

ernment failed to produce evidence that their actions were based on institutional regulations and that prison personnel were not violating mandatory regulations with their behavior. Because of this lack of evidence, the court could not, by default, assume that prison personnel were acting under institutional policies at the time of the attack, thus making the discretionary-function exception inapplicable.

The court contrasted this decision with the previous decision in *Calderon v. United States*, where prison officials took note of threats against an inmate and proceeded within institutional policy on how to respond to those threats. In that case, the discretionary exception function did apply, as the federal employees were acting under institutional policy. Finally, the court held that heavy redactions contained in the records provided to both the district court and the Seventh Circuit Court made the determination of which regulations applied to the prison personnel difficult. Those records that were available showed that both Dr. Bleier and the guards were subject to rules and regulations, but which rules and regulations remained unknown. The available records did indicate that psychology services were required to develop procedures to clear inmates who had a PSY ALERT designation, which indicated that the facility had procedures that Dr. Bleier needed to follow to clear Mr. Keller, who had a PSY ALERT, before placing him into general population. However, since those actual procedures were not contained in the record, the court could not assume that the regulations did not “constrain Dr. Bleier’s discretion” for placing Mr. Keller in general population.

Discussion

The FTCA allows for claims against an employee of the government acting within their scope of office for loss of property, personal injury or death if caused by negligence or wrongful act of omission, under circumstances that a private citizen could also be held liable (28 U.S.C. § 1346(b)(1) (2009)). Numerous case law decisions have upheld federal prisoners’ rights to sue under the FTCA for injuries suffered from negligence of government employees. The discretionary-function exemption shields the government employee from liability, if

... any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or

an employee of the Government, whether or not the discretion involved be abused [28 U.S.C. § 2680(a) (2006)].

The court in *Keller v. United States* rejected that the discretionary-function exception always shields the government from claims resulting from inmate violence and found that the government must show beyond “reasonable dispute” that the exception is applicable. The implications for psychiatrists and psychologists working in correctional settings are clear. In the case of inmate violence, failure to follow mandated statutes, regulations, or policies, nullifies a discretionary-function exception defense. While working with a legal defense team, providing evidence of clinically appropriate adherence to procedures and policies is an effective means of using the exception rule, and not doing so may make a clinician more vulnerable to tort actions. As in this case, the court remanded in part to determine the nature of the procedures governing mental health intake screening and to determine whether Dr. Bleier had complied with those regulations or violated them, which would determine if his action to release Mr. Keller into general population was shielded by the discretionary-function exception or not.

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Ineffective Counsel Resulting From Failure to Explore History of Brain Injury in a Capital Case

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Failure to Fully Investigate and Present Potentially Mitigating Evidence During the Sentencing Phase Violates a Defendant’s Sixth Amendment Right to Effective Counsel

In *Mann v. Ryan*, No. 09-9901 (9th Cir. 2014), the Ninth Circuit Court of Appeals reviewed the *habeas corpus* petition of a man with a state conviction and death sentence for two first-degree murders. The Ninth Circuit affirmed in part and reversed in part the Arizona district court ruling, which had de-

nied the petition. The Ninth Circuit found that defense counsel had failed to adequately investigate and present mitigating evidence at sentencing, including a full investigation of a possible past brain injury and any resulting symptoms.

Facts of the Case

On the evening of November 23, 1989, Richard Alberts and Ramon Bazarro arrived at a Tucson house rented by Eric Mann and his girlfriend, Karen Miller. Mr. Mann had arranged the meeting to sell approximately one kilogram of cocaine to Mr. Alberts for approximately \$20,000. When they met, Mr. Mann gave Mr. Alberts a box in exchange for a bag of money. When Mr. Alberts opened the box, he realized it was filled, not with cocaine, but with paper. At that moment, Mr. Mann grabbed a pistol and shot Mr. Alberts and then Mr. Bazarro, killing both men. Afterward, Mr. Mann picked up a friend named Carlos Alejandro to help move the bodies, which were put in a car and transported to a remote area. The next day, Mr. Mann and Ms. Miller worked to hide any evidence of the crime.

Ms. Miller ended her relationship with Mr. Mann in 1993 and moved to Washington. In January of 1994, she reported the murders to the Pima County Sheriff's Department, and her information led investigators to Mr. Alejandro. Subsequently, Mr. Mann was arrested and charged with two counts of first-degree murder. He was tried in Pima County Superior Court during October of 1994. The testimony of Ms. Miller and Mr. Alejandro, who were both granted immunity, was the primary factor in the prosecution's case. Mr. Mann's attorney argued that Mr. Mann shot the men out of self-defense and that the shootings were not premeditated. Mr. Mann was found guilty on both counts.

