

traumatic context for psychiatric symptoms, and assess risk of violence directed toward or perpetrated by persons seeking asylum. This expertise is particularly relevant when considering that reliable and credible mental health testimony may be essential in establishing a basis for an asylum case, as petitioners' ability to express themselves may be compromised by mental illness, trauma history, or language barriers.

Psychiatrists who conduct forensic evaluations and offer expert witness testimony in asylum proceedings are important in providing a clinical framework to assist the court in understanding the asylum-seeker's experience. In order to provide meaningful opinions to the court, psychiatrists performing these evaluations should ideally have knowledge of the petitioner's culture, the medical resources available in the petitioner's home country, and the unique risks faced by the petitioner, if repatriated. As the IJ is the sole party who hears expert witness testimony, and the standard for overturning the decision of the IJ is clear error, the opinions of mental health experts may exert a significant impact on the decision to grant asylum in cases involving Convention Against Torture applications.

## Burden of Proof in Competence to Stand Trial Hearings

**Heidi Putney, PhD**

*Fellow in Forensic Psychology*

**Andrea Dinsmore, PsyD**

*Assistant Professor of Psychiatry*

*Law and Psychiatry Program*

*Department of Psychiatry*

*University of Massachusetts Medical School*

*Worcester, Massachusetts*

### **Burden to Prove Incompetence to Stand Trial Is Unnecessary to Reconsider When Faced with a Lack of Equally Strong, Conflicting Evidence**

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**Key words:** competency to stand trial; burden of proof; expert witnesses

In *United States v. Washington*, 968 F.3d 860 (8th Cir. 2020), a Minnesota defendant claimed the burden of proof to prove incompetency to stand trial was placed inappropriately on the defendant due to

the conflicting opinions of the expert witnesses. Further, he argued the district court had erred in its drug quantity and firearm-related guideline determinations and had abused its discretion in the ultimate sentence imposed. The U.S. Court of Appeals for the Eighth Circuit affirmed the district court findings, ruling that the burden of proof for incompetence is only reconsidered in cases where the evidence is in equipoise. They also found no error in the guideline determinations or abuse of discretion in sentencing.

#### Facts of the Case

Sean Washington had an extensive history of gang violence and drug offenses, ultimately leading him to need a wheelchair due to spinal injuries from a bullet. In addition, he previously had been shot in the head and had resulting cognitive impairments described as "mild to moderate." Between 2016 and 2017, authorities conducted a wide-reaching investigation into violent gang-related drug distribution in Minneapolis. Evidence of Mr. Washington's involvement included wire-tapped phone calls and his contribution to drug deliveries. In February 2017, Mr. Washington was discovered with drugs, cash, scales, and other drug paraphernalia during a search. Mr. Washington was taken into custody in August 2017 for conspiring to distribute cocaine and heroin.

In December 2017, counsel arranged for a privately retained neuropsychological evaluation of Mr. Washington by psychologist Dr. Norman Cohen to address the question of competence to stand trial. After a one-day meeting with Mr. Washington, Dr. Cohen concluded Mr. Washington "could think logically, but had low intelligence and thought in a concrete manner with limited sophistication" (*Washington*, p 862). Dr. Cohen considered the psychological assessment results to be valid but did not offer an opinion on Mr. Washington's abilities related to competence to stand trial. In February 2018, Mr. Washington's counsel moved for a competency hearing and Mr. Washington was transferred to a federal detention center for approximately forty days for the evaluation. There, psychologist Dr. Cynthia Low conducted several clinical interviews with Mr. Washington over extended periods of time, conducted assessments of his abilities, and administered assessments to determine whether he was malingering. Dr. Low also reviewed his medical and criminal history as well as recorded phone conversations, text messages, and emails he sent while in the

examination facility. In her April 2018 report, she concluded “unequivocally” that Mr. Washington was malingering. She explained he had scored so low on certain tests that he “had to have known the correct answers and purposefully answered incorrectly” (*Washington*, p 863). She concluded he had evidenced the abilities relevant to competency to stand trial and did not have a mental illness that would impair these abilities. Mr. Washington’s counsel then retained a second psychologist, Dr. John Cronin, in May 2018. Dr. Cronin met with Mr. Washington for approximately one hour and concluded Mr. Washington “lacks many of the necessary features to be judged as ‘competent’ to stand trial” (*Washington*, p 863). He further found fault with Dr. Low’s report but did not base his criticisms on the federal competency standards.

The district court found Dr. Low’s analysis to be “most compelling” and indicated the reports from Dr. Cohen and Dr. Cronin were “simply lacking.” After he was found competent to stand trial, Mr. Washington pled guilty. The district court then found Mr. Washington responsible for a specific amount of drug quantities and found the firearm enhancement applied. Mr. Washington sought a sentence below the guidelines due to his physical and mental impairments. The district court imposed a below-range sentence, stating, “I am going to give you a sentence that’s below, slightly below, the guidelines. It is hard to figure out what you have done to earn that, but I do think [it] is appropriate” (*Washington*, p 864). Mr. Washington then appealed the competency decision and sentence.

#### Ruling and Reasoning

Mr. Washington argued that there is a split in circuit decisions on the matter of burden of proof for competence to stand trial determinations. The U.S. Court of Appeals for the Fourth Circuit indicated the burden of proof for trial incompetence nearly always lies on the defendant. Even if this has been unclear in past findings, the burden of proof was irrelevant in this case: “In this instance, we need not dive more deeply into this question nor comment on the merit of Washington’s argument . . . this is simply not a case where the burden of proof matters” (*Washington*, p 864).

