

in place of the expertise of medical professionals (*Brown*, p 271). In light of these opinions, the Fourth Circuit Court of Appeals reversed and remanded the case.

*Discussion*

The Fourth Circuit decision focused heavily on the ALJ's RFC determination in its analysis and ruling, with particular emphasis placed on the ALJ's failure to adhere to regulations dictating that the controlling weight goes to the opinions of treating providers. This court appeared to reject the notion that a physician restricted to reviewing records, rather than treating the patient, would provide a more knowledgeable opinion of the form and extent of an individual's mental and medical illnesses. This ruling is consistent with best practices in psychology and psychiatry more generally, as well as the Specialty Guidelines for Forensic Psychologists (see Guideline 9.03; American Psychological Association (APA) Specialty Guidelines for Forensic Psychology (2013)) and Ethical Guidelines for Forensic Psychiatrists (see Guideline IV; American Academy of Psychiatry and the Law (AAPL) Ethics Guidelines for the Practice of Forensic Psychiatry (2005)). Specifically, the APA and AAPL have recognized the limitations of opinions provided by experts who have restricted their assessments to records and have not directly evaluated clients. Further, according to these guidelines, the specific limitations of these opinions should be clearly stated by the experts providing the opinion so that the audience is aware and in a better position to appreciate potential problems. This court also highlighted that the record did not clearly establish the nontreating physician's expertise in areas in which he was forming an opinion, despite having devalued a treating physician's opinion for this very reason. Again, the APA and AAPL Guidelines are clear that experts should limit their opinions to areas in which they have established competence. When these limitations are made clear in expert testimony, the courts are, perhaps, in a better position to determine which testimony should be accorded the greatest weight. Finally, the Fourth Circuit's ruling provides another perspective on the debate over dual roles for evaluators, particularly when the evaluator is the treating clinician. The tension between maintaining the integrity of the clinical perspective and the law's search for best evidence is illustrated in this decision.

The second most significant determinant in this court's decision to vacate and remand the case is its finding that the ALJ accepted the expert opinion that was most consistent with his own findings, rather than accepting the opinions that were reflective of, and consistent with, the totality of available data submitted to the court. In doing so, this court found that the ALJ failed to draw clear, reasonable associations between the available data and his decision to deny benefits. In sum, the failure to give the appropriate weight to the treating physicians' opinions, along with the lack of a clear nexus drawn between the data and the ALJ's ruling, led this court to vacate and remand the case for further litigation.

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## Dangerousness Standards for Insanity Acquittee

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**The Fifth Circuit Court of Appeals Denies Habeas Relief and Allows Continued Confinement of an Insanity Acquittee Based on "Potential" Dangerousness**

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In *Poree v. Collins*, 866 F.3d 235 (5th Cir. 2017), Carlos Poree sought federal *habeas* relief under 28 U.S.C. § 2254 after a district court's denial of his petition for conditional release to the community and subsequent appealability denials within the Louisiana court system. He then filed for a federal writ of *habeas corpus* challenging the "fact" of his confinement. A federal district court denied his appeal. Mr. Poree appealed to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit Court of Appeals accepted his *writ* and considered whether the state district court had erred in denying the petition for conditional release.

*Facts of the Case*

On November 7, 1977, Mr. Poree embarked on a shooting spree that resulted in one fatality and nine others wounded. According to court documents, he began displaying bizarre behavior and symptoms of paranoia five months before the shootings and was eventually given a diagnosis of schizophrenia. He was ultimately adjudicated not guilty by reason of insanity and committed to the Eastern Louisiana Mental Health System (ELMHS) in 1999. While in custody at ELMHS, the district court reviewed multiple petitions recommending that Mr. Poree be transferred to a less restrictive setting. For a patient to be considered for release or placement in a less restrictive setting, a hospital review panel is appointed to assess whether the patient is an appropriate candidate.

On October 11, 2010, an ELMHS Forensic Review Panel consisting of two psychiatrists and one psychologist completed an evaluation of Mr. Poree's status and recommended he be conditionally released to a group home. At the time, Mr. Poree was 68 years old. The review panel acknowledged Mr. Poree's diagnosis of schizophrenia and noted that his symptoms were stable on his current psychotropic medication regimen. The panel reported that Mr. Poree remained fully compliant with his treatment, expressed awareness of the nature of his violent crime, demonstrated the ability to conform his conduct to the law, and possessed "sufficient moral cognitive judgment to distinguish between right and wrong" (*Poree*, p 239). The review panel stated that he had mental illness that was in stable remission and that he was not dangerous to himself or others, provided that he was adequately supervised. The panel recommended that he be conditionally released to a group home and be subject to return to ELMHS should he violate any of the outlined stipulations.

A contradictory hearing was held in January 2011. All four expert witnesses supported Mr. Poree's transfer to a less restrictive setting. The district court judge denied conditional release, relating that the court had not been satisfied that Mr. Poree did not present a "potential" danger to himself and others. The court described the danger as "inherent in the activity and the conduct" of his index offense. The judge related that even though Mr. Poree was "asymptomatic," this did not "negate the *potential* that Mr. Poree, should he transition into a less

restrictive setting, would not manifest or relapse into the delusions and/or the behavior that presented itself through the years" (*Poree*, p 242, emphasis in original). The district court ordered that he remain at ELMHS with a review to be conducted annually.

