

tion or obtain relevant records. Conducting background investigations is considered a professional norm. Further, according to the guidelines of the American Bar Association, trial counsel should obtain all mitigating evidence in capital cases, whether or not the evidence will be presented at trial. Mr. Abdul-Salaam's trial counsel only contacted three of many members of his family, and the court concluded this fact represented a lack of investigation, rather than case strategy.

Although the evidence regarding Mr. Abdul-Salaam's upbringing during his trial highlighted abuse perpetuated by his father, the evidence presented at the PCRA provided significantly more detailed information about the abuse and adverse conditions. This history was detailed in school and juvenile records obtained for the PCRA. The court stated that the evidence presented at the PCRA provided stronger rationale for mitigation than what was originally presented at sentencing. If this evidence had been presented to the jury at the time of Mr. Abdul-Salaam's trial, it is plausible that the information could have swayed at least one juror and subsequently changed the jury's sentence during the penalty phase of the trial. As a result, Mr. Abdul-Salaam was prejudiced by the errors of counsel at the time of trial, which included counsel's failure to adequately investigate and introduce potentially mitigating factors concerning Mr. Abdul-Salaam's background. It was determined that his appeal met the two *Strickland* prongs, and he was therefore entitled to *habeas* relief.

Discussion

This case highlights the importance of defense counsel's role in conducting a thorough background investigation to determine the presence of mitigating factors. When the death penalty is a potential sentence for a defendant, the court concluded that defense counsel should take special care to investigate all areas of a defendant's background, including any history of childhood abuse and mental health concerns, regardless of whether this information is used in any phase of the trial. In the event such an investigation is not conducted in an adequate manner, this fact has the potential to significantly impact the outcome of the penalty phase of a capital case. For the mental health practitioner, this case highlights the importance of accurate record keeping, as treatment records may serve a crucial role in bolstering the court's understanding of an individual

when faced with high-stakes decisions, such as those inherent in a capital case.

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

Moral Character Inquiry for Washington State Bar Admission

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Moral Character Inquiry Should Be Individualized and Without Categorical Exclusion of Applicants with Criminal or Problematic Substance Use History

DOI:10.29158/JAAPL.003901-19

In *Matter of Simmons*, 414 P.3d 1111 (Wash. 2018), Tarra Simmons, a recent law school graduate, appealed to the Washington Supreme Court after the Washington State Bar Association's (WSBA) Character and Fitness Board ("the Board") recommended by majority vote that her application be denied. The State Supreme Court ruled that the moral character inquiry should be individualized and considered Ms. Simmons' history of problematic substance use, criminal convictions, and bankruptcies, along with her more recent record of sobriety, financial stability, and professional conduct. The court affirmed that there is no categorical exclusion of an applicant with such history. The court held that Ms. Simmons met the burden of proof demonstrating that she was of good moral character and fit to practice law and granted her application to sit for the bar examination.

Facts of the Case

Ms. Simmons was raised in an environment characterized by poverty, crime, substance abuse, and sexual

victimization. At age 13, she ran away from home and experienced periods of homelessness. She was adjudicated guilty of theft, possession of stolen property, and second-degree assault as a juvenile, and she struggled with substance use for years. As an adult, she was convicted of second-degree assault in 2001 and of organized retail theft, unlawful possession of a firearm, and possession of controlled substances in 2011. Ms. Simmons served more than three years in jail and prison for her criminal convictions. Her nursing license was placed on probation, and she faced two bankruptcies and foreclosure on her home.

While Ms. Simmons was in prison in 2011, she engaged in trauma and addiction treatment and, from that point forward, maintained sobriety. Following incarceration, Ms. Simmons attended Seattle University School of Law, was a Dean's Medal recipient, and graduated magna cum laude in May 2017. She became an advocate for civil legal aid, focused on assisting formerly incarcerated individuals with reentry barriers. She was the first student from her university to be awarded a Skadden Foundation fellowship, a national fellowship awarded to junior lawyers who intend to practice public interest law. Ms. Simmons garnered written support from supervisors, faculty, and peers attesting to her consistent ethical behavior during her internships and volunteer work.

Although Ms. Simmons demonstrated a remarkable behavioral transformation postincarceration, her history led the WSBA to refer her application to the Character and Fitness Board for consideration of whether she met the burden of proof that she was of good moral character and fit to practice law. During a Board hearing in April 2017, Ms. Simmons, the youth policy director for the American Civil Liberties Union of Washington, an administrative law judge, and a superior court judge testified on Ms. Simmons' behalf. Following this hearing, the Board recommended denial of Ms. Simmons' application by a six-to-three vote. Because the Washington Supreme Court is the "exclusive authority" to decide bar applications, Ms. Simmons requested that the court review her application and the Board's recommendation.

Ruling and Reasoning

The question before the court was whether Ms. Simmons demonstrated by clear and convincing evidence that she was of good moral character and fit to practice law. After hearing oral arguments and reviewing Ms. Simmons' application and the Board's

recommendation, the Washington Supreme Court unanimously granted her application.

