

deemed competent to stand trial, yet their reasoning regarding their decision to waive the defense was founded in delusional thinking (Litwack TR: The competency of criminal defendants to refuse, for delusional reasons, a viable insanity defense recommended by counsel. *Behav Sci & L* 21:135–56, 2003). In *Phenis v. United States*, 909 A.2d 138 (D. C. 2006), cited in *Glenn*, the District of Columbia Court of Appeals stated that “[t]he quantum and nature of evidence that will trigger the obligation to conduct a *Frendak* inquiry (i.e., waiver colloquy) is necessarily highly fact-bound and varies from case to case” (*Phenis*, p 155). The state supreme court of Hawaii eliminates this variability by applying prospectively the requirement that, if a court is advised of a defendant’s potential lack of penal responsibility, pursuant to Haw. Rev. Stat. § 704-407.5, the court must conduct a waiver colloquy. It is then worth pondering whether states that have not already done so would benefit from clarifying the nature of the evidence required to trigger a waiver colloquy, as the state of Hawaii has established in *Glenn*.

## Standards of Review for Reversing Decisions Made by Immigration Courts

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### Ninth Circuit Standard for Overturning a Decision of an Immigration Judge by the Board of Immigration Appeals Is Clear Error

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**Key words:** Convention Against Torture; asylum; deferral of removal; Board of Immigration Appeals; standards of review

In *Guerra v. Barr*, 974 F.3d 909 (9th Cir. 2020), the Ninth Circuit Court of Appeals considered whether the Board of Immigration Appeals (BIA)

erred when rejecting an immigration judge’s (IJ) decision to grant Jose Eduardo Guerra deferral of removal under the Convention Against Torture because of his risk of torture secondary to his mental illness if deported to Mexico. Mr. Guerra appealed the BIA decision to reject the deferral of removal on the grounds that the BIA used improper standards of review in overturning the IJ’s decision to defer removal under the Convention Against Torture. The Ninth Circuit remanded the case for the BIA to reconsider its decision using correct standards after determining that the BIA applied the wrong legal standard to Mr. Guerra’s claim.

#### Facts of the Case

Mr. Guerra entered the United States at age eleven without inspection and subsequently received a diagnosis of a seizure disorder. After high school, he lived in a home for people with mental disability, as he was unable to care for himself. Mr. Guerra was arrested for allegedly engaging in lewd and lascivious acts in that home. Mr. Guerra was found incompetent to stand trial and referred for psychiatric treatment and competence restoration. He received a diagnosis of schizophrenia and began taking antipsychotic medication. He was deemed competent to stand trial in September 2015. Mr. Guerra pled guilty to violating Cal. Penal Code § 288(a) (2013) and was sentenced to three years imprisonment. After serving his sentence, he was served with an immigration warrant and charged with removability under 8 U.S.C. § 1182(a)(6)(A)(i) (2013) (presence in the United States with admission or parole) and 8 U.S.C. § 1182(a)(6)(A)(i)(l) (2013) (conviction of a crime involving moral turpitude) by the Department of Homeland Security.

Mr. Guerra applied for deferral of removal under the Convention Against Torture, asserting that were he to return to Mexico, he would become homeless due his inability to care for himself and would likely be taken into Mexican law enforcement custody or placed in a mental health institution. Mr. Guerra’s counsel argued that, in either setting, he was more likely than not to be tortured, citing articles about individuals with mental illness being subject to abuse in Mexican jails and mental health facilities. In August 2017, an IJ heard Mr. Guerra’s argument and granted Mr. Guerra deferral of removal under the Convention Against Torture. The judge agreed that, because of Mr. Guerra’s mental illness, he was

more likely than not to experience torture by Mexican police or government officials in a Mexican mental health institution. The Department of Homeland Security appealed the IJ's decision to defer removal under the Convention Against Torture, and this appeal was sustained by the BIA. The BIA disagreed with the IJ's determination that Mr. Guerra would be subject to torture in criminal detention or mental health institutions in Mexico. Mr. Guerra petitioned for review.

