

overextrapolation of the research findings. In this case, expert witnesses presented conclusions based on research that observed an association between an MAOA variant and antisocial, violent behaviors. The Brunner study, however, observed an association between aggression and a lack of MAOA activity, not low MAOA activity, as was the case with Mr. Yezpe (Brunner 1993). Another study observed a relationship between low MAOA activity and antisocial behavior, not impulsive aggression (Caspi 2002). Furthermore, the court noted that the studies the experts cited, as well as other studies in the field, acknowledged the many variables that affect any individual's impulsive behavior and a lack of a clear link between MAOA activity and impulsive violence.

The etiology of violent behavior is complex. Any individual's likelihood of engaging in violence is affected by countless variables. There is a wide gap between possessing a genetic variant and actually exhibiting violence, a gap that contains many biological and environmental factors and their complex interactions.

Fitness for Duty Evaluations Predicated on Psychological Data

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The Federal Circuit Recognized an Employee's Due Process Right to Review and Challenge Psychological Assessments Underlying an Adverse Fitness for Duty Evaluation

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In *Ramirez v. Dep't of Homeland Sec.*, 975 F.3d 1342 (Fed. Cir. 2020), Roberto Ramirez challenged

his removal as a Customs and Border Protection Officer at the Department of Homeland Security (the Agency), which had been based on three fitness for duty evaluations performed by psychiatrists. All of the reports relied on an invalid profile and defensiveness on three separate administrations of the Minnesota Multiphasic Personality Inventory (MMPI). Holding that Mr. Ramirez has a right to meaningfully review the psychiatrists' results, the Federal Circuit reversed and remanded.

Facts of the Case

Mr. Ramirez was a Customs and Border Protection Officer with the Department of Homeland Security. As part of his job description, he was required to be medically qualified to carry a service firearm. One night, he and his wife had an argument. His wife called the police and claimed that Mr. Ramirez had pointed his service firearm at her head and cocked it. Mr. Ramirez denied these allegations. The police found the allegations to be unfounded, and Mr. Ramirez was not charged with a crime.

After the above incident, the Department of Homeland Security took away Mr. Ramirez's service weapon. They required that he partake in a fitness for duty evaluation. The first psychiatrist to perform a fitness for duty evaluation stated that he did not have any evidence that Mr. Ramirez was "unable to safely, efficiently, and reliably perform all of the duties. . ." (*Ramirez*, p 1344, citing the administrative record). That psychiatrist described the limits of his opinion, referencing an inability to state whether Mr. Ramirez could safely carry a gun given evidence that Mr. Ramirez was "not 'totally forthcoming'" (*Ramirez*, p 1344). The evidence cited for this was Mr. Ramirez's performance on the MMPI. The MMPI was interpreted, by a clinical psychologist, as "invalid" due to "extreme defensiveness" (*Ramirez*, p 1345).

The Agency had Mr. Ramirez participate in a second fitness for duty evaluation. The second psychiatrist stated that he was unable to come to a conclusion as to whether Mr. Ramirez had a mental illness or personality disorder "because of [Mr. Ramirez's] defensiveness" (*Ramirez*, p 1345). He stated that he was unable to assess Mr. Ramirez's ability to safely carry a firearm but recommended that "Mr. Ramirez be 'restricted from any weapons carrying position' based on his 'lack of full

cooperativeness' during his evaluation" (*Ramirez*, p 1345). Like the first psychiatrist, the second psychiatrist relied on the lack of validity and defensiveness in the MMPI, which had been re-administered and interpreted by the same clinical psychologist.

Based on the second psychiatrist's report, the Agency found Mr. Ramirez unfit for duty. Mr. Ramirez challenged this in arbitration. He requested copies of the MMPI tabulation and interpretation. The Agency refused to provide these records. Mr. Ramirez's counsel objected, and had his own expert administer a new MMPI, which the expert opined had typical results for that seen in law enforcement personnel.

The arbitrator ordered a third psychiatric evaluation and deferred its final decision on Mr. Ramirez's fitness until after that was obtained. Mr. Ramirez was again administered the MMPI, reviewed by the same psychologist, who again interpreted it as indicative of defensiveness and thus invalid. The third psychiatrist, citing the MMPI interpretation, said that determination of "potential dangerousness to himself or others cannot be made and I cannot declare that he is safe to return to the workplace" (*Ramirez*, p 1347). Mr. Ramirez again requested the MMPI records and was refused.

Thereafter, the arbitrator issued a final award, affirming Mr. Ramirez's removal from his post based on a lack of fitness. Mr. Ramirez petitioned for review by the U.S. Federal Circuit, which has jurisdiction to hear such cases pursuant to federal statutes involving negotiated grievance procedures for certain government employees.

Ruling and Reasoning

There were two primary points in this case. The first was more a matter of procedure. It involved the question of whether the arbitrator was able to issue an interim award, order a new psychiatric evaluation, and then thereafter reconsider Mr. Ramirez's fitness for duty. The Federal Circuit held that this was permissible.

