

facilitate understanding of and communication about the student's needs and guide the formulation of appropriate interventions. Psychiatrists can also help schools interpret assessment data and evaluate the student's response (or lack thereof) to special education services. In addition, psychiatrists can contribute a strong voice in advocating for the needs of their patients to be addressed by appropriate interventions.

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Trial Strategy and the Presentation of Mental Health, Sexual Abuse, and Intoxication Evidence in a Death Penalty Case

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Counsel's Decision Not to Present Intoxication and Mental Health Defenses Was Reasonable Trial Strategy, but Failure to Present Evidence of Sexual Abuse Prejudiced the Defendant

George Herbert Wharton, who had been sentenced to death for first-degree murder in California, appealed the federal district court's denial of *habeas* relief to the United States Court of Appeals for the Ninth Circuit. In *Wharton v. Chappell*, 765 F.3d 953 (9th Cir. 2014), several questions were before the court. Among these were whether defense counsel's decision not to present intoxication and mental-health defenses during the guilty phase was a reasonable trial strategy; whether counsel was ineffective in failing to investigate and present mental health evidence as part of the mitigation case at the penalty phase; and whether counsel's deficiency in failing to present evidence of previous sexual abuse had prejudiced Mr. Wharton.

Facts of the Case

On February 27, 1986, police discovered the body of Linda Smith stuffed inside a barrel located in the kitchen of her home. An autopsy revealed that she had been struck on the head with a blunt instrument, probably a hammer. Her live-in boyfriend, George Herbert Wharton, was arrested shortly after the discovery of the body and charged with her murder. Mr. Wharton admitted to killing Ms. Smith after they had been drinking heavily and had argued. Because of the overwhelming evidence of guilt, acquittal on all charges was considered unlikely. Instead, Mr. Wharton's defense counsel sought to convince the jury that Mr. Wharton was guilty of only second-degree murder or manslaughter as a result of provocation. The jury was unconvinced and convicted him of first-degree murder during the guilt phase of the trial. The same jury returned a verdict of death during the death penalty phase on the third day of deliberations, which the trial judge imposed.

The jury was unaware of Mr. Wharton's earlier convictions of second-degree murder and rape (both of which had occurred in 1975) during the guilt phase. The prosecution introduced this evidence during the penalty phase, when the defense presented mitigating evidence concerning Mr. Wharton's appalling childhood upbringing, which included physical abuse by his step-grandfather. Mr. Wharton's psychotherapist, Dr. Judith Hamilton testified that her diagnosis of Mr. Wharton was atypical impulse control disorder and multiple forms of substance abuse. Dr. Donald Patterson, a psychiatrist retained by the defense, testified that Mr. Wharton had a personality disorder, a substance abuse disorder, and possibly paranoid schizophrenia. Dr. Patterson testified that Mr. Wharton acted under extreme mental or emotional disturbance at the time of the offense. Mitigating evidence of extensive childhood sexual abuse (which was later revealed by Mr. Wharton's half-brother) was not presented during the penalty phase.

The conviction and sentence were affirmed by the California Supreme Court in *People v. Wharton*, 809 P.2d 290 (Cal. 1991). His application to the United States Supreme Court for a writ of *certiorari* was denied in *Wharton v. California*, 502 U.S. 1038 (1992). Following this, Mr. Wharton applied for federal *habeas* relief. The United States District Court for the Central District of California denied his petition.

Mr. Wharton appealed the district court's denial of *habeas* relief to the United States Court of Appeals for the Ninth Circuit. Among his several claims on appeal were that counsel was ineffective by choosing not to present evidence of intoxication and mental illness at the guilt phase, that counsel was ineffective in presenting mental health evidence at the penalty phase, and that counsel was ineffective in investigating Mr. Wharton's purported history of extensive sexual abuse in childhood.

Ruling and Reasoning

The Ninth Circuit affirmed the ruling of the district court denying relief for the claim that counsel was ineffective in the failure to present mental health and intoxication evidence at the guilt phase. The Ninth Circuit ruled that defense counsel's decision not to present such evidence at the guilt phase was an "eminently reasonable" trial strategy. The court agreed with the district court's ruling that there was "no value in pursuing an intoxication defense" and that "pursuing the defense likely would have opened the door to evidence of Petitioner's past crimes" of murder and rape (*Wharton*, p. 968). The Ninth Circuit noted that it is well established under California law that a mental health expert may be cross-examined about a patient's prior criminal history.

The Ninth Circuit also affirmed the ruling of the district court that counsel was not ineffective in failing to investigate and present mental health evidence as a strategy for mitigation at the penalty phase. In capital cases, it is well recognized that trial counsel must investigate a defendant's "social background, including investigation of any family abuse, mental impairment, physical health history, and substance abuse history" (*Correll v. Ryan*, 539 F.3d 938 (9th Cir. 2008), p. 943). The Ninth Circuit noted that defense counsel introduced expert testimony from Drs. Patterson and Hamilton at trial. Mr. Wharton presented to the district court *habeas* testimony by a different psychiatrist, Dr. Richard Dudley, Jr. Mr. Wharton claimed relief on the assertion that testimony by Dr. Dudley would have been much better than Dr. Patterson's. The court agreed with the district court's analysis that Mr. Wharton's proposed expert testimony from Dr. Dudley "is only better than that which was actually presented and not significantly different in kind" (*Wharton*, p. 973).

