However, the report did not include information obtained from the follow-up MRI and EEG, which were found to be within normal limits. Noting these "shortcomings" in Dr. Aubert's report, the court concluded that Liberty's decision not to credit the report was reasonable.

Dr. Aubert diagnosed cognitive disorder, not otherwise specified. She did not indicate whether she believed Ms. McAlister's cognitive deficits had an organic etiology. However, Ms. McAlister claimed that this assumption should be made because "cognitive disorder not otherwise specified" is formally referred to as an "organic mental disorder" in the DSM. The court, however, stated that since they were not medical experts, they could not interpret something that was not explicitly stated by the expert.

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

A Question of Competence Raised After Unsuccessful *Pro Se* Litigation

Patrick Wiita, MD
Fellow in Forensic Psychiatry

Joseph Simpson, MD, PhD
Clinical Associate Professor

Department of Forensic Psychiatry
Institute of Psychiatry, Law, and Behavioral Science
University of Southern California
Los Angeles, CA

United States Court of Appeals Considers the Circumstances Under Which a District Court's Determination of Competence to Stand Trial Could Be Reversed

In *United States v. Dubrule*, 822 F.3d 866 (6th Cir. 2016), the United States Court of Appeals for the Sixth Circuit contemplated whether a district court erred in finding a defendant competent to stand trial before the sentencing phase, having failed to order a competency hearing *sua sponte* before or during the trial-in-chief.

Facts of the Case

Rosaire Dubrule, a former physician, was convicted on one count of conspiracy to distribute controlled substances and 44 counts of distributing controlled substances and sentenced to 150 months in prison. Codefendant Kim Dubrule, Dr. Dubrule's wife and medical assistant, was convicted of criminal conspiracy and sentenced to 18 months in prison. The Dubrules were alleged to be operating a "pill mill," a medical office that provides prescriptions for controlled narcotics in exchange for cash.

Before trial, Dr. Dubrule was arrested in July 2008 for driving while intoxicated on prescription drugs, which called into question his status on bond. He stated that he was a "world famous physician," that the government was trying to kill him, and that they had caused hurricane Katrina. No doubt was raised concerning his competence to stand trial. In September 2008, Dr. Dubrule's defense counsel moved to withdraw from the case, citing difficulties with their working relationship. Counsel declared that he believed his client to be competent and that he may have been "taking his advice elsewhere." A magistrate judge agreed and Dr. Dubrule moved to proceed to trial *pro se.* With nobody raising a doubt regarding Dr. Dubrule's competency, the magistrate judge granted Dr. Dubrule's motion to proceed *pro se* and appointed panel attorney, Ross Sampson, to serve as standby, or "elbow," counsel. Of the many pretrial motions Dr. Dubrule filed, some contained-conspiracy themes, including assertions that he had been victim of "government break-ins" and "financial schemes" and that his leg had been "intentionally broken."

The trial-in-chief concluded in August 2010 with the jury returning guilty verdicts on all counts. At this point, Dr. Dubrule requested legal representation, and Attorney Sampson was appointed. Mr. Sampson's first act was to raise a doubt as to Dr. Dubrule's competence to proceed to sentencing. A forensic psychologist for the Bureau of Prisons (BOP), Dr. Jeremiah Dwyer, evaluated Dr. Dubrule for approximately eight hours and submitted a report in which he opined that Dr. Dubrule had paranoid or grandiose delusions that rendered him incompetent to proceed to sentencing. Defense counsel requested an evaluation of Dr. Dubrule's competence at the time of the trial and at the time of the offenses. A second forensic psychologist for the BOP, Dr. David Morrow, evaluated Dr. Dubrule for approximately eight hours and reviewed the trial transcripts. Dr. Morrow opined in his report that Dr. Dubrule had personality and delusional disorders and, based on his intelligence, would have performed

better at trial or made different decisions regarding plea agreements had he not been impaired by his mental conditions. Dr. Morrow did not offer an opinion regarding Dr. Dubrule's sanity at the time of the offenses.

