

1131 (10th Cir. 2007), noting a finding of prejudice at sentencing that had stemmed from a failure of counsel to present evidence of an abusive mother, brain injury, and substance use that exacerbated the defendant's "mental deficits and impairments." In Mr. Barrett's case, evidence pertaining to Mr. Barrett's psychiatric history and developmental adversities were not presented to the jury at sentencing. During the magistrate's evidentiary hearing, Mr. Barrett's mental health experts opined that he was diagnosed with bipolar disorder, posttraumatic stress disorder (PTSD), and "organic brain damage," and had previous head injuries and a history of fetal alcohol exposure. It was also reported that Mr. Barrett had a history of suicidal ideation, prior suicide attempts, and three inpatient psychiatric hospitalizations. The defense also presented evidence of Mr. Barrett's tumultuous upbringing, which included physical abuse, emotional abuse, and neglect, which the court opined that some jurors "likely would have found sympathetic" (*Barrett*, p 1232). Although the government provided a rebuttal to the defense's expert testimony, the Tenth Circuit concluded that the reported psychiatric conditions were plausible and would have persuaded at least one juror "that the balance of aggravating and mitigating circumstances did not warrant death" (*Barrett*, p 1224, quoting *Wilson v. Trammell*, 706 F.3d 1286 (10th Cir. (2013), p 1305). In addition, the court of appeals also noted that "binding precedents recognize that evidence of mental impairments has substantially more mitigating value when it helps explain the defendant's criminal behavior" (*Barrett*, p 1222–3). The court of appeals also found that a plausible connection existed between Mr. Barrett's shooting of Trooper Eales and his reported psychiatric conditions.

The court of appeals also stated that the balance of aggravating and mitigating evidence can affect a finding of prejudice even if counsel was deficient in performance. The court noted that mental health evidence can have a double-edged effect and highlight a defendant's "continuing threat," which may not result in prejudice if not presented (*Barrett*, p 1231, quoting *Gilson v. Sirmons*, 52 F.3d 1196 (10th Cir. 2008, p 1250).

#### Discussion

In *Barrett*, the Tenth Circuit examined the role of the defendant's mental health history within capital sentencing proceedings and whether the failure to

present such evidence could lead to prejudice as part of a claim of ineffective assistance of counsel in violation of the Sixth Amendment. In assessing the balance of mitigating and aggravating circumstances of the case at sentencing, the court of appeals ruled that evidence of Mr. Barrett's psychiatric conditions and abuse history would have been positively persuasive to at least one juror with a reasonable probability that one juror would have recommended a life sentence. Although the mitigating effects of mental health history for individuals facing the death penalty were well substantiated in *Barrett*, the court also noted that a defendant's psychiatric history could present as an aggravating factor, especially in cases where successful treatment and recovery are not perceived as attainable.

*Barrett* illustrates the importance of a defendant's mental health history in postconviction federal capital sentencing and highlights the effect that psychiatric illness can have during these sentencing proceedings. This case highlights how such history can often be viewed as mitigating but also provides a reminder that in some cases it can be used as aggravating evidence. Psychiatrists should be aware of the double-edged effect of such information in the evaluation process.

## Inmate Failure to Protect Claims and the Eighth Amendment

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### Inmate's Eighth Amendment Right to Protection Was Not Violated When Prison Official Reasonably Responded to Threat

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**Key words:** Eighth Amendment; inmate; prison official; protective custody

In *Mosley v. Zachery*, 966 F.3d 1265 (11th Cir. 2020), the Eleventh Circuit Court of Appeals

considered whether a prison official's decision to not immediately place an inmate in protective custody, after being informed that another prisoner had threatened violence, violated the inmate's Eighth Amendment rights. The district court granted summary judgment for the prison official, finding that, although the official had subjective knowledge of the risk of harm to the inmate, the prison official reasonably responded to the risk. The Eleventh Circuit affirmed summary judgment, ruling that the prison officials' response to the threat was reasonable, even if the harm was not ultimately averted.

