ultimate decision wholly within the executive branch was a deficit in Florida execution procedures. *Panetti* established necessary procedures that are required for a competence to be executed hearing, including a fair hearing with “opportunity to be heard” and the opportunity to submit expert evidence. *Panetti* also established that defendants’ factual understanding of the reason for their execution is not the same as a rational understanding of it.

In *Cole*, although Mr. Cole argued that he was severely mentally ill and incompetent to be executed, he had been determined to be competent to be executed in an evaluation by Dr. Orth in July 2022, and a hearing regarding his competence to be executed had been held. Further, although the warden had subsequently declined to make a referral for competence proceedings, the Tenth Circuit noted that the warden functioned as an initial gatekeeper, rather than the sole gatekeeper, and that the warden’s decisions were subject to judicial review. Mr. Cole contended that Warden Farris deprived him of due process when he improperly made his own determination to not make a referral to the district attorney regarding Mr. Cole’s competence to be executed.

**Neuropsychiatric Factors in a Postconviction Appeal of a Death Sentence**

J. Alexander Scott, MD
*Fellow in Forensic Psychiatry*

Ashley H. VanDercar, MD, JD
*Assistant Professor of Psychiatry*

Department of Psychiatry
*Case Western Reserve University*
*Cleveland, Ohio*

**Neurodevelopmental Disorder Associated with Prenatal Alcohol Exposure (ND-PAE) is Not Equivalent to Intellectual Disability for Death Penalty Purposes**

DOI:10.29158/JAAPL.230094L3-23

**Key words:** capital sentencing; death row; postconviction relief; neurodevelopmental disorder; fetal alcohol syndrome; cruel and unusual punishment

In *Dillbeck v. State*, 357 So.3d 94 (Fla. 2023), the Supreme Court of Florida considered Donald Dillbeck’s fourth successive motion for postconviction relief after he was convicted of first-degree murder, armed robbery, and armed burglary and sentenced to death. Mr. Dillbeck sought relief in part based on a claim that he suffered from a neurodevelopmental disorder associated with prenatal alcohol exposure (ND-PAE). The court affirmed the Second Judicial Circuit Court’s summary denial of Mr. Dillbeck’s petition, noting that the prohibition from *Atkins v. Virginia*, 536 U.S. 304 (2002), on the execution of intellectually disabled persons did not extend to those with “other forms of mental illness or brain damage” (*Dillbeck*, p 100). They also found that the length of time that Mr. Dillbeck had spent on death row did not constitute cruel and unusual punishment.

**Facts of the Case**

In 1979, 15-year-old Donald Dillbeck shot and killed Deputy Dwight Lynn Hall. He pleaded guilty to first-degree premeditated murder and was sentenced to life in prison with the possibility for parole after 25 years. Eleven years into his sentence, while working as a caterer at a public function alongside other inmates, Mr. Dillbeck absconded to Tallahassee. He then obtained a knife and attempted a carjacking in a shopping mall parking lot where he stabbed and killed the driver, Faye Vann. After reapprehension, he was subsequently charged with first-degree murder, armed robbery, and armed burglary. Mr. Dillbeck was convicted on all counts and sentenced to consecutive life terms for the robbery and burglary charges and death on the murder charge. In regard to his sentence of death, the trial court noted five aggravating circumstances: that he had been serving a sentence of imprisonment, that he had a previous capital felony conviction, that he had murdered Ms. Vann during a robbery and burglary, that the murder occurred while he was attempting to avoid reapprehension, and that his actions were “especially heinous, atrocious, or cruel,” (*Dillbeck*, p 97). The court also noted mitigating circumstances, including the nonstatutory factor that Mr. Dillbeck had a treatable mental illness and had been subject to “fetal alcohol effect.”

Mr. Dillbeck appealed his sentence and convictions to the Supreme Court of Florida; after these were affirmed, he subsequently made three postconviction motions over the next three decades which were all denied. Following the signing of his death warrant on January 23, 2023, Mr. Dillbeck made a fourth postconviction motion in which he argued that he was exempt from execution. Among other
claims, he argued that he had a “mental condition that is equivalent to intellectual disability,” (Dillbeck, p 98), thus prohibiting his execution under the Atkins ruling. He also argued that because he had served 30 years on death row, the Eighth Amendment prohibited his execution. After the circuit court denied Mr. Dillbeck’s claims, he appealed to the Supreme Court of Florida, sought a writ of habeas corpus, and requested that his execution be stayed.

