increase the accuracy of clinical risk assessment in these treatment decisions (McDermott B, Scott C, Busse D, *et al*: The conditional release of insanity acquittees: three decades of decision-making. *J Am Acad Psychiatry Law* 36: 329–36, 2008). More research is needed on how best to integrate the information from these assessment tools to further improve their accuracy in clinical settings. Ultimately, the courts often depend on the expertise and documentation provided by psychiatrists to make these important decisions that affect the lives and wellbeing of patients and the community.

Capital Punishment and Youth Offenders

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Constitutionality of Age-Eligibility for Capital Punishment Cannot Be Challenged Prior to Conviction

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Key words: capital punishment; juvenile offenders; mental disorders

In *Commonwealth v. Bredhold*, 599 SW.3d 409 (Ky. 2020), the Supreme Court of Kentucky vacated and remanded a trial court order that raised the age for death-penalty eligibility to 21. The appellees successfully persuaded the lower court that the evolving standards of decency in decisions on the Eighth Amendment precluded the death penalty for those who committed offenses between the ages of 18 and 21. The state supreme court ruled that, as none of the appellees had been convicted, there was no standing to hear the challenge.

Facts of the Case

This case consolidated three related cases. The Commonwealth gave notice of intent to seek the death penalty for all three cases. The first case was that of Travis Bredhold, who was indicted on counts of murder, first-degree robbery, theft, trafficking less than eight ounces of marijuana, and carrying a concealed weapon. On December 17, 2013, when Mr. Bredhold was eighteen years and five months old, he allegedly robbed a gas station and fatally shot a gas-station employee. In anticipation of the trial, Dr. Ken Benedict, a clinical psychologist and neuropsychologist, evaluated Mr. Bredhold. He found "Bredhold was about four years behind his peer group in multiple capacities, including the capacity to regulate his emotions and behavior, and that he suffered from a number of mental disorders" (*Bredhold*, p 413).

The second and third cases involved Justin Smith and Efrain Diaz, Jr., co-defendants who allegedly robbed and fatally shot Jonathan Krueger on April 17, 2015. They were each indicted and charged with one count of murder and two counts of first-degree robbery. Mr. Smith was eighteen years and five months old at the time of the alleged offense, whereas Mr. Diaz, Jr., was twenty years and seven months old at the time of the alleged offense. Dr. Benedict evaluated Mr. Smith and concluded that Mr. Smith's "executive functions related to planning, anticipating the consequences of his actions, and impulse control are below those of an adult and he too exhibited a number of mental disorders" (*Bredhold*, p 413). The trial court called an evidentiary hearing for Mr. Diaz and Mr. Smith, during which Dr. Laurence Steinberg, an expert in adolescent development, testified to current research on brain development. The court supplemented Mr. Bredhold's record with Dr. Steinberg's testimony as well.

The appellees moved the court to exclude the death penalty as a sentencing option. They asked the court to extend the holding in *Roper v. Simmons*, 543 U.S. 551 (2005), to persons who commit offenses under the age of 21. *Roper* precludes the death penalty for persons who commit their offense under the age of 18. The trial court issued three separate orders declaring Kentucky's death penalty statute unconstitutional under the Eighth Amendment as it pertains to capital punishment for offenders under 21 years of age at the time of the offense. The court concluded that the individual psychological findings for Mr. Bredhold and Mr. Smith further supported excluding the death penalty in each of their cases.

The Commonwealth filed interlocutory appeals. Given the public importance of the matter, the appeals were transferred from the Court of Appeals directly to the Supreme Court of Kentucky.

Rules and Reasoning

The Supreme Court of Kentucky acknowledged the gravity of capital punishment decisions. The court reviewed Kentucky law, which authorizes a death sentence for persons convicted of a capital offense. The law is subject to the bounds of the Eighth and Fourteenth Amendments' probations on cruel and unusual punishment. Recognizing that standards of decency evolve, the court reviewed precedent from the U.S. Supreme Court that applied society's evolving standards of decency in their decisions about Eight Amendment applications to juveniles: *Thompson v. Oklahoma*, 487 U.S. 815 (1988); *Stanford v. Kentucky*, 492 U.S. 361 (1989); and *Roper*. Through this line of cases, the Court incrementally applied evolving standards of decency to proscribe execution of juveniles who commit offenses under the age of 18.

Although the court reviewed the Eighth Amendment precedent, the court stressed that none of the three cases had yet been heard by the trial court and no jury had recommended the death penalty. The court said that, with "no penalty having been imposed and the clear possibility that death would not be recommended by the jury in any of these cases" (*Bredhold*, p 415), it was error for the trial court to issue its ruling. Regardless of type of constitutional challenge, the person bringing the challenge must first have standing. "It follows that an appellate court does not have jurisdiction to review on its merits an interlocutory appeal arising from a [trial] court judgment in such circumstances" (*Bredhold*, p 416, citing *Commonwealth v. Sexton*, 566 S.W.3d 185, 195 (Ky. 2018)). The Kentucky Supreme Court does not have jurisdiction to adjudicate the constitutional question raised. Therefore, the trial court's orders declaring Kentucky's death penalty unconstitutional as applied to these appellees were vacated, and the cases remanded for further proceedings.

