

these illnesses affected her ability to work. The ALJ found that she was able to work, despite having some impairments. In sum, while the Social Security disability act defines mental health impairments, such as anxiety-related disorders, the ALJ's focus in making disability decisions primarily rests on how the symptoms of these disorders manifest themselves to affect one's ability to function in daily work life. For both treating clinicians and experts who may become involved in these cases, these distinctions can be critical to the ultimate disposition of a case.

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## Differences in Legal and Psychiatric Criteria of Mental Illness for Sex Offenders

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### Despite Not Being Listed as a DSM-IV Diagnosis, Hebephilia Can Be a Qualifying Mental Impairment Under a Sex Offender Civil Commitment Statute

In *United States v. Caporale*, 701 F.3d 128 (4th Cir. 2012), the Fourth Circuit Court of Appeals reviewed the district court's decision under a sex offender civil commitment statute. Experts disagreed both whether hebephilia qualifies as a mental illness or disorder under the statute and whether the defendant posed a future risk. The district court agreed with the defense on both prongs. On appeal, the Fourth Circuit held that hebephilia is a serious mental illness or disorder. Still, the judgment was affirmed, as there was no clear error on the second prong of refraining from future illegal sexual conduct.

#### Facts of the Case

Patrick Caporale, age 59, had a history of sexual offenses with minors. From 1980 to 1992, he pleaded guilty to at least five charges, ranging from sexual contact with 12- to 13-year-old boys to recruiting underage individuals and filming sexual

acts. He was granted supervised release in August 1998. In December 1999, Mr. Caporale was charged with parole violation for discussing masturbation with a 14-year-old boy. He returned to prison. In June 2001, he was again released under supervision. His parole was violated two years later for possession of child pornography.

He returned to prison in 2003 and remained until March 21, 2008, to complete the sentence for his 1992 conviction. On that day, the government petitioned for civil commitment under the Adam Walsh Child Protection and Safety Act of 2006, 18 U.S.C. § 4248 (2006). He remained in federal custody until a hearing on March 5, 2012.

In the months before the hearing, there was evidence that Mr. Caporale still had interest in pubescent boys. In 2008, he and other inmates used a prison computer to compose pornographic stories about teenage boys. In May 2011, suggestive photographs were seized from his cell.

At the hearing, all parties agreed that Mr. Caporale satisfied the first element of prior conduct under 18 U.S.C. § 4247(a)(5) (2006). It was the government's burden at the hearing to establish, by clear and convincing evidence, both prongs of the second element: that Mr. Caporale was impaired by a serious mental illness, abnormality, or disorder and that he would, if released, have serious difficulty in refraining from sexually violent conduct or child molestation.

A key question was whether Mr. Caporale had a qualifying illness, abnormality, or disorder under § 4247(a) (2006). The three experts each came to different diagnostic conclusions. Lela Demby, MD, felt that Mr. Caporale met the DSM-IV diagnosis of pedophilia (Diagnostic and Statistical Manual of Mental Disorders, APA, 1994; see *Caporale*, p 133). Pedophilia is sexual attraction to prepubescent children, as opposed to pubescent or postpubescent children. Dr. Demby noted that DSM-IV uses age 13 as the presumed ceiling for the diagnosis of pedophilia. Although she thought that Mr. Caporale was primarily attracted to prepubescent boys, she did admit that it was possible for 12-year-olds to be pubescent. Gary Zinik, MD, the other state expert, believed that Mr. Caporale in fact was interested in pubescent, rather than prepubescent, children. Instead of pedophilia, he believed that Mr. Caporale had hebephilia, a sexual interest in pubescent children. Although hebephilia is not listed as a specific DSM-IV diagnosis, Dr. Zinik testified that it would fall under the cate-

gory paraphilia NOS. He noted that Mr. Caporale's recurrent, intense sexual interest in pubescent boys and related behavior pattern had lasted at least six months and had caused significant impairment and disability in Mr. Caporale's life. Thus, he felt Mr. Caporale met DSM-IV criteria for paraphilia NOS.

Joseph Plaud, MD, the expert for the defense, rejected the diagnosis of pedophilia. He noted that age is not the definitive factor, as sexual maturity occurs in a range. His opinion was that Mr. Caporale was attracted to pubescent children and therefore did not meet the DSM-IV criteria for pedophilia. Although sexual acts with pubescent boys are illegal and morally deviant, those acts are not sexually deviant. They do not meet the criteria for a named DSM-IV diagnosis. He felt that a paraphilia NOS diagnosis would not meet the statutory standard. Thus, he opined that Mr. Caporale had no qualifying illness, abnormality, or disorder under § 4247(a) (2006).

A second question was whether, Mr. Caporale would have serious difficulty in refraining from future sexually violent activity or child molestation. Dr. Zinik felt that recent acts such as the 2008 stories and the May 2011 confiscated photos showed ongoing interest in pubescent boys. Using actuarial scales, Dr. Zinik showed that Mr. Caporale's scores on one of the two scales showed him to be high risk and his score on another scale showed a moderately high risk. However, Dr. Zinik acknowledged the tools' limitations. Dr. Demby noted the same evidence and stated that ongoing sexual interest exacerbates future risk. Although she conceded that such acts, unto themselves, are not "sexually dangerous," she opined that they could lead Mr. Caporale to future hands-on offenses.

In contrast, Dr. Plaud noted that Mr. Caporale had committed only noncontact offenses since 1992. He had further demonstrated volitional capacity because he had stopped writing stories since May 2011, almost a year before the hearing. Dr. Plaud did not trust actuarial scales in this instance, testifying that such tools more accurately serve to exclude subjects rather than predict future acts. Further, he noted that high risk on the scales corresponds to less than 25 percent risk over eight years. The risk would drop to below 10 percent once Mr. Caporale reached 60 years of age.

