

overall judgment, reduced impulsivity, and increased responsibility. Although past behavior is a key component of a standard psychiatric evaluation, clinicians must recognize the potential for change in juveniles, with the past actions of youth not definitively representative of future patterns of behavior.

Adjudicated NGRI on One Charge and Guilty on Another

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Trial Court Has the Discretion to Require a Defendant to Serve a Prison Sentence for One Offense Before Being Involuntarily Committed for a Separate NGRI Offense

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In *Williams v. Commonwealth*, 294 Va. 25 (2017), the Virginia Supreme Court evaluated a trial court's discretion related to the sequence of ordering incarceration before involuntary civil commitment. After pleading guilty to a July offense and not guilty by reason of insanity (NGRI) to an August offense, the defendant was sentenced to a 5-year prison term followed by commitment. The Virginia Supreme Court affirmed the lower court's decision.

Facts of the Case

Larry Lee Williams attacked his wife on July 8, 2014, and, again, on August 24, 2014. Mr. Williams had three prior convictions for assault. On September 2, 2014, he pleaded guilty to felony assault and battery, third or subsequent offense, for the July offense. Following the discovery of recordings of jail phone calls in which he stated that he could not recall the August offense due to a blackout, a forensic evaluation was ordered. A psychologist determined that Mr. Williams was competent to stand trial on all charges. At a May 18, 2015, plea hearing for the August offense, the Commonwealth announced that a plea deal had been reached: Mr. Williams would

accept responsibility for the July offense and the Commonwealth would stipulate to a NGRI plea for the August offense. Mr. Williams stated that he understood the potential consequences of pleading guilty and NGRI. The Circuit Court of the City of Richmond accepted the pleas and ordered Mr. Williams be placed in the custody of the Department of Behavioral Health and Developmental Services (DBHDS) for evaluation. He was thus hospitalized at Central State Hospital.

At a November 17, 2015, sentencing hearing, the Commonwealth proposed that Mr. Williams serve five years in prison, the maximum sentence, for the July offense, followed by commitment for the August offense. The defense requested that he be committed immediately, citing psychiatric and neuropsychological reports recommending mental health treatment. The circuit court agreed to the sequence proposed by the Commonwealth. Mr. Williams was sentenced to a five-year prison term preceding NGRI commitment. Mr. Williams appealed.

Ruling and Reasoning

The Virginia Supreme Court affirmed the judgment of the circuit court requiring Mr. Williams to serve time in prison and then be committed.

Mr. Williams' appeal was based on the grounds that the circuit court had violated due process rights by removing a person with mental illness from a hospital and sending him to prison without "time served" credit from hospitalization. While the alleged error was unpreserved (i.e., was not objected to in a lower court), the defense argued that an appellate court should review the case under the "ends of justice" exception. Rule 5:25 states that appellate courts can consider arguments as a basis for reversal, even if there was not a contemporaneous objection made in the lower court, when it would enable the court to attain the ends of justice. The defense contended that to not apply the ends of justice exception would result in a "grave injustice" (*Commonwealth v. Bass*, 292 Va. 19, 27 (2016)) because the circuit court had ignored the seriousness of Mr. Williams' mental illness. The defense concluded that he required treatment, not punishment.

The Virginia Supreme Court noted that Mr. Williams conceded not objecting in the circuit court and, therefore, objections were not preserved for review. The Supreme Court, therefore, could not consider those arguments as a basis for reversal except to attain the ends of justice. The court cited *Gheorghiu v. Commonwealth*,

280 Va. 678, 689 (2010), which ruled that the ends of justice exception should be applied “in very limited circumstances,” such as when the record established that an element of a crime did not actually occur. The court argued that sentence sequencing did not result in a grave injustice as there was due process involving a hearing in which the defendant had counsel, could present evidence, and could be heard. Mr. Williams, as a competent defendant, had pleaded guilty to the July offense, which occurred before his temporary insanity. Mr. Williams never objected to the prison sentence but had merely objected to the sequencing, for which the court argued there was no statutory direction. Furthermore, the court noted that the Department of Corrections would be required by Virginia statute (Code § 53.1-32[A] (2012)) and case law (*Estelle v. Gamble*, 429 U.S. 97, (1976)) to provide mental health treatment to Mr. Williams during his prison sentence. The court contended that Mr. Williams could be transferred to an outside facility, should the need arise. Therefore, the court concluded that there was no manifest injustice with regard to delaying the commitment of a person with mental illness to a psychiatric hospital in favor of serving a prison sentence.

Dissent

In dissent, Justice J. Powell argued that it was a grave injustice to require Mr. Williams to be incarcerated before being committed. He noted that Virginia statute (Code § 19.2-182.2 (2012)) stated that NGRI acquittees “shall” be placed in the custody of DBHDS. Justice Powell argued that, because Mr. Williams was incarcerated after the sentencing hearing, the mandates of the NGRI commitment statute were not followed. Meanwhile, the court did not use its discretion to “suspend imposition of sentence or suspend the sentence in whole or part” (Code § 19.2-303 (2011)), even though the code for felony assault and battery, third or subsequent offense (Code § 18.2-10[f] (2017)), allowed for discretionary sentencing up to five years. Because the NGRI disposition was mandatory, but the criminal sentencing was discretionary, Justice Powell argued that the circuit court erred and abused its discretion. Therefore, Justice Powell concluded that the ends of justice exception applied and should have resulted in reversal.

