

take examination of Mr. Ghane in the emergency room and to the psychiatrist who treated him in the psychiatric unit.

The court of appeals agreed with the district court in admitting testimony by Mr. Gluhovsky, asserting that the clinical encounter with Mr. Gluhovsky was not protected by this privilege, because he was not a licensed psychotherapist and he was not providing either diagnosis or treatment for Mr. Ghane; therefore, *Jaffee* did not apply. However, the court of appeals believed that the district court erred in applying a dangerousness exception and therefore in admitting the testimony of Dr. Houghton, although they found the error to be harmless. In their analysis, the court cited the Sixth Circuit's decision in *United States v. Hayes*, 227 F.3d 578 (6th Cir. 2000), which rejects a dangerous-patient exception to psychotherapist-patient privilege in criminal proceedings. They stated further that individual states' standard of care for duty to protect should not be tied to or confused with an individual's right to invoke privilege in criminal proceedings with regard to communication in the context of a psychotherapist-patient relationship. In their decision, the court of appeals pointed out that the consent obtained by Dr. Houghton was insufficient for the purpose of waiving privilege for criminal proceedings. Such consent must clarify the consequences of disclosure for subsequent criminal prosecution to meet the standards for a knowing and intelligent waiver.

#### Discussion

Although it is certainly of psychiatric (and philosophical) interest to debate whether suicide is, indeed, a peaceful purpose, we found that the findings related to privilege in this case had the most relevance for forensic psychiatric practice. In this ruling, the court clarifies the important distinction between a clinician's duty to report and compulsion to testify. As psychiatrists, it is imperative to evaluate for dangerousness in our patients. Although it is the psychiatrist's responsibility to report in cases of specific threats, the therapeutic relationship can still be maintained with a patient's ability to retain therapeutic privilege in legal proceedings.

From a treating psychiatrist's perspective, we found it troubling that the questions of decision-making capacity and informed consent were not addressed more fully by the clinicians involved. The court of appeals noted that the consent obtained by

the physician to contact authorities was not sufficient and did not equate with waiving privilege. Given that the standard for a knowing and intelligent waiver includes awareness of the nature of the right and the consequences of the decision to abandon the right, it is unlikely that most non-forensically trained clinicians would be in a position to obtain informed consent in such a situation. The clinician should be familiar with the specifics of informed consent in such complicated cases.

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

## Lack of Volitional Control and Culpability

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### Lack of Volitional Control Is Not a Plausible Defense for Culpability in Federal Cases

In *United States v. Rendelman*, 495 F. App'x 727 (7th Cir. 2012), Scott Rendelman appealed his conviction of contempt of court, retaliating against federal officials for the performance of their duties, and threatening the President of the United States. He argued, among other things, that the Southern District Court of Illinois abused its discretion by refusing to authorize a psychological evaluation of his mental state at the time of the offense and by excluding evidence from mental health evaluations conducted during prior prosecutions. He further argued that evidence from these sources would have shown that he was not culpable, because he was unable to stop himself from writing threatening letters to various government officials.

#### Facts of the Case

Mr. Rendelman had been writing obscene and threatening letters to prosecutors, judges, and presidents for over 20 years. While incarcerated in the federal penitentiary in Marion, Illinois, for threatening public officials, he wrote threatening letters to the President, which were intercepted by staff and given

to the Secret Service. A grand jury investigation subsequently followed. He refused to comply with two grand jury subpoenas for handwriting samples, even after the district court ordered him to comply. Following his second refusal, the prosecutor informed him that he would be charged with contempt of court. Shortly thereafter, he wrote a letter threatening to murder and sexually assault the prosecutor. As Mr. Rendelman continued to refuse to provide an example of his handwriting, a psychologist, Dr. Kevin Miller, was retained by appointed counsel to evaluate his mental state and competence to stand trial. Dr. Miller concluded that Mr. Rendelman was competent to stand trial and that he understood that refusing to provide handwriting examples was wrong. Dr. Miller's diagnosis was unspecified autism spectrum disorder. He additionally noted that Mr. Rendelman was in control and fully aware when writing the letters and that his letter writing was not a result of compulsions, as seen in obsessive-compulsive disorder.

The government arranged for a second psychologist, Dr. Christina Pietz, to evaluate Mr. Rendelman's competence to stand trial and his mental state as it pertained to refusing to provide a handwriting sample. Dr. Pietz opined that Mr. Rendelman was competent to stand trial and that he understood that refusing to provide a handwriting sample was wrong. Her diagnosis was obsessive-compulsive personality disorder, with the presence of narcissistic personality traits. In addition, she agreed that Mr. Rendelman was in control of his behavior when writing the letters.

Before trial, Mr. Rendelman requested authorization to retain Dr. Miller again to offer an opinion on his mental state at the time that he wrote the threatening letters, as this was not the focus of his first evaluation. The district court denied this request, stating that Dr. Miller's initial report included enough information about Mr. Rendelman's mental state at the time of his writing the letters. The government moved *in limine* to curtail the evidence that Mr. Rendelman could present at trial about his mental state, arguing that psychological evaluations from past prosecutions should not be permitted because none established that he had a mental disease that would affect his culpability.

