

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

depression. After she was arrested and charged with endangerment, she was referred to immigration court for deportation proceedings. She contested her removal from the United States, petitioning for asylum, even though she was well past the one-year filing deadline. She appeared before an immigration judge for five hearings over three and a half months. During the hearings, she presented evidence of mental illness, including a probation report that documented her history of depression and suicidal thoughts. In addition, the court was informed that she was a plaintiff in a class-action lawsuit seeking greater procedural protection for immigration detainees with mental disabilities (*Franco-Gonzalez v. Holder*, 2014 U.S. Dist. Lexis 156812). The immigration judge was not persuaded by Ms. Rico-Landaverde's arguments, and he issued a final removal order at the conclusion of the hearings.

Ms. Rico-Landaverde appealed the decision to the Board of Immigration Appeals (BIA), which dismissed her petition. She then appealed to the Ninth Circuit Court of Appeals, arguing that the immigration judge had made several errors in her case: he erred in finding her application for asylum untimely; he failed to inform her of her eligibility for a U visa for nonimmigrant status; she is not removable because her conviction was not a crime involving moral turpitude; and he improperly applied the legal standard set in *Matter of M-A-M-*, 25 I. & N. Dec. 474 (B.I.A. 2011), for inquiring into her competency.

Ruling and Reasoning

The Ninth Circuit Court of Appeals dismissed in part and denied in part Ms. Rico-Landaverde's appeal. The court concluded that it did not have jurisdiction over the first two claims (the timeliness of the asylum application and her eligibility for a U visa), because she had not raised them previously with the BIA. The U visa is for victims of certain crimes who have undergone mental or physical abuse as a result of those crimes and who are willing to help law enforcement officials in their investigation and prosecution of criminal activities. The court denied Ms. Rico-Landaverde's claim that she was not removable because her conviction for endangerment was not a crime involving moral turpitude. The court concluded that the nature of her crime was not relevant, as she was removable on other grounds.

Finally, the court considered Ms. Rico-Landaverde's claim that the immigration judge improperly

applied the standard for competency inquiries in immigration proceedings that was established in *Matter of M-A-M-*. The ruling in *M-A-M-* held that immigration judges should inquire further into an individual's competency if they are presented with "indicia of incompetency." Ms. Rico-Landaverde argued that, in her case, the evidence she presented about her past treatment for depression should have triggered a further inquiry into her competence. The court disagreed, reasoning that Ms. Rico-Landaverde's behavior over the three-and-a-half-month span of her asylum hearing suggested that she was competent. She was able to file a *pro se* asylum application, demonstrate appropriate courtroom behavior, and call appropriate witnesses on her behalf. The court also noted that, in her appeal, Ms. Rico-Landaverde argued only that her competence should have been considered by the judge, not that she was actually incompetent at any time during the immigration proceedings.

Dissent

Judge Bea disagreed with the majority's conclusion that the immigration judge's inquiry into Ms. Rico-Landaverde's competence was sufficient in light of her reported history of depression. He opined that the immigration judge's questions of her during the hearings were "business as usual" and did not constitute the "further inquiry" required by *Matter of M-A-M-*. For example, the immigration judge did not inquire into her state of mind, nor did he ask any questions about her psychiatric diagnoses, medications, or history. In Judge Bea's opinion, the *Matter of M-A-M-* standard necessitated a more detailed examination of her mental health problems, and he therefore disagreed with the majority's ruling.

Discussion

This case raises important questions about the standard for requesting a competency evaluation in immigration proceedings. In *Matter of M-A-M-*, the court ruled that individuals are presumed to be competent in immigration matters, and no further inquiry is necessary if there are no indicia of incompetency. This standard provides some guidance to immigration judges, but it leaves open the question of what exactly constitutes indicia of incompetency. Is an individual's stated history of mental illness sufficient? Must the appellant provide documentation of diagnosis and treatment or actually demonstrate bizarre behavior in court?

These questions were not addressed directly by the current decision, but a few other recent appellate court decisions have also examined the them. In *Cen-teno v. Holder*, 584 Fed. Appx. 476 (2014), the Ninth Circuit Court of Appeals decided that a woman's history of major depression constituted sufficient indicia of incompetence to warrant ordering an evaluation. In *Barker v. Attorney General United States*, 792 F.3d 359 (2015), the Third Circuit Court of Appeals considered whether an immigration judge has an obligation to inquire about an immigrant's competence, even when not presented with evidence raising the question. Gregory Barker represented himself during his immigration hearings, and only after the judge ordered his removal did Mr. Barker raise a question of his competence. Applying the *M-A-M-* framework, the *Barker* court reasoned that immigrants are not entitled to routine *sua sponte* questioning by the judge about their mental competence. The court noted that setting such a standard would actually afford more procedural due process rights to immigrants than are given to criminal defendants.

The appellate courts in all of these cases compared immigration proceedings to criminal trials, finding many similarities between them. In both contexts, the stakes are high, and individuals risk losing the fundamental building blocks of the lives they have created. *Matter of M-A-M-* seems to recognize the parallels with criminal cases, establishing a test for competency that is remarkably similar to *Dusky v. United States*, 362 U.S. 402 (1960): "whether he or she has a rational and factual understanding of the nature and object of the proceedings, can consult with the attorney or representative if there is one, and has a reasonable opportunity to examine and present evidence and cross-examine witnesses" (*M-A-M-*, p 484). Despite these similar standards for determining competence, immigration detainees are still a long way from having all of the procedural protections afforded criminal defendants.

According to 8 U.S.C. § 1229a (2012), individuals in immigration cases are entitled to representation by an attorney if they can afford one, but indigent people do not have a right to counsel at the government's expense. *Franco-Gonzalez*, cited by the majority in this decision, moved one step closer to a universal right to counsel in immigration cases by establishing such a right for individuals with mental disabilities. The court in *Franco-Gonzalez* reasoned

that individuals with mental disabilities are particularly vulnerable and may need the assistance of an advocate to help them present the strongest case against deportation. Future legal decisions may continue with this trend toward providing more protections for immigrants, treating the immigration courts more and more like criminal courts.

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Expertise in Determining Service Connection for Mental Illness as Cause of Death

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The Veterans Affairs Board Must Provide Adequate Justification for Denial of Service Connection for Veterans' Mental Health Conditions Potentially Sustained in Service

In *Learman v. McDonald*, 2015 U.S. App. Vet. Claims Lexis 447, the U.S. Court of Appeals for Veterans Claims granted Maureen Learman's appeal of the Board of Veterans Appeals decision to deny service connection for the cause of her husband's death. The court remanded the case for determination.

Facts of the Case

Perry Learman served in the army from 1974 to 1977 and was honorably discharged. In 1978, he was hospitalized for psychotic symptoms and, according to VA medical records, given a diagnosis of "paranoid-type schizophrenia, multiple drug dependence, and alcohol abuse" (*Learman*, p 1). Mr. Learman died in 2002 of a gastrointestinal hemorrhage secondary to esophageal varices and cirrhosis. At the time of his death, Mr. Learman had the service-connected disabilities of schizophrenia and a right shoulder injury.

Mrs. Learman applied for VA widow benefits in March of 2002 and was denied by the VA regional office in January 2005. She filed a Notice of Disagreement before the Board of Veterans Appeals.