The government had concerns with the reports authored by Drs. Dwyer and Morrow and appointed a third evaluator, Dr. Bernice Marcopulos, a professor of clinical psychology and neuropsychology at James Madison University, Harrisonburg, Virginia, and a consultant for The Forensic Panel, a group that specializes in these types of forensic evaluations. Over two and a half days, Dr. Marcopulos evaluated Dr. Dubrule and interviewed family members, former colleagues, employees, and attorneys. She conducted multiple psychological tests, reviewed trial transcripts, pre- and post-trial motions, and the reports provided by Drs. Dwyer and Morrow. Dr. Marcopulos opined that Dr. Dubrule was competent to stand trial, to represent himself, and to proceed to sentencing. The district court agreed with Dr. Marcopulos, and Dr. Dubrule was formally sentenced.

Dr. Dubrule appealed the decision, arguing that the district court erred in finding him competent, in failing to order *sua sponte* a competency hearing before trial and in holding that he waived his insanity defense, that his pretrial and standby counsel provided ineffective assistance by failing to request a competency evaluation, and that his rights had been violated when the court relied on expert testimony that misleadingly claimed to be "peer reviewed." Circuit Judges Clay, Gilman, and Griffin heard the appeal.

Ruling and Reasoning

The Sixth Circuit unanimously affirmed the district court's rulings in an opinion authored by Judge Clay. The *Dusky* standard requires that a criminal defendant possess (1) a "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding," and (2) "a rational as well as factual understanding of the proceedings against him" (*Dusky v. United States*, 362 U.S. 402 (1960)). The Sixth Circuit has applied this standard previously, noting that "even if [the defendant is] mentally ill, it does not follow that because a person is mentally ill he is not competent to stand trial" (*United States v. Davis*, 93 F.3d 1286 (6th Cir. 1996), p 1290). Nor is a defendant "rendered incompetent . . . merely because he cannot get along with his counsel or disapproves of his attorney's performance" (*United States v. Miller*, 531 F.3d 340 (6th Cir. 2008), p 350). In cases with a *pro se* litigant, "the mere fact that [he] espouses a far-fetched, or even bizarre, legal-defense theory is insufficient to clear the high hurdle for incompetency" (*United States v. Davis*, 515 Fed. Appx. 486 (6th Cir. 2013), p 493).

The court found that the district court did not err in giving more weight to Dr. Marcopulos' opinion, as it noted that she possessed more training and experience in forensic psychology, performed a more extensive evaluation, and ultimately provided more thoroughly explained and persuasive conclusions than the other experts. Indeed, the Sixth Circuit has upheld decisions wherein expert testimony was given more weight when it is more persuasive, as in *United States v. Mathis*, 738 F.3d 719, (6th Cir. 2013), p 740, or when an expert's experience is qualitatively and quantitatively superior, as in *Bernier v. United States* 816 F.2d 678 (6th Cir.1987).

The court also noted the ample opportunity the trial court had to observe Dr. Dubrule in orchestrating and carrying out his defense. Based on the evidence, it appeared that he had a working knowledge of relevant law, a rational and factual understanding of the proceedings, and the ability to consult with his standby counsel and that his *pro se* motions contained no plainly-delusional material. Dr. Dubrule's contention that his overconfidence before trial and his underperformance during trial rendered him incompetent to stand trial was not persuasive, with Judge Clay opining that Dr. Dubrule's "postconviction hindsight is not a compelling enough basis" (*Dubrule*, p 879) to reverse a district court's determination. Second, the Sixth Circuit held that the district court did not err by failing to order *sua sponte* a competency evaluation because there was no "reasonable cause to believe" Dr. Dubrule was incompetent. Based on the numerous hours that the court interacted with Dr. Dubrule and the testimony of the initial defense attorney that he believed his client to be competent, the court concluded that Dr. Dubrule was simply unwilling, rather than unable, to cooperate with counsel. The government's motion to revoke bond was prompted by behaviors resulting from abuse of prescription drugs and the court had no reason to question his ability to conduct a defense when sober.

