

conforming to society's rules" (*Lopez-Delgado*, p 9). The circuit court noted that the district court was "ultimately more concerned with the unique danger it believes Lopez poses to the public," and found this to be a plausible rationale for sentence enhancement (*Lopez-Delgado*, p 9). The circuit court concluded that, while the variance from the range provided in the guidelines was "substantial," it was not outside of the "universe of reasonable sentences," and therefore not an abuse of the district court's discretion.

Discussion

For over two centuries, federal judges in the United States wielded nearly unlimited discretion in sentencing, leading to "unjustifiably wide" ranges of sentences for similarly situated offenders (*Federal Sentencing: The Basics*, United States Sentencing Commission (2020)). The Sentencing Reform Act of 1984 passed with bipartisan support as a measure to reduce inequitable sentencing. The act created the United States Sentencing Commission and provided ranges for sentencing in federal cases, with a goal of limiting judicial subjectivity. In *United States v. Booker*, 543 U.S. 22 (2005), a divided Supreme Court invalidated the portions of the federal sentencing guidelines that made them mandatory on the basis of the Sixth Amendment right to a trial by jury. The ranges provided in the guidelines became advisory as a result, and federal judges regained wide discretion in sentencing. In the years since *Booker*, with the mandate of the sentencing guidelines removed, the rates of sentencing outside of provided ranges increased; in recent years, only about half of federal sentences fall within the guideline ranges (U.S. Sentencing Commission: Quarterly Data Report, 2020; Tonry M. Federal sentencing "reform" since 1984: The awful as enemy of the good. *Crime & Just.* 2015: 44:99–164).

Although the extent of variation from the guidelines in *Lopez-Delgado* may seem extreme, the deference of the appellate court is not entirely surprising. In *Gall v. United States*, 552 U.S. 38 (2007), the Supreme Court reinforced the concept of deference to sentencing courts that was introduced in *Booker*. *Gall* set the high standard of abuse of discretion for review of federal sentences, even when "significantly outside" the guidelines range. Although *Gall* involved a sentence below the recommended range, the Court held that, under the now-advisory sentencing guidelines, federal judges can apply any "reasonable" sentence, as long as they explain their reasoning.

Psychiatric history enters the sentencing calculus based on the belief long held by society that "defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional or mental problems, may be less culpable than defendants who have no such excuse" (*Penry v. Lynaugh*, 492 U.S. 302 (1989), p 319). As evidenced in *Lopez-Delgado*, however, elements of psychiatric history are not always interpreted as mitigating, but may also be aggravating. Given the broad discretion trial courts have in sentencing, the direction and extent of sentence adjustment for a given finding of psychiatric history may vary significantly from judge to judge. This is concerning for forensic psychiatrists, as judges may find assessments of future risk more persuasive than opinions intended to suggest decreased culpability, such as those involving addiction or childhood trauma. In sentencing testimony, making broad statements regarding the future risk of a defendant may overstate the ability of the forensic psychiatrist to predict future behavior and lead to longer sentences when evidence to support such far-reaching conclusions is limited.

Appellate Court Clarifies That Immigration Judges Cannot Disregard Mental Health Professional Guidelines

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Immigration Judges Are Not Permitted to Dismiss the Diagnostic Conclusions of Mental Health Professionals

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In *Granados v. Garland*, 992 F.3d 755 (9th Cir. 2020), the U.S. Court of Appeals for the Ninth Circuit clarified that immigration judges cannot

disregard diagnostic conclusions of mental health professionals and instead make their own assessments of a defendant's mental illness.

Facts of the Case

Wilbur Agustin Acevedo-Granados was born and raised in El Salvador. In 1989, when he was one year old, his mother moved to the United States, fearing violence from the guerillas because of her husband's employment by the Salvadoran military police. Several years later, Mr. Acevedo-Granados's father was killed by the guerillas. Mr. Acevedo-Granados remained in El Salvador with his grandmother until late adolescence, then moved to the United States to join his mother in California.