The court explained that the burden of proof is only reconsidered in cases where the evidence that the defendant is competent is just as strong as the evidence that he is incompetent (i.e., equipoise). In this case,

said the court, the competency determination was not sufficiently close to consider the burden of proof a potential source of error. They further stated the district court had support for its sentence. The district court placed considerable weight on Mr. Washington’s role in the conspiracy and his physical and mental health limitations. Sentencing courts have wide latitude to weigh the factors in each case. The appeals court said it was nearly inconceivable to imagine a case where the district court imposed a below-guidelines sentence and abused its discretion in not varying downward still further. If anything, the appeals court expressed doubt as to the wisdom of varying downward at all. The findings were affirmed.

#### Discussion

Although the Eighth Circuit ruled that the burden of proof for incompetence is considered where there is equally strong evidence for and against competence, this court indicated a need for need for high-quality evidence on both sides to make this determination. In 2012, the American Psychological Association (APA) published the Specialty Guidelines for Forensic Psychologists (APA Guidelines) specifically to improve the quality of forensic evaluations and to ensure the ethical practice of forensic psychology (APA, 2013). The American Academy of Psychiatry and the Law (AAPL) published similar Ethics Guidelines for the Practice of Forensic Psychiatry in 2005 (AAPL, 2005).

At face value, this case appears to describe two forensic evaluations with a view that favored the defendant’s position and one forensic evaluation with a view that did not favor the defendant. These evaluations were not weighted equally, and both the district court and the appeals court were critical of the informative value of the evaluations favoring the defendant. Specialty guidelines offer guidance to forensic evaluators. Using the APA Guidelines as illustrative, forensic practitioners should strive to be unbiased, impartial, and avoid partisan presentation of incomplete or inaccurate evidence (APA, 2013; Guideline 1.02). They should obtain a level of understanding of the legal and professional standards, laws, and precedents that govern their participation in legal proceedings (APA, 2013; Guideline 2.04). This understanding should include whether the requested evaluation is within one’s scope of competence (APA, 2013; Guideline 2.01). Finally, specific care should be taken to ensure adequate procedures are observed to strive for high-quality

forensic evaluations that are accurate, fair, and avoid deception (APA, 2013; Guideline 11.01). For example, because of the factors often unique to forensic contexts, practitioners should make sure to consider matters such as low effort, response style, and malingering (APA, 2013; Guideline 10.02). As noted by both the district court and the appeals court, some of the reports offered in this case failed to meet the standards described in the guidelines above and therefore did not equally weigh in the decision of whether to reconsider the burden of proof.

The law and clinical forensic practice have long had a complex relationship, attempting cohesion despite different aims and boundaries. Also important in this case was the ability of the psychologists to convey their assessment techniques and forensic opinions in a way that was interpretable and useable by the trier of fact. When reports that fall short of expectations enter the court room, they can contribute to a poor reputation for the field, serve as an injustice to decision makers, and improperly affect individual rights. A high-quality report, therefore, is not simply answering the question, but doing so in a way that provides the best supported, clearly inferred, and most comprehensive opinion. This opinion must also consider specific legal nuances without sacrificing quality and maintaining neutrality. Ultimately, the work undertaken by forensic practitioners affects not only the individual evaluator, but also the credibility of the entire field of forensic evaluation as well as the liberty of those they evaluate. Toward this end, specific training and competence in the specialty area of clinical forensic practice is important to the ethical execution of justice and protection of individual rights.

## Jury Instruction on Criminal Responsibility Defenses Involving Voluntary Intoxication

**Tara J. Ryan, PhD**  
Fellow in Forensic Psychology

**Natalie M. Anumba, PhD**  
Assistant Professor of Psychiatry

Law and Psychiatry Program  
Department of Psychiatry  
University of Massachusetts Medical School  
Worcester, Massachusetts

## Substantial Likelihood for Miscarriage of Justice Existed with Model Jury Instructions for Insanity Defenses in Cases Involving Mental Illness Caused by Voluntary, Chronic Substance Use

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**Key words:** insanity defense; voluntary intoxication; settled insanity

In *Commonwealth v. Dunphe*, 153 N.E.3d 1254 (Mass. 2020), the Supreme Judicial Court of Massachusetts held that there was a significant risk that the jury misunderstood a model jury instruction on criminal responsibility. With this, justice demanded that the defendant's conviction be vacated and the case remanded for a new trial.

### Facts of the Case

Aldo Dunphe had a six- to seven-year history of smoking large quantities of cannabis most days. In February 2013, Mr. Dunphe's wife (then fiancée) noticed behavioral and personality changes, including increased paranoia around her fidelity. In the following months, his mental health deteriorated, and on November 1, 2013, Mr. Dunphe was psychiatrically hospitalized on a voluntary basis. Clinicians diagnosed him with psychosis not-otherwise-specified because they were unable to disentangle his cannabis use from a potential preexisting mental disorder. He did not use any cannabis following his admission. During a family visit on November 2, 2013, Mr. Dunphe claimed his biological father (Mr. Dunphe is adopted), who abused him as a child, was another patient on the psychiatric ward (his biological father resides in Guatemala). He repeated this delusion to a nurse two days later.

On November 5, Mr. Dunphe killed the patient he claimed was his father. He thereafter washed his hands and returned to his room, where he was found by police laying on his bed with the victim's blood on his clothing. He told police that the victim threatened to kill him and that he waited for the nurse to leave the victim's room before he entered the room and grabbed the victim by the neck, took him to the ground, punched him, and stuffed towels in his mouth and nostrils. He stated he intended to beat the victim but not to kill him. Later that day, when interviewed by two additional police officers, Mr. Dunphe admitted to killing the victim. He told the