

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

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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

need to communicate with his client to understand fully the significance and context of those facts so that he may pursue the most persuasive arguments on appeal” (*Nash*, p 1053).

The second issue was whether Mr. Nash, if found incompetent, was entitled to a stay in court proceedings until competency could be restored. The court held that a stay was required and cited as precedent a decision by the Seventh Circuit (*Holmes v. Buss*, 506 F.3d 576 (7th Cir. 2007)). Citing *Holmes*, the Ninth Circuit suggested that more important than “categorical rules” regarding competence, such as those protected by the Sixth and Eight Amendments, was whether “rational communication with the petitioner is essential to counsel’s ability to meaningfully prosecute an appeal” (*Nash*, p 1054). Because a petitioner could potentially benefit from rational communication with his attorney on appeal and this communication could alter the course of the legal proceedings, the court concluded, “A petitioner who lacks the ability to communicate rationally . . . is entitled to a stay of the appeal until the petitioner is found competent” (*Nash*, p 1055).

On the third question of whether Mr. Nash was entitled to a competency determination, the court divided its reasoning into two parts. The justices first examined whether his claims could benefit from the ability to communicate rationally with counsel and subsequently explored whether he had provided sufficient evidence of incompetence to warrant a competency determination. To determine the relevance of his ability to communicate rationally, the court examined the claims that he sought to raise on appeal. The court noted that some of these claims involved ineffective assistance of counsel at both the guilt and penalty phases of his trial. The court reasoned that Mr. Nash, “is better positioned than anyone to identify aspects of his personal history that should have been, but were not elicited” (*Nash*, p 1055). The court went further by arguing that given the fact that Mr. Nash has been assisted by several attorneys over the years, “The information that Nash possesses would provide first-hand insight into the earlier proceedings, insight that might be helpful in ways that Nash’s current attorneys cannot currently identify because of his alleged incompetence” (*Nash*, p 1056). Believing that the success of the claims on which the certificate of appealability was granted would depend on Mr. Nash’s ability to rationally communicate with counsel, the court con-

cluded that it was important to consider the question of competency.

To determine whether Mr. Nash provided sufficient evidence of incompetence to warrant a competency determination, the court recognized that the precedence of *Gates* left unresolved the showing that would warrant a competency evaluation and the standard of competence for *habeas* relief. On the latter, citing *Gates* and *Holmes*, the court concluded “competency to pursue federal *habeas* relief in a death penalty case requires that the petitioner possess essentially the same mental capacity that renders him competent to stand trial” (*Nash*, p 1057).

The court relied on a psychiatric evaluation indicating that Mr. Nash suffered from a delusional disorder as well as a personality disorder, to determine whether he had presented “reasonable cause” to suggest incompetence. It also relied on a sealed declaration from Mr. Nash’s *habeas* counsel that described difficulties in communicating with him in a rational manner. It concluded that Mr. Nash had “presented sufficient evidence of incompetence to warrant a competency determination” (*Nash*, p 1058).

The court granted Mr. Nash’s motion for a limited remand to the district court to conduct a competency determination.

Discussion

The decision reached by the Ninth Circuit in *Nash* followed court precedent that there is a statutory right to counsel in capital *habeas* proceedings, regardless of whether these proceedings involve an appeal. The court recognized that even though appeals are often considered “matters of law,” the ability of the petitioner to communicate rationally with counsel still has a direct bearing on the arguments and facts put forth on appeal. By ruling that Mr. Nash had a right to a stay in court proceedings until competency was determined, and if necessary restored, the court supported the role that individuals have in assisting counsel in their own defense.

In the past year, this case has been cited positively by the Ninth Circuit, and the U.S. District Courts for the Eastern District of California and the Southern District of Florida (*Lewis v. Ayers* No. S-02-0013, 2010 U.S. Dist. LEXIS 5787 (E.D. Cal. Jan. 26, 2010)) discussed some of the more controversial implications of *Nash*. In *Lewis*, the court noted:

Not surprisingly, all petitioners in non-capital *habeas* proceedings are “competent” to proceed in *habeas*, even when a basis for their petitions involve incompetency at trial.

Because the posture of capital and non-capital petitioners is different, i.e., a capital petitioner may often benefit by delay while a non-capital petitioner will almost always have nothing to gain by delay, no non-capital petitioner ever claims that he is incompetent to proceed on appeal or in habeas [*Lewis*, 2010 U.S. Dist. LEXIS 5787 n. 3].

Although the court recognized that petitioners are likely to claim incompetence more frequently in capital *habeas* proceedings, it anticipated and safeguarded against such a claim in *Nash* by declaring that competency to pursue federal *habeas* relief in a death penalty case requires that the petitioner possess essentially the same mental capacity that renders him competent to stand trial—that is, the ability to understand and communicate rationally with counsel when necessary. The court did not make a distinction between postconviction proceeding standards and those held before conviction.

This case also highlights the importance of the “now” determination in competency. If a defendant’s mental health deteriorates, the court specifically states that the question of competency should be reconsidered. Again, in *Lewis*, the court noted that “petitioner’s competence is not static” but clarified that the periods of incompetence must be of sufficient duration to preclude counsel from acquiring the basic assistance that any competent petitioner would be able to give. This provides some means by which courts can evaluate the extent to which competency hearings are warranted in these cases. The court also provided forensic psychiatrists a clear standard against which to measure an individual’s competence in such proceedings.

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