Death Penalty and Mentally Ill Defendants

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Updates to Medical Diagnostic Standards Do Not Warrant Review of Previously Heard Claims of Intellectual Disability in Federal Prisoners Sentenced to Death

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In *Bourgeois v. Watson*, 977 F.3d 620 (7th Cir. 2020), the U.S. Court of Appeals for the Seventh Circuit reversed the district court's grant of a stay of execution and denied the petitioner's *habeas corpus* petition under 28 U.S.C. § 2241 (2009) on the basis that the petitioner had, via 28 U.S.C. § 2255 (2009), previously fully litigated his intellectual disability claim as a basis for death penalty prohibition according to both the Federal Death Penalty Act (FDPA), 18 U.S.C. § 3596(c) (1994), and *Atkins v. Virginia*, 536 U.S. 304 (2002). The Seventh Circuit held that the petitioner's claims did not meet the criteria for subsequent litigation under 28 U.S.C. § 2255(e), also known as the "savings-clause."

Facts of the Case

JG, the two-year-old daughter of Alfred Bourgeois, came into her father's temporary custody in May 2002 after a court ordered paternity test and subsequent child support hearing. Over the next month, Mr. Bourgeois was alleged to have severely physically and sexually abused JG. Mr. Bourgeois worked as truck driver, and his family traveled with him. In June 2002, while making a delivery to Corpus Christi Naval Air Station, JG overturned her "training potty." Enraged, Mr. Bourgeois slammed her head into the windows and dashboard of his truck, resulting in her death. Mr. Bourgeois was charged with murder and tried in the U.S. District Court for Southern Texas. After a two-week trial, Mr. Bourgeois was found guilty and sentenced to death by a unanimous jury.

Mr. Bourgeois directly appealed to the Fifth Circuit Court of Appeals, raising arguments related to the government's use of aggravating factors at sentencing, the constitutionality of the FDPA, and the district court's delegation of supervision over his execution. The district court's decision was affirmed. He appealed to the U.S. Supreme Court but was denied *certiorari*.

Mr. Bourgeois filed a motion for postconviction relief under 28 U.S.C. § 2255. He raised fourteen points, including the assertion that he was intellectually disabled. The district court utilized the *Atkins* criteria for determination of intellectual disability: significantly sub-average intellectual functioning, related significant limitations in adaptive skill areas, and manifestation of those limitations before age 18. For one week, the court heard expert and lay witnesses testify about his intellectual and psychological abilities. The court noted that Mr. Bourgeois had not been diagnosed with intellectual disability prior to being sentenced to death, and although Mr. Bourgeois' intelligence testing results were in the intellectually disabled range, his effort on such tests was deemed poor. His life history was also found to be inconsistent with the impairment seen in intellectual disability, and any impairment was not present before eighteen years of age. As the three prongs of the *Atkins* criteria were not satisfied, the district court rejected his intellectual-disability claim.

In July 2019, Mr. Bourgeois was transferred to federal death row in Terre Haute, Indiana and given an execution date. He filed a *habeas corpus* petition under 28 U.S.C. § 2241 in the Southern District of Indiana. He argued that through 28 U.S.C. § 2255 (e) (referred to as the "savings clause" or "safety valve"), he was allowed to proceed under 28 U.S.C. § 2241 as his previous motion under 28 U.S.C. § 2255 was inadequate because of the outcome of *Moore.* That is, the judge in his case in the Southern District of Texas relied on outdated diagnostic standards that were rejected in *Moore v. Texas*, 137 S.Ct. 1039 (2017) (*Moore I*) and subsequently in *Moore v. Texas*, 139 S. Ct. 666 (2019) (*Moore II)*.

The government's response was that Mr. Bourgeois had fully litigated his intellectual disability claim in

the Southern District of Texas and that *Moore I* and *Moore II* did not justify savings clause relief under 28 U.S.C. § 2255(e). The government's brief referred throughout to Mr. Bourgeois' intellectual disability claim as his "*Atkins* claim" without mentioning his FDPA claim. Mr. Bourgeois argued in his reply that the government had failed to challenge his claim under § 2241 because he challenged the execution of his sentence as well as the imposition.

The court granted his motion for a stay. His *Atkins* claim was not addressed. The court found the government had waived its arguments against the FDPA claim under § 2241 as it had not separately discussed them from his *Atkins* claim. The court supposed that the government's failure to address Mr. Bourgeois' FDPA claim was intentional and thus a waiver (which precludes review) rather than forfeiture (which permits subsequent court correction under a plain error standard). The court believed Mr. Bourgeois had a strong argument for intellectual disability under his FDPA claim.

In its reply, the government emphasized that Mr. Bourgeois himself had referred to his *Atkins* and FDPA claims collectively as his "*Atkins* claim" and that Mr. Bourgeois made the same arguments for both claims. The court rejected the government's motion. The government appealed the district court's order.

Ruling and Reasoning

The Seventh Circuit Court of Appeals reversed the district court's decision. Mr. Bourgeois' stay was vacated with instructions to dismiss his petition. The Seventh Circuit found that the government had not waived or forfeited their argument against Mr. Bourgeois' FDPA claim. While waiver is "intentional relinquishment or abandonment of a known right" (*Bourgeois*, p 629, citing *Henry v. Hulett*, 969 F.3d 769 (7th Cir. 2020), p 786), forfeiture is the failure to raise a timely argument and does not require the failure to be intentional. Mr. Bourgeois did not discretely discuss his FDPA and *Atkins* claims; therefore, the government did not waive nor forfeit response to his FDPA claim. Regardless of forfeiture or waiver, the Seventh Circuit had an interest in reaching finality and adding efficiency to the judicial system by ruling on this case.