The district court issued a written opinion siding with the defense. The court noted that hebephilia is not an appropriate basis for civil commitment under

the Walsh Act. It is a contested subject in the mental health community. The court also sided with the defense on the question of future dangerousness. They were persuaded by the defense's focus on the current condition, whereas the state's witnesses focused on past conduct. The court ordered Mr. Caporale's release. The government appealed.

#### *Ruling and Reasoning*

The Fourth Circuit Court of Appeals noted that their review must look for clear error. They further stated that the district court's findings conflicted with *United States v. Carta*, 592 F.3d 34 (1st Cir. 2010). In *Carta*, the First Circuit considered whether hebephilia met statutory requirements under the Walsh Act. In concluding that it did, they reasoned that a fact finder may assume "that the statutory concept is delimited by the consensus of the medical community, but this is not so. Further, a mental disorder or defect need not necessarily be one so identified in the DSM to meet the statutory requirement" (*Carta*, pp 39–40). The *Carta* court further found that hebephilia would fall under paraphilia NOS, a DSM disorder. Agreeing with the First Circuit's analysis in *Carta*, the Fourth Circuit held, as a matter of law, that the district court erred in concluding that hebephilia would not be a mental disorder under the scope of the Walsh Act.

Next, the court of appeals looked at whether the district court had erred in finding that Mr. Caporale, if released, would have serious difficulty in refraining from sexually violent conduct or child molestation. The court of appeals looked at previous rulings in cases with similar fact patterns under the Walsh Act and noted that the defense case was "by no means irrefutable." Also, the district court's analysis could have been more comprehensive. Viewing the record as a whole, the court of appeals found no clear error in the lower court's finding.

Since the government had the burden of proving both prongs, the district court's finding that hebephilia is not a mental disorder under the Walsh Act was harmless error. The court of appeals found no clear and convincing evidence that the district court was mistaken in concluding that the government had not met its burden of proof that Mr. Caporale was sexually dangerous.

#### *Discussion*

This case highlights a gap between the psychiatric and statutory definitions of a mental illness or disorder.

der. A disorder need not be named in the DSM to be found a qualifying mental disorder under the law. Further, it is not enough simply to have an expert label an individual with a named mental illness. It is also necessary to show that a defendant's ability to function normally in society is impaired and disrupted. Once this is shown, as a matter of law, it is a mental illness or disorder under the Walsh Act.

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## Retroactive Changes to the Diminished-Capacity Defense: Reviewing the Effect on Due Process

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### The U.S. Supreme Court Upholds Retroactive Application of a Michigan State Court Decision That Abolishes the Diminished-Capacity Defense

In *Metrish v. Lancaster*, 133 S. Ct. 1781 (2013), the U.S. Supreme Court reviewed the case of a defendant in a Michigan murder trial who sought to present a diminished-capacity defense on retrial. The defendant unsuccessfully attempted this defense strategy in his original trial. In the time period between the defendant's original trial and retrial, the Michigan Supreme Court abolished the use of the diminished-capacity defense.

The Michigan Court of Appeals disallowed the defendant's use of the diminished-capacity defense on retrial, raising the question of whether the Michigan Court of Appeals violated due process in its retroactive application of the Michigan Supreme Court's decision to abolish the defense.

#### Facts of the Case

On April 23, 1993, Burt Lancaster, a former Michigan police officer with a protracted history of psychiatric illness, shot and killed his girlfriend. He

was charged with first-degree murder and possession of a firearm in the commission of a felony. At his Michigan state court jury trial in 1994, Mr. Lancaster presented a defense of diminished capacity, admitting that he had killed his girlfriend but asserting that he lacked the necessary *mens rea* to support a conviction for first-degree murder. At that time, a Michigan Court of Appeals precedent allowed a defendant to enter a diminished-capacity plea. Despite the defense's argument, the jury convicted Mr. Lancaster of both charges.

Mr. Lancaster unsuccessfully appealed in Michigan state court. However, his convictions were overturned in *Lancaster v. Adams*, 324 F.3d 423 (6th Cir. 2003), after Mr. Lancaster filed a petition in federal district court, in which he asserted that the prosecutor in his original case had improperly excluded a black juror on the basis of race.

Mr. Lancaster's retrial began in 2005. In this trial, Mr. Lancaster waived his right to a jury and again attempted to present a diminished-capacity defense. Before the retrial, the Michigan Supreme Court disapproved the use of the diminished-capacity defense in *People v. Carpenter*, 627 N.W.2d 276 (Mich. 2001). The trial court held that the Michigan Supreme Court ruling applied retroactively and, therefore, Mr. Lancaster could not assert a diminished-capacity defense. The court again convicted Mr. Lancaster of first-degree murder and the associated firearms charge, and imposed a sentence of life imprisonment for the first-degree murder conviction and a consecutive two-year sentence for the related firearms offense.

Mr. Lancaster appealed unsuccessfully to the Michigan Court of Appeals. The appeals court rejected Mr. Lancaster's argument that retroactive application of *Carpenter* violated his right to due process. The Michigan Supreme Court declined review of the case, thereby maintaining Mr. Lancaster's convictions.

Undeterred, Mr. Lancaster filed a petition for a writ of *habeas corpus* in federal district court, reasserting his due process claim. He argued that the abolition of the diminished-capacity defense was a substantive change in the law and that the trial court violated his Fifth and Fourteenth Amendment rights in retroactively applying the change to his case.

The district court denied the petition but granted a certificate of appealability. Mr. Lancaster appealed the denial, and the Sixth Circuit Court of Appeals