#### Facts of the Case

Tommy Mosley and Shaun Taylor were inmates at Georgia's Autry State Prison. During a 2014 search of Mr. Taylor's cell, a corrections officer found what appeared to be a cell phone, which Mr. Taylor refused to surrender. Mr. Taylor requested Mr. Mosley (not present at the search) to provide a statement indicating Mr. Taylor possessed a radio, not a cell phone. Mr. Mosley agreed but instead wrote that he did not see Mr. Taylor with a cell phone or radio. Mr. Mosley did not inform Mr. Taylor about his statement.

Two weeks later, prison official Lieutenant Towanda Zachery presided over Mr. Taylor's disciplinary hearing, wherein Mr. Mosley's statement was read. Lt. Zachery found Mr. Taylor not guilty of possessing a cell phone, but guilty of failing to follow instructions and obstructing the search. Lt. Zachery noted that Mr. Taylor "did not appear angry or upset" following the determination (*Mosley*, p 1268). He did not make threats toward other inmates, including Mr. Mosley.

After the hearing, Mr. Taylor entered Mr. Mosley's cell on the "honors dorm" (good behavior unit). He quoted Mr. Mosley's statement, accused him of snitching, and threatened to kill Mr. Mosley. Mr. Mosley asked Mr. Taylor to leave his cell, and Mr. Taylor complied.

Later that morning, Mr. Mosley informed Lt. Zachery that Mr. Taylor had threatened his life and asked for protection. Lt. Zachery said she "would look into" moving Mr. Taylor, noting that officials were already considering transferring Mr. Taylor from the honors dorm due to disagreements with his counselor. Mr. Mosley was instructed to return to his cell for count time.

Within "moments" of Mr. Mosley reporting the threat to Lt. Zachery, Mr. Taylor pulled Mr. Mosley into his cell and superficially assaulted him.

Mr. Mosley sued Lt. Zachery under 42 U.S.C. § 1983 (1996), alleging that Lt. Zachery violated his Eighth Amendment right to freedom from cruel and unusual punishment, by being deliberately indifferent to Mr. Mosley's risk of harm.

Lt. Zachery argued that there was no evidence to support Mr. Mosley's claim of deliberate indifference and moved for summary judgment. The district court granted summary judgment, concluding that, although the evidence demonstrated Lt. Zachery had "subjective knowledge of a risk of harm" to Mr. Mosley, she "responded reasonably to the risk, even if the harm was not averted" (*Mosley*, p 1270). Mr. Mosley appealed.

#### Ruling and Reasoning

The Eleventh Circuit Court of Appeals reviewed the Eighth Amendment's prohibition of cruel and unusual punishment, noting that the U.S. Supreme Court interpreted the Eighth Amendment to require that prison officials "take reasonable measures to guarantee the safety of the inmates" in *Farmer v. Brennan*, 511 U.S. 825 (1994), p 832. In *Farmer*, the Supreme Court delineated two requirements that must be met for a claim of failure to prevent harm: the inmate is required to demonstrate that he is incarcerated in conditions creating a "substantial risk of serious harm" and the official must have a "sufficiently culpable state of mind" (*Farmer*, p 834). In these cases, the state of mind must be "one of deliberate indifference to inmate mental health and safety" (*Farmer*, p 834).

Citing *Caldwell v. Warden, FCI Talladega*, 748 F.3d 1090 (11th Cir. 2014), the Eleventh Circuit noted that, to survive summary judgment of a failure-to-protect claim alleging deliberate indifference, the plaintiff must provide sufficient evidence of: "(1) a substantial risk of serious harm; (2) the defendant [']s deliberate indifference to that risk; and (3) causation" (*Caldwell*, p 1099). The district court in *Mosley* had granted summary judgment on the second element of deliberate indifference.

