a series of landmark decisions, the Supreme Court has established the *Daubert* standard for the admission of expert witness testimony. Retrospective analysis of behavior to reconstruct an individual's state of mind is a fundamental methodol-

ogy in forensic psychiatry. In this case, this methodology was combined by an expert witness with data from published, peer-reviewed studies on the phenomenon of suicide by cop. This approach and the resulting conclusions were found to meet the *Daubert* standard in trial and on appeal. This suggests that when analyzing complex behavior, by combining careful, well-accepted forensic psychiatric methodology with relevant published research, forensic psychiatric experts can increase the likelihood that their conclusions and testimony will meet the legal standards for admission. At the same time, given the variability in the quality and validity of published research, courts should examine studies proffered in support of expert testimony, so as not to accept testimony that is lacking in scientific basis. In making admissibility determinations, courts may, and arguably should, call upon mental health experts to assist with analyzing methodology and studies offered as a basis for expert testimony. Finally, this case underscores the importance of forensic psychiatric research dedicated to phenomenon that may not be sufficiently addressed by the body of knowledge and literature of general psychiatry.

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

Competence to Assist Counsel in Habeas Proceedings

Melissa Nau, MD

Fellow in Forensic Psychiatry

John R. Chamberlain, MD

Associate Clinical Professor of Psychiatry

Department of Psychiatry

University of California, San Francisco

San Francisco, CA

Even a Habeas Appeal That Is Record-Based and Resolvable as a Matter of Law Can Benefit From Communication Between Counsel and Client

In *Nash v. Ryan*, 581 F.3d 1048 (9th Cir. 2009), the United States Court of Appeals for the Ninth Circuit examined the question of whether the statutory right to competence in *habeas* proceedings, as determined by *Gates v. Woodford*, 334 F.3d 803 (9th Cir. 2003), applies to an appeal of denial of *habeas* relief. The State of Arizona argued that it should not apply, given the record-based nature of an appeal.

Facts of the Case

On May 25, 1983, Viva Leroy Nash was convicted of first-degree murder, armed robbery, and aggravated assault and was sentenced to death in an Arizona superior court. The Supreme Court of Arizona upheld the conviction in 1985. Subsequently, Mr. Nash filed several petitions for postconviction relief in both state and federal court. Eventually, he filed an amended *habeas* petition, which raised the questions addressed in this appeal.

Mr. Nash argued that the statutory right to competence, as outlined in 18 U.S.C. § 3599 (2010), applies to an appeal. He also argued that he was currently incompetent to pursue an appeal and that proceedings should therefore be stayed until he was found competent. The state opposed these arguments, first disputing that the right to competence extended to an appeal from the denial of *habeas* relief in capital cases. The state also argued that a competency determination was not warranted in this case.

The Ninth Circuit Court of Appeals specifically addressed three questions in this case:

Does the statutory right to competence in *habeas* proceedings apply to an appeal?

If a defendant is found incompetent, is he entitled to a stay in court proceedings until competency can be restored?

Is there sufficient evidence to suggest that a competency evaluation would be indicated for Mr. Nash?

Ruling and Reasoning

On the question of whether the statutory right to competence in federal *habeas* capital cases extends to an appeal, the court primarily cited the decision in *Gates* as precedent. In *Gates*, the court concluded that a capital *habeas* petitioner's statutory right to counsel also encompassed the right to competence in *habeas* proceedings. In its analysis of this case, the Ninth Circuit found that a defendant's ability to provide meaningful assistance to counsel "depends in substantial measure on the petitioner's ability to communicate with him" (*Gates*, p 813). The *Nash* court noted, "We fail to see why that statutory right to assistance of counsel does not also encompass 'meaningful assistance' on appeal" (*Nash*, p 1053). To substantiate their position, the court reasoned, "Although extra-record facts would be documented in the district court record, counsel may nonetheless