#### Ruling and Reasoning

The Ninth Circuit found that the BIA erred by reviewing the IJ's factual findings *de novo* instead of reviewing the findings for clear error, as stated in 8 C.F.R. § 1003.1(d)(3)(i) (2003). According to 8 C.F.R. § 1003.1(d)(3)(i) (2003), facts determined by the IJ may be reviewed solely to determine whether there is evidence of clear error in decision-making, not for the BIA to provide an independent interpretation of the fact. Citing *Rodriguez v. Holder*, 683 F.3d 1164, 1170 (9th Cir. 2012), the Ninth Circuit outlined that the criteria to determine the IJ's findings clearly erroneous require that the findings are "illogical or implausible, or without support in inferences that may be drawn from facts in the record," which the Ninth Circuit determined the BIA did not do.

The Ninth Circuit ruled that the BIA did not abide by clear error review when it rejected the determination that Mexican mental health workers act with intent to harm patients. In *Ridore v. Holder*, 696 F.3d 907 (9th Cir. 2012), the court found that determining whether government officials act with intent to inflict suffering is subject to clear error review. The IJ had made a number of findings. The IJ determined that government workers would intentionally inflict harm on Mr. Guerra on the basis of evidence that individuals with mental illness face systemic discrimination because of mental disability and that the Mexican government does not enforce laws that prohibit this discrimination. In addition, the IJ determined that individuals with mental illness are often only provided necessary mental health care within institutions where they are often subject to the use of physical restraints, abuse, and heavy sedation to control behavior, which the IJ determined qualified as torture under the Convention Against Torture.

The IJ also rejected the explanation that the inappropriate treatment in mental health institutions was secondary to misunderstanding of mental illness.

The court ruled that the BIA rejected the IJ findings, instead finding that intent to inflict suffering that qualified for torture under the Convention Against Torture could not be determined from the continued use of these mental health institution practices because the persistence of these practices within institutions was secondary to complex public policy concerns and limited resources. Citing *Brezilien v. Holder*, 569 F.3d 403 (9th Cir. 2009), the Ninth Circuit determined that the BIA erred when it engaged in impermissible fact-finding by identifying alternative explanations for the continued use of inhumane institutional practices. In addition, the BIA cannot reverse the IJ's factual finding because it would have weighed the evidence differently, referring to *Anderson v. Bessemer City*, 470 U.S. 564 (1985).

The Ninth Circuit Court of Appeals remanded the case to the BIA to reconsider its decision using "clear error" review. The Ninth Circuit did not remand to the BIA to grant relief, as requested by Mr. Guerra's counsel, but instead vacated the BIA's decision and remanded the BIA to apply the appropriate standard of review.

#### Discussion

This case provides valuable insights into the process by which asylum application cases are decided and appealed. Immigration courts are specialized courts, under the jurisdiction of the U.S. Department of Justice, that hear the cases of asylum applicants. The IJ serves as the finder of fact in making rulings on whether to grant deferral of removal. A case may be appealed to the BIA, which can reverse a decision of the IJ. Decisions of the BIA may be appealed to the federal circuit court of appeals that has jurisdiction over the state where the immigration court is located. In *Guerra v. Barr*, the Ninth Circuit established the standard by which the BIA may overturn the ruling of the IJ in an asylum application case, namely that the IJ has made clear error in interpreting evidence.

Psychiatric testimony may play an important role in asylum cases. Evaluations of asylum applicants are a type of forensic evaluation. Individuals seeking asylum often have experienced trauma that put them at risk for psychiatric conditions such as posttraumatic stress disorder. In addition, individuals with mental illness are at risk of experiencing future trauma, which may be mitigated with proper identification and treatment. Psychiatrists are in a unique position to evaluate evidence of mental illness, explore any

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

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**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