rights, in this case the right to trial counsel, is "knowing and voluntary."

In the court's view, the issue was not, as Brooks posed it, whether distinct tests of competence could be imposed: (1) the familiar *Dusky v. United States*, 362 U.S. 402 (1960), test for competence to stand trial, versus (2) a different and higher test for competence to represent oneself at trial. Rather, the issue was that, whatever the defendant's level of competence (or thinking ability), the waiver of a constitutional right, such as counsel, at any such stage requires a threshold finding that it is "knowing and voluntary." This, in turn, depends on whether the defendant exhibits a requisite fund of knowledge as to what he is waiving, a different matter from thinking ability, and context specific. More knowledge is required for a "waiver of the right to the assistance of counsel *at trial*, the stage of a criminal prosecution most difficult for a layperson to navigate. . ." (380 F.3d at 1012, citation omitted; emphasis in original).

Pointing to Brooks' counterproductive antics in court, including "punch[ing his] lawyer in the face," (380 F.3d at 1011) the court found ample support that Brooks' knowledge base fell short of the constitutional threshold for a waiver. A defendant, after all, cannot have it both ways. Had the court allowed him to proceed *pro se*, Brooks' behavioral disorganization and truncated understanding of law and procedures would have supported an appeal of the inevitable conviction on the ground that he did not know the implications of proceeding without a lawyer. Heads, Brooks wins; tails, the state loses.

Alternatively, the court reasoned, as a matter of federalism, states are always free to adopt greater protections than the minimums mandated by the federal Constitution. As such, even if this were viewed as consisting of two distinct tests of competence (the *Dusky* test to stand trial, and a higher one to waive trial counsel), rather than an issue of "knowing" waiver, all Wisconsin did was to give Brooks greater protection as to a fair trial.

Discussion

A number of state courts, not as nimble as the Seventh Circuit, have followed *Godinez* more concretely, holding that "competent to stand trial" now means competent for all purposes and specifically for a waiver of trial counsel. No federal circuit court has done so yet. When one does, conflicting with this case and exposing the ambiguity of *Godinez*, a Supreme Court revisit to the issue seems likely.

This case highlights the perils of *dicta*. Under the precise ruling in *Godinez*, Brooks would have had no *habeas* argument. In *Godinez*, the defendant's waiver of counsel was accepted, and he elected to plead guilty, in both respects the opposite of this case. There was no need for Justice Thomas to issue a blanket statement purporting to cover all situations, including this procedurally opposite one, with a single procrustean competence test. (Justice Thomas would learn this lesson again in *Kansas v. Crane*, 534 U.S. 407 [2002], wherein the dissenters from *Kansas v. Hendricks*, 521 U.S. 346 [1997], were able to undercut *Hendricks* by pouncing on Justice Thomas's unnecessary flourish in *Hendricks* that sexually violent predators are totally undeterrable.) Often a well-intended overreach for rhetorical forcefulness and ready administrability sacrifices coherence and precedential stability.

Judge Posner wryly concluded his opinion:

> We may be wrong, but if so Brooks must still lose. . . . [A] state court's decision can be struck down only if it is contrary to "clearly established " federal law as declared by the Supreme Court. *Godinez* did not *clearly* establish. . .the rule for which Brooks contends. . . [380 F.3d at 1013, emphasis in original].

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Commitment Pursuant to Insanity Acquittal

"Clear and Convincing" Burden of Proof on an Insanity Acquittee at a Commitment Hearing Is Constitutional

In *United States v. Weed*, 389 F.3d 1060 (10th Cir. 2004), an insanity acquittee argued, first, that the federal statutory commitment scheme violates (1) due process by placing the burden of proof on the acquittee, where the underlying crime involves bodily injury or "serious damage to. . .property," to establish by "clear and convincing evidence" either

that he is no longer dangerous or no longer mentally ill; and (2) equal protection, in that the burden of proof for nonviolent insanity acquittees is lower, a "preponderance of the evidence." In addition, the acquittee contended that, whatever the burden of proof, his commitment constituted "clear error," since there was no evidence of ongoing mental illness. The Tenth Circuit rejected all three arguments.

Facts of the Case

On December 12, 2001, 27-year-old Jason Weed, with no record of mental illness, calmly walked out of his Tulsa apartment and, without provocation, shot and killed a postal worker as he delivered the mail. The police found Weed a few blocks away, disoriented and confused, not responding to police questions, and singing "Jingle Bells." Videotape of the post-arrest interrogation shows Weed alternating "between extreme laughter and anger," making "numerous unresponsive and irrational statements," and at times appearing "calm and coherent, and at others. . .erratic and his speech incomprehensible" (389 F.3d at 1063).

Charged with the murder of a federal employee, Weed entered what lawyers colloquially call a "slow plea" (essentially a protracted *Alford* plea). He stipulated that he had committed the killing and the prosecution stipulated to insanity, making the brief ensuing non-jury trial and judgment of not guilty by reason of insanity (NGRI) a formality.