Deliberate indifference involves subjective and objective components. A prisoner must demonstrate that the prison official actually (subjectively) knew of the substantial risk of serious harm, and that the official failed to respond in an objectively reasonable way (referencing *Bowen v. Warden, Baldwin State Prison*, 826 F.3d 1312 (11th Cir. 2016)). Prison officials with subjective knowledge of substantial risk of

serious harm “may be found free from liability if they responded reasonably to the risk, even if harm was not ultimately averted” (*Farmer*, p 844). These determinations must be based on the facts the prison official knew at the time of the official’s response to the risk of harm.

Analyzing the facts *de novo*, the Eleventh Circuit concluded that Lt. Zachery responded reasonably to Mr. Mosley’s risk of harm. Lt. Zachery said she would investigate Mr. Taylor’s threat and consider transferring Mr. Taylor. Mr. Taylor did not appear angry following the disciplinary hearing. Mr. Mosley’s written statement addressed possession of a cellphone, for which Mr. Taylor was acquitted. Mr. Taylor was convicted of charges not addressed in Mr. Mosley’s statement. Mr. Taylor was housed in the honors dorm for inmates with “minimal” behavioral concerns. Lt. Zachery’s consideration of transferring Mr. Taylor was related to disagreements with his prison counselor, not behavioral concerns.

Furthermore, Lt. Zachery instructed Mr. Mosley to return to his cell for count time, which involved close monitoring of inmates, a process which was highly regulated and therefore likely to address any risk. Mr. Mosley reported only a threat, without harm, and was not assaulted until four hours after the hearing. Mr. Taylor attacked Mr. Mosley only “moments” after Lt. Zachery was informed of the threat.

The Eleventh Circuit referenced two prior cases in which the court determined that a prison official had not reasonably responded to a substantial risk of serious harm to a prisoner. In *Marsh v. Butler County*, 268 F.3d 1014 (11th Cir. 2001), the court decided in favor of plaintiffs who sued the sheriff of Butler County, alleging that the sheriff’s “deliberate indifference to the unreasonably dangerous conditions at the Jail deprived [them] of their Eighth Amendment and Fourteenth Amendment rights” (*Marsh*, p 1024). The court outlined that Lt. Zachery, unlike the sheriff in *Marsh*, did not do “absolutely nothing” in response to the threat. Lt. Zachery informed Mr. Mosley that she would investigate the threat and consider moving Mr. Taylor and sent Mr. Mosley to his cell for count time where prisoners would be closely monitored.

In *Cottone v. Jenne*, 326 F.3d 1352 (11th Cir. 2003), an inmate was killed by another inmate with a history of violent outbursts. Despite surveillance cameras in the cell block, the officers were not

monitoring inmates during this period, instead taking consecutive breaks and playing computer games. In contrast to *Cottone*, Lt. Zachery placed Mr. Mosley in the highly monitored environment of count time. Furthermore, at the time of the assault, she was not on a break or playing computer games. She agreed to investigate the threat and look into moving Mr. Taylor and had Mr. Mosley supervised via count time.

The court determined that Lt. Zachery’s response was reasonable, even if the harm was not averted. Summary judgment for Lt. Zachery was affirmed.

#### Discussion

This case addressed whether a prison official, in response to subjective knowledge of a threat of violence by another inmate, failed to protect the inmate from violence by not immediately placing him in protective custody, thereby violating the Eighth Amendment. In these cases, the standard of deliberate indifference is used, which requires subjective knowledge of a substantial risk of serious harm, and failure to respond in an objectively reasonable way to the risk of harm. Successful deliberate indifference claims require some further reasons, beyond an inmate’s informing a prison official of a threat, that a prison official could have concluded that a particular threat evidenced a substantial threat, rather than a mere possibility, of serious harm.

It is important to consider the context in making these determinations, which must be based on the facts the prison official knew at the time of the official’s response to the risk of harm. A negative outcome does not automatically constitute deliberate indifference. A prison official who considers the information available and takes objectively reasonable steps to address this risk of harm is not liable under 42 U.S.C. § 1983. In this case, the defendant took reasonable steps to protect the inmate from violence, although the harm was not ultimately averted.

