

suggesting that the human brain is not fully developed until about age 25, and he stated that his immaturity at the time of the offense should be grounds for relief. The court rejected this claim on the basis that it was conclusory. They pointed out that the law uses age 18, and not 25, as the barrier between childhood and adulthood; and that the research cited by Mr. Crow did not show that his mental state was equivalent to that of a “generic juvenile.”

The third argument was that the state should ignore a two-year time limit for appeals because he had a “mental disease.” Elsewhere, he referred to “a long history” of mental health defects and medication. The court dismissed this argument as “highly conclusory,” stating that Mr. Crow simply asserted the presence of a condition without explaining what that condition is or how its symptoms would have affected his appeal process. The justices also noted that he successfully filed three petitions prior to the current one, which they took as evidence of relatively intact mental functioning.

Discussion

In this ruling, the Minnesota Supreme Court held that the postconviction appellate court acted properly when it summarily denied a relief petition by a man serving a life sentence for murder, his fourth such petition.

Mr. Crow raised a number of arguments related to his mental state. The court’s rationale in dismissing these claims rested mainly on the notion that they were “conclusory,” which is to say, they flatly asserted mental states that purportedly merited relief, without explaining how those states related to the crime or to the previous petitions. Mr. Crow’s claim of a “mental disease” was the clearest example of this. He stated that he had a mental disease for which he had sought treatment, but he failed to explain which symptoms in particular affected his adherence to normal petition procedures.

Perhaps the most interesting of Mr. Crow’s assertions was the one regarding brain development. He cited research which indicates that the human brain takes about 25 years to fully develop, then stated he should receive postconviction relief because he was only 22 years old when he committed the crime. The court simply responded that the law considers offenders above age 18 to be adults

and that he failed to explain how his mental state was similar to that of a child (again, his statement was conclusory).

Despite its inadequacy, this argument highlights a possible area of tension between legal standards and advancing scientific research. The U.S. criminal justice system draws a bright line between adolescence and adulthood at age 18. Advances in neuroscience have already eroded that line by demonstrating that brain areas associated with impulse control and judgment are slower to develop than previously thought. It is conceivable that the level of criminal responsibility afforded to young adult offenders might someday change as a result of this research. One wonders if the Minnesota Supreme Court would have given Mr. Crow’s argument more weight had he explained the association between brain maturity and impulse control in greater detail. Because he did not establish the crucial link between the actual symptoms of his mental state, the manifestations of his immaturity, and the facts of the case, the court found the argument unpersuasive.

Must an Attorney Investigate and Consider a Diminished Capacity Defense?

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Failing to Investigate and Consider a Diminished Capacity Defense May Constitute Deficient Counsel if Claimant Suffered Prejudice

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In *Hernandez v. Chappell*, 923 F.3d 544 (9th Cir. 2019), the Ninth Circuit Court of Appeals considered whether a federal district court had erred in denying a defendant’s *habeas* petition based on ineffective assistance of counsel. Francis Hernandez, the defendant, had filed a *habeas* petition for guilt-phase relief that had been denied by the district court, which ruled that “counsel was ineffective for failing

to present mental health evidence to support a diminished capacity defense, but that Hernandez did not suffer any prejudice” (*Chappell*, p 549). In *Chappell*, the Ninth Circuit affirmed the district court’s ruling. In doing so, the court conveyed that an attorney’s failure to consider a diminished capacity defense may constitute grounds for a claim of ineffective assistance of counsel when it represents the “best possible defense.” Such a failure does not, however, automatically entitle the defendant to relief where, as here, there was no reasonable probability of a different outcome had the attorney presented a diminished capacity defense due to mental disease or defect.

Facts of the Case

A jury convicted Mr. Hernandez of committing the first-degree murder, forcible rape, and forcible sodomy of two victims, Edna Bristol and Kathy Ryan, in separate incidents five days apart in January 1981. The pathologist concluded that both were killed by strangulation or suffocation and noted that their bodies were subjected to “extremely similar and extremely rare trauma to the anal and vaginal areas” (*Chappell*, p 547). Additionally, “their bodies were mutilated, with bite marks on their breasts, and their pubic hair was singed. Bristol had ligature marks around her wrists and ankles. Ryan’s nose was fractured, and a tic-tac-toe pattern had been carved into her abdomen post-mortem” (*Chappell*, p 547).

When Mr. Hernandez was arrested in early 1981, he made a taped confession to the crimes and “chillingly recounted not only his horrific acts, but also the thoughts and feelings that went through his mind as he committed the crimes” (*Chappell*, p 547). In other words, his confession established the *mens rea* and specific intent required for the crimes with which he had been charged. In decades of legal proceedings, Mr. Hernandez has not disputed the reliability or voluntariness of his confession.

At trial, Mr. Hernandez’s attorney presented a diminished capacity defense based on voluntary intoxication with alcohol. His trial attorney did not present a diminished capacity defense based on a history of mental disease or defect. While Mr. Hernandez was a juvenile, prior to the assaults and murders of Ms. Bristol and Ms. Ryan, Mr. Hernandez had undergone one known psychological assessment at a juvenile justice facility. This assessment concluded

that Mr. Hernandez “functioned within the high normal range of intellectual ability. . . . His behavior is characteristic of an antisocial personality in that he is aware of what he is doing, realizes that he is capable of doing it and goes about doing it with impunity. . . . There were no indications of organicity nor of a neurological dysfunction” (*Hernandez v. Martel*, 824 F. Supp. 2d 1025 (C.D. Cal. 2011), p 1039). As presented in hearings after his trial, Mr. Hernandez’s history also included being the victim of “physical and sexual abuse at the hands of a psychotic adoptive mother” and “head injuries from nearly a dozen motorcycle accidents,” including one that had resulted in his losing consciousness and experiencing “convulsions” (*Hernandez v. Chappell*, 878 F.3d 843 (9th Cir. 2017), p 846).

