

that the defendant was competent, although pretending not to be so. Thus, the court believed that he was attempting to exercise his fundamental constitutional right not to be tried while incompetent, but doing so while he was actually competent. In scientific terms, this would be considered a false positive. If he actually was a false positive, then his constitutional rights were upheld. Of course, the danger lies in an overzealous stance toward such cases, which might result in a false negative. This would mean that a court found an involuntarily uncooperative defendant competent, thus leading to an *in absentia* trial and a violation of the defendant's constitutional rights.

In *United States v. Greer*, 158 F.3d 228 (5th Cir. 1998), the defendant received an additional sentence for obstruction of justice after the district court ruled that he had feigned mental illness to delay or prevent further prosecution. The appellants in *Greer* argued that allowing sentencing enhancements to be imposed upon defendants who feign incompetency could conceivably dissuade nonfeigning defendants from exercising their constitutional right to avoid being tried while incompetent. Although the Fifth Circuit Court affirmed the district court's decision, they did acknowledge the potential "chilling" effect that might occur if such penalties were applied routinely.

Mental Health Mitigation Evidence and Ineffective Assistance of Counsel

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Failure to Present Evidence of Mental Illness in Death Penalty Mitigation May Establish an Ineffective Assistance of Counsel Claim

DOI:10.29158/JAAPL.210080-21

Key words: death penalty; mitigation; ineffective assistance

In *United States v. Runyon*, 983 F.3d 716 (4th Cir. 2020), the U.S. Court of Appeals for the Fourth

Circuit considered the claim that a lawyer's failure to investigate fully, and present mitigating evidence of, a defendant's brain injury and mental illness constituted ineffective assistance of counsel in violation of the Sixth Amendment. A district court had dismissed the claim. The Fourth Circuit disagreed, held that the claim was colorable, and remanded the case for an evidentiary hearing to resolve the matter.

Facts of the Case

David Runyon shot and killed Cory Voss as part of a murder-for-hire conspiracy with Mr. Voss's wife, Catherina Voss, and her lover, Michael Draven. Mrs. Voss and Mr. Draven had decided to murder Mr. Voss to collect his Navy death benefits, including a \$400,000 life insurance policy payout. They hired Mr. Runyon to commit the murder. On the night of April 29, 2007, Mrs. Voss sent Mr. Voss to the bank to withdraw money from an account she had recently opened. While Mr. Voss was at the ATM, Mr. Runyon, who was waiting in hiding, got into Mr. Voss's truck. The next morning, Mr. Voss was found dead in his truck near the bank.

The police eventually arrested and charged Mr. Runyon, Mrs. Voss, and Mr. Draven. Mrs. Voss and Mr. Draven received sentences of life imprisonment. As for Mr. Runyon, a federal jury found him guilty of conspiracy to commit murder for hire, carjacking resulting in death, and murder with a firearm in relation to a crime of violence. Because Mr. Runyon had a history of head trauma, his lawyer engaged several experts, including a neuropsychologist and a neuropsychiatrist, in preparation for the penalty phase of trial. These experts examined Mr. Runyon, ordered brain imaging, and offered opinions that Mr. Runyon had impaired executive functioning, had a neurological disorder, and required further testing. During the penalty phase, however, Mr. Runyon's lawyer did not investigate these matters further or present any mitigation evidence of a neurocognitive disorder. The jury, after weighing other mitigating and aggravating factors, recommended the death penalty, which the district court imposed.

In 2015, after exhausting the appeals process, Mr. Runyon filed a *habeas corpus* motion claiming eighteen grounds for relief, including ineffective assistance of counsel. Mr. Runyon presented evidence from

four experts, collectively stating that his head trauma had resulted in impaired executive functioning, post-traumatic stress disorder, and psychosis. In addition, Mr. Runyon presented evidence from his former lawyer, who stated that he should have continued the investigation into Mr. Runyon's mental health history and that the expert evidence in the *habeas* motion would have been useful during the penalty phase of trial. The district court denied the *habeas* motion on all claims. The Fourth Circuit granted a certificate of appealability to hear argument on four of Mr. Runyon's claims.

Ruling and Reasoning

The three-judge panel of the Fourth Circuit produced three different opinions in this case. The majority opinion by Judge Niemeyer is controlling because one of the other two judges agreed with its ruling on each of the four claims that the court considered. The relevant claim here was whether Mr. Runyon's lawyer provided ineffective assistance when he failed to investigate fully Mr. Runyon's brain injury and mental illness and failed to introduce this evidence in mitigation during the penalty phase of trial. The Fourth Circuit held that this claim was plausible, but that the existing record did not support a conclusion in either direction. Therefore, the Fourth Circuit vacated the district court's denial of the claim and remanded the case for an evidentiary hearing to resolve the facts in dispute.

