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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Key words: penal responsibility defense; waiver; appeal; colloquy; jury

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

neither required to obtain a waiver from him nor to *sua sponte* instruct the jury to consider the defense. The ICA further determined that there was sufficient evidence to support Mr. Glenn's conviction and thus affirmed it. Mr. Glenn filed a writ of *certiorari*.

Ruling and Reasoning

The state supreme court affirmed Mr. Glenn's conviction and the judgment of the ICA. First, the court agreed that a trial court does not have a duty to *sua sponte* instruct a jury regarding the PR defense when insufficient evidence is presented at trial to support it. Second, while the court did not find a due process violation in Mr. Glenn's case by not having him waive his right to a PR defense through a colloquy, it adopted this rule prospectively to ensure defendants put forth a knowing, intelligent, and voluntary waiver of the PR defense.

In his appeal, Mr. Glenn cited Haw. Rev. Stat. § 704-408: "If the report of the examiners . . . states that the defendant at the time of the conduct alleged was affected by a physical or mental disease . . . that substantially impaired the defendant's capacity to appreciate the wrongfulness of the defendant's conduct or to conform the defendant's conduct to the requirements of law, the court shall submit the defense of physical or mental disease, disorder, or defect to the jury . . . ." The court reinforced that Haw. Rev. Stat. § 704-408 must be read in *pari materia* with Haw. Rev. Stat. § 704-402 and § 701-115. When reading these statutes together, the court interpreted Haw. Rev. Stat. § 704-408 to indicate that the defendant and counsel must present evidence supporting the PR defense at trial before the court is required to instruct the jury about it. Not only did Mr. Glenn assert that he was not mentally ill and chose to assert a theory of self-defense, but none of the examiners who evaluated his penal responsibility testified at his trial. Thus, the court held that there was insufficient evidence of lack of penal responsibility at trial to warrant the circuit court to instruct the jury about it.

The state supreme court disagreed, however, with the ICA's determination that the circuit court did not have a duty to obtain a waiver of the PR defense. The court ruled prospectively that, when a trial court receives notice that a defendant's penal responsibility is in question in a case, pursuant to Haw. Rev. Stat. § 704-407.5 (2019) (i.e., "Examination of defendant with respect to physical or mental disease, disorder, or defect excluding penal responsibility"), the "court has a duty to advise a defendant about the penal-responsibility defense and to ensure that a defendant knowingly, intelligently, and voluntarily chooses to waive the defense" (*Glenn*, p 139). The court explained that a colloquy between the court and a defendant, to ensure understanding of the implications of waiving a PR defense, is essential to preserve one's due process rights, particularly due to the implications of the insanity defense.

The court cited *Frendak v. United States*, 408 A.2d 364 (D.C. Cir. 1979) to support their reasoning. In *Frendak*, the U.S. Court of Appeals for the District of Columbia Circuit outlined several reasons why a defendant may choose to accept the jury's verdict rather than raise the PR defense (e.g., possible commitment to an institution, associated stigma) and determined that "whenever the evidence suggests a substantial question of the defendant's sanity at the time of the crime, the trial judge must conduct an inquiry designed to assure that the defendant has been fully informed of the alternatives available, comprehends the consequences of failing to assert the defense, and freely chooses to raise or waive the defense" (*Frendak*, p 380). Because the colloquy requirement was adopted prospectively by the state supreme court in *State v. Glenn*, it did not apply to Mr. Glenn's case. The state supreme court asserted that there was no evidence in the record to suggest that Mr. Glenn's decision not to raise the PR defense was not knowing, intelligent, or voluntary.