Section 2255(f) limits a federal prisoner to one attempt at postconviction relief. According to § 2255(h) a federal court of appeals is allowed to certify successive motions if there is newly discovered evidence or a new rule of law which is made retroactive to cases on collateral review by the Supreme Court. Mr. Bourgeois had attempted successive motions previously, which were rejected by the Fifth Circuit.

Section 2255(e) allows a *habeas corpus* petition if a test of the legality of the prisoner's detention by motion is inadequate or ineffective. The prisoner may file this petition under 28 U.S.C. § 2241. "'Inadequate or ineffective,' taken in context, must mean something more than unsuccessful" (*Purkey v. United States*, 964 F.3d 603 (7th Cir. 2020), p 611). If the claims brought under 28 U.S.C. § 2241 could have previously been brought under 28 U.S.C. § 2255, the "savings clause" does not apply.

Mr. Bourgeois had previously brought claims of intellectual disability under his previous § 2255 motions. The FDPA and *Atkins* were in existence at the time of his claims. *Moore I* would not have changed the litigation so substantially that Mr. Bourgeois would be entitled to another review. "The savings clause does not apply every time the Supreme Court clarifies the law . . . or every time the medical community updates its diagnostic standards" (*Bourgeois*, p 637, citing *Purkey*, p 615). Further, Mr. Bourgeois had no new evidence to support his claim of intellectual disability. Therefore, he had no right to utilize the savings clause.

Mr. Bourgeois requested *certiorari* from the U.S. Supreme Court. The Court rejected his request. Justice Sotomayor, joined by Justice Kagan, dissented. Justice Sotomayor noted the importance of avoiding the execution of those who are intellectually disabled.

Discussion

The judicial system avails federal prisoners a course for legal remedy under 28 U.S.C. § 2255. This course is narrowly proscribed, as finality and efficiency are also necessary qualities for a functional legal system. According to 28 U.S.C. § 2255(h), a second motion or beyond requires either newly discovered evidence or a newly made rule of constitutional law that is retroactive. Section 2255(e) is thus referred to as the savings clause or safety valve. It allows for an application for a writ of habeas corpus if a previous § 2255 is "inadequate or ineffective to test the legality of [the prisoner's] detention." 28 U.S.C. § 2241 is the route of *habeas corpus*

application. While the federal system allows numerous avenues of appeal, these avenues are not unlimited. Once a postconviction relief appeal is unsuccessful for an inmate, further appeal is not warranted absent new evidence or new appellate decisions that would alter the interpretation of the appellate arguments.

This case highlighted the balance that must be struck between providing an avenue for appeal without constraining the court system with endless litigation. The court acknowledged that the medical community's standards are ever-changing, yet this does not permit new litigation, nor does each prior decision need to be reviewed as a result of changing diagnostic standards.

Conversion Therapy for Minors

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Ordinances That Prohibit Therapists from Conducting Sexual Conversion Therapy with Juveniles Violate the First Amendment Right to Freedom of Speech

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In *Otto v. City of Boca Raton*, 981 F.3d 854 (11th Cir. 2020), two therapists appealed the district court's decision to deny preliminary injunction of the City of Boca Raton and Palm Beach County ordinances that proscribed licensed therapists from engaging in therapy with the goal of changing a minor's sexual orientation or gender identity or expression. The Eleventh Circuit Court of Appeals reversed and remanded.

Facts of the Case

In late 2017, Palm Beach County (Florida) and the City of Boca Raton (hereafter referred to as the County and the City, respectively) enacted ordinances prohibiting therapists or counselors from practicing sexual orientation change efforts (SOCE) based on findings in the legislature that SOCE posed a significant health risk to minors. The County's and the City's ordinances barred therapists from treating minors with the goal of changing a minor's sexual orientation or gender identity or expression, but these ordinances specifically permitted therapy that supported and assisted individual minors undergoing gender transition.

Two licensed therapists (plaintiffs Dr. Robert W. Otto and Dr. Julie H. Hamilton) argued that the ordinances infringed on their First Amendment right to freedom of speech, as their therapy was solely based in speech. Prior to enactment of these ordinances, these therapists often treated patients for depression and anxiety, which they believed was secondary to distress from their sexuality or gender identity. Drs. Otto and Hamilton denied the ability to "change" a person's sexual orientation or gender identity; they contended that through speech-based therapy, motivated patients could decrease homosexual attraction and behavior as well as "gender identity confusion." They indicated that their therapy was voluntary and client-directed. Otto and Hamilton described these patients as typically having "sincerely held religious beliefs" that conflicted with homosexual orientation or gender identity that was incongruent with gender assigned at birth. The defendants (i.e., the County and the City) did not dispute that the plaintiffs' practices were comprised exclusively of speech, but the defendants maintained that SOCE posed a seriously increased risk of depression and suicide in minors.

The therapists sued to permanently enjoin enforcement of these ordinances; they moved for a preliminary injunction on the grounds that state law preempted the ordinances and that the ordinances violated the First Amendment protection of freedom of speech. The local governments countered that their only desire was to protect minors from the harm of that speech and that, as government entities, they have the power to limit this speech because they considered it professional speech and conduct. The District Court for the Southern District of Florida denied the motion. On the First Amendment claim, the district court found that the therapists failed to demonstrate a substantial likelihood of success on the merits. In addition, the district court found that even if the therapists could demonstrate a likelihood of