

sibly deter psychiatrists from assuming care for potentially violent and risk-laden patients.

Addendum

The Supreme Court of Vermont withdrew the decision it initially released. The majority's new opinion affirmed and reversed the same count dismissals as the previous opinion. However, the court added caveats that carve out the extent of liability incurred by providers as a result of this holding. Specifically, it identifies three conditions that must be met for the duty to inform caretakers to apply. The caregiver must be "actively engaging" with the provider in relation to the patient's care, the treatment or discharge plans must "substantially rely" on the caretaker's ongoing involvement, and the caregiver must be within the zone of danger, rendering the caregiver susceptible to the patient's "violent propensities." Once established, this duty is fulfilled by providing "reasonable information to notify the caregiver of the risks, and of steps he or she can take to mitigate the risks" (*Kuligowski*, p 41). The court also assigned the burden of defining reasonable disclosure, as well as proving duty, breach and causation to the plaintiffs. Justice Reiber amended his dissent, describing these new "obstacles" to litigation as "cold comfort" to mental health providers, given that the duty to inform, as laid out by the *Kuligowski* majority, remains "amorphous."

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Inmate Raises Extreme Emotional Disturbance Defense

Corissa Carlson MA

Predocutorial Psychology Fellow in Forensic Psychiatry

Traci Cipriano JD, PhD

Assistant Clinical Professor of Psychiatry

Law and Psychiatry Division

Department of Psychiatry

Yale University School of Medicine

New Haven, CT

Can Prison Conditions Ever Be So Abhorrent as to Give Rise to an Extreme Emotional Disturbance Claim?

In *Johnson v. State* 2016 Ark. 156 (Ark. 2016), the Supreme Court of Arkansas held that impending confiscation of personal property was not sufficient

provocation to support instructing a jury to consider an extreme emotional disturbance (EED) defense. Furthermore, the court affirmed that the state was not required to disclose information regarding general violence in the East Arkansas Regional Unit, where Mr. Johnson was incarcerated.

Facts of the Case

On January 20, 2012, Latavious D. Johnson was approached by correctional officer Barbara Ester in the East Arkansas Regional Unit, where Mr. Johnson was serving a life sentence for first-degree murder. Officer Ester accused Mr. Johnson of wearing contraband shoes, which Mr. Johnson denied. Mr. Johnson was sent to his cell to remove his shoes. Officer Ester left Mr. Johnson while she sought Lieutenant Steven Lane for assistance with confiscating the alleged contraband shoes. While at his cell, Mr. Johnson retrieved a personal property inventory sheet recorded during his prison intake, which did not label his shoes as contraband, and had been signed by Officer Ester. Mr. Johnson also retrieved a homemade weapon, which he subsequently used to stab Officer Ester upon her return with Lieutenant Lane, resulting in her death.

In the original trial held in Lee County Circuit Court, Mr. Johnson was tried by a jury for capital murder. He provided testimony wherein he admitted to stabbing Officer Ester but denied realizing at the time of the stabbing that his actions could result in Officer Ester's death. Mr. Johnson was convicted of capital murder and sentenced to death. Pursuant to Ark. R. App. P. Crim. Rule 10, in any case involving a conviction where the sentence is death, an automatic appeal is filed with the circuit court clerk and reviewed by the Supreme Court of Arkansas.

In his appeal to the Supreme Court of Arkansas, Mr. Johnson stated he was under extreme emotional distress at the time of the stabbing, and therefore, the trial court jury should have been instructed to consider his mental state at that time, including the EED defense and the accompanying lesser charge of manslaughter. Ark. Code Ann. § 5-10-104 (2012) states that a person commits manslaughter if he "causes the death of another person . . . under the influence of extreme emotional disturbance for which there is a reasonable excuse" and "the reasonableness of the excuse is determined from the viewpoint of a person in the actor's situation under the circumstances as the actor believed them to be." Mr. Johnson asserted that

the prison environment itself, and the personalities and violent tendencies of the guards, contributed to his elevated level of distress, which erupted upon Officer Ester's accusation because of Mr. Johnson's belief that his shoes were not contraband. Furthermore, Mr. Johnson stated that certain prison records, including information about violence in general, as well as any complaints against prison guards, should have been disclosed during his trial, because such records would provide information on the prison climate, which was relevant to his EED claim.

