

cases where trial counsel's ineffectiveness is blatant from the record, appellate counsel can raise the issue on direct appeal or an appellate court can address the deficiencies *sua sponte*. This ruling further reinforced that counsel's testimony was not necessary. She added that looking at the whole record made "good practical sense" because counsel may be unwilling or unable to testify (e.g., memory loss, death). Justice Sotomayor stated that these circumstances should not negate claims of ineffective assistance of counsel.

Justice Sotomayor stated that the Alabama Court of Criminal Appeals never explained, in light of the record before it, why the decisions that Mr. Reeves' counsel made were reasonable. She opined that the court of criminal appeals rested its decision solely on the fact that Mr. Reeves did not call counsel to testify at the PCR hearing. She stated that the word "must" was not "mere stock language" and that the court "unquestionably applied this requirement" to Mr. Reeves' claim. At the outset of its analyses, the court of criminal appeals reported that Mr. Reeves' failure to call counsel to testify was "fatal to his claims of ineffective assistance of counsel" (*Reeves*, p 28). Justice Sotomayor pointed out that the court of criminal appeals emphasized Mr. Reeves' failure to call his counsel to testify at five different points in its opinion. She opined that the court's failure to consider non-counsel testimony was "baffling."

Discussion

Justice Sotomayor outlined specific examples of counsel's deficient performance found within the full record. Counsel had repeatedly requested funds to hire an expert to assess Mr. Reeves in preparation for the sentencing phase but had failed to retain such an expert. The dissent outlined that counsel described possession of "hundreds of pages" of mental health data and asserted a need for an expert to review these records and evaluate Mr. Reeves. The failure to hire such an expert after presenting that information raises many questions, including how attorneys assess the need to obtain mental health evaluations and the factors involved in these decisions. These decisions are clear in some cases, but certainly not all. In this case, the record is silent about the decision-making process because Mr. Reeves failed to call his attorneys to testify in the PCR hearing.

Furthermore, once the decision is made that an opinion is needed regarding a mental health concern, the type of evaluation needed must be determined. In

Mr. Reeves' trial, a court-appointed expert completed trial phase evaluations. During the sentencing phase, the same expert was asked to provide testimony as a mitigation witness, over her objections that the trial phase evaluations she performed were insufficient for mitigation. During the PCR hearing, a mitigation evaluation was completed, and several factors were identified that had not been considered in the sentencing phase. This case highlights the need for counsel to be aware that forensic evaluations, especially in capital cases, differ depending on the question and that the completion of one evaluation is not generalizable to all questions that may arise during both phases of capital cases. Although forensic evaluations may cover some of the same content (e.g., diagnosis), they differ based on the purpose of the evaluation and complexity of the case. Open communication and collaboration between counsel and mental health experts are necessary to provide an optimal outcome.

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Excessive Force Was Not Used in Arrest of Mentally Ill Man Who Died Shortly After Restraint

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Sheriff's Deputies, Knowing a Citizen Was Mentally Ill, Used Force by Taser; Objective Reasonableness Test Employed; Deputies and Others Received Summary Judgment Against § 1983 and ADA Claims

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In *Roell v. Hamilton County*, 870 F.3d 471 (6th Cir. 2017), the U.S. Court of Appeals for the Sixth Circuit upheld that Gary Roell's Fourth

Amendment right to be free from excessive force was not violated. The opinion affirmed the district court granting summary judgment to the arresting officers under 42 U.S.C. § 1983, and to Hamilton County under both § 1983 and the Americans with Disabilities Act (ADA).

Facts of the Case

Mr. Roell, a man with chronic mental illness, had been noncompliant with his psychotropic medication since June 2013. While his wife was away in August 2013, he relapsed; at one point, he threw a flower pot through his neighbor's window. The neighbor found Mr. Roell outside, naked except for a t-shirt. While the neighbor tried to talk to Mr. Roell, he pulled out the window screen and threw it at her. Feeling threatened, she had her son call 9-1-1.

Two sheriff's deputies arrived and found Mr. Roell standing by the broken window, holding a garden hose with a metal nozzle and a garden basket. According to their testimony, they told Mr. Roell, "Show us your hands," and he "charged at them at a 'pretty brisk walk,' . . . still holding the hose and the garden basket" (*Roell*, p 477). Witnesses described Mr. Roell as muttering unintelligible phrases and talking about "water." The neighbor's son recalled that Mr. Roell repeatedly stated that he did not have a weapon.

Deputies continued to make attempts to instruct Mr. Roell to stop and get on the ground, or risk being tased. Because Mr. Roell resisted physical restraint from the deputies, one deputy tased him, with little effect. A third deputy arrived, but all were unable to restrain Mr. Roell due to his combativeness. Accordingly, one deputy deployed his taser twice more. Once restrained, Mr. Roell went limp and began to snore. The deputies noted that twice Mr. Roell woke up, thrashed around, and then returned to snoring before they observed that he had no pulse or respirations. Despite resuscitation efforts by emergency medical services, Mr. Roell was pronounced dead at the hospital. The deputy coroner recorded the cause of death as "excited delirium due to schizoaffective disorder," and the manner natural (*Roell*, p 478).

