

of the PET scan as it pertained to a diagnosis of pseudocyesis was arguably admissible when this lower standard was used. However, it concluded that any error resulting from its exclusion was ultimately harmless. Furthermore, because the MRI evidence was both methodologically unreliable and, in this case, “had no scientifically recognized significance,” the district court acted within its authority when it concluded that “the results were irrelevant to Montgomery’s insanity defense and the mitigating factors she pleaded” (*Montgomery*, p 1093).

Discussion

In this case, the Eighth Circuit addressed the evidentiary rules regarding the admissibility of brain imaging and scientific testimony during the guilt and penalty phases of a capital trial. The court noted that during the guilt phase, Federal Rule of Evidence 702, informed by *Daubert*, governs the admission of scientific testimony. The earlier “general acceptance test,” originally established in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), held that scientific evidence is admissible at trial so long as it is “sufficiently established to have gained general acceptance in the particular field in which it belongs” (*Frye*, p 1014). The stricter *Daubert* standard requires that the district court act as gatekeeper and “ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable” (*Daubert*, p 589). The decision in *Daubert* stressed that the inquiry “must be solely on principles and methodology, not on the conclusions that they generate” (*Daubert*, p 595). In the present case, the court of appeals went on to explain that the threshold governing admissibility of scientific expert testimony was lower during the sentencing phase of a capital trial.

In *Daubert*, the court outlined five guidelines to assist judges in determining scientific validity. It noted that judges should consider whether the methodology is falsifiable, subject to publication and peer review, based on a technique with a known or potential error rate, standardized, and generally accepted within the scientific community.

Although the court in *Daubert* assigned the status of gatekeeper to district judges, best practice requires that forensic psychiatrists do the same. Ideally, the scientific community should hold the evidence and testimony it puts forward to standards as high or higher than those of judges. Whether it is neuroimaging as it pertains to psychiatric diagnoses or any

other scientific assertion, it is paramount that the methodology on which the expert’s assertions are based be relevant, reliable, and grounded in science. Holding experts to such high standards is vital to engendering the trust of both the public and the legal system as to the value of their testimony. It is imperative that testimony by forensic psychiatrists carry more weight than “subjective belief or unsupported speculation” (*Montgomery*, p 1090 (citing *Tamraz*, p 670)).

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Burden of Proof in a Retrospective Competency to Stand Trial Hearing

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Requiring Defendants to Bear the Burden of Proof in Retrospective Competency Hearings Does Not Violate Due Process Guarantees

In the case of *People v. Ary*, 246 P.3d 322 (Cal. 2011), during a retrospective competency hearing, a California trial court ruled that Mr. Ary did not carry his evidentiary burden of proving he was incompetent to stand trial when he was tried. The First Appellate District Court of Appeal vacated this decision and held that the trial court violated Mr. Ary’s due process rights by assigning him the burden of proving he was incompetent when tried. The California Supreme Court reversed the court of appeal’s judgment.

Facts of the Case

James Ary, Jr, was charged with capital murder for the 1997 killing of Ronnie Ortega in Contra Costa County. Mr. Ary was advised of and waived his constitutional rights under *Miranda v. Arizona*, 384 U.S. 436 (1966) and confessed to shooting Mr. Ortega. During pretrial motions, Mr. Ary moved to suppress his confession, arguing that his *Miranda*

waiver was made unknowingly and involuntarily. Moreover, he argued that his statements to the police were coerced. In support of his arguments, he presented psychiatric testimony that he had mild mental retardation. The trial court ruled that his *Miranda* waiver was valid. However, it ruled that his confession was made under police coercion, and his confession was suppressed.

In September 2000, a jury convicted Mr. Ary of first-degree murder and three other felonies, including carjacking, robbery, and being a felon in possession of a firearm. He was found eligible for the death penalty due to special-circumstance allegations, as he was lying in wait for the victim. The jury was unable to decide on a penalty. The trial court sentenced him to life imprisonment for the murder and 16 years for the other felonies, to be served consecutively.

Mr. Ary appealed the trial court's decision on various grounds. A panel from the court of appeal remanded the case on one issue, that his due process rights were violated because of the trial court's failure to conduct a pretrial inquiry into his competence to stand trial. The court of appeal described this error as prejudicial, but did not reverse the trial court's decision. The case was remanded to determine whether a retrospective competency hearing would be feasible. The feasibility would depend on whether there was sufficient evidence to render a reasonable psychiatric opinion as to his mental condition at the time of the trial. He requested that the court of appeal impose a beyond a reasonable doubt standard of proof on the prosecution to show the feasibility of holding such a hearing. This request was rejected on the grounds that this standard was not relevant, as the question of competency to stand trial was a "threshold matter." The court of appeal stated if Mr. Ary was found competent to stand trial in a retrospective hearing, the court would rule on the other points raised in his appeal. If he was found to be incompetent, the trial court's judgment would be reversed.