Ruling and Reasoning

The Supreme Court of Florida conducted a de novo review of Mr. Dillbeck’s claims, beginning with his allegation that an emerging medical consensus equated ND-PAE with intellectual disability and thereby prohibited his execution. First, the court noted that Mr. Dillbeck and his counsel had failed to pursue the ND-PAE claim with diligence on prior occasions, such as during his sentencing in 1991 (when his counsel was aware of his history of fetal alcohol exposure) and later in 2013 when ND-PAE became recognized as a diagnosable condition. Having thus barred the claim as untimely, the court further noted that they were rejecting Mr. Dillbeck’s argument that a recent “sociolegal tipping point” had occurred equating ND-PAE to intellectual disability. Furthermore, the court reiterated their precedent that the prohibition of execution of intellectually disabled persons under the Atkins decision does not apply to persons with “other forms of mental illness or brain damage” (Dillbeck, p 100), even if those impairments cause similar deficits in cognition and judgment as in intellectual disability.

Discussion

This case describes postconviction claims for relief from execution related to a neuropsychiatric condition alleged to be equivalent to intellectual disability. Previously, the Atkins Court noted that interpretation of the Eighth Amendment should be subject to “evolving standards of decency” and described evidence for a new national consensus against the execution of those with intellectual disability (Atkins, p 312). The Atkins Court also noted that the goals of retribution and deterrence were less likely to be achieved in executing a person with intellectual disability, and cited evidence that those with intellectual disability had decreased abilities to learn from experience, engage in logical reasoning, and communicate their intentions and motivations. In the 2014 case of Hall v. Florida, 572 U.S. 701 (2014), the U.S. Supreme Court held that Florida’s strict definition of intellectual disability as an IQ score of 70 or below (for purposes of eligibility for execution) was unconstitutional, and that a defendant should be allowed to introduce supporting evidence of intellectual disability such as deficits in adaptive functioning. In considering the Atkins and Hall Courts’ reasoning, a question arises as to what degree other neuropsychiatric conditions might equate to intellectual disability, thereby shielding a larger group of people from capital sentences.

In the present case, the Supreme Court of Florida declined to expand the Atkins prohibition on execution. They chose not to recognize other forms of mental illness or brain damage (namely, ND-PAE) as equivalent to intellectual disability. The court did so even with the acknowledgment that another form of mental illness could manifest with the same deficits as intellectual disability. The trial court in which Mr. Dillbeck was initially sentenced did recognize “fetal alcohol effect” as a nonstatutory mitigating factor, which serves as a reminder that a variety of neuropsychiatric conditions have been, and can be, taken into consideration during different phases of criminal trials.

ND-PAE remains as a proposed “Condition for Further Study” in the DSM-5 and DSM-5-TR. The proposed criteria require “more than minimal” exposure to alcohol during fetal development and symptoms in childhood causing impaired neurocognitive functioning, impaired self-regulation, and impaired adaptive functioning (communication difficulties must be present). Although a full-scale IQ under 70 satisfies the impaired neurocognitive functioning requirement, it may alternatively be satisfied by impairment in executive function, learning abilities, or visu spatial reasoning. Thus, a diminished IQ is not necessary for the diagnosis of ND-PAE. In effect, ND-PAE constitutes a broader category in which some individuals with this diagnosis, but not all, can have an intellectual disability that would prohibit their execution.