The Ninth Circuit vacated the district court's denial of relief on the claim of counsel's deficiency in

presenting evidence regarding Mr. Wharton's history of childhood sexual abuse. Mr. Wharton contended that his half-brother (Gerald Crawford) would have provided testimony about sexual abuse of Mr. Wharton by his father and step-grandfather. Mr. Crawford testified to the district court that sexual abuse at the hands of Mr. Wharton's father and step-grandfather was extensive in the household. The jury did not hear at the penalty phase that Mr. Wharton had been raped by both his father and step-grandfather. He argues that counsel failed to investigate and present this testimony.

The Ninth Circuit noted that childhood sexual abuse can be powerful evidence in mitigation and that sexual abuse was related to the crimes before the trial jury. The court noted that the jury deliberated on issuing the death penalty for three days and that this decision was not reached easily. The court held that had this testimony been offered to the jury, there was "a reasonable probability that the jury may not have rendered a verdict of death" (*Wharton*, p. 978). Defense counsel had hired an investigator to examine Mr. Wharton's background, but for unclear reasons, had not obtained this information about sexual abuse from Mr. Crawford. The court could not definitively say whether this was a result of deficient performance of defense counsel, and it therefore vacated the district court's ruling and remanded it for further proceedings.

Discussion

Previously established rulings that all mitigating evidence must be presenting at the penalty phase for capital cases holds true in this case. As noted in *Caro v. Calderon*, 165 F.3d 1223 (9th Cir. 1998), "It is imperative that all relevant mitigating information be unearthed for consideration at the capital sentencing phase" (p 1227). An attorney's decision to withhold pertinent evidence concerning substance abuse and mental illness must be balanced against the possible repercussions of having a defendant's prior criminal history revealed to a jury. Of course, this is affected by multiple factors, including the seriousness of these prior crimes, the relevance of the mental health evidence to the present offense, and the attitude of the jury. As always, the practicing psychiatrist should be aware that case law opens up cross-examination to disclosure of prior criminal acts.

Psychiatrists often encounter details of past alleged sexual abuse when evaluating clients. Although the

veracity of these claims may vary substantially and our ability to investigate such claims is limited, it is important nonetheless to communicate this information to attorneys. As psychiatrists, we may also obtain reports of other potentially mitigating evidence during examinations of criminal defendants (e.g., physical abuse and deprivation). As with reports of sexual abuse, the psychiatrist must communicate this information to the retaining attorney. The net that must be cast when investigating mitigating factors in capital cases is very wide. However, psychiatrists must also be cognizant that the attorney has to take other considerations about trial strategy into account when determining whether to present the mitigating evidence that he unearths. This need for attorneys to balance competing factors when determining trial strategy will continue to allow for appeals regarding the presentation of mitigating evidence in ongoing and future capital cases.

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Conditional Release Revocation of Federal Insanity Acquittee

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Insanity Acquittee's Eviction From Assigned Group Home Is Sufficient Justification for Revocation of His Conditional Release

In *United States v. Washington*, 764 F.3d 491 (5th Cir. 2014), the United States Court of Appeals for the Fifth Circuit considered whether the United States District Court for the Western District of Texas ruled in error in revoking an insanity acquittee's conditional release on the grounds that he was evicted from a group home, thereby violating his prescribed treatment regimen. The court rejected the defendant's claim that the required residence at Guidance House was not a component of his physician-prescribed treatment regimen and agreed with the district court's finding that the

defendant's continued release posed a substantial risk to the public.

Facts of the Case

In January 2008, Marvin Goodlow Washington was arrested and charged with bank robbery by force and violence after entering a bank in Waco, Texas, where he threatened a teller with the statement "Don't make me stab you." He left the bank with \$2,711 in cash. After being apprehended by law enforcement, Mr. Washington was later examined by doctors who reported that the rationale for the robbery was based on a delusion that he was married (when in fact he was not), and that he had to carry out the crime to attract media attention so that his missing wife could be found.

After arraignment, Mr. Washington's defense counsel motioned for a competency evaluation, after which Mr. Washington was found incompetent to proceed to trial. He was then transferred to the Federal Medical Center in Butner, North Carolina (FMC-Butner) where he resided for several months. At FMC-Butner, he refused treatment with psychotropic medications, but his refusal was overridden by a court-issued forced medication order. In June 2009, the FMC-Butner staff concluded that he was competent to proceed to trial.

After a bench trial in October 2009, he was found not guilty by reason of insanity and was remanded to a mental health facility for evaluation and treatment. In 2012, the Bureau of Prisons certified that he had recovered from his mental disease or defect and was eligible for conditional release. The decision was eventually approved after a hearing by the district court, which ruled that by clear and convincing evidence Mr. Washington "would not pose a substantial risk of bodily injury to another person or serious damage to property of another" (*Washington*, p. 493).

The court set conditional release parameters (under 18 U.S. Code § 4243), which included his remaining under the supervision of the probation office, participating in routine mental health services, remaining adherent to his prescribed medication regimen, and maintaining residence at Guidance House, a group home located in Burlington, North Carolina. According to the release agreement, Mr. Washington would not be able to relocate from Guidance House without the court's approval. In July 2013, 15 months into his condi-