The second, more pertinent question looked at whether Mr. Ramirez had a due process right to review the MMPI data, analysis, and results, upon which his fitness for duty evaluations were based. The court held that he did, and that he was denied due process when he was deprived of the ability to obtain, review, and challenge those records. More specifically, the court concluded that "when an

agency relies, directly or indirectly, on the results of a psychological assessment in justifying an employee's removal, the agency must provide the employee with a meaningful opportunity to review and challenge the data, analysis, and results of that assessment" (*Ramirez*, p 1353).

The court's holding was based on a public employee's constitutional right to due process during their removal from their position; this is a property right, protected by the procedural protections in the Due Process Clause of the Fourteenth Amendment in the U.S. Constitution. The court referenced the factors from *Mathews v. Eldridge*, 424 U.S. 319 (1976) as relevant for assessing the required procedures for Mr. Ramirez's removal from his employment: a weighing test assessing the private interest; the risk of erroneous deprivation using specified procedures and probable value of additional procedures; and the importance of the government interest and potential burden of additional procedures.

The court noted that employees' right to evaluate relevant evidence used against them is part of due process. In this case, the MMPI records were critical. Mr. Ramirez's removal from his position was based primarily on the second psychiatrist's recommendation that he not have a firearm; that opinion was heavily founded on the invalid MMPI and the interpretation of defensiveness. Mr. Ramirez could only challenge that evidence if he had access to the underlying data, analysis, and interpretation.

The court, in evaluating the government interest, noted that it would not be unduly burdensome for the government to provide the MMPI records to Mr. Ramirez. The Agency had contracted for the testing and relied on it. The fact that the interpretation was included within, and used as a part of, a fitness for duty evaluation did not shield the data from being produced, nor did the fact that the Agency itself did not actually possess that data. Cross-examination of the psychiatrist who used the MMPI interpretation in his report was insufficient. It was not the psychiatrist who had analyzed and interpreted the data, it was the clinical psychologist. Access to the MMPI data, analysis, and interpretation was necessary in order for Mr. Ramirez to be able to criticize and rebut the psychologist's methods and interpretation.

The court addressed some additional claims, which although not central to its overall holdings, were interesting. For example, the Agency claimed that Mr. Ramirez had needed to try to obtain the MMPI records himself and had not done so. The court noted that Mr. Ramirez did not have a treatment relationship with the psychologist and thus did not have a reasonable expectation of being able to obtain that information. Furthermore, the Agency had not even attempted to obtain the MMPI records.

The court vacated the arbitration award and remanded the case with a mandate to provide Mr. Ramirez, or his agent, with the MMPI assessments, responses, and interpretations, and provide an opportunity to challenge that evidence at a new hearing. The majority opinion declined to decide what to do if the MMPI data were no longer available, though that question was discussed in depth in the concurring opinion.

Discussion

This case involves an extension in the Federal Circuit of what has been seen in the Fifth Circuit with other types of testing data (e.g., urine drug tests in *Banks v. Fed. Aviation Admin.*, 687 F.2d 92 (5th Cir. 1982) and a proprietary algorithm in *Houston Federation of Teachers, Local 2415 v. Houston Independent School District*, 251 F. Supp. 3d 1168 (S. D. Tex. 2017)). Specifically, government employees who are removed from their jobs have a constitutional right to due process, which includes the right to challenge testing data that the government uses to support the employee's removal. In this case, that meant the ability to obtain the data, analysis, and interpretation of the MMPI. The mere fact that such a test is incorporated into a secondary report does not shield the underlying data.

As forensic psychiatrists, we often use psychological testing to support our diagnosis or opinion of malingering, both in civil and criminal realms (e.g., the MMPI, Miller Forensic Assessment of Symptoms Test, Test of Memory Malingering, etc.). The opinions that we make using such results can have profound implications for an evaluatee. Although *Ramirez* was specific to psychological test results pertaining to a government employee's fitness for duty, the underlying legal concept would seem equally applicable to psychological testing used in other forensic realms. This prompts the question of whether

forensic psychiatrists who refer out their psychological testing should consider obtaining the scoring data, results, and interpretations to retain in their files.

Determination of Intellectual Disability for Capital Punishment Clarified

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Standardized Measures Not the Only Criteria to Establish Adaptive Functioning Deficits in Intellectual Disability Determination for Capital Cases

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In *Commonwealth v. Cox*, 240 A.3d 509 (Pa. 2000), the Pennsylvania Supreme Court vacated the ruling of the court that heard the Post Conviction Relief Act (PCRA) claim of Russell Cox, an individual on death row. The PCRA court had ruled that Mr. Cox did not provide sufficient evidence of intellectual disability to render him ineligible for execution. The state supreme court held that the PCRA court's strict adherence to performance on standardized measures to establish adaptive functioning deficits was erroneous. The court further ruled the PCRA court failed to consider additional significant evidence in support of deficits in Mr. Cox's adaptive functioning. The court remanded the case for further consideration of the question of interest.

Facts of the Case

On February 27, 1986, Mr. Cox and Percy Lee entered the home of Evelyn Brown and her 17-year-