Sealed also highlights differing standards for dangerousness, depending on what clinicians are seeking for the patient. Initially, Appellant's treating clinicians felt that she could not be forcibly medicated because she was not a present danger to herself or others, which is why they sought in-voluntary medication under *Sell* criteria for the sole purpose of rendering her competent to stand trial. Although Appellant was not considered dangerous enough to require involuntary medication at that time, she was later found to be dangerous enough to meet criteria for civil commitment. Providers of care in psychiatric settings should be aware of dynamic factors in risk assessments and dangerousness standards for various procedures and should understand there can be differences between the risk of dangerousness in an institutional setting versus in the community.

Guilty but Mentally Ill, Ineffective Assistance of Counsel, and *Habeas Corpus*

Jarrad Morgan, JD, DO
Resident in Psychiatry
Pine Rest Christian Services
Grand Rapids, Michigan

Anne Wagner Spina, MD
Fellow in Forensic Psychiatry

Debra A. Pinals, MD
Clinical Professor of Psychiatry
Director, Program in Psychiatry, Law, and Ethics

Department of Psychiatry
University of Michigan
Ann Arbor, Michigan

Counsel's Failure to Object to Improper Statutory Procedure for Entering a Guilty but Mentally Ill Plea Constitutes Ineffective Assistance of Counsel in Violation of the Sixth Amendment

DOI:10.29158/JAAPL.200089L2-20

Key words: plea; guilty but mentally ill; ineffective assistance

In *Velazquez v. Superintendent Fayette SCI*, 937 F.3d 151 (3rd Cir. 2019), the U.S. Court of Appeals for the Third Circuit considered whether a criminal defendant may petition for *habeas corpus* relief when counsel is ineffective for failing to object to a defective plea process during a plea of guilty but mentally ill (GBMI). The district court's order rejecting the defendant's claim was vacated. The case was remanded to grant the petition for the writ and to vacate the judgment of conviction.

Facts of the Case

In 2008, Mr. Anthony Velazquez was charged with multiple counts arising from two separate incidents. The first incident involved three events. First, he entered a home, where he had a physical altercation with his lover and another person living in the home. Second, during his preliminary hearing, he threatened that lover to prevent her from testifying against him. Third, he wrote that lover several threatening letters from prison. The second incident arose from scratches incurred by a corrections officer while seeking to restrain and place Mr. Velazquez into a cell. Because of these incidents, Mr. Velazquez was charged with burglary, witness intimidation, terroristic threats, and harassment for the circumstances pertaining to his lover, and aggravated assault for injuring the corrections officer.

Mr. Velazquez's defense counsel advised him to plead GBMI, considering that Mr. Velazquez had experienced mental illness. Under 18 Pa. Cons. Stat. § 314(b) (2008), there are three requirements for a GBMI plea to be accepted in Pennsylvania: the judge must examine "all reports prepared pursuant to the Rules of Criminal Procedure," the judge must hold a hearing solely on the topic "of the defendant's mental illness at which either party may present evidence," and the judge must be "satisfied that the defendant was mentally ill at the time of the offense" (*Velazquez*, p 154).

If the GBMI plea is accepted, then the defendant may be sentenced in accordance with the offense as would occur with other general offenders. A second hearing must then be held to determine whether the defendant is severely mentally disabled. If so, then the defendant must also be provided mental health treatment pursuant to 42 Pa. Cons. Stat. § 9727(b) (2008). If the plea is not accepted, then the defendant may withdraw it and demand a jury trial.

Against this statutory context, Mr. Velazquez pled GBMI, forfeiting his right to trial. Instead of following the statutory framework, however, the judge

entered a plea of guilty and postponed resolving the question of mental illness. Defense counsel did not object and agreed that Mr. Velazquez was pleading guilty and that there might be a hearing on GBMI at the time of sentencing. The state indicated that it would only request a hearing to determine whether he would be sent to a psychiatric hospital or a carceral setting.

Subsequently, defense counsel neither obtained Mr. Velazquez's mental health records nor sought mental health examinations. No mental health hearing was held. His plea was recorded as a straight guilty plea, to which defense counsel did not object. He was sentenced with neither a trial nor the opportunity to request one.

On direct appeal, defense counsel asserted that Mr. Velazquez had entered a GBMI plea and made no further arguments of additional requirements, and that it had been accepted. Consequently, the trial court's decision was upheld by the Pennsylvania Superior Court (i.e., Pennsylvania's intermediate criminal appellate court). No error was found in defense counsel's performance at that time.

After exhausting the direct appeal process, Mr. Velazquez petitioned *pro se* for post-conviction relief under Pennsylvania's Post-Conviction Relief Act (PCRA), 42 Pa. Cons. Stat. §§ 9541-46 (1982). In his petition, he asserted that no hearing was held regarding his mental health and his defense counsel was ineffective.

The state-appointed PCRA counsel issued a no-merit letter, which is a request to withdraw from a case on the basis of a meritless petition. In its letter, PCRA counsel agreed that Mr. Velazquez should have been afforded a mental health hearing before being sentenced, but that this was ultimately unnecessary because the state did not challenge his GBMI status. Hence, PCRA counsel asserted that Mr. Velazquez was not prejudiced. Mr. Velazquez's petition was dismissed by the PCRA court, and the Pennsylvania Superior Court affirmed.

Mr. Velazquez sought relief through the federal district court, which rejected the claim because his GBMI plea was not challenged by the state and was accepted by the trial court. He then appealed to the Third Circuit via *habeas* jurisdiction in accordance with 28 U.S.C. § 2254 (1996) nearly 10 years after his conviction.

