of crafting prerelease conditions should be particularly careful to include any restrictions believed necessary to reduce the risk to society. Conditions applied *post hoc*, at least in federal cases of release for not guilty by reason of insanity (NGRI), are likely to be rejected at the appellate court level.

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

Threshold for Ordering an Evaluation of Competency to Stand Trial

Katherine Michaelsen, MASc, MD
Fellow in Forensic Psychiatry

Reena Kapoor, MD
Assistant Professor of Psychiatry

Department of Psychiatry
Yale School of Medicine
New Haven, CT

Defense Attorney's Observations Are Insufficient to Prompt Ordering a Competency Evaluation

In *United States v. Villareal*, No. 13–2367, No. 13–2586, 2014 WL 2869658 (8th Cir. June 25, 2014), the Eighth Circuit Court of Appeals affirmed the trial court's decision to deny the defendant's motions for a competency evaluation and assistance of a mental health expert at trial, because they were based solely on the attorney's description of the defendant, without medical records or court observation of disorganized behavior.

Facts of the Case

On August 22, 2012, Javier Villarreal was indicted along with 16 co-defendants for methamphetamine-related offenses. He was charged with one count of conspiracy to distribute methamphetamine and two counts of aiding and abetting in the distribution of more than five grams of the drug. On December 4, 2012 Mr. Villarreal filed a motion requesting a psychiatric evaluation to aid in determining his intelligence level, understanding, decision-making ability, and competence to stand trial. In the motion, Mr. Villarreal's attorney documented her observations of Mr. Villarreal's mental state and her knowledge of his mental health history. Mr. Villarreal himself was unable to clarify the nature of his mental health problems, but stated that he had attended special education classes in school and worked closely with his father as an adult. His sister confirmed this report and also stated that he had significant memory problems. The attorney noted that during their meetings, Mr. Villarreal repeatedly made conflicting statements about matters related to the case. He also had difficulty remembering the content of their previous discussions—both information reviewed and his own statements—and could not recall what he had told police officers upon his arrest.

After reviewing the motion, the district court found insufficient evidence to order the requested evaluation under 18 U.S.C. § 4241 (2009) and therefore held a hearing on December 20, 2012, to determine whether to order a competency evaluation. During the hearing, the court asked Mr. Villarreal three yes/no questions, and two of the questions had to be repeated to him (*United States v. Villareal*, No. 2:12-cr-20043-011 (W.D. Ark. 2012), Transcript of the Proceedings Before the Honorable P.K. Holmes, III, USDC Judge, Fort Smith, Arkansas, December 20, 2012). The court concluded that the evidence failed to establish an active mental disorder or raise sufficient doubts about his competence. The court stated that "defense counsel's observations that the Defendant may have a below-average intelligence level, memory problems, and a history of attending special education classes in school do not indicate that Defendant is presently incompetent" (*United States v. Villareal*, No. 2:12-cr-20043-PKH (W.D. Ark. 2012), document 165, filed December 21, 2012, page ID 702). The court noted that there was no inquiry into his medical history, that there was no indication of irrational behavior, and that he had "responded suitably to questions . . . and behaved appropriately" during the hearing (*United States v. Villareal*, No. 2:12-cr-20043-PKH (W.D. Ark. 2012), document 165, filed December 21, 2012, page ID 702). The court concluded that the only evidence in support of his incompetence was the opinion of his attorney, which "[did] not establish sufficient doubt to warrant a competency hearing and/or a mental evaluation" (*United States v. Villareal*, No. 2:12-cr-20043-PKH (W.D. Ark. 2012), document 165, filed December 21, 2012, page ID 703).

On January 30, 2013, Mr. Villarreal pleaded guilty to one count of aiding and abetting metham-

phetamine distribution. On June 11, 2013, at sentencing, he renewed his motion for the assistance of a mental health professional. His sentencing memorandum reiterated the previous concerns about his cognitive deficits. It included an affidavit from his sister, indicating that he had faced significant challenges since childhood, and General Equivalency Diploma (GED) test scores, which showed the lowest possible score in reading (0-grade equivalent) and a third-grade score in math. The district court denied the motion and sentenced Mr. Villarreal to 46 months of imprisonment.

He appealed to the U.S. Court of Appeals, Eighth Circuit, arguing that the district court erred in denying his motion for assistance from a mental health professional, in denying a competency evaluation, and by failing to hold a *sua sponte* competency hearing.

Ruling and Reasoning

In addressing Mr. Villarreal's appeal, the Eighth Circuit Court of Appeals reviewed the case using an abuse-of-discretion standard, stating that the lower court's decision would be affirmed "unless clearly arbitrary or unwarranted, or clearly erroneous" (*United States v. Whittington*, 586 F.3d 613, 617 (8th Cir.2009)). The court concluded that, because the district court had held a hearing allowing him to show reasonable cause to order the competency evaluation, the district court's decision was not arbitrary or clearly erroneous.

The Eighth Circuit echoed the district court's concerns that the evidence presented was insufficient to warrant a competency evaluation, including only Mr. Villarreal's attorney's observations, without evidence from Mr. Villarreal's medical history or indication of irrational behavior. The court cited *Reynolds v. Norris*, 86 F.3d 796 (8th Cir.1996), p. 800, noting that defense counsel's observations alone are insufficient to trigger the trial court's obligation to hold a *sua sponte* competency hearing. The court also cited *United States v. Shan Wei Yu*, 484 F.3d 979 (8th Cir.2007), which concluded that a defendant is presumed competent unless the court hears contrary evidence "arising from irrational behavior, the defendant's demeanor, and any prior medical opinions addressing the defendant's competency" (p 985). The court concluded that Mr. Villarreal failed to raise sufficient doubt about his competency to stand trial and that the district court did not abuse its discretion in refusing to order an evaluation.