Mrs. Roell sued Hamilton County, its commissioners, the sheriff, and the three deputies. There were three claims: that the deputies used excessive force, violating Mr. Roell's Fourth Amendment rights (§ 1983 claim); that there was intentional discrimination and failure to accommodate Mr. Roell's

known mental disability (ADA claim); and a state-law claim of wrongful death. The district court granted summary judgment to the defendants in relation to these causes of action. Mrs. Roell appealed the summary judgment under her § 1983 and ADA claims.

Ruling and Reasoning

The U.S. Court of Appeals for the Sixth Circuit affirmed the district court's decision, 2 to 1. The district court had held that, with respect to the § 1983 claim, the deputies were entitled to qualified immunity, rendering the sheriff and Hamilton County not liable as well. In considering this appeal, the appellate court ruled on two matters: the defense claim of qualified immunity, and the use of excessive force. This immunity defense "protects government officials 'from liability for civil damages in regard to their conduct that does not violate clearly established statutory or constitutional rights of which a reasonable person would have known'" (*Roell*, p 480). The defense requires two elements: whether the officer violated the plaintiff's constitutional rights under the Fourth Amendment, and whether that right was clearly established at the time of the incident.

For the § 1983 claim, the appellate court relied on *Graham v. Connor*, 490 U.S. 386 (1989), employing a three-factor objective reasonableness test: severity of the crime, immediacy of threat, and resisting arrest. The court emphasized that "[t]he 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight" (*Roell*, p 486, citing *Graham*, p 396). The court cited Ohio's definition of a deadly weapon: "any instrument, device or thing capable of inflicting death and designed or specially adaptable for use as a weapon, or possessed, carried, or used as a weapon" (*Roell*, p 480).

Because Mr. Roell was experiencing acute mental illness, the deputies were required to consider his diminished capacity in deciding whether to use force. But no case law precludes the use of all force against someone with diminished capacity. Therefore, the court ruled, the deputies acted reasonably, and some degree of force was justified given the circumstances.

Next, the court considered whether Mr. Roell's Fourth Amendment rights were established at the time of his arrest; specifically, whether a reasonable officer would have been aware that using force on an

individual with diminished capacity, despite posing a threat to others, would have been excessive. Here, the court sided with the defendants' qualified immunity. To address Hamilton County's accountability under § 1983, the court recognized that a county cannot be liable for this claim unless a constitutional violation by its officers is established.

The court also affirmed the ruling that Mrs. Roell failed to establish a viable claim under the ADA because she did not produce any evidence that the defendants intentionally discriminated against Mr. Roell due to his mental illness. Mrs. Roell argued that steps to de-escalate the situation should have been taken, but whether Title II of the ADA applies in the context of an arrest had not been addressed by the courts. Notwithstanding, based on the facts of the case, such as the deputies facing challenging circumstances while attempting to restrain Mr. Roell, Hamilton County was entitled to summary judgment; the proposed accommodations, such as verbal de-escalation, were unfeasible given Mr. Roell's hostile presentation.

Dissent

Judge Moore dissented on the matter of granting summary judgment to the three sheriff's deputies in Mrs. Roell's § 1983 claim. The essence of her reasoning was: "If it is apparent to officers that an individual is unarmed and mentally unstable, then the officers must de-escalate and may not use as much force as would be permissible when confronted with an individual who was either mentally stable or armed" (*Roell*, p 490). Summary judgment is not appropriate, she continued, when facts are ambiguous; for example, whether Mr. Roell was armed with a weapon and the degree of his aggressiveness.

Discussion

This case was brought about because of an arrest of a person with mental illness who died after law enforcement used physical force to detain him. This affords us the opportunity to examine policy and procedures when law enforcement deals with citizens with psychiatric or other disabilities.

While the court supported the deputies' defense in the circumstances of the incident, questions remain about what a reasonable official would do under Ohio procedures. How do policies or procedures guide officers' actions, and do they adequately prepare them to deal with citizens in crisis in the least forceful manner? How does the level of threat that

officers perceive fit into the implementation of policy? Do their procedures, for example, help officers determine under what circumstances a garden hose might be regarded as a deadly weapon, as mentioned in the dissenting opinion.

An important feature of this case is that "the deputy coroner determined that the cause of Roell's death was 'excited delirium due to schizoaffective disorder' and that the manner of his death was natural" (*Roell*, p 478). Presumably, then, the use of force was not material to Mr. Roell's death, which was caused by the condition in which the deputies found him. Because the coroner's determination foreclosed inquiry about the manner of death, the decision does not provide a more nuanced view of the medical events leading to Mr. Roell's death. Expert testimony might have offered rates of deaths associated with tasings and "excited delirium" in the context of schizoaffective disorder. The decision provides no evidence about Mr. Roell's health prior to the incident, aside from his psychiatric diagnosis, nor were toxicology results provided that might shed light on a medical cause of delirium. Therefore, it is not clear medically whether the tasing and restraint were contributory to Mr. Roell's death. We wonder whether the appellate court might have ruled differently (i.e., by remanding the matter for trial) if these subtleties had been illuminated by further analysis of the details surrounding Mr. Roell's death.

Deliberate Indifference and Negligence Claims in a Correctional Facility

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Seventh Circuit Court of Appeals Affirmed the Dismissal of a Prisoner's Eighth Amendment and Negligence Claims Where Clinicians Sought Consultation

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