After the conviction, Mr. Mann's attorney requested more time to investigate his background and asked the court to appoint a psychologist from the superior court clinic to evaluate his client's mental health. The court approved both requests. An autobiography written by Mr. Mann during this period also mentioned a traffic accident from 1985 in which he had sustained a head injury and his two passengers had been killed. A court-appointed psychologist evaluated Mr. Mann and diagnosed alcohol abuse, polysubstance abuse, and antisocial personality disorder. The psychologist also concluded that Mr. Mann was probably a "psychopath."

The judge specifically denied that Mr. Mann had proved remorse for the murders, and pointed out that in Mr. Mann's autobiography he had not indicated remorse for the deaths of the two passengers from the accident in 1985. This, along with the psychologist's report, led the judge to conclude that Mr. Mann was "incapable of remorse" and had "no conscience," and he was sentenced to death. On direct appeal, the Arizona Supreme Court affirmed his convictions and, after independently reviewing the factors, concluded that the mitigating factors were not enough to justify leniency. The United States Supreme Court denied his petition for writ of *certiorari*.

Mr. Mann appealed to the state trial court for postconviction relief. He claimed violation of his constitutional right to effective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), caused by his lawyer's failure to investigate and present reasonably available mitigating evidence pertaining to the effects of the traffic accident in 1985 and retain an independent mental health expert. In evidentiary hearings during the postconviction proceedings, the judge heard testimony from Dr. James Comer, a clinical neuropsychologist who had conducted a battery of tests to detect evidence of organic brain injury and also considered a psychological evaluation conducted by Dr. Richard Hinton and medical records from the 1985 accident.

The state court denied the petition for postconviction relief and, regarding the claim of ineffective assistance for failure of counsel to present reasonably available mitigating evidence, the court concluded that Mr. Mann failed to show that his counsel's conduct had prejudiced him. The Arizona Supreme Court denied a petition for review without comment, and the district court denied Mr. Mann's *habeas corpus* petition. The district court's denial was reviewed *de novo* by the Ninth Circuit Court of Appeals, which ruled on each prong of the *Strickland* analysis.

Ruling and Reasoning

Examining the deficiency prong of the *Strickland* analysis, the Ninth Circuit ruled two to one that defense counsel's performance at sentencing was constitutionally deficient. They cited the Supreme Court's past emphasis that judgment of an attorney's performance in such cases is based on "reasonableness under prevailing professional norms" (*Strickland*, p 688) and that this would include a "thorough

investigation of a defendant's background" (*Williams v. Taylor*, 529 U.S. 362 (2000)). Citing the American Bar Association (ABA) standards in place at the time of Mr. Mann's sentencing, the court wrote that counsel's investigation should reflect an effort to "discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence" introduced by the prosecution (ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1C, 1989).

The Ninth Circuit found that defense counsel's preparation for a possible sentencing phase was below an objective standard of reasonableness, pointing out counsel's request for a continuance to conduct further investigation. Beyond the lack of preparation, they cited *Wiggins v. Smith*, 539 U.S. 510 (2003), and concluded that the investigation conducted was unreasonable "in light of what counsel actually discovered" (*Wiggins*, p 525) concerning Mr. Mann's history of head trauma. Despite knowledge of the 1985 accident, counsel did not try to obtain medical records or otherwise investigate possible brain damage, even after a consulting expert had advised counsel to seek neuropsychological testing. The court found counsel's failure to further investigate this history to be evidence of deficient performance.

Examining the prejudice prong of the *Strickland* analysis, the Ninth Circuit ruled two to one that defense counsel's deficient performance prejudiced Mr. Mann's case. The court found that, in Mr. Mann's case, mitigating evidence that counsel failed to uncover and present would have significantly changed the sentencing profile presented to the judge during the sentencing hearing. Specifically, they reasoned that after the 1985 accident, medical records indicated that Mr. Mann was grieving deeply about the deaths caused by the tragedy. The court would refer to this documented presence of grief as evidence that could have been presented to refute the claim the Mr. Mann was a psychopath who did not experience remorse.

In contrast to the state court, the Ninth Circuit found counsel's failure to seek and present the results of neuropsychological testing especially damaging. They cited the evaluation in 2001, when Dr. Comer had performed a battery of tests and concluded that Mr. Mann had a traumatic brain injury that led to cognitive defects and may have contributed to behavioral changes. In addition, the court cited the psycho-

logical evaluation conducted in 2000 by Dr. Hinton, which described Mr. Mann as having lingering emotional effects of the 1985 accident. These evaluations led the court to conclude that, had evidence of Mr. Mann's serious brain injury and changes in personality been presented, it could have altered the balance of mitigating and aggravating factors.

Thus, the Ninth Circuit ruled that Mr. Mann was denied his Sixth Amendment right to effective assistance of counsel, and the case was remanded to the district court.