The court also found no error in denying his motion for assistance from a mental health professional. They reasoned that the appointment of a mental health expert is only required when a defendant's mental health is likely to be a significant factor at trial, citing *Ake v. Oklahoma*, 470 U.S. 68 (1985). The court concluded that Mr. Villarreal failed to show that his mental health would have been a significant factor at trial and failed to show that he was prejudiced by the decision.

Discussion

The defense attorney in this case requested a competency evaluation, citing substantial concerns that Mr. Villarreal made inconsistent statements, did not retain new information, had attended special education classes, and had achieved limited independence as an adult. The Eighth Circuit Court of Appeals found these factors insufficient to raise doubts about his competency, primarily because he behaved appropriately in court and did not present records documenting his mental health history. In essence, the court seems to require that counsel perform its own investigation into the defendant's medical records, history, and mental state before it will order such an evaluation by a mental health professional. This prerequisite raises the question: what is the threshold for ordering a competency to stand trial evaluation?

18 U.S.C. § 4241(a) (2009) does not provide judges much guidance about when to order a competency evaluation, simply stating that it should occur when there is "reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent . . . ." The U.S. Supreme Court has not provided an exact definition of "reasonable cause," but case law seems to encourage an inclusive interpretation. For example, in *Drope v. Missouri*, 420 U.S. 162 (1975), the Court noted, "[a]lthough we do not [. . .] suggest that courts must accept without question a lawyer's representations concerning the competence of his client . . . an expressed doubt in that regard by one with 'the closest contact with the defendant,' is unquestionably a factor which should be considered" (*Drope*, FN 13, p. 177). The *Drope* Court added that "evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on

competence to stand trial are all relevant in determining whether further inquiry is required, but . . . even one of these factors alone may, in some circumstances, be sufficient" (p 180).

In *Villareal*, the Eighth Circuit cited the lack of these three factors as reasons to support presumed competence. However, in relying on these factors, the court misunderstands the nature of disorders such as intellectual disability, which may cause incompetence to stand trial but not result in dramatic courtroom displays. In these cases, the ability to respond appropriately to yes/no questions is an insufficient indication of competence. Furthermore, attorneys may be unable to evaluate a defendant's mental state or to investigate his mental health history, as a defendant's limitations may prevent him from providing detailed information or directing the attorney to relevant records. Particularly if the defendant is from a lower socioeconomic background (where treatment may have been unavailable) or a culture in which families do not seek formal treatment, it may simply be impossible for an attorney to gather the documentation required by the *Villareal* decision (Reply Brief of Appellant, *United States v. Villareal*, No. 13–2367, No. 13–2586 (8th Cir. 2014)).

Ultimately, by way of their specialized training and experience, experts are better able to evaluate a defendant's mental state and mental health history than are defense attorneys. Therefore, it stands to reason that the courts should use a fairly low threshold for ordering an expert evaluation, particularly in relation to such fundamental matters as competency to stand trial. As the U.S. Supreme Court stated in *Cooper v. Oklahoma*, 517 U.S. 348 (1996), "[e]rroneous determination of competence threatens a 'fundamental component of our criminal justice system'—the basic fairness of the trial itself" (p 365). Mental health professionals should advocate on behalf of a lower standard for ordering competency evaluations, as this provides greater fairness for defendants whose mental illnesses or intellectual deficits render them unable to advocate for themselves. Psychiatrists should provide education about the nuances of mental illness, especially those conditions that present more subtly than the stereotype of florid psychosis. Without this enhanced understanding of mental illness, courts risk creating a standard for competency that disadvantages these vulnerable defendants.

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

Another Victory for the Employee Retirement Income Security Act?

Gretchen N. Foley, MD
Fellow in Forensic Psychiatry

J. Richard Ciccone, MD
Professor of Psychiatry
Director, Psychiatry and Law Program

University of Rochester Medical Center
Rochester, NY

Under the Terms of the Employee Retirement Income Security Act (ERISA), 29 U.S.C.S. § 1001-1461 (1974), an ERISA Plan Cannot Be Overridden by Equitable Defenses; However, If a Plan Is Silent or Ambiguous With Respect to Apportionment of Settlements, Equitable Principles May Be Used

In *U.S. Airways, Inc. v. McCutchen*, 133 S. Ct. 1537 (2013), the U.S. Supreme Court overturned a Third Circuit decision that had rejected an ERISA plan's claim that it was entitled to a 100 percent reimbursement of medical expenses after third-party recovery. In *McCutchen*, the Court reaffirmed the terms of ERISA plans, at least where they are deemed unambiguous, are controlling, regardless of whether they seem fair or equitable.

Facts of the Case

James McCutchen worked as an airline mechanic for U.S. Airways. In January 2007, he was seriously injured when a young driver lost control of her car, crossed the median, and caused a deadly multiple car accident. Mr. McCutchen was a participant in a self-funded health benefits plan (the Plan) established under ERISA by his employer. Under the terms of the agreement, the Plan was obligated to pay the medical expenses of any participant injured by a third party, and the participant was required to reimburse the Plan if any money was later recovered from the third party. The Plan paid $66,866 to cover Mr. McCutchen's medical expenses.

Mr. McCutchen later hired an attorney and filed a lawsuit against the other driver. While his damages were estimated in excess of 1 million dollars, the total recovery was only $110,000 ($10,000 from the driver, who had only limited liability insurance and $100,000 in uninsured motorist coverage from his auto insurer). After deducting his attorney's 40 per-