intellectual disability is not currently offered the same reprieve.

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Must Attorneys Use Forensic Mental Health Experts in Psychiatric Cases?

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Court Denies Petition for New Trial Based on Claims of Ineffective Assistance of Counsel for Failure to Call a Forensic Mental Health Expert

In *Ellis v. Raemisch*, 856 F.3d 766 (10th Cir. 2017), the Tenth Circuit Court of Appeals deliberated whether a federal district court erred in finding that a defendant had exhausted state remedies in his appeals process and was prejudiced by ineffective assistance of counsel in his initial trial. Mark Stephen Ellis, the defendant, argued that his defense was inadequate because his attorney did not to call a forensic psychologist to testify on [his] behalf. The Tenth Circuit upheld a previous ruling that the attorney's decision not to call or consult an expert forensic psychologist was not unreasonable.

Facts of the Case

A jury convicted Mr. Ellis of five felonies and one misdemeanor involving child sexual assault on his adopted daughter, V.E. The sexual assaults occurred when V.E. was approximately 8 to 10 years old, from 1999 to 2001. In 2000, Kari Ellis, Mr. Ellis' wife, filed for divorce after learning that Mr. Ellis was having an affair. The divorce proceedings were contentious, and during this period V.E.'s older brother, M.E., told Ms. Ellis that his father had "screwed" V.E. (*Ellis*, p 777, citing Aplt.'s App. Vol. III, p 154). Ms. Ellis contacted the police, and their investigation resulted in finding semen on one of V.E.'s blankets. Shortly thereafter, V.E. revealed for the first time that M.E. also had been sexually assaulting her, for which he pleaded guilty. M.E. later testified at his father's trial that he had assaulted her after hearing that Mr. Ellis had.

Mr. Ellis's trial occurred in 2002, and he was represented by Rowe Stayton, a criminal defense lawyer who was experienced in child sexual assault cases. However, Mr. Stayton had stressful family matters, as well as being occupied with concurrent trials leading up to Mr. Ellis's court date. This notion was one of the elements in Mr. Ellis's claim of ineffective assistance, which he would pursue in higher courts. During Mr. Ellis's trial, Mr. Stayton's defense strategy entailed showing how his wife despised him by "put[ting] this hatred over from her into the children." (*Ellis*, p 771, citing Aplt.'s App. Vol. II, p 32 (Opening Statement)). He proved this claim by cross-examination of state witnesses: V.E., who stated that she was angry with her father and felt closer to her mother; V.E.'s sisters, of which one allied with her mother and the other with her father; M.E., who was also angry with Mr. Ellis; and a forensic scientist who claimed that the semen on V.E.'s blanket was a minute sample and could have been transferred by touching the object after already having semen on one's hands. The jury convicted Mr. Ellis on all counts.

Five years into serving his sentence, in 2007, Mr. Ellis filed a motion alleging ineffective assistance of counsel for postconviction relief in the Colorado state district court. He argued that Mr. Stayton failed to call an expert forensic psychologist to testify about family dynamics and childhood memories; failed to call lay witnesses who could have alleged themes of witness coaching, parental alienation, and collusion; and committed other errors, such as weak cross-examination and mishandling of prejudicial evidence. Mr. Stayton countered this claim by stating that not only was he adequately prepared but that he was well versed in psychological principles involved in child sexual assault cases through his vast experience in trying these cases, as well as giving lectures to his counterparts across the country. The themes disputed by Mr. Ellis were adequately conveyed through his cross-examination of various witnesses. Not calling in an expert was a deliberate tactic used by Mr. Stayton, not only because the testimony would have been redundant, but also because it would have left the defense exposed to attack by the

state. Mr. Stayton felt that they should focus on the weaknesses in the prosecution's case.

After these proceedings, the state district court denied Mr. Ellis's motion; he later appealed to the Colorado Court of Appeals (CCA), which also affirmed the state district court's ruling. Mr. Ellis never sought review of his ineffective-assistance claims in the Colorado Supreme Court. In 2014, he filed a writ of *habeas corpus* in the U.S. District Court for the District of Colorado. Subsequently, they ruled in favor of Mr. Ellis, stating that Mr. Stayton's representation was insufficient and prejudicial and that he exhausted all state remedies to argue his claim before federal appeal. The court granted Mr. Ellis *habeas* relief with the condition that the state retry him within 90 days of their judgment or else release him from custody. In response to this ruling, the state filed a motion against all judgments with the Tenth Circuit Court of Appeals.

Ruling and Reasoning

The Tenth Circuit ruled that Mr. Ellis had exhausted all state remedies and ruled that the U.S. District Court of Colorado erred in stating that his defense was inadequate and prejudicial, as well as denying the writ of *habeas corpus*, thus denying Mr. Ellis's appeal.

The court affirmed that one must exhaust all state remedies for appeals of criminal convictions or postconviction relief before federal involvement. This affirmation originated from the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Under AEDPA, "a federal prisoner generally must exhaust available state-court remedies before a federal court can consider a *habeas corpus* petition" (*Bland v. Sirmons*, 459 F.3d 999 (10th Cir. 2006)). According to Colorado Appellate Rule 51.1 (2006), when a claim has been presented to the state court of appeals or state supreme court and relief is denied, the litigant has exhausted all available state remedies.