Discussion

State v. Glenn highlights that finding a defendant competent to stand trial, followed by the defense's decision not to assert the PR defense at trial, can no longer be assumed in Hawaii to indicate that a defendant has knowingly, intelligently, and voluntarily waived the defense. Rather, the court ruled that an explicit discussion between the court and defendant is necessary. The waiver colloquy between the court and defendant may serve to ensure the defendant's due process rights in several different ways. For instance, defense counsel may not have educated the defendant about the option of this defense (Bonnie RJ, Poythress NG, Hoge SK, *et al*: Decision-making in criminal defense: an empirical study of insanity pleas and the impact of doubted client competence. J Crim L & Criminology 87:48–62, 1996). Moreover, there have been cases in which defendants were

deemed competent to stand trial, yet their reasoning regarding their decision to waive the defense was founded in delusional thinking (Litwack TR: The competency of criminal defendants to refuse, for delusional reasons, a viable insanity defense recommended by counsel. Behav Sci & L 21:135–56, 2003). In *Phenis v. United States*, 909 A.2d 138 (D. C. 2006), cited in *Glenn*, the District of Columbia Court of Appeals stated that "[t]he quantum and nature of evidence that will trigger the obligation to conduct a *Frendak* inquiry (i.e., waiver colloquy) is necessarily highly fact-bound and varies from case to case" (*Phenis*, p 155). The state supreme court of Hawaii eliminates this variability by applying prospectively the requirement that, if a court is advised of a defendant's potential lack of penal responsibility, pursuant to Haw. Rev. Stat. § 704-407.5, the court must conduct a waiver colloquy. It is then worth pondering whether states that have not already done so would benefit from clarifying the nature of the evidence required to trigger a waiver colloquy, as the state of Hawaii has established in *Glenn*.

Standards of Review for Reversing Decisions Made by Immigration Courts

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Ninth Circuit Standard for Overturning a Decision of an Immigration Judge by the Board of Immigration Appeals Is Clear Error

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Key words: Convention Against Torture; asylum; deferral of removal; Board of Immigration Appeals; standards of review

In *Guerra v. Barr*, 974 F.3d 909 (9th Cir. 2020), the Ninth Circuit Court of Appeals considered whether the Board of Immigration Appeals (BIA) erred when rejecting an immigration judge's (IJ) decision to grant Jose Eduardo Guerra deferral of removal under the Convention Against Torture because of his risk of torture secondary to his mental illness if deported to Mexico. Mr. Guerra appealed the BIA decision to reject the deferral of removal on the grounds that the BIA used improper standards of review in overturning the IJ's decision to defer removal under the Convention Against Torture. The Ninth Circuit remanded the case for the BIA to reconsider its decision using correct standards after determining that the BIA applied the wrong legal standard to Mr. Guerra's claim.

Facts of the Case

Mr. Guerra entered the United States at age eleven without inspection and subsequently received a diagnosis of a seizure disorder. After high school, he lived in a home for people with mental disability, as he was unable to care for himself. Mr. Guerra was arrested for allegedly engaging in lewd and lascivious acts in that home. Mr. Guerra was found incompetent to stand trial and referred for psychiatric treatment and competence restoration. He received a diagnosis of schizophrenia and began taking antipsychotic medication. He was deemed competent to stand trial in September 2015. Mr. Guerra pled guilty to violating Cal. Penal Code § 288(a) (2013) and was sentenced to three years imprisonment. After serving his sentence, he was served with an immigration warrant and charged with removability under 8 U.S.C. § 1182(a)(6)(A)(i) (2013) (presence in the United States with admission or parole) and 8 U.S.C. § 1182(a)(6)(A)(i)(l) (2013) (conviction of a crime involving moral turpitude) by the Department of Homeland Security.

Mr. Guerra applied for deferral of removal under the Convention Against Torture, asserting that were he to return to Mexico, he would become homeless due his inability to care for himself and would likely be taken into Mexican law enforcement custody or placed in a mental health institution. Mr. Guerra's counsel argued that, in either setting, he was more likely than not to be tortured, citing articles about individuals with mental illness being subject to abuse in Mexican jails and mental health facilities. In August 2017, an IJ heard Mr. Guerra's argument and granted Mr. Guerra deferral of removal under the Convention Against Torture. The judge agreed that, because of Mr. Guerra's mental illness, he was