

of the proceedings against him or her” and “whether the defendant has sufficient present ability to consult with his or her lawyer with a reasonable degree of rational understanding” (*Surber*, p 72). This determination rests with the finder of fact, and Nebraska has established case law and statutory law detailing this responsibility. An individual must have a “sufficient” ability to consult with a “reasonable degree” of understanding. Therefore, the presence of psychotic thought processes, even if they interfere with an individual’s understanding or ability to consult with counsel, do not necessarily require a finding of incompetence. Indeed, Nebraska case law holds, “There are no fixed or immutable signs of incompetence, and a defendant can meet the modest aim of legal competency, despite paranoia, emotional disorders, unstable mental conditions, and suicidal tendencies” (*Surber*, p 72; citing *State v. Lang*, p 401).

It is solely within the purview of the fact finder to weigh all evidence and determine which evidence holds the greater probative value. In the present case, despite Dr. Hartmann’s opinion that Mr. Surber’s delusional mistrust rendered him unable to consult with and assist counsel with a “reasonable degree” of understanding, the expert opinion was merely one piece of evidence weighed by the fact finder, particularly given Mr. Surber’s history of malingering and the court’s direct observation of his capacity to work with counsel. Courts have held that even in the case of uncontradicted expert opinion, the trier of fact makes the final determination, such as in *McDonald v. U.S.*, 312 F.2d 847 (D.C. Cir. 1962). In Nebraska, it is not only the responsibility of the fact finder to assess what evidence holds more weight when determining competency, but also to conclude what constitutes a sufficient ability and reasonable degree of understanding. Although agreement between the courts and mental health professional opinion occurs in more than 90 percent of cases (*Zapf et al. Have the Courts Abdicated Their Responsibility for Determination of Competency to Stand Trial to Clinicians?* *J Forensic Psychology Practice*. 2008 Oct; 4(1): 27–44), the court is not bound by a mental health expert’s opinion.

## Withdrawal of No Contest Plea

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### Defendant Did Not Present a Fair and Just Reason for His Withdrawal of His No Contest Plea

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**Key words:** close assistance; ineffective assistance; fair and just reason; plea withdrawal; not guilty by reason of mental illness

In *Delgado v. State*, 509 P.3d 913 (Wyo., 2022) the Wyoming Supreme Court considered whether the defendant could withdraw his no contest plea. The court ruled he did not have a “fair and just reason,” nor did he receive ineffective assistance of counsel. Thus, his withdrawal was not permitted.

#### Facts of the Case

On November 24, 2019, Gilber Aldolfo Delgado, Jr., was charged with aggravated assault and battery after threatening his wife. Mr. Delgado’s father told defense counsel Mr. Delgado was “not behaving normally” and appeared depressed. While meeting in jail, defense counsel observed the defendant making statements she believed were delusional. She advised him to pursue a not guilty by reason of mental illness (NGMI) defense, but he declined. At his first hearing, Mr. Delgado entered a plea of not guilty; his defense attorney did not mention her concerns about his mental state, nor did she request a competency evaluation.

Mr. Delgado met with his attorney again after being released on bond. His attorney observed he was no longer actively symptomatic, and she had no concerns about his competency-related abilities. Prior to their meeting, Mr. Delgado’s attorney consulted with his wife about his mental state on the day of the alleged incident and reviewed the 911 call. She again proposed an NGMI defense. Mr. Delgado again declined, citing the stigma attached to that plea, and the possibility of indefinite hospitalization. His counsel negotiated a deal involving a no contest plea for a reduced charge and a suspended prison sentence. Mr. Delgado’s plea was accepted after it was

determined he entered it “knowingly and voluntarily” and with satisfactory assistance of counsel. The defense requested sentencing be deferred, pending a mental health evaluation.

Mr. Delgado was evaluated but before the report was submitted, he was charged with driving under the influence and entered an inpatient treatment program. While in treatment, he was evaluated again, and diagnosed with severe alcohol use disorder and bipolar I disorder. The presentencing mental health report was received by the court following his discharge from treatment. It noted diagnoses of moderate alcohol use disorder and moderate major depressive disorder. Mr. Delgado filed a motion to withdraw his no contest plea. He argued he could withdraw his plea because, at the time of the charge and at the time of the plea hearing, he did not understand the extent of his actions, could not determine right from wrong, and was unable to conform his conduct to the requirements of the law because of his bipolar I diagnosis. He also indicated he wanted to withdraw his plea because he could be fired following a felony conviction. His motion was denied, and he subsequently appealed. Mr. Delgado filed another motion to withdraw his plea, citing ineffective assistance of counsel. He claimed his attorney should have requested a competency evaluation prior to allowing him to enter his plea. This motion was again denied, and he appealed.

#### Ruling and Reasoning

The Wyoming Supreme Court ruled the district court did not err in denying Mr. Delgado’s petitions to withdraw his no contest plea. In his motion regarding ineffective assistance, Mr. Delgado argued his attorney failed to investigate an NGMI defense or to ensure he was competent before entering his plea. But the court noted Mr. Delgado opposed the NGMI defense before entering his plea. Further, the court articulated an NGMI defense cannot be imposed on a competent defendant, citing *McLaren v. State*, 407 P.3d 1200 (Wyo. 2017).

Regarding his competency when entering his plea, the court acknowledged Wyoming statute, which states competency should be assessed when there is “reasonable cause” to believe the defendant is “unfit to proceed.” Because his symptoms were only present while in jail and subsequently resolved, the court held a “reasonably competent attorney” would not have been expected to request a competency evaluation.