At trial in federal district court, Mr. Rendelman testified that he wrote the letters to protest being raped and beaten in prison and that he had wanted to

demonstrate that incarceration does not rehabilitate or deter offenders. He indicated he was compelled by his conscience to write the letters because he would otherwise feel complicit in the sexual assaults that occur in prison. The jury returned a verdict of guilty on all counts. He appealed to the Seventh Circuit Court of Appeals, arguing that the district court abused its discretion by denying a second evaluation by Dr. Miller and excluding evidence obtained during mental health evaluations conducted during prior prosecutions, both of which he believed would demonstrate that he could not stop himself from writing the letters.

#### *Ruling and Reasoning*

The Seventh Circuit Court of Appeals held that the district court did not abuse its discretion when it denied Mr. Rendelman's request for an additional evaluation. The court reasoned that his reported inability to stop writing letters was not a valid defense for culpability, as the evidence of mental condition is relevant to culpability only if it bears directly on sanity or *mens rea*. Citing *United States v. Worrell*, 313 F.3d 867 (4th Cir. 2002), and *United States v. Cameron*, 907 F.2d 1051 (11th Cir. 1990), the court ruled that a lack of capacity to control behavior is not a relevant consideration under the federal insanity standard (18 U.S.C. § 17 (2006)), which considers mental disease or mental defect as an excuse only if an individual does not appreciate the nature or wrongfulness of his actions. The court similarly noted that because evidence of unconscious behavior is irrelevant to the question of intent (*United States v. Poblott*, 827 F.2d 889 (3d Cir. 1987)), Mr. Rendelman's argument that he wrote the letters because of an unconscious compulsion, to which Dr. Miller testified during sentencing, was not a plausible defense to culpability. The court reasoned that it was appropriate for Mr. Rendelman to present evidence of compulsion at sentencing, which was permitted. The federal sentencing guidelines (U.S.S.G. § 5K2.13) allow for a downward departure if a defendant has a significantly reduced mental capacity that substantially contributes to the commission of the offense.

The court further rejected Mr. Rendelman's argument that he should have been granted an additional evaluation because the prior evaluations authored by Dr. Miller and Dr. Pietz were related to his refusal to provide writing exemplars, rather than his mental state at the time he wrote the threatening letters. The

court reasoned that although the focus of Dr. Miller's evaluation was related to the contempt charge, it did address Mr. Rendelman's mental state at the time he wrote the letters. Specifically, Dr. Miller reported that Mr. Rendelman was in control and fully aware when he wrote the letters. He further noted that Mr. Rendelman denied having obsessions or compulsions relating to his letter writing.

Finally, the court rejected Mr. Rendelman's argument that the district court abused its discretion by excluding the evidence from psychological evaluations conducted for the purposes of prior prosecutions. He asserted that this evidence was relevant because it would show he lacked *mens rea* as a result of his compulsion to write the letters. The court asserted that the evidence was properly excluded because, as previously discussed, his reported compulsion was not a valid defense for culpability.

#### Discussion

In the present case, Mr. Rendelman argued that he was not culpable for his actions, because he lacked the capacity to control his behavior as a result of an unconscious impulse to write letters. The court of appeals rejected his argument, relying on the legal statute addressing insanity as it pertains to criminal responsibility at the time of the offense (18 U.S.C. § 17 (2006)). The federal insanity statute is specifically limited to an appreciation of the nature and quality or wrongfulness of one's actions. According to 18 U.S.C. § 17 (2006), "it is an affirmative defense under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts." The capacity to control one's actions is not relevant to one's sanity at the time of a crime, and unconscious influence on behavior is not relevant to intent. The court properly excluded evidence about volitional control (e.g., a second psychological evaluation or psychological evaluations from prior prosecutions), as it was not necessary or legally relevant to a culpability defense. However, evidence about capacity to control behavior is a relevant consideration at sentencing, which was properly allowed in the present case. Such evidence may provide a basis for a downward departure under federal sentencing guidelines.

Of note, although a lack of volitional control is not a valid defense for culpability according to federal

statute, some states include an element of volitional control within their standard definition of insanity. For example, some jurisdictions have adopted the test for insanity proposed by the American Law Institute Model Penal Code (1985), which includes consideration of an individual's capacity to conform his or her conduct to the requirements of the law.

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

## Death Penalty and Defendants Diagnosed with Mental Retardation

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### Arizona Supreme Court Reviews Testimony on Adaptive Functioning of a Defendant Diagnosed with Mental Retardation in a Death Penalty Case

In *State v. Grell*, 291 P.3d 350 (Ariz. 2013), the Arizona Supreme Court reviewed evidence on appeal to determine whether a defendant had mental retardation and should be protected from the imposition of the death penalty. The state and the defense stipulated that Shawn Grell had subaverage intellectual functioning. The state's expert witness opined that Mr. Grell's behavior was consistent with antisocial personality disorder. However, the defendant presented evidence of educational, medical, criminal, and social history, which he argued was proof of adaptive functioning deficits that had been present since his childhood.

#### Facts of the Case

Shawn Grell murdered his two-year-old daughter by pouring gasoline on her and setting her on fire. An Arizona trial court found him guilty of murder and sentenced him to death. He appealed his conviction. While his appeal was pending, the U.S. Supreme Court issued the opinion in *Atkins v. Virginia*, 536 U.S. 304 (2002), making it unconstitutional for states to execute defendants who have a diagnosis of