Prisons are environments in which persons who have committed crimes, some violent in nature, are housed together in close proximity. The risk of violence and threats of violence in response to conflict is increased. Because of limited resources in the prison setting, not every inmate can be placed in protective custody in response to a threat of violence. The prison official must carefully consider the information available in determining how to respond to the threat. The response options are not simply

protective custody or not. There are additional options to protect an inmate, such as separating inmates or increasing supervision. If a prison official's response is objectively reasonable, the official is not liable under 42 U.S.C. § 1983 for violation of the Eighth Amendment, even if the harm is not ultimately avoided.

## Admissibility of Expert Testimony regarding Genetic Predisposition to Violence

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### Expert Testimony about Genetic Predisposition to Violence Did Not Meet Daubert Criteria for Admissibility

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**Key words:** violence; *Daubert*; genetics; expert testimony; “warrior gene”

In *State v. Yopez*, 483 P.3d 576 (N.M. 2021), the New Mexico Supreme Court evaluated the admissibility of expert testimony regarding defendant Anthony Yopez's genetic predisposition to violence. Mr. Yopez sought to present this testimony to make the argument that he had a genetic predisposition to impulsive violence which made him unable to form the specific intent needed to commit the offense of murder.

#### Facts of the Case

Mr. Yopez lived with his girlfriend Jeannie Sandoval and her adoptive mother's boyfriend, George Ortiz. On October 29, 2012, Mr. Yopez killed Mr. Ortiz during an argument. Mr. Yopez and Ms. Sandoval subsequently set Mr. Ortiz's body on fire. Mr. Yopez was charged with first-degree murder, conspiracy to commit first-degree murder, tampering with evidence, and unlawful taking of a motor vehicle.

Prior to the trial, Mr. Yopez filed a motion *in limine* to admit expert testimony about his predisposition to violence, on the basis of his having a genotype that results in low monoamine oxidase A (MAOA) activity and his childhood abuse. This expert testimony was based on research that evaluated the relationship between childhood abuse, MAOA activity, and antisocial and violent behavior. In one prominent study, Brunner *et al.* had identified an association between MAOA complete deficiency and impulsive aggression among males in a family (Brunner HG, Nelen M, Breakenfield XO, *et al.* Abnormal behavior associated with a point mutation in the structural gene for monoamine oxidase A. *Science*. 1993 October; 262[5133]:578–580). Another study by Caspi *et al.* was noted to find that male victims of childhood maltreatment who had a genotype with low MAOA levels had a predisposition toward adult antisocial behavior (Caspi A, McClay J, Moffitt TE, *et al.* Role of genotype in the cycle of violence in maltreated children. *Science*. 2002 September; 297[5582]: 851–854). Mr. Yopez had a low-activity MAOA genotype and a history of childhood maltreatment; therefore, experts posited that he had a predisposition toward impulsive violence.

The state filed a motion *in limine* to exclude this testimony, on the basis that this testimony did not meet *Daubert* criteria, with data lacking both reliability and relevance to the case at hand, because of the poorly understood science and not clearly established relationship. The state further argued that his self-reported abuse history was not corroborated, and the expert testimony may mislead and confuse the jury. After a *Daubert/Alberico* hearing at which he was not successful, Mr. Yopez moved for reconsideration.

The district court ultimately determined that this expert testimony was inadmissible, by standards established in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Although the district court found the research on childhood maltreatment, low MAOA activity, and a predisposition to violence to be reasonably reliable, the court did not admit the testimony because the experts did not clearly explain how the science led to their conclusions that Mr. Yopez had a predisposition to impulsive violence. Though the court found that the broad findings of the studies met *Daubert* criteria, the expert testimony did not and misstated the results. Mr. Yopez was ultimately found guilty of second-degree murder, tampering with