

Breyer (joined by Justice Ginsburg) agreed with Justice Sotomayor's reasoning. However, he surprised many with his suggestion that, if it did not abolish the death penalty outright, the Court should, at a minimum, hold a full briefing to evaluate its constitutionality.

Discussion

The district court's findings of fact regarding the safety and efficacy of midazolam in this case are germane to the testimony of forensic psychiatrists. In this case, there was no factual evidenced-based literature that any expert witness could reasonably rely on, short of extrapolations and inferences, because randomized controlled trials of medications in extremely high-dose ranges are unethical. Similarly, a reasonable forensic psychiatrist testifying on a matter related to capital punishment might opine within the scope of his or her expertise, but in so doing may be asked questions outside the scope of current scientific knowledge. This case serves as a useful reminder that in death penalty cases, any expert testimony is carefully scrutinized.

The death penalty remains a highly contentious topic that presents an ethics-related dilemma for participating forensic experts. Forensic psychiatrists are often asked to testify on a variety of matters related to capital punishment, including competence to proceed, criminal responsibility, sentencing mitigation, and competence to waive further appeals for execution. Forensic psychiatrists are most helpful to the court when their role is well defined. However, there are current professional ethics guidelines stating that physicians should not participate in a "legally authorized execution" unless the physician's involvement falls within permissible exceptions (American Medical Association Code of Medical Ethics: Opinion 2.06, 2000). Offering a reasonable statement for the court that does not violate those guidelines requires thoughtfulness before accepting the referral and prior to testimony about how a professional opinion can be ethically articulated. A prudent expert should be clear about what it means to "participate" in death penalty cases and consider obtaining consultation in complex cases.

The ethics-based dilemmas facing forensic psychiatrists in capital cases may evolve. The American Psychiatric Association currently endorses a moratorium on capital punishment and the American Academy

of Psychiatry and the Law has no current position statement regarding capital punishment.

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Federal Sentencing Guidelines in an Exceptional Domestic Violence Case

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A Pattern of Activity Involving Threatening and Harassing E-Mails Enhances Sentence

In *United States v. Lee*, 790 F.3d 12 (1st Cir. 2015), the court of appeals affirmed a decision from the District Court of Maine that convicted Benjamin Lee for charges of threatening and stalking his ex-wife and her boyfriend. Mr. Lee argued that his previous threats toward his victims were in the context of an altered mental status that was influenced by his health concerns.

Facts of the Case

Mr. Lee met his ex-wife, Tawny, when she was eight years old and started dating her when she was in her late teens. She had just ended a relationship with Timothy Mann when she began dating Mr. Lee. Soon thereafter, she and Mr. Lee married and had two children. They later divorced twice, the first time in 1993.

Mr. Lee was described as being verbally and physically abusive toward Ms. Lee throughout their marriage. The abuse had been documented to span over three decades. Ms. Lee relayed several incidents of Mr. Lee's controlling and threatening behavior, including incidents of physically restraining her and subjecting her to "nearly daily verbal abuse" during their marriage. Ms. Lee later testified that Mr. Lee told her in 1979 "if he couldn't have her, no one could" (*Lee*, p 14), causing her to stay with him for fear of her safety.

After the divorce, Ms. Lee became concerned about Mr. Mann's safety when Mr. Lee reportedly sent people to "watch" him. This caused Ms. Lee to return to her ex-husband. They subsequently remarried in 2001, but only so Mr. Lee could be covered under his wife's insurance for his back surgery.

The abuse continued. When, in 2010, he struck her with a cane and her daughter called the police, Ms. Lee did not press charges. A year later, Ms. Lee re-established contact with Mr. Mann, but before she could leave to join him, Mr. Lee's back was broken in an automobile accident, and she stayed to care for him. She finally left him for Mr. Mann in April 2012.

After separating from Mr. Lee, she reported receiving numerous e-mails (300 in a matter of months) and angry calls to relatives, placed by him. The e-mails were hostile and threatening to her and Mr. Mann, including one that threatened to "nail Tawny's head on the wall" (*Lee*, p 14).

Mr. Lee, who was morbidly obese, was hospitalized three times between April and July 2012, with diagnoses that included altered mental status, hypoglycemia, drug abuse, diabetes, a thyroid disorder, high blood pressure, and depression. He later had another back surgery.

When Mr. Lee obtained Ms. Lee's address in Maine, where she was living with Mr. Mann, he told a friend of his plan to kill Mr. Mann and Ms. Lee if she did not return to Missouri with him. In August 2012, he told family and friends he was planning a trip to Colorado. His sister, suspecting he was leaving for Maine, contacted Ms. Lee to warn her. Mr. Lee was stopped four miles from Mr. Mann's residence and arrested after a search of his car revealed multiple firearms, a bayonet, duct tape, rubber gloves, handcuffs, plastic bags, knives, ammunition, and maps that had a layout of Mr. Mann's home. Later, Mr. Lee's son discovered a note left for him by his father stating that when he read it, Mr. Lee would "probably [be] either dead or not with you any longer" (*Lee*, p 15). Mr. Lee was charged in December 2012 with two counts of interstate stalking and convicted on both on September 16, 2013. The Presentence Investigation Report recommended a sentence in the range of 51 to 63 months, but the district court imposed a sentence of 100 months, representing a two-level sentencing enhancement under the federal sentencing guidelines for "a pattern of activity involving stalking, threatening, harassing, or assaulting the

same victim" U.S.S.G. § 2A6.2(b)(1) (2013). The district court noted that this case was not a "standard variety misdemeanor domestic violence" case (*Lee*, p 17). Mr. Lee filed an appeal challenging his conviction and sentence.