Whatever the merits of a possible diminished capacity defense based on mental illness may have been in the case of Mr. Hernandez, his trial attorney later acknowledged that he was ignorant of the California law permitting such a defense, and therefore “neither investigated nor made a reasonable decision not to investigate” the possibility of presenting such a defense at trial (*Chappell*, p 550, citing *Kimmelman v. Morrison*, 477 U.S. 365 (1986), p 385). The result of the trial was that the jury found Mr. Hernandez guilty on all counts.

Mr. Hernandez was subsequently assessed by a number of psychological professionals. At a postconviction hearing, he presented testimony from a psychiatrist, two psychologists (one specializing in neuropsychology), and a criminologist. The general psychologist commented extensively on his social and family history and suggested that Mr. Hernandez had dissociated during the crimes, leaving him with “no subsequent actual recollection of the events that transpired” (*Chappell*, p 555). The psychiatrist diagnosed him with bipolar disorder and stated that he had been in a “manic or hypomanic state while simultaneously experiencing dissociative symptoms” (*Hernandez v. Chappell*, 878 F.3d 843 (2000), p 857). She concluded that his “capacity to form the specific intent to rape and kill was substantially impaired” (*Chappell*, p 555). The neuropsychologist concluded that Mr. Hernandez had organic brain damage based on the results of psychological testing, which the neuropsychologist used to create “behavioral images” that he stated represented the physical state of Mr. Hernandez’s brain.

Ruling and Reasoning

The Ninth Circuit agreed with the lower court that Mr. Hernandez's trial attorney was "constitutionally deficient" in failing to investigate and consider a diminished capacity defense based on the contention that Mr. Hernandez was mentally ill (and thus could not form the requisite specific intent). The court ruled, however, that Mr. Hernandez had not shown that his "counsel's errors were so serious as to deprive the defendant of a fair trial" (*Strickland v. Washington*, 466 U.S. 668 (1984), p 687); in other words, the court ruled that he had not met the "reasonable probability . . . of reasonable doubt" standard established by *Strickland*. Consequently, the Ninth Circuit ruled that Mr. Hernandez was not entitled to relief and affirmed the district court's ruling.

The Ninth Circuit based its ruling on the fact that "the strength of the evidence for Mr. Hernandez's intent to rape and kill contrasts with the relatively weak . . . evidence that his mental condition rendered him incapable of forming the requisite intent" (*Chappell*, p 554). The court systematically critiqued the testimony of each of the defense's mental health experts as failing to demonstrate that Mr. Hernandez was incapable of forming the requisite intent. The court relied extensively on Mr. Hernandez's own statements from his confession to support the notion that he had formed the required specific intent for both first-degree murders. For example, the court noted that the clinical psychologist's "suggestion . . . that Hernandez was in a dissociative state and 'had no subsequent actual recollection' of his crimes is totally contradicted by his detailed confession" (*Chappell*, p 555).

Discussion

In this ruling, the Ninth Circuit considered the merits of a *habeas* petition based on ineffective assistance of counsel for failure to consider and investigate a diminished capacity defense based on a defendant's history of mental disease or defect. As established by *Strickland*, it is not automatic that a deficiency of counsel at trial has prejudiced the defendant. For a failure to consider a diminished capacity defense due to mental disease or defect to have been prejudicial, the Ninth Circuit ruled, there must be strong evidence that the alleged mental disease or defect directly affected the defendant's ability to form the requisite specific intent.

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Claim of Unconstitutional Discrimination Against Transgender Individuals

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Department of Defense Policy Uses Gender Dysphoria and Gender Transition as Basis for Excluding Military Service by Transgender Individuals

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In *Karnoski v. Trump*, 926 F.3d 1180 (9th Cir. 2019), plaintiffs challenged as unconstitutional discrimination a 2017 memorandum precluding military participation by transgender individuals (additionally naming the Acting Secretary of Defense and officials of the Department of Defense and Department of Homeland Security). The District Court for the Western District of Washington issued a preliminary injunction in favor of the plaintiffs. After the suit was filed, President Trump revoked the 2017 memorandum and authorized a 2018 policy precluding persons with gender dysphoria from participation in the military. In a motion to dissolve the preliminary injunction, the district court rejected the defendants' arguments, ruling that triable arguments exist as to whether the policy violates First and Fifth Amendment protections.

The defendants appealed to the Ninth Circuit and to the U.S. Supreme Court for an expedited decision. The Supreme Court stayed the preliminary injunction issued by the district court pending ultimate determination of the arguments. With the preliminary injunction lifted, the defendants enacted criteria of gender dysphoria and transgender transition as factors in determining eligibility for military service.

The Ninth Circuit issued a *per curiam* opinion vacating the court's order striking the defendants' motion to dissolve the preliminary injunction and remanding the case to the district court for further consideration.