The trial court found that sufficient evidence was available to hold a retrospective competency hearing regarding Mr. Ary's mental state when he was tried. It placed the burden of proof on him over defense objections. After considering the testimony of witnesses, the trial court ruled that he had failed to prove, by a preponderance of the evidence, that he was incompetent at the time of his trial. He filed an appeal challenging this ruling, asserting that his due process rights were violated when he was asked to

bear the burden of proof. The court of appeal, in a two-to-one decision, concluded that, in a retrospective competency hearing, federal due process principles require that the prosecution bear the burden of proof. The Attorney General for the State of California petitioned the California Supreme Court for review.

Ruling and Reasoning

The California Supreme Court reversed the court of appeal's judgment. The state supreme court held that requiring a criminal defendant to bear the burden of proof that he was not competent at a retrospective competency hearing "does not offend some principle of justice so rooted in the traditions of our people to be ranked as fundamental" (*Ary*, p 329). In its reasoning, the California Supreme Court reviewed the legal history of the concepts of competency to stand trial, citing the Due Process Clause of the Constitution's Fourteenth Amendment, which prohibits trying a criminal defendant who is mentally incompetent. The court noted that when a trial court is presented with evidence that raises a reasonable doubt as to a defendant's competence, federal due process principles require that the trial be suspended and the court hold a hearing to determine a defendant's competency to stand trial.

Cal. Penal Code § 1368(a) (2011) has provisions that address these requirements. The trial court is required to suspend criminal proceedings, before judgment, if the court has reasonable doubts of an individual's competency to stand trial. The statute also provides for the allocation of burden of proof. All defendants are presumed to be mentally competent unless it is proved by a preponderance of evidence that the defendant is incompetent to stand trial. It is the defendant who bears this burden of proof.

This issue was previously challenged in *People v. Medina*, 799 P.2d 1282 (Cal. 1990), in which the California Supreme Court rejected the assertion that the presumption of a defendant's competency violates the Due Process Clause. This decision was upheld by the United States Supreme Court (*Medina v. California*, 505 U.S. 437 (1992)). In the current case, the California Supreme Court held that the question at hand was whether this ruling also applies to post-judgment proceedings. The state supreme court examined the court of appeal's majority opinion. The majority held that in a postjudgment proceeding,

assigning a defendant the burden of proof was inconsistent with principles of fundamental fairness, as a defendant would be unable to sustain the burden of proof in such circumstances. Thus, the court of appeal determined that in a retrospective competency hearing, it is the prosecution that bears the burden of proving a defendant is competent to stand trial.

The minority opinion of the court of appeal reasoned that the Supreme Court's decision in *Medina v. California* gave the states leave to decide who should be allocated the burden of proof in any stage of court proceedings. The California Supreme Court agreed with this opinion, citing support from case law. In the case of *Moran v. Godinez*, 57 F.3d 690 (9th Cir. 1994), the Ninth Circuit held that the rationale in *Medina v. California* that allocated the burden of proof to a defendant in contemporaneous proceedings was applicable to postjudgment competency hearings as long as there were adequate procedures to assess competency. The California Supreme Court found that most courts that have ruled on this question have agreed that *Medina v. California* applies to postconviction competency hearings. The state supreme court cited *Rhode v. Olk-Long*, 84 F.3d 284, 288 (8th Cir. 1996); *Tate v. State*, 896 P.2d 1182 (Okla. Crim. App. 1995), and *Traylor v. State*, 627 S.E.2d 594 (Ga. 2006).

The California Supreme Court agreed with the prevailing view that if the reviewing court concludes that a trial court has violated a defendant's due process rights by failing to hold a hearing to assess mental competency, the case may be remanded to assess the feasibility of a retrospective determination of trial competency. If a retrospective determination is deemed feasible, then requiring a defendant to bear the burden of proof does not violate due process.

Discussion

In *People v. Ary*, the California Supreme Court showed consistency with previous case law that addressed whether assigning the burden of proof in a

retrospective hearing to the defendant violates the defendant's due process rights. Implications for the forensic expert pertain to the feasibility of such evaluations. Forensic psychiatrists may be asked to aid in assessing the feasibility of retrospective determinations as well as to perform the evaluation. In *People v. Robinson*, 60 Cal. Rptr. 3d 102 (Cal. Ct. App. 2007), the court of appeal set out relevant factors in determining the feasibility of a postjudgment hearing on competence at the time of the trial. These factors include: the time elapsed since the original trial proceedings, the availability of contemporaneous medical evidence, statements made by the defendant in trial records, as well as the availability of individuals and trial witnesses who were in a position to interact with defendant before and during the trial phase.

Evaluation of the defendant's competency to stand trial is traditionally an examination of the present mental state, as well as the defendant's ability to understand the nature of the proceedings and to assist counsel. Although record review, information from collateral sources, and (in certain circumstances) psychometric testing, are important components of a competency evaluation, expert opinion often depends on the in-person assessment of a defendant's current state. In contrast, a retrospective competency evaluation may rely on information other than a forensic interview. Unfortunately, collateral sources of information (e.g., medical and legal records) may be unavailable or lacking in information pertinent to competency assessment. Further, potential witnesses may become unavailable as time passes. If witnesses are available, the information they provide may be subject to recall bias. Forensic experts should be cognizant of these potential limitations when formulating opinions regarding the feasibility of retrospective competency hearings as well as when performing such an evaluation.

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