Regarding his conviction, he challenged the admissibility of his history of abusing his wife; the timing of the trial, which he felt was unfairly expeditious, thereby denying him a fair trial; and the sufficiency of the evidence against him. Mr. Lee stated that Mr. Mann and Ms. Lee had no reason to fear him, because his health problems incapacitated him physically, he did not show any worrisome conduct while driving by the Mann residence, and he was arrested several miles from it. He argued that his threats were "hyperbolic reactions" to his broken marriage, as well as secondary to mental problems associated with his health. In terms of his sentence, he argued that the district court improperly enhanced his sentence for his pattern of threats that occurred while he was affected by hypoglycemia, and erred in denying him downward departure for his mental and physical condition. Finally, he challenged the substantive reasonableness of his sentence. Of note, Mr. Lee had made a pretrial motion to exclude evidence of his abusive behavior toward his daughter and sister, as well as evidence that he had engaged in acts of animal cruelty. That evidence was subsequently not presented at trial.

Ruling and Reasoning

The First Circuit Court of Appeals affirmed the district court's decisions. Ruling on Mr. Lee's first challenge, the court observed that evidence of his past abuse of Ms. Lee was relevant to her fear of him at the time of his travel and was reasonable, thereby rejecting his challenge of historical perspective. Concerning the timeliness challenge, the court reminded Mr. Lee of his counsel's statement at trial that "no further witnesses" would be called to testify on his behalf; therefore, the expeditious nature of the trial did not deprive him of the opportunity for an adequate defense. In responding to Mr. Lee's assertion of insufficient evidence, the court stated that, given his statement to his friend of his intention to kill Mr. Mann and possibly Ms. Lee and the discovery of dangerous weapons in his car, a reasonable jury would find the defendant culpable.

Regarding the district court's application of a two-level sentence enhancement, the appellate court re-

viewed the sentencing guidelines and concluded that Mr. Lee's long-term pattern of activity involving stalking, threatening, harassing, and assaulting Ms. Lee was substantial and directly connected to the offense. His pattern of e-mail threats alone was enough to sustain the pattern-of-activity enhancement of his sentence.

The circuit court also reviewed Mr. Lee's request for consideration of downward departure given his mental and physical problems, but cited the danger to the victim and the public as the district court's reason for denial of downward departure. The district court had recognized its discretion in the matter and did not abuse it. The circuit court quoted the district court's opinion on this matter. The district court's opinion was based on a concern captured in the statement, "I see no recognition on the part of the defendant as to the conduct he engaged in, the seriousness of it, and so I have real concerns for protecting the victims and the public" (*Lee*, pp 17–18).

Finally, the court concluded that the sentence was substantively reasonable, because his letter to his son, the dangerous weapons in his car, and his undeterability indicated that "this was a serious interstate stalking case that created exceeding danger" (*Lee*, p 17).

Discussion

Forensic psychiatrists are familiar with evaluations requested for the purpose of mitigation of sentence. Often the presence of debilitating mental health or psychological problems associated with the crime can serve as a strong mitigating factor, or the basis for a formal downward departure in a federal sentencing. In this case, Mr. Lee asserted that his frequent threatening e-mails to harm his ex-wife were due to hypoglycemia, and in his appeal, he "emphasize[d] the seriousness of his health and mental problems" (*Lee*, p 17). However, his history revealed a long pattern of antisocial conduct, including recurrent abusive behavior toward his ex-wife, daughter, and sister and cruelty to animals. Available data showed that his pattern of threats to his ex-wife had begun approximately 30 years earlier, well before he was hospitalized for medical and psychological problems.

There was no indication that a psychiatric evaluation of Mr. Lee was ordered to support his argument on appeal for downward departure due to his "health and mental problems." It is, questionable however, whether such an evaluation would have made a dif-

ference in this case. With recidivism rates uniformly reported as high regardless of treatment modality, perpetrators of domestic violence of the sort discussed in this case present a challenge for defense attorneys. A widely cited study reported a recidivism rate of 60 percent for treated batterers (perpetrators of domestic violence) compared with 65 percent for nontreated batterers (Babcock JC, Green CE, Robie C: Does batterers' treatment work? . . . *Clin Psychol Rev* 23:1023–1053, 2004, p 1044). Therefore, although a psychiatric evaluation might help juries to understand this kind of behavior, it represents a double-edged sword, in that it also helps make the case that the behavior is likely to continue.

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Competency in Immigration Proceedings

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Immigration Judge's Inquiry Into Competency Was Sufficient Despite Applicant's Prior History of Depression

In *Rico-Landaverde v. Holder*, 607 Fed. App'x. 666 (9th Cir. 2015), the Ninth Circuit Court of Appeals considered whether a woman's history of depression was sufficient to require further inquiry into her competence before the immigration judge ordered her removal from the United States. The court upheld its earlier precedent that an immigration judge should inquire further when presented with "indicia of incompetency." It concluded that the judge's inquiry was sufficient under the particular circumstances of this case.

Facts of the Case

Veronica Rico-Landaverde, a native of Mexico, entered the United States illegally and lived for several years in Arizona, where she gave birth to eight children and was repeatedly arrested for small crimes. She had a history of alcohol dependence and