Ruling and Reasoning

The Supreme Court of Arkansas ruled that the circuit court appropriately did not instruct the jury to consider Mr. Johnson's EED claim, and a resulting lesser charge of manslaughter, nor did the court err in denying Mr. Johnson's request for records related to violence in the prison in general.

The court's ruling on the EED instruction was based on several considerations. An EED affirmative defense involves the defendant's introducing evidence related to a triggering event and the defendant's resultant mental state in an effort to establish mitigating circumstances that would allow for a lesser sentence under the state EED statute. The Supreme Court of Arkansas reasoned that an EED defense may be considered only when a person charged with murder has acted after being provoked by "physical fighting, a threat, or a brandished weapon" (*Johnson*, p 5). The court considered whether Officer Ester had confronted Mr. Johnson in a way that would present a physical threat and found that she had not. The court reasoned that Mr. Johnson did not face an immediate threat because he retrieved the weapon after leaving the presence of Officer Ester and before any physical attempt to confiscate his shoes.

The court further found that the trial court did not err in denying Mr. Johnson's broad request for records beyond those directly related to the incident because those records were not relevant to Mr. Johnson or his defense. Mr. Johnson cited several prior cases, including *Lockett v. Ohio*, 438 U.S. 586 (1978); *Eddings v. Oklahoma*, 455 U.S. 104 (1982); and *Skipper v. South Carolina*, 476 U.S. 1 (1986). The court noted that in all of these cases, the mitigating circumstances were related to "the defendant's character, his record, or the circumstances of the offense" (*Johnson*, p 12). In Mr. Johnson's case, the trial

court ordered the release of records related to Mr. Johnson's character and background, as well as records for Officer Ester, including any complaints filed against her and other officers who testified. Mr. Johnson was not granted access to information about the care and protection of the inmates at East Arkansas Regional Unit, or reports about officer-on-inmate violence (with the exception of the officers who were called to testify in the trial).

Discussion

This case raises an interesting question: can prison conditions ever be so deplorable as to give rise to an EED defense?

Consideration of an EED defense involves a jury's evaluating the reasonableness of a defendant's behavior under the circumstances experienced by the defendant. A key aspect of Mr. Johnson's EED defense was his claim that the prison staff fostered a culture of violence. Specifically, Mr. Johnson alleged that the climate of fear and violence among inmates, reinforced by the threatening behavior and attitudes of prison staff as well as other inmates, led to a heightened state of fear and vulnerability in Mr. Johnson. As a result, Officer Ester's assertion that Mr. Johnson's prized shoes were contraband, and her retrieval of an additional prison guard to assist with taking Mr. Johnson's shoes, triggered his extreme distress. It is significant that Officer Ester previously found, in writing, that Mr. Johnson's shoes were acceptable and not contraband. In a personal communication (August 23, 2016), Mr. Johnson's attorney, Jeff Rosenzweig, reported that Mr. Johnson had a history of physical abuse and neglect by his father. Did Mr. Johnson's perception of threats to his physical and personal integrity overwhelm him?

Interpretation of the Arkansas EED statute is inconsistent. The statute is written in accordance with the Model Penal Code, but the Supreme Court of Arkansas has interpreted the statute based upon a common law heat-of-passion standard. Previous cases, including *Bankston v. State*, 205 S.W.3d 138 (Ark. 2005), highlight the overlap between EED and heat of passion, but also offer distinctions mainly focused on the direct act of provocation. In the current case, the court similarly applied a common law heat-of-passion standard. This application of the heat-of-passion interpretation leaves no room for an EED defense, because there was a time lapse between Mr. Johnson's initial encounter with Officer Ester

and the attack that occurred after she returned with Lieutenant Lane. On the other hand, under the Model Penal Code interpretation, the brief time lapse would not have precluded an EED defense.