Further, Mr. Delgado asserted his unwillingness to consider an NGMI plea was evidence he was incompetent. The court disagreed, citing *Simmons v. Luebbers*, 299 F.3d 929 (8th Cir. 2002). According to *Simmons*, lack of participation in an evaluation is not necessarily evidence of incompetency, absent other compelling evidence. The district court’s ruling, that Mr. Delgado’s attorney provided adequate counsel, was affirmed.

Regarding the denial of motion to withdraw his no contest plea, the court emphasized defendants can withdraw guilty or no contest pleas if there is a “fair and just reason.” In *Frame v. State*, 29 P.3d 86 (Wyo. 2001), seven factors were identified to assist in determining whether a defendant may withdraw a plea. Under the assertion of innocence factor, Mr. Delgado argued he was NGMI upon withdrawing his plea, and a mental illness defense is a complete defense. In contrast, the court found the evaluations Mr. Delgado submitted to substantiate this defense did not provide credible evidence he was NGMI. This action did not constitute a proper assertion of innocence. Addressing the factor of delay in filing the motion, the court concluded that, although Mr. Delgado did delay in withdrawing his plea for employment reasons, he did not delay in withdrawing his plea upon being diagnosed with bipolar I. As to the close assistance of counsel factor, the court referenced its rationale regarding the defendant’s assertion he received ineffective assistance of counsel. Regarding the knowing and voluntary plea factor, the court noted Mr. Delgado never provided evidence he was unable to understand or consent to his plea. Overall, the court ruled that the district court did not err in denying Mr. Delgado’s plea withdrawal.

#### Discussion

This case joins many other cases in addressing a defendant’s claim of ineffective assistance of counsel. In *U.S. v. DeCoster*, 487 F.2d 1197 (D.C. Cir. 1973), the court chose not to define ineffective assistance of counsel, stating each case must be assessed independently. The court said that a reasonable legal route in one case may be inappropriate or ineffective in another. Further, it indicated that defining “ineffective counsel” too specifically would interfere with counsel’s independence, which implicates a constitutionally protected right. Since this holding, factors such as conflict of interest, misadvisement about possible sentences, failure to advise defendant to take a

plea deal, failure to raise a statute of limitations defense, failure to call eyewitnesses to testify, failure to investigate mitigating evidence, and prohibiting a defendant from testifying have been deemed ineffective assistance in some cases. In *Strickland v. Washington*, 466 U.S. 668 (1984), the U.S. Supreme Court clarified that to prove ineffective counsel, the claimant must show deficient attorney performance that directly affected the outcome of the case. When assessing deficient performance, the court must consider whether the counsel's actions were reasonable, compared with "prevailing professional norms" (*Strickland*, p 688).

In Mr. Delgado's case, the court relied on *Keats v. State*, 115 P.3d 1110 (Wyo. 2005). In *Keats*, the court held counsel provided ineffective assistance because Mr. Keats expressed interest in pursuing an NGMI defense, which was not explored, despite the defendant's being symptomatic at the time of the offense and having a history of mental illness. The *Delgado* court distinguished Mr. Delgado's case from *Keats*, as he opposed the NGMI defense. The court previously held defendant preferences can restrict viable actions counsel can take. Indeed, an NGMI defense cannot be imposed on a competent defendant.

Regarding the district court's denial of Mr. Delgado's motion to withdraw his no contest plea, the court considered if Mr. Delgado presented a "fair and just reason" to permit withdrawal. As part of this consideration, the court considered whether Mr. Delgado received "close assistance of counsel" when withdrawing his plea. Here, the court clarified "close assistance" and "ineffective assistance" are distinct concepts. It posits "constitutionally ineffective" counsel is not required to fail the "close assistance" factor under *Frame*. To meet *Frame's* "close assistance" factor, counsel need merely be "adequate and available." The court provides some guidance as to what constitutes a violation of this concept (e.g., refusing to meet with the defendant, ignoring the defendant's requests, being generally unavailable, having a contentious relationship with the defendant, failing to communicate with the defendant). These concepts are important for forensic mental health evaluators to be familiar with because they can be relevant in assessments of trial and other criminal competencies. In particular, understanding the legal framework for lawyers' "close assistance" and "ineffective assistance" is useful to

understand what courts expect in the attorney-client relationship.

## Admission of Witness Testimony

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### Court Did Not Abuse Its Discretion in Admitting Testimony of a Witness Who Testified Only as a Treatment Provider

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**Key words:** ADA; ADEA; expert testimony; judgment as a matter of law

In *Gruttemeyer v. Transit Authority*, 31 F.4th 638 (8th Cir. 2022), John Gruttemeyer brought an action against his former employer, the Transit Authority of the City of Omaha (Metro), alleging disability discrimination under the Americans with Disabilities Act (42 U.S.C. § 12112 (2008)), retaliation in violation of the Age Discrimination in Employment Act (29 U.S.C. § 623 (d) (2015)), and violations of state law. The trial court denied Metro's motion for judgment as a matter of law or a new trial, and Metro appealed. Metro argued that Mr. Gruttemeyer did not disclose his witness as an expert. The Eighth Circuit ruled that the lower court did not abuse its discretion in admitting the witness's testimony because she testified as a treatment provider.

#### Facts of the Case

John Gruttemeyer was employed by the Omaha Fire Department for 23 years. He took a leave of medical absence for one year because of stress and depression, and he later retired with a disability pension in 2010. In 2011, he began working for the Transit Authority of the City of Omaha (Metro) as a full-time bus operator, and then in 2015 as a bus fueler and washer. He was a member of the Transportation Workers Union of America (the Union) for the duration of his employment with Metro, and he served as its vice president from November 2015 until March 2016.