Second, Mr. Ellis's claim regarding receiving constitutionally ineffective counsel by not calling five key witnesses, including an expert forensic psychologist which ultimately was prejudicial against him, was overruled by the Tenth Circuit. The ruling in *Strickland v. Washington* 466 U.S. 668 (1984) showed, not only must a counsel's performance fall below an objective standard of reasonableness but the defendant must prove that counsel's performance was prejudicial against him with a substantial likelihood that the result of the case would have been different had these errors not occurred. Both scenarios must occur to satisfy an ineffective-assistance claim in the eyes of the Tenth Circuit. The court concurred with the CCA's assertion that Mr. Stayton's decision not to call an expert psychologist was not only reasonable but strategic. Calling in an expert would have exposed the defense to "attack [which Mr. Stayton] feared would undercut his chances of prevailing" (*Ellis*, p 786, citing Aplt.'s App. Vol. VI, p 229). He stated that calling an expert to explain these psychological theories "would be insulting to the jury to try to point out the parental alienation" (*Ellis,* p 786). This theory persisted as an explanation for not calling other witnesses, as their testimony would be redundant and failure to do so should be labeled as a tactic and not incompetency.

There was one error identified by the Tenth Circuit and it was that Mr. Stayton never interviewed V.E.'s past psychologist, Dr. Peter Long, before trial. Overall, this error was not presumed substantial enough to be prejudicial and affect the trial outcome. Finally, the Federal District Court's decision to grant federal *habeas* relief within ninety days was reversed by the Tenth Circuit since Mr. Ellis never raised new aspects of his ineffective-assistance claim in the CCA. Per *Hawkins v. Mullin*, 291 F.3d 658 (10th Cir. 2002), a federal court may grant *habeas* relief only after exhausting these claims in the appropriate state court, which Mr. Ellis had failed to do.

Discussion

In this ruling, the appellate court examined the importance of technique when preparing a criminal defense. To determine whether a defense is prejudicial or incompetent requires sufficient evidence. An expert's testimony is effective and should only be used in court when it adds a unique perspective in favor of an argument, and it can be used at the discretion of a lawyer such that it can relay this message while not being an area of attack from the opposition. Assuming the result of a case would be overturned based on testimony of forensic experts and lay witnesses is a fallacy, and one must consider a lawyer's experience, the circumstances of the ruling, and each state's structure of the appeal process to validate the basis of an appellant's claims.

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Intellectual Disability and Family Reunification

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Termination of Parental Rights Is Improper Without a Finding of Reasonable Efforts At Reunification Tailored To a Parent's Intellectual Disability

In re Hicks/Brown, 893 N.W.2d 637 (Mich. 2017), concerned the parental rights of Ms. Brown, a woman with intellectual disability, were terminated. Before terminating parental rights, Michigan's Probate Code, Mich. Comp. Laws § 712A.19a(2) (2017)), requires a finding that there has been a reasonable effort at family reunification. Ms. Brown argued that the Department of Health and Human Services (the Department) failed to provide a reasonable accommodation of her disability. The department later argued that this objection to accommodation was not timely. The Supreme Court of Michigan considered whether the objection to accommodation was timely and if so, whether the Department's efforts at family reunification were reasonable.

Facts of the Case

Ms. Brown, a mother with intellectual disability, took her daughter to the Department, stating she could not take care of her. The Wayne Circuit Court assumed jurisdiction over the daughter on January 29, 2013, and instituted a service plan provided by the Department. Ms. Brown had a son in February 2013, and the court took jurisdiction over him as well.

Psychological assessment by the Department concluded that Ms. Brown had a moderate-to-severe cognitive performance problem and that she had an IQ of 70 with borderline intellectual functioning. At a January 2014 hearing, and on at least five occasions between August 2014 and the trial for termination of parental rights in July 2015, Ms. Brown's attorney argued that the service plan did not meet Ms. Brown's needs because of her intellectual disability. She inquired about how her client could obtain more individualized assistance, receiving services through a community mental health agency called the Neighborhood Services Organization (NSO). The trial court granted the request, but Ms. Brown never received the services.

On July 25, 2015, the trial court granted the Department's petition to terminate Ms. Brown's parental rights to both children. Ms. Brown appealed the case to the court of appeals, arguing that the Department's reunification efforts had failed to accommodate her intellectual disability as required by the Americans with Disabilities Act (ADA) and that this failure should have prevented the termination of her parental rights. The Department and the children's lawyer-guardian ad litem argued based on the prior case of *In re Terry*, 610 N.W.2d 563 (Mich. Ct. App. 2000), that Ms. Brown had waived any claim stemming from her disability, because she had not raised her objection in a timely manner, which would have been when the service plan was adopted or soon afterward. The court of appeals panel rejected this argument, holding that Ms. Brown had preserved her claim by objecting sufficiently in advance of the termination proceedings to comply with the Terry preservation requirements. Based on this holding, the panel concluded that the Department failed in its duty to make reasonable efforts to reunify the family because the case service plan never included reasonable accommodations. Any termination order was therefore premature. The children's lawyer guardian ad litem appealed the case to the Supreme Court of Michigan.

Ruling and Reasoning

The Supreme Court of Michigan affirmed in part the court of appeals' opinion and held that the termination order was improper because an incomplete analysis had been made by the trial court as to whether there had been reasonable efforts to accommodate Ms. Brown's intellectual disability. The court also held that the Department could not argue on appeal that Ms. Brown did not raise her objection in a timely manner.

The Supreme Court of Michigan cited Michigan's Probate Code, which states that the Department has an affirmative duty to make reasonable efforts at reunification (Mich. Comp. Laws §712A.19a(2) (2017)). Reasonable efforts include creating a plan that provides services to the parent with the intent