

provided a more accurate assessment of Mr. Wessel's clinical symptoms, rather than brief observation periods during direct interviews. Regarding the diagnosis itself, the judge effectively incorporated diagnostic information from all three experts to inform her own conclusion.

Additionally, the judge ultimately determined that Mr. Wessel's conduct, including his inconsistent participation in evaluations and courtroom behavior, was volitional and manipulative. This appeared to be informed by testimony from experts that he was able to participate appropriately in his defense if he so chose, as well as by examining his patterns of behavior across evaluations and in court during trial. It illustrates how judges may incorporate expert evidence with their own observations to determine the volitional nature of one's behavior.

Finally, this case outlines the differing standards for competence to stand trial and waiving a jury trial, stating that waiving a jury trial requires a determination of whether the waiver is knowing, voluntary, and intelligent. The case demonstrates how even a competent waiver of a jury trial may not be accepted by a judge.

Systemic Inequities in Death Penalty and As-Applied Constitutional Challenges

Brittany Sherrill, PsyD
Fellow in Forensic Psychology

Danielle Rynczak, JD, PsyD, ABPP
Assistant Professor of Psychiatry
Law and Psychiatry Program

Department of Psychiatry
University of Massachusetts Chan Medical School
Worcester, Massachusetts

Systemic Inequities Are Inadequate As-Applied Challenges in Death Penalty Cases Unless Directly Applicable to the Defendant

DOI:10.29158/JAAPL.220056L1-22

Key words: death penalty; capital punishment; racial inequities; as-applied challenges; aggravating circumstances

In *Commonwealth v. Hairston*, 249 A.3d 1046 (Pa. 2021), the Supreme Court of Pennsylvania affirmed a trial court's denial of postconviction relief. In a

challenge to the constitutionality of the state's death penalty, the court ruled that an "as-applied" challenge requires the defendant to assert personal impact from the state's capital punishment system.

Facts of the Case

Defendant Kenneth Hairston was initially charged with rape, attempted rape, attempted escape, and other crimes in May 2000 related to allegations that he had raped his stepdaughter numerous times throughout a six-year period and then attempted to flee upon arrest. Following his arrest, Mr. Hairston threatened to harm himself and his family if his stepdaughter revealed the past assaults. Two weeks prior to trial, Mr. Hairston, who had self-inflicted injuries, and his wife and child, who both died of blunt force head trauma, were found in their burning home. Mr. Hairston later admitted that he killed his wife and son using a sledgehammer and started the fire. Mr. Hairston was subsequently convicted of rape, sexual assault, burglary, attempted escape, and related charges, as well as two counts of criminal homicide in a separate proceeding. The jury found two aggravating circumstances and two mitigating circumstances in the penalty phase of the bifurcated trial, and Mr. Hairston was sentenced to death.

The time which Mr. Hairston had to file postsentence motions lapsed and trial counsel withdrew. New counsel was appointed and requested additional time for postsentence motions, which was granted. The postsentence motions were denied by the trial court. Mr. Hairston then appealed, but all claims not associated with the automatic review conducted in capital cases were not preserved because the time to file an appeal had lapsed.

Mr. Hairston then filed a petition for relief pursuant to the Post Conviction Relief Act (PCRA), 42 Pa. Cons. Stat. 9541-9546 (1997), arguing his prior counsel was ineffective by failing to file timely motions following sentencing. This request was granted. He then filed an appeal *nunc pro tunc*, yet the matters raised were denied and his judgment was again affirmed. The U.S. Supreme Court denied a petition for writ of *certiorari* in October 2014.

Mr. Hairston's counsel again filed a PCRA (as a petition to amend the petition) and a motion for stay of execution. Following several extensions and receipt of two notices of intention to dismiss the petition, Mr. Hairston's counsel filed a supplemental amended petition which, citing the Joint State

Government Commission (JSGC) report, challenged the constitutionality of the death penalty. The PCRA court again filed a notice of intention to dismiss, referencing the same reasons as the two earlier notices. Mr. Hairston appealed the decision to the Supreme Court of Pennsylvania.