Weed was committed to a secure federal facility for further psychological evaluation, with a commitment hearing scheduled within 40 days, as required by federal statute, 18 U.S.C. § 4243. The hearing was postponed for 9 months, however, until May 2003, 17 months after the crime, due to defense continuances. (Every defense lawyer knows that a commitment hearing 40 days after adjudication, and only eight months after the killing, will not come out well. Like wine, a case must, as lawyers say, be "aged.")

At the commitment hearing, a defense psychologist testified that Weed had been psychotic at the time of the killing in December 2001 but that the psychosis had fully resolved by the end of that month (apparently in response to one dose each of haloperidol and lorazepam) and had not recurred in the ensuing 17 months. He further testified that Weed met no current DSM-IV diagnosis. The psychologist did not know what may have caused Weed's "Brief Psychotic Disorder," but pointed out that, according to the DSM-IV, recurrences are "rare." On cross-examination, the psychologist conceded that a person who has been violently psychotic "is more likely to suffer another occurrence and presents a greater risk to the public than someone who has never had such a condition." He also acknowledged "that Weed may still have the mental defect" that caused the psychotic episode (389 F.3d at 1064).

A prosecution psychiatrist testified that, at the time of the killing, Weed was experiencing a brief psychotic disorder "with prominent manic features." As etiologies, the psychiatrist ruled out Weed's past steroid use and his "participation in an exhaustive self-awareness program the week prior to the shooting." He speculated that Weed may have suffered "a complex partial seizure. . .[h]owever, he could not with reasonable medical certainty say that this was the cause." If Weed had a seizure disorder, the psychiatrist noted, he would be "more vulnerable than the average person to having another seizure." Finally, the prosecution psychiatrist agreed with the defense psychologist that Weed was currently asymptomatic, but added: "[T]hat should not be interpreted that I'm guaranteeing that he will never again have symptoms because I cannot say that with confidence" (389 F.3d at 1065).

In addition, the court considered, as required by statute, the "Certificate of Mental Disease or Defect and Dangerousness," compiled by Weed's treaters, signed by the warden and submitted on behalf of the Bureau of Prisons. The Bureau's position was congruent with the agnostic posture of the prosecution and defense experts:

> Mr. Weed is not viewed as presenting an increased risk of dangerous behavior in his current mental status. However, he is viewed as presenting a high risk of dangerousness if he relapsed into another psychotic episode. . . . The risk of any such future recurrence of a psychotic episode is unknown. Mr. Weed may not have any further such episodes in his life or he may have these episodes at some unpredictable intervals in the future [389 F.3d at 1065].

On the basis of this equivocal evidence, the trial court found that Weed had failed to establish by "clear and convincing evidence" that he currently was either not mentally ill or not dangerous. He was committed for further treatment, subject to 18-month reviews, as per 18 U.S.C. § 4247(g).

Ruling and Reasoning

The U.S. Court of Appeals for the 10th Circuit affirmed, rejecting Weed's constitutional and weight-of-the-evidence arguments.

In evaluating Weed's claim that placing a "clear and convincing" burden of proof on an insanity acquittee to establish his eligibility for release violates due process, the court invoked the familiar three-prong test of *Mathews v. Eldridge*, 424 U.S. 319 (1976), which mandates the "consideration of three distinct factors":

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail [424 U.S. at 335].

As to the first *Mathews* "consideration," Weed's "private interest," the court recognized that psychiatric commitment entails "a significant deprivation of liberty" and stigma but found three factors as a "counterbalance to these negative effects on Weed's private liberty interest." First, "Weed himself advanced his mental condition"; second, "Weed is stigmatized by the [insanity] verdict" itself, so commitment adds little extra stigma; and "[t]hird. . .Weed will receive psychiatric treatment," which will "increase. . .Weed's opportunity to overcome his present mental condition, thereby increasing the probability that the confinement will be ended" (389 F.3d at 1068).

The second *Mathews* "consideration," the risk of an erroneous deprivation of Weed's liberty interest, was, in the court's view, "counterbalanced by the obvious point that the very nature of an insanity acquittal lessens the likelihood of an erroneous commitment since the defendant himself advances insanity as a defense, compared with the involuntary civil confinement process" (389 F.3d at 1068). The court added that statutory release hearings every 18 months plus the opportunity for *habeas corpus* challenge "mitigate. . .the risk of error. . ." (389 F.3d at 1069).

On the final *Mathews* "consideration," the weight of the government's interest, it was very easy for the court to conclude, perhaps with understatement, that "[t]he government clearly has a strong interest in protecting society from persons who pose a danger to others because of a mental disease" (389 F.3d at 1069).

Turning from due process to equal protection, the court brushed aside Weed's complaint of the higher burden of proof for violent insanity acquittees as essentially frivolous. It is settled that insanity acquittees are not members of a "suspect class" nor does the burden of proof constitute a "fundamental right." Therefore, a "rational basis" rather than a "strict scrutiny" review applies, and clearly there is at least some rational basis for distinguishing violent from nonviolent insanity acquittees as to a court's required level of confidence that the individual is safe to release.