In July 2017, Mr. Acevedo-Granados was arrested after a dispute with his brother that allegedly turned violent. He was charged with exhibiting a deadly weapon, vandalism, and resisting arrest. During the state criminal proceedings, Mr. Acevedo-Granados's competency to stand trial was questioned by the judge and a court appointed competency evaluator. Prior to the formal competency hearing, however, Mr. Acevedo-Granados was taken into custody by the U.S. Immigration and Customs Enforcement Agency and detained at Adelanto Detention Facility, where he underwent psychiatric and psychological evaluations. During the subsequent immigration hearings, two immigration judges questioned Mr. Acevedo-Granados's ability to represent himself, and he was evaluated by two psychologists. Both opined that Mr. Acevedo-Granados met DSM-5 criteria for intellectual disability. Their findings were consistent with those of four other mental health professionals who assessed Mr. Acevedo-Granados while he was detained at Adelanto.

With the help of a court-appointed lawyer, Mr. Acevedo-Granados filed an application for asylum, withholding of removal, and protection under the Convention against Torture (CAT). Mr. Acevedo-Granados's application was based on his fear that if returned to El Salvador, he would face persecution and his life would be endangered because of his membership in a particular social group. He defined this group as, "El Salvadoran men with intellectual disabilities who exhibit erratic behavior," or alternatively, "indigent El Salvadoran men, lacking family support, suffering from severe mental disabilities and exhibiting bizarre behavior" (*Granados*, p 760). In addition, he informed the court that if returned to El Salvador, he would be homeless with no family who

could care for him. At the immigration hearing, an expert on relevant conditions in El Salvador testified in support of Mr. Acevedo-Granados's application, citing limited access to mental health services in El Salvador and outlining the dismal circumstances facing people with mental illness who are homeless.

The immigration judge denied Mr. Acevedo-Granados's application. She considered only his first proposed group and held that it did not satisfy the criteria for "particularity" and "social distinction," both necessary eligibility criteria. The judge declined to make a determination as to what constitutes an intellectual disability and decided that because Mr. Acevedo-Granados did not display any erratic behavior based on her observations in the courtroom, she did not consider his behavior to be "erratic" or unusual.

Mr. Acevedo-Granados appealed to the Board of Immigration Appeals (BIA). The BIA affirmed the immigration court rulings, holding that his first proposed group was not sufficiently particular because the terms "intellectual disability" and "erratic behavior" are imprecise and subjective. The BIA ruled that this proposed group could include individuals with a wide range of intellectual disabilities and behavioral manifestations thus rendering it "amorphous." Unlike the immigration judge, the BIA did consider the second group proposed by Mr. Acevedo-Granados but concluded that it was "largely encompassed" by the first group.

With regard to the social distinction analysis, the BIA held that Mr. Acevedo-Granados's proposed group did not meet the necessary application requirements. The BIA held that the records did not show that El Salvadoran society regards those with intellectual disability as a social unit that is meaningfully distinct from the larger population of individuals with mental illness. The board also held that harassment of mentally ill or disabled persons for behaviors and symptoms that stem from their mental conditions, does not establish the group as socially distinct.

Mr. Acevedo-Granados appealed to the Ninth Circuit Court of Appeals.

Ruling and Reasoning

The U.S. Court of Appeals for the Ninth Circuit issued a split decision, holding that the immigration judge and BIA misunderstood Mr. Acevedo-Granados's proposed social group based on his intellectual disability with regard to asylum and withholding of removal but that evidence supported the denial of CAT protection.

The court first considered the BIA's denial of asylum and withholding claims, reviewing the questions of law *de novo*. As outlined in the United States Code Title 8, aliens may qualify for asylum if they are unwilling or unable to return to their country because of a "well-founded fear of persecution" (8 U.S.C. § 1158(b)(1) (2015)) and for withholding of removal if "his life or freedom would be threatened" on account of membership in a particular social group (8 U.S.C. § 1231(b)(3) (2011)). Relying on *Rios v. Lynch*, 807 F.3d 1123 (9th Cir. 2015), the applicant must establish that the group is: composed of members who share a common immutable characteristic; defined with particularity or precisely delineated; and socially distinct within the general society.