Ruling and Reasoning

The Third Circuit Court of Appeals, reviewing the case *de novo*, ruled both that Mr. Velazquez received ineffective counsel from his trial court attorney and was prejudiced by this. The district court's order was vacated, and the case was remanded with instructions to grant Mr. Velazquez's petition and to vacate his conviction.

In rendering its decision, the Third Circuit determined that the guilty plea entered by the trial court was invalid. The process used by the trial court did not adhere to the process set forth by 18 Pa. Cons. Stat. § 314(b). By not adhering to the statute, the trial court denied Mr. Velazquez the process for determining both whether he was mentally ill at the time of his offense and whether he was severely mentally ill and required treatment.

Citing the U.S. Supreme Court in *Lafler v. Cooper*, 566 U.S. 156 (2012), the Third Circuit determined that the proper remedy was not merely to alter Mr. Velazquez's sentence to reflect what treatment he would have received had the GBMI plea been entered correctly, but instead to provide him with his lost opportunity, i.e., the process set forth by Pennsylvania statute. Specifically, he must receive a hearing to determine whether he was mentally ill at the time of his offense and, if so, receive a hearing to determine whether he is severely mentally disabled, requiring mental health treatment. If determined not to be mentally ill, then he would have the right to demand a jury trial. Simply adjusting his sentence would not provide him with his statutorily mandated hearings and would deny him the opportunity to demand a jury trial if it were determined that he was not mentally ill at the time of his offense. To allow these opportunities it was necessary to vacate his conviction.

The trial court's failure to conduct the proper hearings resulted from defense counsel's failure to object to the court's procedure for addressing Mr. Velazquez's GBMI claim. This failure was compounded by defense counsel's failure to raise the proper claim on direct appeal. Subsequently, PCRA counsel incorrectly stated that the plea had been accepted, resulting in both the PCRA and the superior court's inaccurate understanding of the nature of Mr. Velazquez's claim and consequent failure to rule based on what would have been a correct and factual understanding of the claims. The court determined that defense counsel was ineffective because

"counsel was ignorant of the GBMI-plea procedures prescribed by Pennsylvania law" and "failed to assure that this procedure was followed and failed to verify that the plea documents reflected the plea his client sought to enter" (*Velazquez*, p 161, relying on *Hinton v. Alabama*, 571 U.S. 263 (2014)). Consequently, Mr. Velazquez was prevented from taking advantage of the statutory GBMI process.

Discussion

Velazquez largely addresses questions of legal procedure. As a result, it primarily affects the practice of law rather than the practice of forensic psychiatry. For psychiatrists in the Third Circuit, this case highlights the unique procedural requirements of GBMI in Pennsylvania. For psychiatrists anywhere who are involved in these sorts of cases, it illuminates the potential complexity of laws that involve mental health and sentencing outcomes. Attorneys who have little experience with mental health law, or who have experience but do not practice within this realm regularly, may encounter difficulty in guiding their clients through this legal framework.

Given that these attorneys can understandably struggle with these points, and errors can, as in *Velazquez*, result in a *habeas* petition, they may seek assistance in navigating the laws of their jurisdiction. Because forensic psychiatrists specialize in the intersection between psychiatry and mental health law, consultation may be sought because of their familiarity with these laws. Therefore, knowledge of the basic legal procedures for insanity, GBMI, and similar criminal matters in a forensic psychiatrist's jurisdiction not only can prevent errors in the psychiatrist's own work, but also can be helpful to attorneys who seek guidance from a forensic psychiatrist.

Jail Physician Liability in Detainee's Death by Suicide

Nicole Sussman, MD
Fellow in Forensic Psychiatry

Christopher Fields, MD
Assistant Professor of Psychiatry
Director, Forensic Psychiatry Fellowship

Department of Psychiatry and Behavioral Sciences
Medical University of South Carolina
Charleston, South Carolina

Jail Physician Entitled to Qualified Immunity Where There Is Lack of Evidence That Detainee Showed a Strong Likelihood of Suicide

DOI:10.29158/JAAPL.200090-20

Key words: qualified immunity; jail; suicide; deliberate indifference

In *Baker-Schneider v. Napoleon*, 769 F. App'x 189 (6th Cir. 2019), the U.S. Court of Appeals for the Sixth Circuit in an unpublished opinion reversed the district court's decision to deny qualified immunity to a jail physician, Rubab Huq, M.D., who evaluated a pretrial detainee prior to his dying by suicide. The court considered whether Dr. Huq acted with deliberate indifference to the detainee's mental health needs by releasing him into the general population without first treating his mental illness. The Sixth Circuit held that Dr. Huq was entitled to qualified immunity because the detainee did not show a likelihood of attempting to die by suicide, nor did Dr. Huq disregard that risk.

Facts of the Case

On November 6, 2014, Michael Schneider was arraigned for a misdemeanor domestic violence charge and ordered to be held without bond until his pretrial hearing. The next day, Mr. Schneider was transported to a detention center; shortly after his arrival, he underwent routine screening. Mr. Schneider reported several acute and chronic physical medical conditions to a medical assistant as well as symptoms of heroin withdrawal, including diarrhea and hearing voices. Mr. Schneider also disclosed mental health conditions including bipolar disorder, a history of cutting, and a history of a suicide attempt, although further details (e.g., the date of his suicide attempts) are unknown. Mr. Schneider did not report having current thoughts of suicide. The medical assistant entered the history obtained into an online form and noted that Mr. Schneider was not crying or acting unusual, nor did he show signs of depression, shame, or anxiety. There were visible cuts on his hands, and Mr. Schneider indicated these injuries had been self-inflicted. The medical assistant referred Mr.