The Fourth Circuit relied on the two-part test of ineffective assistance of counsel established in *Strickland v. Washington*, 466 U.S. 668 (1984). In the first part of the test, the court considered whether the performance of Mr. Runyon's lawyer was "deficient." Here, the court noted that "our focus is on 'whether the investigation supporting counsel's decision not to introduce' particular mitigating evidence 'was itself reasonable'" (*Runyon*, p 731, quoting *Wiggins v. Smith*, 539 U.S. 510 (2003), p 523 (emphasis in original)). The court considered the evidence available to Mr. Runyon's lawyer at the time of trial. This included reports from experts stating that Mr. Runyon likely had neurological damage resulting in impaired functioning and delusions. The experts also had recommended further evaluation of Mr. Runyon. The court concluded that "these red flags clearly pointed to potential mitigating evidence" (*Runyon*, p 732). The court also considered the

decision not to use this potential mitigating evidence. Mr. Runyon's lawyer had stated that he did not remember the reason he had not introduced the evidence and that the mental health evidence uncovered later during further investigation would have been useful. The court concluded that it was unclear whether not using the evidence was a "strategic," and thus reasonable, decision.

In the second part of the *Strickland* test, the Fourth Circuit considered whether the potentially deficient performance of Mr. Runyon's lawyer "prejudiced the defense," in the sense that the result would have been different if he had introduced the mitigating evidence in question. The court concluded that, again, the matter was unclear. In sum, the Fourth Circuit ruled that there should have been further inquiry into whether Mr. Runyon received ineffective assistance of counsel and remanded the case for an evidentiary hearing to make that determination.

Dissent

In his dissent, Judge Wilkinson concluded that the district court rightly denied Mr. Runyon's ineffective claim. He argued that the two *Strickland* requirements are "high bars" and that the majority opinion "flouts *Strickland*" by interpreting it too liberally. In this case, Mr. Runyon's lawyer made an "eminently reasonable" decision not to use mental health mitigation evidence and instead introduced fourteen other mitigating factors. Because the lawyer's decision was a "strategic" one, there was a "strong presumption" that it was adequate.

Discussion

This case highlights a tension in the courts regarding death penalty mitigation evidence and ineffective assistance of counsel claims. On the one hand, there is the argument that judicial review of ineffective claims should be deferential, and thus afford some degree of finality, to trial court decisions. The worry is that posttrial inquiries can always question a losing strategy after the fact: "It is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable" (*Strickland*, p 689). *Post hoc* determinations are vulnerable to hindsight bias, a problem well known to forensic

psychiatrists who consult on malpractice cases or psychological autopsies.

On the other hand, there is the argument that ineffective claims deserve greater consideration in death penalty cases. As Justice William Brennan wrote, “Counsel’s general duty to investigate . . . takes on supreme importance to a defendant in the context of developing mitigating evidence to present to a judge or jury considering the sentence of death; claims of ineffective assistance in the performance of that duty should therefore be considered with commensurate care” (*Strickland*, p 706). In a case such as *Runyon*, where there is overwhelming evidence of guilt, mitigation may represent the only chance a defendant has to avoid the death penalty. Forensic psychiatrists are familiar with how important and ubiquitous mental health matters are in death penalty mitigation. In *Runyon*, the defense assembled substantial mental health evidence from experts but did not use it in mitigation. According to the Fourth Circuit, this could be ineffective assistance.

Runyon also illustrates an interesting ethics question. The majority opinion seems to give particular weight to the former defense lawyer’s statements, made many years after the trial, that mental health evidence could have helped his mitigation argument. The ethics quandary facing the lawyer here involves helping a past client by admitting a mistake and accepting the blame. The parallel in medicine is when a doctor makes an error that harms a patient and considers whether admission of the mistake represents evidence of malpractice or makes a malpractice suit less likely to begin with. State laws differ in their approaches to encouraging, or even imposing a duty regarding informing patients of adverse medical outcomes. Currently, most states have partial apology laws that make apologies and statements of regret inadmissible in malpractice suits. Only a few states have full apology laws that also protect admissions of error or fault. (Ross NE, Newman WJ: The role of apology laws in medical malpractice. *J Am Acad Psychiatry Law* 49:406–414, 2021) While the intent of apology laws is to foster open communication with patients and limit malpractice liability, some research suggests that these laws may instead increase the probability of lawsuits (Hodge Jr., SD: Should a Physician Apologize for

a Medical Mistake? . . . *Clev. St. L. Rev.* 69: 1–33, 2020).

Intellectual Disability in Capital Murder Cases

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Failure to Introduce Mitigating Evidence That Does Not Outweigh the Aggravating Evidence It Invites Does Not Constitute Ineffective Assistance of Counsel

DOI:10.29158/JAAPL.210081-21

Key words: intellectual disability; *Atkins v. Virginia*; death penalty; mitigation; expert testimony

In *Rodriguez v. Sec’y, Fla. Dep’t of Corr.*, 818 F. App’x 945 (11th Cir. 2020), the U.S. Court of Appeals for the Eleventh Circuit found that the U.S. District Court for the Southern District of Florida properly denied Mr. Rodriguez’s petition for a writ of *habeas corpus*, in which he claimed ineffective assistance of counsel at his capital sentencing hearing (because of failure to present mitigating evidence) as well as ineligibility for the death penalty because of intellectual disability. The Eleventh Circuit ruled that because the postconviction mitigating evidence Mr. Rodriguez presented was weak, there is not a substantial likelihood that the imposed penalty would have been different had his attorney acted differently. Furthermore, the Eleventh Circuit ruled that the lower courts appropriately applied *Atkins v. Virginia*, 536 U.S. 304 (2002) in rejecting the intellectual disability diagnosis, given Mr. Rodriguez’s failure to present clear and convincing evidence of below average intellectual functioning and adaptive