Discussion

In *Bredhold*, the court ruled that that the appellees did not have standing before sentencing to challenge the applicability of the death penalty to persons who commit offenses between the ages of 18 and 21.

Currently, the precedent set by *Roper* is that persons who commit offenses before the age of 18 may not be sentenced to death. Proponents of existing law may argue that the *Roper* decision confirms other legal standards that set the age of adulthood at 18. On the other side, as the appellees in *Bredhold* pointed out, there is increasing research and literature from the fields of neuropsychology and neurobiology on brain development. Among others, the American Psychiatric Association and the American Academy of Psychiatry and the Law joined in an *amicus* brief in *Roper* to emphasize important behavioral differences in adolescents, as a group, in comparison to older persons.

Although the court in *Bredhold* did not reach the issue of whether the evolving standards of decency are now such that the Eighth Amendment prohibits its imposition of the death penalty on persons under age 21 at the time of their offense, courts may face this question in the future. In addition to the U.S. Supreme Court line of cases on capital punishment for juveniles, the U.S. Supreme Court has also established a line of cases on sentences of life without parole for juvenile offenders. For example, in *Miller v. Alabama*, 567 U.S. 460 (2012), the Court considered two cases of 14-year-old juveniles who had been convicted of murder. They were both sentenced to mandatory life sentences without parole. Under *Miller*, the Court ruled that the Eighth Amendment prohibits sentencing schemes that mandate life without parole in cases where a juvenile is convicted of homicide. Relying on *Roper* and other cases, the Court recognized that there exist developmental qualities of youth that require juveniles to be treated differently from adults in the criminal justice system. These line of cases and further scientific research about brain maturation are likely to be used in future challenges to the death penalty and life, or *de facto* life, sentence schemes. Further, as courts consider these cases and individual characteristics of defendants, forensic mental health professionals may have a role, like in *Bredhold*, of evaluating defendants and communicating to the court an evaluee's important cognitive and behavioral abilities (or deficits). In

Bredhold, the evaluating psychologist concluded that the appellees had cognitive abilities below what is expected for their age, placing their cognitive functioning below the minimum age qualification for capital punishment.

Asserting Defense of Lack of Personal Responsibility

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Court Has a Responsibility to Advise a Defendant of the Penal Responsibility Defense and Obtain a Knowing, Intelligent, and Voluntary Waiver

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In *State v. Glenn*, 468 P.3d 126 (Haw. 2020), the Supreme Court of Hawaii reviewed the ruling of the Intermediate Court of Appeals (ICA) to affirm the conviction of Michael Glenn, charged with terroristic threatening in the first degree. Initially found incompetent to stand trial, Mr. Glenn was deemed competent following treatment, asserted a theory of self-defense at trial, and was found guilty by the circuit court. In his appeal, Mr. Glenn argued that the court should have either *sua sponte* instructed the jury about the lack of penal responsibility defense (Hawaii's insanity defense, based on the Model Penal Code; hereafter PR defense) or obtained from him a knowing and intelligent waiver of the defense. The state supreme court affirmed the verdict of the ICA but concluded prospectively that, if a court receives notice that a defendant's penal responsibility is in question, they must ensure a defendant's waiver of the defense is intelligent, knowing, and voluntary.

Facts of the Case

On June 5, 2014, the State of Hawaii charged Michael Glenn with one count of terroristic threatening in the first degree after he allegedly threatened to strike another man with a baseball bat on May 27, 2014. At the request of his defense counsel, three mental health professionals evaluated Mr. Glenn, two of whom asserted that he was unfit to proceed and lacked penal responsibility. At his fitness hearing in October 2014, the circuit court concluded that Mr. Glenn was unfit to proceed and committed him to treatment at Hawaii State Hospital. Following treatment at Hawaii State Hospital, Mr. Glenn underwent a set of re-evaluations of his fitness and was eventually found fit to proceed by September 2015.

At his trial in March 2016, Mr. Glenn refused to use the PR defense, and none of the examiners who evaluated his penal responsibility testified at his trial. Instead, he asserted that he had acted in self-defense when he threatened the other man with his baseball bat. His defense counsel requested that the court instruct the jury to consider whether he had acted in self-defense. The court did not discuss the PR defense with Mr. Glenn, nor did the court instruct the jury about it. The jury found Mr. Glenn guilty of terroristic threatening in the first degree, and the circuit court sentenced him to five years of imprisonment.

In an appeal to the ICA, Mr. Glenn asserted that the court erred by failing to conduct a colloquy with him to ensure that he was knowingly, intelligently, and voluntarily waiving the PR defense. He argued that the court should have *sua sponte* instructed the jury regarding the PR defense, based on Haw. Rev. Stat. § 704-408 (2019), which provides that, if an examiner finds that a defendant lacks penal responsibility, the court "shall" instruct the jury on the PR defense. Mr. Glenn further argued that there was insufficient evidence to support his conviction.

In response, the ICA determined that Haw. Rev. Stat. § 704-408 must be read *in pari materia* with Haw. Rev. Stat. § 704-402 (2019) (i.e., "Physical or mental disease, disorder, or defect excluding responsibility is an affirmative defense") and § 701-115 (2019) (i.e., "No defense may be considered by the trier of fact unless evidence of the specified fact or facts has been presented"). The ICA concluded that, because no evidence to support a PR defense was presented at Mr. Glenn's trial, the circuit court was