Increasingly, forensic psychiatrists are asked to perform postconviction evaluations related to appeals based on a convicted person’s mental state at the time of the offense. In January 2021, House Bill 136 was signed into law in Ohio and implemented as Ohio Rev. Code § 2929.025; it prohibits capital punishment for those whose mental illness
Fifth Amendment Rights Not Violated When a Negative Inference Is Made from an Individual’s Silence in Termination of Parental Rights Proceedings

DOI:10.29158/JAAPL.230095-23

Key words: Fifth Amendment; negative inference; right to remain silent; substance use; termination of parental rights

In In re Dependency of A.M.F., 526 P.3d 32 (Wash. 2023), the Supreme Court of Washington considered whether a negative inference may be drawn from a mother’s refusal to answer specific questions during a termination of parental rights proceeding. The court affirmed the rulings of the trial and appellate courts and ruled that there was no Fifth Amendment violation as the negative inference was not the only evidence supporting termination of parental rights.

Facts of the Case

AMF was born to YR and at the time of his birth had methamphetamines and opiates in his system. AMF was referred to the Department of Children, Youth and Families by hospital staff. A social worker met with YR’s family, who expressed concerns about YR’s ability to care for her son because of her substance use, mental health, and unstable housing. AMF was treated for withdrawal symptoms in the hospital and discharged to YR’s parents, where he has lived his whole life. Records suggested his grandparents wished to adopt him. During this time, YR continued to struggle with substance use.

When AMF was 19 months old, the state petitioned to terminate YR’s parental rights. At the time, YR was facing criminal charges of unknown nature. YR decided to testify at the termination of parental rights trial and, on advice of counsel, she did not answer questions about the last time she had used illegal drugs. The trial court warned YR that she was entitled to exercise the right to remain silent but that a negative inference might be drawn from her silence.

The trial court did draw a negative inference from YR’s silence and, in combination with the other evidence presented, found the state had met all the statutory requirements and granted the termination petition. The court of appeals upheld the trial court’s decision, and the Supreme Court of Washington granted review.

Termination of Parental Rights and Application of Fifth Amendment

Jessica Povlinski, MD
Fellow in Child and Adolescent Psychiatry

Catherine Vogt, MD
Resident in Psychiatry

Alexandra Audu, MD
Adjunct Clinical Assistant Professor

Fifth Amendment Rights Not Violated When a Negative Inference Is Made from an Individual’s Silence in Termination of Parental Rights Proceedings

DOI:10.29158/JAAPL.230095-23

Key words: Fifth Amendment; negative inference; right to remain silent; substance use; termination of parental rights

In In re Dependency of A.M.F., 526 P.3d 32 (Wash. 2023), the Supreme Court of Washington considered whether a negative inference may be drawn from a mother’s refusal to answer specific questions during a termination of parental rights proceeding. The court affirmed the rulings of the trial and appellate courts and ruled that there was no Fifth Amendment violation as the negative inference was not the only evidence supporting termination of parental rights.

Facts of the Case

AMF was born to YR and at the time of his birth had methamphetamines and opiates in his system. AMF was referred to the Department of Children, Youth and Families by hospital staff. A social worker met with YR’s family, who expressed concerns about YR’s ability to care for her son because of her substance use, mental health, and unstable housing. AMF was treated for withdrawal symptoms in the hospital and discharged to YR’s parents, where he has lived his whole life. Records suggested his grandparents wished to adopt him. During this time, YR continued to struggle with substance use.

When AMF was 19 months old, the state petitioned to terminate YR’s parental rights. At the time, YR was facing criminal charges of unknown nature. YR decided to testify at the termination of parental rights trial and, on advice of counsel, she did not answer questions about the last time she had used illegal drugs. The trial court warned YR that she was entitled to exercise the right to remain silent but that a negative inference might be drawn from her silence.

The trial court did draw a negative inference from YR’s silence and, in combination with the other evidence presented, found the state had met all the statutory requirements and granted the termination petition. The court of appeals upheld the trial court’s decision, and the Supreme Court of Washington granted review.

Termination of Parental Rights and Application of Fifth Amendment

Jessica Povlinski, MD
Fellow in Child and Adolescent Psychiatry

Catherine Vogt, MD
Resident in Psychiatry

Alexandra Audu, MD
Adjunct Clinical Assistant Professor

Department of Psychiatry
Cincinnati Children’s Hospital and Medical Center
Cincinnati, Ohio

Department of Psychiatry
University of Michigan
Ann Arbor, Michigan