

icance of his actions fundamentally describes what led to this tragedy” as evidence that his purported diminished capacity was treated as aggravating (*Lucas*, p 793).

*Ruling and Reasoning*

The court of appeals did not agree with this characterization of the district court’s statements. The court pointed out that, because the district court did not believe individuals with Asperger syndrome were more likely to engage in criminal activities, there was no reason to believe that it was treated as an aggravating factor. Instead, the district court rejected Mr. Lucas’s argument that the presence of diminished capacity should necessarily result in a lesser sentence, citing *United States v. Portman*, 599 F.3d 633 (7th Cir. 2010), p 638: “Of course . . . a district court could find diminished capacity but choose not to reduce a sentence. For example, a court could find that the defendant would remain dangerous after treatment” (*Lucas*, p 794). The court of appeals agreed with the district court’s reasoning that, because Mr. Lucas had already received extensive parental and professional support before the attempted kidnapping, he would be likely to remain dangerous, even after further treatment, and a reduced sentence would therefore not be justified. His subsequent appeal to the U.S. Supreme Court was denied *certiorari* in 2013.

*Discussion*

This case highlights that an argument for mitigation based on psychological conditions is not necessarily accepted as a reason to hand down a reduced sentence. Courts are free to refuse sentence reduction, even when the condition contributes to the commission of the crime, if the defendant is likely to remain dangerous. The presence of sufficient prior treatment and support, which were nonetheless ineffective in preventing criminal behavior, may be used to support a finding of continued dangerousness. Such backfiring of mental health evidence offered in good faith is troubling, not only because the evidence is a double-edged sword, but because it could have a chilling effect on such proffers going forward. Although we appreciate that the sentencing calculus would include elements of deterrence as well as retribution, deterrence via enhanced mental health care is preferable to adding years of incarceration.

Mr. Lucas had documented conditions which, if properly explored and explained, could have placed

him in a better light before the court. A better use of the expert’s report may have been to characterize more fully the role and effect of Mr. Lucas’s autism spectrum disorder (ASD) on his appreciation of wrongfulness. Limitations in theory of mind in ASD can give rise to behaviors that appear odd, insensitive, or even frankly antisocial to judges, juries, and prosecutors. He had a hypertrophied interest in his online gaming, taking the currency too literally. Rigidity and impulsivity may be interpreted as intractability or callousness. Deficits in social cognition that result in a lack of an ability to understand another’s subjective, and particularly emotional, reality may directly contribute to significant misunderstandings and the commission of such ostensibly terrible acts. Although there is no guarantee of success, either in determinations of criminal responsibility or in sentencing, an expert opinion used to educate the trier of fact on these questions would be a step in the right direction.

Mr. Lucas did not receive the minimum sentence of 7 years; it was 17.5, but could have been life. Given the elements of child sexual predation and homicidal threats, one can understand the court’s concerns. It may have been overreaching, however, for him to argue that Provigil induced a manic episode that resulted in the commission of the crime, particularly since the district court could easily discount that justification on the basis of the timeline. Without clear evidence that Provigil was the inciting agent and a compelling explanation of how it would affect *mens rea* and criminal responsibility, such an argument is unlikely to be helpful.

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**Juror’s Willful Misconduct and Sentencing of a Juvenile Offender to Life Without Parole**

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**Removal of a Juror Is Warranted When Willful Misconduct Includes Compilation of Outside Evidence and Assertion of Medical Expertise; the Eighth Amendment is Not Violated If, at the Time of Sentencing of a Juvenile Offender, the Sentencing Court Considers Mitigating Factors**

In *Bell v. Uribe*, 729 F.3d 1052 (9th Cir. 2013), the United States Court of Appeals for the Ninth Circuit considered whether the District Court for the Central District of California erred in not upholding the state trial court's decision to dismiss a juror who was the lone holdout for acquittal after the juror had engaged in misconduct, ostensibly conducting independent research and acting as an expert on mental health. The court also ruled on whether the Eighth Amendment was violated when the jury found 1 of the defendants/appellants (there were 16 at the time of the offense) guilty of first-degree murder and sentenced her to life in prison without the possibility of parole.

*Facts of the Case*

Natalie DeMola, 16, her boyfriend Terry Bell, 17, and his friend Christopher Long plotted to rob and kill Ms. DeMola's mother, staging her murder as a random burglary gone awry. Ms. DeMola, an honor student and champion swimmer, and Mr. Bell had planned the crime for at least two months. They recruited Mr. Long by promising him a share of the money and other goods from the DeMola home. On April 10, 2001, they murdered 47-year-old Kim DeMola.

In 2005, a Riverside County Superior Court convicted Ms. DeMola and Mr. Bell of first-degree murder and sentenced them to life in prison without the possibility of parole. A separate jury found Mr. Long guilty of first-degree murder and, without special aggravating circumstances, sentenced him to 25 years to life.

The four-week trial resulted in several days of jury deliberations, interrupted by accusations of misconduct by Juror No. 7, a nurse. On day four, Juror No. 12 informed the court that Juror No. 7 worked in the mental health field and was expressing a medical opinion to the remaining jurors that one of the defendants had clinical depression. The jury foreman answered in the negative when asked by the court whether Juror No. 7 was portraying herself as an expert in the mental health field and evaluating the evidence accordingly. The court then instructed Ju-

ror No. 7 that "the deliberation process must be based upon the evidence introduced in the case and that a particular juror can't use his or her expertise in evaluating the evidence because that individual never testified as an expert" (*Bell*, p 1055).