Ruling and Reasoning

On appeal, Mr. Hairston raised several challenges to the constitutionality of the death penalty. Regarding his facial challenge, he argued that the law violates the prohibition against cruel and usual punishment and the current standards of decency. Relying on *Gregg v. Georgia*, 428 U.S. 153 (1976), the Pennsylvania Supreme Court noted the death penalty had previously been held to not violate evolving standards of decency, and its constitutionality is upheld so long as due process is afforded. Further, the “evolving” nature of decency is a decision the court reserves for state legislatures to decide.

Mr. Hairston’s as-applied challenge focused on the imposition of the death penalty to Pennsylvania’s death row prisoners. He argued that the current system for application of the death penalty exonerated “twice as many death row prisoners as it has executed,” and described capital punishment as “primarily attributable to bad lawyering, geographical happenstance, racial disparities, and prosecutorial caprice” (*Hairston*, p 1059). In his argument, Mr. Hairston relied on a report from the Joint State Government Commission (JSCG Report), which identifies disproportional costs for persons sentenced to death compared with life imprisonment, disproportional death sentences applied to persons with intellectual disability, and percentage of persons who have received death sentences that have a mental illness and need for treatment. He also cited the report’s identification of geographical and racial biases in who receives the death penalty. Mr. Hairston noted vast discretion, a lack of standardized state processes for training of defense counsel, differences in outcomes with private versus public defenders, inadequate jury instructions, the breadth of aggravating circumstances coupled with overly narrow inclusion of mitigating factors, and other factors outside of culpability that affect whether an individual is sentenced to death.

The court stated that appellants must demonstrate that they are personally affected by the defect to successfully argue that the death penalty is unconstitutional “as applied” to them. The court ruled that Mr.

Hairston had not successfully argued that these disparities applied to him. For example, he himself did not argue that he had low intellectual functioning, or that any racial bias toward him or the victim negatively affected his sentencing. Further, he did not argue that he was personally affected by deficits in funding and training for defense counsel, prosecutorial misuse of power, or extensive aggravating circumstances.

Regarding Mr. Hairston’s other arguments, the court found no requirement that the jury use verbatim statutory language in their opinion regarding mitigating and aggravating circumstances. Statements regarding witness credibility and use of juvenile record are permissible because they formed the basis of an expert opinion. The PCRA court’s denial of relief was affirmed.

Discussion

Although the Pennsylvania Supreme Court did not find Mr. Hairston’s as-applied challenges sufficient to reverse the lower court’s imposition of the death penalty in his case, the court recognized the possibility for future challenges on the merits of similar arguments. Specifically, the court did not negate that systemic inequities have led to the disparate imposition of the death penalty. Mr. Hairston’s argument failed because he did not show how the systemic disparities personally affected him. The U.S. Supreme Court has repeatedly affirmed the constitutionality of the death penalty when due process of law is afforded, and it has also applied limits to its application in the case of intellectually disabled offenders (*Atkins v. Virginia*, 536 U.S. 304 (2002)), individuals under the age of 18 at the time of the offense (*Roper v. Simmons*, 543 U.S. 551 (2005)), and incompetent offenders (*Ford v. Wainwright*, 477 U.S. 399 (1986)). Some legislative efforts have also arisen to eliminate the use of capital punishment for individuals with severe mental illness.

In 2001, the American Psychological Association adopted a policy calling for the elimination of capital punishment in all jurisdictions until policies that limit its current deficiencies in application are adopted (American Psychological Association. *The Death Penalty in the United States*. 2001. Available from: <http://www.apa.org/about/policy/death-penalty.aspx>). The areas of concern were quite similar to those highlighted by Mr. Hairston. Similarly, other health organizations called for a moratorium on the death penalty at least until procedures exist to apply it fairly

and with due process. The American Academy of Psychiatry and the Law enacted a similar policy in 2001, also calling for prevention of executions of persons with mental disability or under the age of 18 at the time of the offense (The American Academy of Psychiatry and the Law: Death penalty: position statement of AAPL. Available from: <http://aapl.org/positions.htm>).