The appeals court rejected Dr. Dubrule's claim of ineffective assistance of counsel, primarily because he could not prove prejudice. But for counsel's failure to request a competency evaluation before or during trial, the result of the proceeding would have been different. No "good cause" was found that would allow Dr. Dubrule's belated filing of an intention to assert an insanity defense, as he attributed the belatedness to his proposed incompetence to stand trial or represent himself. Finally, Judge Clay rebuffed Dr. Dubrule's accusation that the government falsely represented the "peer reviewed" nature of Dr. Marcopulos' evaluation in regard to her failure to disclose that she would be consulting with other experts before the completion of the report. Dr. Dubrule contended that, had he known about the consultations, defense counsel could have objected to adjusting such a process. Judge Clay dismissed the idea that such an objection would have affected the outcome of the court proceedings, given that defense counsel had the opportunity to cross-examine Dr. Marcopulos regarding her methods at the time of the competency hearing.

Discussion

In this ruling, the Sixth Circuit Court of Appeals affirmed an important notion regarding competence. If a defendant's competence is not called into question by counsel, the court's decision to order a competency hearing should be based on "all of the information before it" (*United States v. Tucker*, 204 F. App'x 518 (6th Cir. 2006), p 520). That a defendant has a mental illness may be sufficient to warrant a competency hearing, but it is certainly not sufficient to assume incompetence. *Indiana v. Edwards*, 554 U.S. 164 (2008) separated the standards for competency to stand trial and competency to self-represent in the name of fairness. Although a court may face societal pressure to act in deference to self-determination, "the Constitution permits judges to take realistic account of the particular defendant's mental capacities" so that those with genuinely impairing mental illness are not left "hopeless and alone before the court" (*Edwards*, pp 177–78). Finally, we are reminded that with *pro se* litigants, an unorthodox defense strategy is not in itself sufficient to render the defendant incompetent to stand trial.

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

Constitutional Rights Violations in Civil Commitment

Caitlin A. Wenzke, MD
PGY-4 Psychiatry Resident, Trainee in Forensic Psychiatry

Cheryl Hill, MD, PhD
Assistant Professor of Psychiatry

Kari-Beth Law, MD
Assistant Professor of Psychiatry

Department of Behavioral Medicine and Psychiatry
West Virginia University School of Medicine
Morgantown, WV

Police Involuntarily Detained Person With Physical Disabilities Without Probable Cause for Mental Health Evaluation

Gordon Goines reported to the police that he believed his neighbor was stealing his cable. He was taken into custody and transported to the hospital for a mental health evaluation. This evaluation resulted in his involuntary mental health detainment. Mr. Goines sued the police officers and Valley Community Services Board and their employee, citing violations of his Fourth and Fourteenth Amendment rights. The district court dismissed the complaints against both parties, and Mr. Goines appealed. In *Goines v. Valley Community Services Board*, 822 F.3d 159 (4th Cir. 2016), the Fourth Circuit affirmed the dismissal against Valley Community Services Board and the mental health clinician, but vacated the lower court's dismissal of claims against the officers.

Facts of the Case

Mr. Goines reported that, in May 2014, he began to have problems with his cable television, including service disruption and emission of occasional loud noises when the television was turned on. A cable technician evaluated his claims on May 15, 2014, and discovered that Mr. Goines' cable had been spliced by a neighbor, whose action was deemed the likely cause of the problems. The technician recommended that Mr. Goines report the neighbor's infraction to the police.

Mr. Goines went to the police station to file a report before addressing the matter with his neighbor because he had concerns of how his neighbor would respond. According to the Incident Report, Mr. Goines first reported his claim to one officer, who told two officers that Mr. Goines may have mental health problems. Of note, Mr. Goines had a diagno-