

slaughter after he presented an argument of diminished capacity, asserting that a history of depression and chemical imbalance (manifested by a junk food diet) rendered him unable to premeditate murder. In Michigan a judicial decision ended the diminished-capacity defense, as described in *Metrish*. In California, voters approved a 1982 proposition to abolish the diminished-capacity defense following the *White* verdict.

Variability in application of the diminished-capacity defense is likely to persist from state to state. Therefore, forensic clinicians should be aware of the relevant statutes and case law pertaining to diminished capacity in the jurisdictions in which they practice.

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Involuntary Commitment and the Risk of Harm if Released

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Risk of Harm Determination for the Purpose of Commitment Can Consider a Broad Range of Historical and Clinical Data

In *United States v. Taylor*, 513 F. App'x 286 (4th Cir. 2013), the United States Court of Appeals for the Fourth Circuit considered whether the District Court for the Eastern District of North Carolina erred when it found that Cornell M. Taylor continued to satisfy the criteria for civil commitment. On appeal, Mr. Taylor argued that his recent good behavior justified his release. Mr. Taylor further stated that the opinions offered by his treating psychiatrist and an independent forensic evaluator, suggesting that he was high risk for violent behavior because of the potential of a re-emerging psychosis and aggression, were speculative in nature, and thus not sufficient to support a finding of "substantial risk" under 18 U.S.C. § 4246 (1992). The court of appeals affirmed the district court's finding that Mr. Taylor continued to meet the criteria for civil commitment.

Facts of the Case

On February 1, 2006, the District Court for the Central District of Illinois found Cornell M. Taylor incompetent to stand trial after he had been charged with threatening a federal officer. He was committed to the Federal Medical Center in Butner, NC.

Before his release, in July 2006, Mr. Taylor was evaluated for civil commitment under 18 U.S.C. § 4246(b) (1992) pursuant to an order from the Illinois district court. In November 2006, the Government filed a certificate of mental disease or defect and danger. On January 10, 2007, the district court committed him under § 4246(d) (1992) based on finding clear and convincing evidence that Mr. Taylor had a mental disease or defect that would create a substantial risk of bodily injury to another person or serious damage to property of another if released.

After another approximately eight months at the federal medical center, Mr. Taylor was granted conditional release to reside at a community home for adults in Springfield, Illinois. After several months at the residence, Mr. Taylor was found to have violated the terms of his release by returning to the home under the influence and in possession of a bottle of alcohol. In addition, his probation officer indicated that there had been difficulties supervising him in the home. Based on these problems, on April 7, 2008, the district court revoked his conditional release, and Mr. Taylor returned to the federal medical center in Butner.

On March 28, 2011, in an annual report pursuant to 18 U.S.C. § 4247(e) (2006), Mr. Taylor's psychiatrist and psychologist at the federal medical center informed the court that Mr. Taylor had refused the Haldol decanoate prescribed to treat his schizoaffective disorder. His doctors recommended ongoing treatment at the facility, as they believed that his refusal of medication indicated that he was not appropriate for conditional release.

On November 9, 2011, Mr. Taylor filed a motion to the district court to determine his ongoing commitment under 18 U.S.C. § 4246 (1992), arguing that his recent good behavior justified his release. An independent examiner, Katayoun Tabrizi, MD, was appointed to conduct an evaluation of Mr. Taylor.

Dr. Tabrizi diagnosed Mr. Taylor with schizoaffective disorder, bipolar type, as well as alcohol abuse and adult antisocial behavior (provisional). She argued that his refusal of antipsychotic medication suggested limited insight into his mental illness and she

contended that this is a risk factor for violent behavior. She also discussed the numerous other risk factors that Mr. Taylor had for aggression including a history of alcohol abuse, history of aggression, and threats due to his psychiatric symptoms, history of gun possession, inadequate social support, and an extensive juvenile and criminal history. Based on these factors and active symptoms, including irritability, argumentativeness, and paranoia, as well as his refusal of medication, she believed that he continued to be inappropriate for conditional release to a community-based program.

At his hearing in February 2012, Mr. Taylor's treating psychiatrist, Robert G. Lucking, MD, testified at a commitment hearing that he agreed with Dr. Tabrizi's report. He described how Mr. Taylor's psychotic symptoms, including paranoid delusional symptoms involving the mental health staff, the judge, and his attorney, re-emerged after he refused his Haldol decanoate. He also noted that Mr. Taylor had exhibited significant anger, hostility, and aggression the last time he was off antipsychotic medication, threatening to kill himself and others. Dr. Lucking believed that Mr. Taylor's emerging psychotic symptoms were related to refusal of medication and would be likely to lead to violent behavior similar to that which had caused his initial arrest.

In the hearing, Mr. Taylor offered only his own testimony in support of his conditional release. The district court determined that he continued to meet the criteria for commitment under 18 U.S.C. § 4246 (1992), and he returned to the federal medical center.

Mr. Taylor appealed the finding that he was not suitable for conditional release, citing his recent good behavior and arguing that the opinions that the two psychiatrists offered regarding his dangerousness were speculative in nature and thus not enough to support a finding of "substantial risk" under U.S.C. § 4246 (1992).

Ruling and Reasoning

The Fourth Circuit affirmed the district court's ruling. Under 18 U.S.C. § 4247(h) (2006), if a person committed under U.S.C. § 4246 (1992) files a motion to determine whether he should be released, the defendant bears the burden of proving that "he has recovered from his mental disease or defect to such extent that his release would no longer create a substantial risk of bodily injury to another person or

serious damage to property of another" (18 U.S.C. § 4246(e) (1992)).