In the most interesting part of its opinion, the court had to wrestle with Weed's argument that no evidence had been adduced to establish, as required by statute, that at the time of the commitment hearing he remained dangerous "due to a *present* mental disease or defect" (18 U.S.C. § 4243(d); emphasis added). Faced with the unanimity of both experts and the Bureau of Prisons' report that Weed had no "present" DSM-IV disorder, the court first declared that the psychiatric mental illness and legal mental illness are distinct entities: "courts have generally expressed reluctance in applying medical criteria to legal concepts" (389 F.3d at 1072).

Still, there had to be some evidence of "present" legal mental illness. Citing the psychologist's speculation that Weed "may still have the [unknown] mental defect" and the psychiatrist's conjecture without evidence that "Weed's psychotic episode may have developed from a rare brain seizure" (389 F.3d at 1073), the court, remarkably, reified this hypothetical "evidence":

> . . .[T]he testifying doctors agree that Weed may still suffer from a condition not triggered since the time of the crime. The experts also agree that, if triggered, the condition may cause Weed to present a substantial danger to others. On this record, the district court did not err in concluding that such a condition constitutes a mental defect within the meaning of the statute [389 F.3d at 1073].

Discussion

One suspects the reality of the case is that a 27-year-old killer of an innocent federal employee was simply not, at 29 years old, going to walk free from federal custody. The case needed further aging.

Narrowly, but significantly, *Weed* embodies the conundrum faced recurrently in the trenches by the forensic clinicians (and more attenuatedly by courts):

what to do with the "insane" who are not mentally ill. Obviously, such patients are more abundant in jurisdictions where insanity acquittals more routinely result from plea agreements rather than trials, so that some of the insane were not even insane at the time of the crime. Jason Weed is not the only insanity acquittee nationwide being "treated" for a "condition" no one can identify. In 18 months, his treaters will have to return to court and opine on whether the "treatment" is "working."

More broadly, this case spotlights, once again, the uneasy meshing of law and psychiatry. By operation of the statutory standard for commitment ("present mental illness"), the forensic experts, assuming they were correct in excluding malingering, had little to contribute to this case: Weed may have a mental illness but we do not know what, and he may be dangerous in the future but we do not know how or when. At the same time, confined by their forensic role, the experts made no mention, so far as the court's opinion suggests, of what, in a clinical consultation, would be at or near the top of the suspected etiologies. This, if not malingered, was a sudden manic-psychotic episode in a 27-year-old male with no psychiatric prodrome, which promptly remitted, with no further symptoms for 17 solid months afterward.

Surely, this could be Bipolar Disorder, unmasked by the stress and possible sleep deprivation of Weed's "participation in an exhaustive self-awareness program the week prior to the shooting. . . ." Alternatively, it seems at least plausible that "Weed's previous steroid use," was not all that "previous" (389 F.3d at 1064).

Courtroom rules and custom spurn clinical intuition based on experience, in favor of concretely defensible "reasonable medical certainty." Moreover, medicine (and especially psychiatry) answers questions as the answers come, whereas the law commands an answer from psychiatrists within 40 days and thereafter every 18 months.

Leaving the court in the dark about these plausible clinical scenarios—Bipolar Disorder or ongoing steroid dabbling—could well lead to inadequate probation terms when, after a decent interval, Weed is inevitably released, possibly without provision for the potentially helpful elements of mood-stabilizing medication and prohibition of steroid possession or use.

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Psychotherapist-Patient Privilege

Licensing Board Investigating Social Worker's Alleged Misconduct May Inspect Treatment Records

In *Jane Doe et al. v. Maryland Board of Social Work Examiners*, 862 A.2d 996 (Md. 2004), the Maryland Court of Appeals weighed the authority of a professional licensing board against statutory privilege and confidentiality protections and the federal constitutional right of privacy afforded the clients of a clinician under investigation. The court's resolution is murky, owing to an unelucidated factual disagreement between the majority and the dissent.

Facts of the Case

The Maryland Board of Social Work Examiners (Board) received a credible complaint that Ms. F., a licensed social worker, had unlawfully failed to report her client John Doe's admissions during therapy of child abuse. The Board issued a subpoena *duces tecum* to Ms. F. for her treatment records, pursuant to its statutory investigative authority.

Here, the five-judge majority and the two-judge dissent part company as to the facts. The majority opinion clearly states that the subpoena sought the charts only of John Doe and his wife Jane Doe, also a client of Ms. F. The dissent flatly disagrees, reading the subpoena as calling for the charts of all of Ms. F.'s clients. (Curiously, neither side simply quotes the subpoena itself, which presumably would settle the issue.)

Ms. F., joined by John and Jane Doe, moved in the Baltimore city circuit court to quash the subpoena, which was denied, and they appealed. In the meantime, Ms. F. settled the Board's complaint, admitting that she "knowingly failed to report suspected child abuse" and related transgressions (862 A.2d at 1012), and accepting a license suspension of one year. This did not moot the issue of her records,