Every state bar requires character and fitness qualifications for admission (see Standard 504, Qualification for Admission to the Bar, <https://www.americanbar.org>). Lawyers are entrusted to protect valuable client assets, and certification of character and fitness requirements safeguard the public and uphold professionalism and the ethical practice of law. The court asserted that standards used to assess moral character change with evolving societal norms and moral conventions. The court cited the Washington State Court Admission and Practice Rules (APR) (http://www.courts.wa.gov/court_rules) as guidance for the Board's recommendation and determined that the Board's recommendation was not conclusive, only advisory. The court therefore concluded that their standard of review for such inquiries was *de novo*.

The court concurred with the Board that Ms. Simmons bore the burden of proving that she was of "good moral character," defined in APR 20(c) (2016) as "a record of conduct manifesting the qualities of honesty, fairness, candor, trustworthiness, observance of fiduciary responsibilities, adherence to the law, and a respect for the rights of other persons and the judicial process." She also bore the burden of proving that she was fit to practice law, defined in APR 20(d) (2016) as "a record of conduct that establishes that the applicant meets the essential eligibility requirements for the practice of law." The Board concluded that Ms. Simmons met three of the five essential eligibility requirements as outlined in APR 20(e) (2016). Those three requirements centered on Ms. Simmons' ability to perform legal tasks and fulfill professional obligations, to competently execute essential legal skills, and to communicate clearly. The Board opined that Ms. Simmons failed to meet two requirements, which addressed her ability to exercise good judgment and "conduct oneself with a high degree of honesty, integrity, and trustworthiness in financial dealings, legal obligations, professional relationships and in one's professional business" and "in a manner that engenders respect for the law and adheres to the Washington Rules of Professional Conduct" (*Simmons*, p 1115). The court disagreed with the Board on those two findings.

The Washington Supreme Court said that Ms. Simmons was sufficiently rehabilitated from her previous conduct and demonstrated positive behaviors consistent with good moral character and fitness to practice

law. The court declined to adopt a bright-line rule for the duration needed to determine adequate rehabilitation because of the individualized nature and complexity of recovery. The court contrasted this opinion to specific time-based restrictions for reinstatement after disbarment. It reasoned that new applicants have never violated public trust and their previous misconduct “rarely” provides irrefutable evidence of a lack of good moral character and fitness to practice law. The court stated that Ms. Simmons’ six-year record of sobriety, financial stability, honesty, laudable behavior, and appropriate response to situations that might predispose her to relapse was sufficient to demonstrate that her recovery was of adequate duration. The court cited research that concluded that a substantial majority of substance abusers who remain abstinent for at least five years will not relapse. The court noted that Ms. Simmons had already reached a sufficient period of sobriety such that her behaviors were “about as likely as they ever will be” to represent lasting change (*Simmons*, p 1118). Finally, the court noted that Ms. Simmons was the first person in Washington to be awarded a “Certificate of Restoration of Opportunity,” a civil court order that prohibited many state licensing entities from denying eligible individuals an occupational license solely on the basis of a criminal record.

The court concluded that Ms. Simmons’ “respect for the law” also demonstrated her good moral character and fitness to practice law. The court disagreed with the Board’s conclusion that Ms. Simmons minimized her substance use history. The court concluded that the initial bar application could not lawfully require such a disclosure, in accordance with APR 22.1(e) (2016), and that Ms. Simmons voluntarily provided her medical records once there was specific justification to request such information. Further, the court concluded that Ms. Simmons’ attitude toward the Board was not entitled or inappropriate. The court said that the Board erred in their adverse view of Ms. Simmons’ publicity and pride in her accomplishments and contended that her publicity in the case was reasonable given her circumstances, and that, if anything, her publicity further held her accountable to maintain sobriety. The court reasoned that Ms. Simmons had attained achievements beyond those of an average law student and was right to take pride in her accomplishments. The court did not observe evidence that Ms. Simmons expected special treatment, but rather viewed her efforts to keep the decision to approve her application

at the lowest adjudicatory level as appropriate for a burgeoning lawyer.

Discussion

Matter of Simmons examines the individualized nature of a character and fitness inquiry by a state bar association. As the Washington Supreme Court expressed, a license to practice law is a privilege that should not be granted as a right. It is appropriate to approach evaluation of an individual’s moral character with personalized consideration and with the goal of protecting public interests. An individual’s past is not necessarily indicative of future behavior, and the court affirmed that history of criminal behavior or substance abuse does not categorically exclude an applicant from bar admission. A 2015 study revealed that some data collected during character and fitness inquiries, such as academic performance variables, are associated with higher risk of future discipline; however, the study concluded that information collected during such inquiries is generally unhelpful in predicting subsequent lawyer discipline due to the low base rate of discipline (Levin L, Zozula C, Siegelman P: The questionable character of the bar’s character and fitness inquiry. *Law & Soc. Inquiry* 40:51–85, 2015). Forensic consultants should be mindful of the conclusions in this case when approaching fitness-for-duty evaluations; each inquiry’s conclusions should be substantiated in a logical, individualized, fair, and accurate manner.

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

Use of Excessive Force and Qualified Immunity

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