Although Mr. Hairston did not prevail in overturning his sentence by highlighting the racial and socioeconomic disparities inherent to the application of the death penalty, the weaknesses he identified remain nonetheless important. Whether the court would have reached a different outcome for a defendant who was clearly disproportionately affected by the specific biases in capital punishment proceedings remains to be seen. Ultimately, as these flaws in use of the death penalty in the United States are continually exposed, we may see further limitations in its use.

Psychiatric Treatment and Competence to Stand Trial Evaluations

Victoria Pietruszka, JD, PhD
Fellow in Forensic Psychology

Eden D. Prendergast, JD
Instructor
Law and Psychiatry Program

Department of Psychiatry
University of Massachusetts Medical School
Worcester, Massachusetts

Mere Presence of Psychiatric Symptoms and Medication is Not Sufficient to Establish Ineffective Assistance of Counsel for Attorney's Failure to Pursue a Competence to Stand Trial Evaluation

DOI:10.29158/JAAPL.220056L2-22

Key words: ineffective assistance of counsel; competence to stand trial; involuntary guilty plea

In *Bell v. Parish*, 2021 U.S. App. LEXIS 21464 (6th Cir. 2021), the Sixth Circuit Court of Appeals ruled that counsel was not ineffective in failing to pursue a trial competence evaluation because the client did not give counsel reason to doubt competency and it is not enough, without more, for the defendant

to have previously been given the diagnosis of a mental illness and been prescribed medication.

Facts of the Case

This case involves the shooting death of 17-year-old Kiaria Williams. She was struck by a bullet sent through her home, and she died one month later from her injuries. After the shooting, Theodore Bell told witnesses that he shot at a house after someone shot at his car. In a voluntary interview, Mr. Bell told police that he and an acquaintance were looking for someone else when someone shot at them, and they later returned to “shoot up the house,” that he was the driver, and that his acquaintance discharged the gun that struck Ms. Williams.

Mr. Bell was charged with first-degree murder, assault with intent to murder, possession of a firearm by a felon, and commission of a felony with a firearm. Several weeks after his arrest, he developed symptoms of delirium and displayed bizarre behavior while in jail and was moved to the mental health ward for observation. Records note that doctors related his delirium to withdrawal from his use of nonprescribed alprazolam, a medication Mr. Bell had been taking prior to his arrest. Records from October 2009 indicated Mr. Bell was given a diagnosis and treated for substance abuse, mental health problems, and high blood pressure. A report from February 2010 indicated that Mr. Bell was irritable and experiencing sleep difficulties, though he denied psychotic symptoms.

In March 2010, Mr. Bell pleaded guilty to several charges. The trial court accepted his plea and sentenced him to 23 to 40 years. Later, Mr. Bell submitted a motion to withdraw his guilty plea, claiming his counsel had been ineffective by failing to initiate an evaluation of his competence to stand trial before his plea. Mr. Bell further claimed that he had been taking medication that affected his ability to understand the proceedings. The trial court denied the motion as there was no indication Mr. Bell was incompetent at the time of his plea. Both the Michigan Court of Appeals and the Michigan Supreme Court denied Mr. Bell's request for appeal.

Mr. Bell filed a *habeas corpus* petition in October 2011, which was dismissed. Both the Michigan Court of Appeals and the Michigan Supreme Court again denied Mr. Bell's request for leave to appeal this denial. Mr. Bell then filed an amended petition for writ of *habeas corpus*, claiming ineffective assistance of counsel for failure to have his competency evaluated, among