With regard to the particularity element, the court appreciated that the term mental illness carries a variety of meanings, and that intellectual disability can be used imprecisely by laypersons. But the court ruled that the immigration judge and BIA erred by assuming that diagnosing mental illness was a subjective act. The court clarified that satisfying the particularity standard with regard to intellectual disability does not depend on immigration judges making their own diagnostic assessment based on their courtroom observations. Mr. Acevedo-Granados's diagnosis was a specific medical condition, for which the medical profession has established criteria delineated in DSM-5. Even though the immigration judge was not required to accede to the expert opinions, she was not entitled to disregard evidence in the record that documented diagnoses made by medical professionals. The court remanded the case for fact finding.

With regard to the social distinction analysis, the court noted that the immigration judge did not make the findings of fact necessary to determine whether Mr. Acevedo-Granados's proposed group met the social distinction requirement and that the BIA committed two additional legal errors in their social distinction analysis. First, the court clarified that a proper social distinction analysis focuses on whether the society in general recognizes persons sharing a particular characteristic to be a group sufficiently separate from the rest of the society and not whether one group is sufficiently distinguishable from other similarly persecuted groups. In this case, the proper analysis should have focused on whether individuals with intellectual disabilities face greater risk of persecution than the general population in El Salvador. Second, the court found that the BIA erred

in their reasoning that behavioral manifestations of mental illness do not satisfy the social distinction requirement. The court reasoned that discrimination on the basis of outward manifestations of mental illness sufficiently establishes that the group is perceived as distinct from the rest of the society. In Mr. Acevedo-Granados's case, the record established that people with mental illness in El Salvadoran society are targeted and subjected to abuse.

Considering whether the immigration judge and BIA insufficiently addressed the second proposed group, the court held that neither are free to ignore arguments raised by the parties. The court ruled that Mr. Acevedo-Granados's second group must be given proper consideration.

For Mr. Acevedo-Granados's application for protection under CAT, the court upheld the decisions of the immigration judge and BIA, holding that despite poor conditions in El Salvador, there was no evidence that medical workers or the police specifically intended to harm those with intellectual disability, a necessary requirement for CAT protection.

Discussion

The U.S. immigration court system has been criticized for significant problems that have compromised its capacity to deliver fair and impartial decisions. Immigration courts operate without the transparency and well-defined standards that apply to state and federal courts (Policy Brief: Why President Biden Needs to Make Immediate Changes to Rehabilitate the Immigration Courts. February 12, 2021. Available from <http://www.aila.org>. Accessed August 24, 2021). Counsel for detainees is not a guaranteed right, expert testimony is inconsistently considered by immigration judges, and strict evidentiary rules found in state and federal courts are not applicable in immigration courts. U.S. politicians and non-partisan observers have raised the alarm over the politicization of immigration courts over the past several years (Immigration Courts Aren't Real Courts. Time to Change That. New York Times, Opinion, May 8, 2021. Available from <https://www.nytimes.com>. Accessed August 24, 2021; AILA Document Number 21032434, Letter from Eight U.S. Senators to Attorney General Garland. Available from <http://aila.org>. Accessed on August 24, 2021.)

Of particular concern for psychiatrists is the lack of clear operative guidelines for immigration attorneys and judges as to the diagnosis of individuals with

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mental illness. Given that psychiatric illnesses are both stigmatized and poorly understood by those without expertise in mental health, immigrants with psychiatric illness are left doubly vulnerable when navigating the immigration court system. Establishing the presence of a mental illness or properly excluding it requires specialized knowledge as consequences can be far-reaching.

The basic function of the judge is to ensure that applications of the law are fair and consistent. In *Granados*, the Court of Appeals for the Ninth Circuit rejected immigration judges' subjective interpretation of mental illness. This decision represents a step in the direction of improving public confidence in the immigration court system.