The court concluded that Juror No. 7 was deliberating properly and instructed the deadlocked jury to continue deliberating until it reached a verdict. Two days later, the jury sent a note indicating that Juror No. 7 was indeed functioning as an expert and not as a deliberating member of the panel. When interrogated by the court at that time, the jury foreman related that Juror No. 7 had returned home, compiled information from her professional source, and presented the information to the jury, along with the conclusion that one of the defendants had clinical depression. Other jurors concurred. There had been no such evidence offered at trial.

The court found that, despite specific instructions to limit the deliberations to the evidence, Juror No. 7 had engaged in willful misconduct, attempting to persuade the jury based on her training and experience and extraneous information. The court excused her as unable to perform her duties per the court's directives. After an alternate juror was empaneled, the jury reached a unanimous guilty verdict within hours.

Mr. Bell and Ms. DeMola appealed their convictions to the California Court of Appeal and then to the California Supreme Court, arguing in part that the trial court's removal of Juror No. 7 denied their Sixth Amendment right to a fair and impartial jury, as well as their Fourteenth Amendment rights to due process and a fair trial. The California Court of Appeal concluded that Juror No. 7 had committed misconduct by violating the court's instructions against independent research and acting as an unsworn expert witness. Thus, the defendants' rights had not been violated. The California Supreme Court affirmed the California Court of Appeal's opinion. Mr. Bell and Ms. DeMola then sought *habeas* relief in the United States District Court for the Central District of California.

In 2011, the federal magistrate judge recommended that Mr. Bell's petition be dismissed with prejudice, but revised that recommendation a few weeks later. The magistrate concluded that *habeas* relief was warranted because the record disclosed that the trial court discharged Juror No. 7 because of her views on the merits of the case. Accordingly, the district court granted *habeas* relief and ordered the state

to “either release Bell and DeMola or retry them within 120 days of the date of this order” (*Bell*, pp 1057–8). The state immediately appealed the district court’s ruling and obtained an order staying re-trial pending appeal.

*Ruling and Reasoning*

The Ninth Circuit found that Mr. Bell and Ms. DeMola’s claims did not support *habeas* relief. Juror No. 7 had been properly removed because she engaged in misconduct by offering her expert opinion on a defendant’s mental health and by violating the court’s instructions during deliberations. Mr. Bell and Ms. DeMola’s argument that the dismissal of Juror No. 7 was contrary to established federal law because the juror’s use of a dictionary did not justify the extreme need for dismissal failed for three reasons. First, the court of appeals upheld Juror No. 7’s removal, not because she had consulted a dictionary, but because she had violated the trial court’s explicit instructions to “not do any independent research [which includes] . . . looking at a dictionary” (*Bell*, p 1059). The court’s instructions concluded with “if you do that, you will be in violation of your oath, and you will be excused as a juror in the case” (*Bell*, p 1059). Second, the petitioners could not support their contention that the California Court of Appeal’s opinion was contrary to the trial court’s decision. Third, the petitioners relied on cases in which juror misconduct was revealed only in conjunction with a new trial or in *habeas* proceedings.

*Discussion*

A juror may not bring into the jury room evidence developed outside the witness stand. In presenting her analysis, Juror No. 7 directed the jurors to rely on her expert opinion, and concluded that one of the defendants had depression. The Court of Appeals for the Ninth Circuit also held that the sentence did not violate the Eight Amendment as cruel and unusual as to Ms. DeMola, a juvenile offender, because she was not sentenced to life without the possibility of parole, pursuant to a mandatory sentencing scheme that prohibited the court from taking into account potential mitigating circumstances.

Juror misconduct can include communication by a juror with persons outside of the trial or bringing outside evidence into the trial. Information not in evidence can bias jurors and may influence other jurors’ decisions. Juror misconduct threatens the fairness of a trial and implicates due process consider-

ations. This case highlights the importance of jurors’ adhering to the court’s instructions. While a juror’s assessment of the evidence is necessarily informed by life experiences, including education and professional background, specialized information cannot play a role. Where personal liberty is at stake, the jurors play a pivotal role in determining the outcome of a case. In *Bell v. Uribe* the appeals court concluded that retaining Juror No. 7 would have unfairly biased other jurors. The fact that she may have been the lone holdout for acquittal was not the significant consideration.

The *Bell* decision also reinforced the integrity of California’s sentencing scheme. In *Miller v. Alabama*, 132 S. Ct. 2455 (2012), the Court held that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without the possibility of parole for juvenile offenders. However, for states such as California, where the penalty for a defendant found guilty of murder in the first degree who was 16 to 18 years of age at the time of commission of the crime is confinement in the state prison for life without the possibility of parole, or, at the discretion of the court, 25 years to life, a defendant cannot establish an Eighth Amendment violation. The sentencing court could have taken mitigating factors into account when sentencing Ms. DeMola and, because the sentence was not mandatory, *Miller* did not apply.

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## Patient Privilege and Dangerousness: Should Duty to Warn Affect Confidentiality?

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### Physician Testimony on a Patient’s Possession of Cyanide Admitted Erroneously Based on a Dangerous-Patient Exception to Privilege

In *United States v. Ghane*, 673 F.3d 771 (8th Cir. 2012), the United States Court of Appeals for the