Mr. Poree challenged the state district court's ruling, but his appeals were denied by the Louisiana appellate court system. He then filed for federal *habeas* relief challenging the fact of his confinement at ELMHS. A federal district court denied his appeal. He then appealed to the United States Court of Appeals for the Fifth Circuit.

*Ruling and Reasoning*

The United States Court of Appeals for the Fifth Circuit affirmed the state court's denial of *habeas* relief, holding that the state court's decision was not contrary to clearly established federal law. The circuit court relied on *Jones v. United States*, 463 U.S. 454 (1983) and *Foucha v. Louisiana*, 504 U.S. 71 (1992), in its delineation of "clearly established federal law". The court held that "the governing legal principle derived from *Foucha* and *Jones* is that a state may continue to confine an insanity acquittee only as long as the acquittee is both mentally ill and dangerous" (*Poree*, p 248). In *Foucha*, the Court ruled that there was no basis to continue the confinement of an insanity acquittee who was once dangerous but no longer has mental illness. The circuit court emphasized that both criteria must be met simultaneously for continued confinement.

The question in *Poree* was how a state makes its dangerousness determination. The state district court had held that potential danger, based on prior conduct, and regardless of how temporally remote, was adequate to satisfy the dangerousness prong of *Jones* and *Foucha*. Concluding that Mr. Poree presented a potential danger to himself and others, the state court denied his release. Mr. Poree argued that the state court's standard of potential dangerousness was too broad and asserted that the preconditions of mental illness and dangerousness have a temporal component based on the language in *Foucha*, which held that continued confinement "is improper absent a determination in civil commitment proceedings of *current* mental illness and dangerousness" (*Foucha*, p 78, emphasis in original). The circuit court noted that the Supreme Court did not specify how a state must make its

dangerousness determination but held that the state court's decision to continue Mr. Poree's civil confinement on the basis of potential dangerousness did not conflict with clearly established Supreme Court precedent.

However, the circuit court pointed out that the state court's dangerousness standard appeared to be inconsistent with Louisiana state code, which states that the court must determine "whether the committed person is no longer mentally ill. . . and can be discharged, or can be released on probation, without danger to others or to himself" (*La. Code Crim. Proc. Ann.* art. 657 (1991)). Louisiana defines "dangerous to others" as "the condition of a person whose behavior or significant threats support a reasonable expectation that there is a substantial risk that he will inflict harm upon another person in the near future" (*La. Rev. Stat. Ann.* § 28:2(3) – (4)(1986)); but as the circuit court's review concerned federal law, it held that the "remedy lies in Louisiana state courts, not federal habeas proceedings" (*Poree*, p 250).

*Dissent*

In a dissenting opinion, one of the justices asserted that the district court was not simply in conflict with its own state code but was also "contrary to clearly established Supreme Court law" (*Poree*, p 254). The dissenting opinion said that the "state court made no finding of dangerousness" (*Poree*, p 252) and that the difference between "dangerousness" and "potential dangerousness" is not merely "semantic." Rather, the district court's use of a "potential dangerousness" standard rendered "the Supreme Court's dangerousness requirement meaningless" (*Poree*, p 252). The dissent related that because "it is possible for every insanity acquittee to become dangerous, the state court's standard lacks any limit" (*Poree*, p 252) and "strips the dangerousness precondition of meaning" (*Poree*, p 254). In closing, the dissent asserted that:

Civil confinement is not punitive. It may not be used to accomplish what the criminal system could not—here, a life sentence. The systems are distinct in both justification and operation. They will remain so only if courts are faithful to the requirements of continued civil confinement (*Poree*, p 254).

*Discussion*

The district court's use of a "potential" dangerousness standard would seem to greatly reduce the import of expert opinion as to the appropriateness of

release of insanity acquittees to less restrictive settings. If "dangerousness" is deemed "inherent" in the index offense, then the criminal court might just ignore expert opinion recommending release, and justify indefinite confinement, based solely on the "inherent" seriousness of the index offense.

It is important for forensic evaluators to recognize Louisiana's broad interpretation of dangerousness. Future decisions may help to clarify the bounds of potential dangerousness.

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## Psychiatrist–Patient Privilege in Criminal Court

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### The Supreme Court of Connecticut Denies Defendant's Request for *In Camera* Review of Privileged Psychiatric Records of Homicide Victim

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In *State v. Fay*, 167 A.3d 897 (Conn. 2017), the Supreme Court of Connecticut ruled that privileged psychiatric records of a homicide victim are subject to *in camera* review for the trial court to determine whether the defendant's constitutional right of confrontation affords him the records. In the instant case, however, the defendant failed to make sufficient showing of his compelling need for the records based on criteria outlined by the court.

*Facts of the Case*

On July 8, 2010, William Fay shot his brother (who was also his roommate) twice with the victim's firearm in their shared apartment. The victim later died as a result of his injuries, and Mr. Fay did not deny shooting him. He was convicted of manslaughter, although he claimed self-defense. He presented evidence that the victim had problems with depression and alcoholism that had caused previous violent confrontations between them. Mr. Fay alleged