First, based on the concurring opinions by both his treating psychiatrist and the independent evaluator, the appeals court found that Mr. Taylor had a severe mental illness and that he was manifesting active symptoms of his schizoaffective disorder at the time of the hearing. Mr. Taylor was the only person to offer testimony, and he suggested that he had recovered from his illness. Taken together, the court had sufficient evidence to support commitment.

Second, the appeals court held that the district court's finding regarding the risk of harm if released was equally supported by the record. This ruling was based again on the testimonies of both Dr. Tabrizi, who listed Mr. Taylor's numerous risk factors for potential aggression if released, and Dr. Lucking, who stated that he viewed Mr. Taylor's recurring psychotic symptoms while unmedicated at the hospital as a harbinger of risk for further aggressive behavior similar to that seen previously when he was unmedicated.

Mr. Taylor argued that because he had "not engaged in any physically aggressive behavior directed against others or property" (*Taylor*, p 291) in more than one year, the testimony of the psychiatrists regarding his risk of harm was "speculative . . . [and] not enough to support a finding of 'substantial risk'" (*Taylor*, p 291), in accordance with 18 U.S.C. § 4246 (1992). Citing *United States v. Williams*, 299 F.3d 673 (8th Cir. 2002), p 677, and *United States v. Cox*, 964 F.2d 1431(4th Cir. 1992), the appeals court stated that the dangerousness evaluation requires the evaluators and the district court to consider Mr. Taylor's "entire behavioral and psychological profile." In consequence, the Fourth Circuit determined that the experts appropriately considered wide-ranging historical and clinical data, rather than focusing only on Mr. Taylor's recent behavior or on one event at one point in time. On this basis, the appeals court found that the district court did not err in determining that Mr. Taylor's release continued to present a "substantial risk." Therefore, the Fourth Circuit found that Mr. Taylor continued to satisfy the criteria for civil commitment under 18 U.S.C. § 4246 (1992).

Discussion

This case addresses what can and should be considered in determining whether an individual meets

the criteria for civil commitment. This topic is pertinent, not only to mental health providers specializing in forensics, but to all practicing psychiatrists who are expected to make clinical determinations of when to petition for ongoing commitment or to discharge patients from inpatient settings. This case reconfirms that it is appropriate to consider demographic, historical, and clinical factors associated with increased risk of aggression as opposed to simply considering the patient's recent behavior. The factors presented by the psychiatrists in *United States v. Taylor* are similar to those typically considered by clinicians and evaluators when conducting risk assessments. For example, the court cited several prior legal cases in making the decision in *United States v. Taylor* (see *United States v. Cox*, 964 F.2d 1431 (4th Cir. 1992), p 1433; *United States v. Ecker*, 30 F.3d 966 (8th Cir. 1994), p 970).

Although all states permit involuntary commitment based on risk of harm to self or others, local jurisdictional practice may vary in what data can be incorporated into the commitment opinion. That said, this case highlights the importance of considering the risk of harm if released, which is different from considering only the risk of harm within the hospital.

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Intellectual Disability and the Death Penalty: Factors to Consider

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Texas Court Decision Upheld: All Evidence Was Fairly Considered in Determination of Intellectual Disability

In *Hernandez v. Stephens*, No. 12-70006 (5th Cir. filed Aug. 2, 2013), the Fifth Circuit Court of Ap-

peals upheld a Texas state court's decision that Mr. Hernandez was not intellectually disabled. Mr. Hernandez had appealed, claiming that the court did not adequately consider evidence to support a finding of intellectual disability and instead relied exclusively on evidence that opposed such a finding. The appeals court determined that the state court had not erred in its findings and had reasonably considered the facts in the case.

Facts of the Case

On October 14, 1997, Ramiro Hernandez, a Mexican national, went to the home of his boss, Glen Lich, and bludgeoned him to death. He then tied Mr. Lich's wife to her bed and raped her repeatedly. He threatened to harm her mother, who was sleeping in the adjoining room if she tried to call the police and told her that she would have to pay him if she ever wanted to see Mr. Lich again. Mrs. Lich was eventually able to escape and get help. Mr. Hernandez was convicted of capital murder and sentenced to death in 2000.

He appealed to the state district court on the basis that he was intellectually disabled and that his execution would therefore violate his Eighth Amendment protection against cruel and unusual punishment per *Atkins v. Virginia* (536 U.S. 304 (2002)). The Texas Court of Criminal Appeals ordered an evidentiary hearing, during which the state court found that he did not have intellectual disability. The Texas Court of Criminal Appeals adopted these findings, and he was denied the relief he sought.

Mr. Hernandez then applied for relief in the United States district court, alleging that his Constitutional rights had been violated because of his intellectual disability and that he had received ineffective assistance of counsel based on several arguments, including that a thorough investigation and presentation of mitigating evidence had not been made during his trial. The district court denied his application and granted a certificate of appealability on the intellectual disability claim but not on the other claims. He appealed the denial of the intellectual disability claim and also sought a certificate of appealability on three other claims. We focus only on his appeal of the finding that he was not intellectually disabled.

The Fifth Circuit Court of Appeals noted that it had held in *Chester v. Thaler*, 666 F.3d 340 (5th Cir. 2011), that Texas' standards for determining mental