

lifelong prohibition. The ruling stressed that “Congress cannot condition individual constitutionally protected rights on states’ participation” (*Tyler*, p 343). The court opined that “the government’s interest in keeping firearms out of the hands of the mentally ill is not sufficiently related to depriving the mentally healthy, who had a distant episode of commitment, of their constitutional rights” (*Tyler*, p 344). It held that Mr. Tyler’s complaint, as alleged, stated a violation of the Second Amendment and it reversed and remanded for further proceedings, consistent with the opinion.

Discussion

In this case, the court ruled that laws imposing controls on the right to keep and bear arms must fulfill the most thorough constitutional test balanced in favor of upholding fundamental rights, and in this circuit, such a test must be judged by a strict-scrutiny analysis. The court’s opinion comprehensively narrated what has been occurring in the courts since the Supreme Court’s decision in *Heller* in 2008. The Sixth Circuit did not rule that Mr. Tyler must have his Second Amendment right restored immediately, but it provided him the opportunity to prove that he had regained mental stability and no longer posed a risk to himself or others because of mental illness.

Although not precedential for all jurisdictions, the case marks another ruling on the jurisprudence of gun rights. Contrary to popular belief and the media’s promulgation after tragic events, most incidents of gun violence are not caused by mental illness (American Psychiatric Association Position Statement on Firearm Access, Acts of Violence and the Relationship to Mental Illness and Mental Health Services, 2014). The matter of the relation of firearms laws and mental illness has nonetheless become blurry. Without careful consideration, restoring Second Amendment rights across the nation to a class of individuals who are already stigmatized could easily be overlooked in the complex and political landscape related to access to firearms. Regardless of one’s views on firearms, the critical importance of having an equitable and just system in which rights are applied fairly to all individuals cannot be overlooked.

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Due Process Rights: Considerations for Child Witness Testimony

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Defendant’s Due Process Rights Were Not Violated in Child Witness Credibility Considerations

In *Moreland v. Bradshaw*, 699 F.3d 908 (6th Cir. 2012), the petitioner, Samuel Moreland, sought a writ of *habeas corpus* after the state’s affirmance of his conviction and death penalty sentence for the murder of five individuals (*State v. Moreland*, 552 N.E.2d 894 (Ohio 1990)). The Sixth Circuit of the United States Court of Appeals upheld the decision of the lower court and denied Mr. Moreland’s petition, holding that neither the lack of an evidentiary hearing on the child victim’s competence nor the exclusion of expert witness testimony about child suggestibility regarding the child witness violated due process.

Facts of the Case

In November of 1985, Mr. Moreland argued with his girlfriend, Glenna Green over her refusal to give him money to purchase alcohol. He left and came back twice over the course of the evening. When he returned the second time, he had a rifle and proceeded to shoot Ms. Green twice in the head, killing her. He then reportedly shot other members of her extended family, including 11-year-old Dayron, who survived and was the only eyewitness to testify at trial. Mr. Moreland was tried by a three-judge panel that found him guilty of five counts of aggravated murder and sentenced him to death. He appealed to the Ohio Court of Appeals, which affirmed the trial court’s decision.

After initial appeals were denied, Mr. Moreland filed a petition for a writ of *habeas corpus* pursuant to 28 U.S.C. § 2254 (2006) raising nine claims. Five of the claims were certified for appeal, including two particularly relevant to forensic practitioners: that

the trial court failed to conduct an adequate evidentiary hearing into the competence of Dayron and the admissibility of his testimony and that the trial court wrongly excluded expert testimony about Dayron's susceptibility to suggestion.

Regarding the first claim, Mr. Moreland argued that Dayron's testimony was inconsistent and unreliable. He noted that Dayron, initially identified his mother's ex-boyfriend, and not Mr. Moreland, as the killer. Dayron later changed his statement and at trial identified Mr. Moreland as the attacker. Mr. Moreland attempted to equate the facts in his case with those found in *McKenzie v. Smith*, 326 F.3d 721 (6th Cir. 2003), where the eyewitness was a three-year-old child deemed incompetent to testify. Mr. Moreland argued that his due process rights were violated by the trial court's failure to conduct a competency hearing to determine Dayron's competency to testify as an eyewitness. The Ohio Supreme Court denied his appeal, determining that his due process rights were not violated.

Mr. Moreland's second point of contention was that his due process rights were violated by the exclusion of the testimony of Dr. Michael Williams, a child psychologist, concerning Dayron's susceptibility to suggestion. Dr. Williams was allowed to testify about his diagnosis that Dayron was a "parentified" child, but he was not allowed to testify to his opinion that Dayron was likely reporting events of the crime from his mother's perspective (based on suggestive statements she and other family members allegedly made to him following the crime). The Ohio Supreme Court also denied the appeal; however, they did not comment on whether the exclusion violated Mr. Moreland's due process rights.

Ruling and Reasoning

With regard to the credibility of Dayron's testimony, the court of appeals noted that the Ohio Supreme Court ruled that the trial court's decision to hold an interview with Dayron in the judges' chambers was sufficient to determine his competence to testify as a witness. This interview was conducted by the judges in the presence of all attorneys and Mr. Moreland, where they asked him relevant competency-related questions (e.g., could he tell the difference between the truth and a lie). They pointed out that the Ohio Rules of Evidence 601 (1981) state that persons are considered to be competent witnesses, except "those of unsound mind and children under ten years of age, who appear incapable of

receiving just impressions of the facts . . . or are not relating them truly" (*Moreland*, p 922). The court stated that although the Confrontation Clause guarantees a defendant the right to confront an accuser or witness against him (Sixth Amendment, U.S. Constitution) and the right includes that the witness be competent to testify, the right does not necessarily guarantee the defendant a competency hearing of a potential witness.