Discussion

This case highlights that effective assistance of counsel, in regard to mitigating and aggravating sentencing factors requires that any past incident that may have led to brain injury be fully investigated and presented. Of note, despite an evaluation being performed by a court-appointed psychologist during the sentencing phase, the Ninth Circuit cited the lack of an "independent" expert. This may suggest that court-appointed evaluators can be seen by some courts to favor the prosecution and that the defense should consider hiring its own experts.

Histories of concussions or other brain injuries are not uncommon and often have occurred many years before the time of an evaluation; in addition, there is often a lack of data about brain function before or shortly after such injuries. Although sparse information may limit a clinician's ability to draw conclusions about the relationship between present behavior or symptoms and past brain injuries, *Mann* suggests that fully investigating such incidents, including obtaining records and conducting neuropsychological tests, is an essential part of mitigation, especially in capital cases when a defendant's life is in the balance.

Consideration of prior brain injuries may be especially important when certain aspects of a defendant's personality, such as traits associated with antisocial personality disorder or psychopathy, which often accompany claims that a defendant is unable to experience remorse, are highlighted during sentencing. Because such characteristics may be related to head trauma or other brain injuries, a full investigation into such a possibility must be undertaken by defense counsel when questions related to a defendant's personality or empathic capacity are raised.

Globally, there is a trend toward the abolition of the death penalty. In the United States, there has been a movement to exclude certain groups of individuals, such as the intellectually impaired, from the death penalty based on the Eighth Amendment to the U.S. Constitution (*Atkins v. Virginia*, 536 U.S. 304 (2002)). Individuals with impairments such as head injuries or major mental illnesses may represent a group of similarly situated individuals. This trend suggests an increasingly important role of the forensic psychiatrist or psychologist in identifying such individuals in capital cases.

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Miranda Considerations in Juvenile Defendants

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Evidence Used to Convict Juvenile Derived From Interrogation Obtained While Juvenile Was in Custody Deemed a Violation of His Fifth Amendment Rights by the Ninth Circuit Court of Appeals

In *United States v. I.M.M.*, 747 F.3d 754 (9th Cir. 2014), the Ninth Circuit reviewed the decision by U.S. District Court for the District of Arizona to convict a male juvenile for sexual abuse of a minor. He appealed, arguing that the court should have suppressed his statements under *Miranda*, because he had not been made aware of his rights. The Ninth Circuit considered the circumstances of his interrogation to determine whether he was held in custody at the time he made his self-incriminating statements. The court ultimately opined that his admission was sufficient to convict him, but it also decided that the circumstances under which he gave his testimony were coercive and in violation of his Fifth Amendment rights and reversed the district court's earlier decision, remanding the case for reconsideration.

Facts of the Case

I.M.M., a 12-year-old boy, was playing with his 6 year-old female cousin, M.M., and her 5 year-old brother on an Indian reservation in Arizona at the time of the alleged incident. Their grandfather found M.M. standing in front of the boys with her pants down. She told her grandfather, "They told me to take my clothes off," and then she began crying. M.M.'s mother became involved, and she reported at trial that M.M. had also told her, "[I.M.M.] made her do it." M.M. had not complained of pain and was not asked about what happened to her. She was not checked for signs of assault or taken to a hospital or police station for examination. The police interviewed the grandfather three weeks after the incident. Forensic interviewers took a statement from M.M. two weeks later, and her younger brother provided a statement two months after that.

At trial M.M.'s younger brother took the stand after being found competent to testify. He reported that he had seen M.M. and I.M.M. "having sex," though later admitted he did not know what having sex meant. He described M.M. as sitting on I.M.M.'s lap with both of their pants pulled down and, using euphemisms, related seeing I.M.M.'s penis being put in the part of M.M. that "poops."

I.M.M. was interviewed by the police more than seven months after the incident. A plain-clothes detective picked up him with his mother and drove approximately 40 minutes to the police station. They were put in a small room, and the door remained closed the entire time I.M.M. was there. The detective did not read I.M.M. his *Miranda* rights, but I.M.M.'s mother signed a Parental Consent to Interview a Juvenile. She then waited in the lobby while I.M.M. was interviewed. The detective told I.M.M., who was 12 years old at the time, that he did not have to answer any questions if he felt uncomfortable. Although I.M.M. was in the sixth grade, he was in special-education classes and had a second-grade reading ability. He also had emotional problems from witnessing his father's attempt to kill his mother and may have been sexually abused by his father.

The detective spent approximately 1 hour questioning I.M.M.. Basic questioning revealed that I.M.M. did not know his own address. For nearly half the interrogation he denied that any sexual conduct had occurred. The detective used what he described as "deception," leading I.M.M. to believe