Regarding prison culture, although Mr. Johnson was denied access to records related to general prison violence on the basis of relevance, in that the records were not necessary for the preparation of his defense, one could argue that such records would have provided information about the prison climate, which in turn, may have provided information relevant to Mr. Johnson's state of mind. Although not mentioned in the decision, the Arkansas prison system has a history of investigations of prisoner mistreatment, including an 18-month Department of Justice investigation resulting in the citation of two Arkansas prisons for unconstitutional conditions (Rigby M: DOJ Investigation: Conditions in Arkansas Prisons Unconstitutional. May 15, 2004. Available at <https://www.prisonlegalnews.org/news/2004/may/15/doj-investigation-conditions-in-arkansas-prisons-unconstitutional>. Accessed October 22, 2016). The most recent Department of Justice investigation of the prison system began in 2015 and was, based on inmates' allegations of sexual abuse and harassment by corrections officers in the Arkansas women's prison (U.S. Department of Justice: Justice Department Announces Investigation into Allegations of Sexual Abuse at the McPherson Women's Prison in Newport, Arkansas. June 11, 2015. Available at <https://www.justice.gov/opa/pr/justice-department-announces-investigation-allegations-sexual-abuse-mcpherson-womens-prison>. Accessed September 22, 2016).

Another aspect of this case to consider is that Mr. Johnson was already serving time in prison for killing his father. Parricide is rare, and most of those cases involve a child who has been severely abused or has mental illness (Hart JL, Helms JL: Factors of parricide: allowance of the use of battered child syndrome as a defense. *Aggress Violent Behav* 8: 671–83, 2003). We have limited information about Mr. Johnson's developmental, family, and psychological history. Nonetheless, if Mr. Johnson had been a victim of severe abuse as a child, might prison conditions exacerbate any baseline heightened arousal and hypervigilance? Might the actions of a prison authority figure trigger safety fears rooted in childhood trauma?

The possibility of a prisoner's successful EED claim based on prison environment may raise con-

cerns of opening the floodgates of prisoner litigation. Yet, this case raises a theoretical possibility that perhaps should be considered in the future: could a prison climate of fear and violence, combined with insufficient mental health services be so abhorrent as to give rise to an EED claim? In this case, the court's heat-of-passion interpretation of the relevant Arkansas statute did not require it to address this question.

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Prison Litigation Reform Act: Congressional Statute Not Open to Judicial Discretion

Celeste Valencia, MD
Fellow in Forensic Psychiatry

Charles C. Dike, MD, MPH
Associate Program Director
Law and Psychiatry Fellowship Program

Law and Psychiatry Division
Department of Psychiatry
Yale University School of Medicine
New Haven, CT

The Supreme Court Emphasizes the Mandatory Nature of the Exhaustion Requirement of the Prison Litigation Reform Act

In *Ross v. Blake*, 136 S. Ct. 1850 (2016), the U.S. Supreme Court held that a court may not pardon an inmate's failure to exhaust administrative remedies before filing a suit irrespective of any "special circumstances" taken into account. In this case, the U.S. Supreme Court revoked a flawed precedent set by the appeals court; one that permitted deviation from congressional law set forth in the Prison Litigation Reform Act (PLRA) of 1997. The Court's reasoning emphasized that legislation unambiguously allows only one excuse to fail to exhaust administrative remedies; when an administrative remedy is not available for use.

Facts of the Case

Shaidon Blake was serving a life sentence in the custody of the state of Maryland. On June 21, 2007, two corrections officers, James Madigan and Michael Ross, handcuffed Mr. Blake and escorted him to the prison's segregation unit. During the escort, Officer Madigan wrapped a key ring around his fingers and