Mr. Moreland did not identify any Supreme Court precedent governing how a state competency hearing is to be conducted, and, indeed, the Supreme Court has not set forth a definition of witness competence required by the Due Process Clause, nor has the Court established a specific age below which a competence hearing would be required. The Supreme Court allows the requirements for competency determinations to be made at the state level. Further, the court reported that states that do require competency hearings of witnesses typically ask questions similar to those asked of Dayron in the judge's chambers. The court also noted that although Mr. Moreland's attorney was unable to question Dayron during the interview in chambers, the attorney had the opportunity to cross-examine Dayron at trial.

The court determined that Mr. Moreland's comparison of his case to *McKenzie v. Smith* was unwarranted because, in his case, the minor was an 11-year-old and was determined to be competent, per state law. The court also ruled that credibility determination is beyond the scope of a *habeas* review. In sum, Mr. Moreland failed to show that the lack of a competency hearing for Dayron's testimony violated his due process rights.

Regarding Mr. Moreland's claim that not allowing some of the testimony of Dr. Williams violated his due process rights, the court noted that the Ohio Supreme Court ruled that the decision by the trial court was not in error, based on *Ohio v. Boston*, 545 N.E.2d 1220 (1989), which stated that an expert may not testify about his opinion regarding the truth or accuracy of statements made by a child declarant. As such, Dr. Williams was not allowed to enter his opinion about the accuracy of Dayron's identification of Mr. Moreland. The court determined that Mr. Moreland had not adequately established due process violations, adding that his claim is essentially a matter of state law and not in the jurisdiction of a federal *habeas* review. The court stated that "a *habeas* petitioner does not have a constitutional right to the

presentation of expert testimony on the reliability of eyewitness identification (*Moreland*, pp 923–4). Further, the court noted that Dr. Williams was allowed to testify as to why Dayron’s version of events was problematic (e.g., the explanation that Dayron was a “parentified” child); he was only precluded from providing his opinion as to whether Dayron’s statements were “more likely the product of influence from his mother, detectives, prosecutors and social workers” (*Moreland*, p 924).

Discussion

The arguments set forth concern the impact of suggestibility on children’s credibility as witnesses in court. Child suggestibility refers to the likelihood that a child, because of a variety of biological and environmental factors, will be persuaded to believe that information provided to him is true, when it is not (Malloy LC, Quas JA: Children’s suggestibility: areas of consensus and controversy, in *The Evaluation of Child Sexual Abuse Allegations* . . . Edited by Kuehnle K, Connell M. Hoboken, N J: John Wiley & Sons, Inc, 2009, pp 267–97). Researchers have investigated this question extensively, and *amicus* briefs have been written on the subject (e.g., Bruck M, Ceci SJ: Amicus brief for the case of State of New Jersey v. Michaels . . . presented by committee of concerned social scientists. *Psychol Pub Pol’y & L* 1:272–322, 1995). Children are consistently found to be more suggestible to outside influences than are adults. Factors, including the use of suggestive questioning, the misuse of expert testimony, and allowing children to testify outside of the courtroom, thus not facing the accuser, all negatively affect the perception of children’s credibility and accuracy (Montoya J: Lessons from Akiki and Michaels . . . *Psychol Pub Pol’y & L* 1:340–69, 1995).

In this case, Mr. Moreland argued that Dayron’s testimony should be called into question, given his age and the repeated suggestive statements allegedly made to him by his relatives before trial. Although the court ruled that the techniques used by the trial court (e.g., questioning Dayron in judge’s chambers) were sufficient to establish the child’s competency to testify, the use of standardized, structured interviews would be an important consideration from a psycho-legal perspective, given that children are more susceptible to leading or suggestive questioning.

Further, the delineation of allowing Dr. Williams to provide expert testimony educating the court

about a diagnosis he gave Dayron, but not allowing him to testify about his opinion regarding the accuracy of Dayron’s statements is an important distinction. It is the role of an expert witness to educate the trier of fact about specialized knowledge, particularly knowledge that is generally accepted in the particular field of study. In this way, providing information about a diagnosis and its impact on functioning is quite different from testifying about subjective opinions of a child’s testimony. This case illustrates an important point about the limits of expert testimony. Expert witnesses may provide the court with the empirically supported knowledge about general questions regarding a child’s suggestibility and eyewitness testimony; however, they must stop short of providing an opinion about the accuracy of the actual eyewitness testimony in the particular case.

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The Weight of Treatment Team Opinion Regarding Mental Illness in Social Security Disability Claims

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The Opinion of a Treating Physician Does Not Have Controlling Weight in Determining Disability if the Record As a Whole Indicates Otherwise

In *Bernard v. Colvin*, 774 F.3d 482 (8th Cir. 2014), the Eighth Circuit Court of Appeals affirmed the decision of the U.S. District Court of Minnesota, Minneapolis, supporting the Social Security Commissioner’s denial of Social Security Disability Insurance (SSDI) benefits and Supplemental Security Income (SSI) to Todd Michael Bernard. Despite the opinion of three separate treating clinicians who determined that Mr. Bernard had mental impairments that warranted a disability claim, the appeals court agreed with the lower court’s ruling to not give con-