Concurrence

In concurrence, Justice J. Mims explicitly agreed with Justice Powell’s argument that statutory law (Code § 19.2-182.2 (2012)) required NGRI acquittees to be committed, but argued that the circuit

court had complied with the law because it had placed Mr. Williams in DBHDS custody for evaluation immediately after accepting his NGRI plea.

Justice Mims reluctantly agreed with the majority’s ruling regarding the ends of justice exception. However, he lamented the inadequate statutory direction regarding the prioritization of incarceration and NGRI commitment, and he urged state legislative action. He further noted that medical care is the principal function of hospitals, while it is only an incidental function of prisons.

Discussion

Williams v. Commonwealth brings together various, often colliding, facets of forensic psychiatry. In question is the prioritization of treatment and punishment for persons with mental illness who become involved in the criminal justice system. There is often a single adjudication and disposition for offenses committed within a similar time frame. That is, a person with mental illness who committed offenses is either found guilty and incarcerated, or NGRI and committed. Sometimes, charges are dropped or consolidated.

Sequencing prioritization most commonly arises in scenarios involving being found guilty for an offense committed during an NGRI commitment, or being found NGRI for an offense committed during incarceration. Typically, there is no statutory direction about sequencing in such cases. Though Justice Powell’s dissent in *Williams* argued that there was implied statutory direction based on the NGRI commitment statute being mandatory and the felony assault and battery sentencing being discretionary, Justice Mims’ concurrence pointed out that the circuit court had already complied with the NGRI mandate in Code of Virginia § 19.2-182.2 (2012) (*italics added for emphasis*): The court *shall* place the person so acquitted (“the acquittee”) in *temporary* custody of the Commissioner of Mental Health, Mental Retardation and Substance Abuse Services (here in after referred to in this chapter as the “Commissioner”) for *evaluation* as to whether the acquittee may be released with or without conditions or requires commitment.

The statute proceeds to explain the procedures related to the evaluation, but it does not provide explicit direction about disposition and certainly not as it might apply to a case like Mr. Williams’. Justice Mims wrote that one of his reasons for writing a separate concurrence was to emphasize the need for legislative action in providing sequencing direction

for such cases. The defense may have very well been right that treatment of a person with mental illness is more important than incarceration, but the law as it currently stands in Virginia, and most jurisdictions, does not ensure this. Perhaps mental health professionals can advocate for such legislative prioritization.

Improper Dismissal of a *Pro Se* Due Process Claim After Forced Medication Injections

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Whether the Court Can Dismiss a *Pro Se* Pretrial Defendant's Due Process Claim from Forced Injection of Medications Based on a Report of Prison Official's Investigation

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In *Winkel v. Hammond*, 704 Fed.Appx. 735 (2017), an unpublished opinion by the Tenth Circuit, the court considered constitutional challenges to involuntary administration of medication. The U.S. District Court for the District of Kansas dismissed the due process claim of Mr. Robert Winkel, a *pro se* pretrial defendant, related to forcible injections of antipsychotic medications based on an investigative report filed by prison officials. The plaintiff appealed, stating that the trial court failed to hold a hearing to determine whether forcibly medicating him was necessary. The U.S. Court of Appeals for the Tenth Circuit reversed and remanded the case, stating the district court improperly dismissed the plaintiff's claim based on the prison official's report without providing him an opportunity to respond.

Facts of the Case

Robert Winkel filed a due process claim while he was incarcerated at El Dorado Correctional Facility. He alleged that while he was being evaluated at Larned State Security Hospital (LSSH) for compe-

tency to stand trial, his due process rights were violated when they forcibly administered antipsychotic medications. The district court requested that officials at LSSH review the allegations and prepare a report based on *Martinez v. Aaron*, 570 F.2d 317 (10th Cir. 1978). District courts use *Martinez* reports when a *pro se* plaintiff's complaint requires identification or clarification of their claim.

LSSH filed the *Martinez* report, and three days later the district court entered an order dismissing Mr. Winkel's claim for "failure to state a claim for relief." The court cited the *Martinez* report and ruled that after review of the full records, Mr. Winkel was afforded his due process rights related to the two forcible injections of medication in question. The court wrote:

Staff repeatedly addressed plaintiff, and there was consensus among medical staff that the prescribed medication was both appropriate and necessary to allow plaintiff to adequately care for himself and to avoid any harm to others. The materials show the injections were the result of an administrative determination that considered the relevant aspects of plaintiff's medical condition and the need for the prescribed medication (*Winkel*, p 736, citing R.vol.1, 161).

Mr. Winkel appealed, arguing that his case was improperly dismissed based on the fact that the court used the *Martinez* report in determining whether his complaint was sufficient to state a claim, which thus denied him the opportunity to respond to the facts contained in the report.

Ruling and Reasoning

The U.S. Court of Appeals, Tenth Circuit, delivered the ruling that reversed the district court's ruling that Mr. Winkel had failed to state a claim based on the contents of the *Martinez* report. They remanded the case back to the U.S. District Court for the District of Kansas.

The Tenth Circuit's determination of whether a *pro se* complaint fails to state a claim relies on the standard applied under Fed.R. Civ P. 12(b)(6) (2014). They must look at the specific allegations in the complaint to determine whether the claim is plausible, and in doing so "we must accept the allegations of the complaint as true and construe those allegations, and any reasonable inferences that might be drawn from them, in the light most favorable to the plaintiff" (*Gaines v. Stenseng*, 292 F.3d 1222, 1224 (10th Cir. 2002)). The court of appeals stated that the only way a *pro se* complaint can fail to state a claim is when the plaintiff challenges prison policies