

(schizophrenia, schizoaffective disorder, delusional disorder, or bipolar disorder) impaired their ability to “execute rational judgment” at the time of the offense regarding either conforming their conduct to the law or appreciating the “nature, consequences, or wrongfulness” of their conduct. Retroactively, convicted prisoners on Ohio’s death row were given one year in which to petition courts to overturn their sentences based on a claim of mental illness at the time of the offense. In 2022, Kentucky passed legislation as implemented in Ky. Rev. Stat. Ann §§ 532.130 and 532.140 (2022) barring the imposition of the death penalty on those who are proven to have been experiencing schizophrenia, schizoaffective disorder, bipolar disorder, or delusional disorder at the time of the offense. Similar legislation has been introduced in several other states (Bonnie RJ. Severe mental illness and the death penalty: A menu of legislative options. Wash. & Lee J. Civil. Rts. & Soc. Just. 2023; 29 (2): 151–168).

The *Dillbeck* case is relevant to forensic psychiatrists because it highlights the expanding arena of mitigation and the argument that diagnoses beyond intellectual disability should serve as death penalty exclusions. Forensic psychiatrists can become involved in such cases at the trial or appellate level (e.g., post-conviction evaluations). These types of evaluations are distinct from competence to be executed evaluations, which remain a separate matter examining a prisoner’s present mental state.

## Termination of Parental Rights and Application of Fifth Amendment

**Jessica Powlinski, MD**

*Fellow in Child and Adolescent Psychiatry*

*Department of Psychiatry*

*Cincinnati Children’s Hospital and Medical Center  
Cincinnati, Ohio*

**Catherine Vogt, MD**

*Resident in Psychiatry*

**Alexandra Audu, MD**

*Adjunct Clinical Assistant Professor*

*Department of Psychiatry*

*University of Michigan  
Ann Arbor, Michigan*

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

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**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.

Ruling and Reasoning

YR argued that her Fifth Amendment rights had been violated, as the trial court had drawn a negative inference from her silence when asked about recent drug use. She also asserted that the trial court had not established that continuation of her parental rights impaired AMF's ability to integrate into a stable and permanent home or would not be in his best interests.

With respect to the former matter, the court noted that state and federal constitutions establish the right to remain silent for defendants facing criminal proceedings. In addition to protecting individuals from being called as a witness against themselves, the Fifth Amendment allows individuals to not answer questions in other civil or criminal proceedings when their answers could incriminate them. In criminal cases, a defendant's invocation of the right to remain silent may not be used as evidence of guilt. But, in civil cases, the trier of fact may draw a negative inference from an individual's silence. The court noted that other state courts had found that negative assumptions could be drawn from parents' assertion of their Fifth Amendment right to remain silent in parental rights termination cases. The court also considered other cases (*Garrity v. New Jersey*, 385 U.S. 493 (1967); *Spevack v. Klein*, 385 U.S. 511 (1967)) in which the Fifth Amendment had been expanded to apply to specific civil cases. But the court noted that the Supreme Court has since held that *Garrity* and *Spevack* do not establish that a negative inference is inherently improper in civil cases (*Baxter v. Palmigiano*, 425 U.S. 308 (1976)). Rather, these cases establish that "the Fifth Amendment does not allow the state to meet its evidentiary burden in a civil case based solely on an assertion of the right to remain silent" (*A.M.F.*, p 38). As the trial court had not based any finding or the judgment itself solely on YR's silence, the court determined that YR's Fifth Amendment rights had not been violated, therefore reaffirming the findings of the trial court.

With respect to the latter concern, the court noted that under Washington state law, termination of parental rights required that the trial court find by clear and convincing evidence that continuing the parent-child relationship would diminish the child's prospects for permanency in a stable home and that termination would be in the best interest of the child. While YR had asserted that termination would not change the child's placement with his grandparents,

the court disagreed as continuing YR's legal relationship with AMF impaired his eligibility for adoption. The court found no error in the trial court's conclusion that termination was in AMF's best interest. The rulings of the trial and appellate courts were affirmed, and the case remanded for any further proceedings necessary.

Discussion

*In re Dependency of A.M.F.* addresses the application of the Fifth Amendment right to remain silent in termination of parental rights hearings, which are civil proceedings, including when persons want to keep private their mental health or substance use history. An individual retains the right to not answer questions asked during termination of parental rights proceedings; unlike in a criminal proceeding; however, in a civil case the trier of fact may draw a negative inference from the individual's decision to exercise the right to remain silent. Despite the liberty interests at stake in custody hearings, this case highlights that termination of parental rights proceedings are civil and not criminal in nature.

In conducting forensic evaluations, evaluatees are free to decline to participate in the evaluation and free to decline to answer questions. An evaluatee's refusal to answer certain questions or to participate with aspects of the evaluation are only one piece of data for the forensic psychiatrist to weigh when considering the totality of available information and rendering an opinion. Psychiatrists conducting custody evaluations should be aware of the possibility that the trier of fact may draw negative inferences from an evaluatee's refusal to cooperate with aspects of a forensic evaluation. While the specific advisements given by evaluators may vary depending on the details of the case (for instance, whether the evaluator is working for the plaintiff or the court), where appropriate, the evaluator should provide warning that refusal to participate in aspects of the evaluation may be noted in the report. In general, and as with other types of forensic evaluations, in considering what information to include in the forensic report, the evaluator should be guided by principles of truth-telling as well as respect for persons and be thoughtful about what information is necessary to render an opinion.

One other point of consideration is that in *In re Dependency of A.M.F.*, the questions the mother declined to answer were related to substance use. While YR's refusal to answer questions about

substance use were not the sole factor in removing her parental rights, substance use was nonetheless a factor in considering the best interests of the child and the stability of the home. The case highlights the legal ramifications of substance use, which are of particular importance given the national opioid epidemic.

## Role of Expert Opinion in an Insanity Defense

**Jessica Witt, MD**  
Resident in Psychiatry

Department of Psychiatry  
University of Michigan  
Ann Arbor, Michigan

**Yuliang Hu, MD**  
Resident in Psychiatry

Department of Psychiatry and Psychology  
Mayo Clinic  
Rochester, Minnesota

**Lisa Anacker, MD**  
Adjunct Clinical Assistant Professor

Department of Psychiatry  
University of Michigan  
Ann Arbor, Michigan

### Prosecutor's Argument in Opening and Closing Statements Not Prejudicial to Defendant or Defendant's Insanity Defense in the Absence of a Viable Insanity Defense

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**Key words:** argument; insanity defense; prosecutorial misconduct

In *Rodriguez v. State*, 516.P.3d 850 (Wyo. 2022), the Supreme Court of Wyoming ruled that the prosecutor's argument made during opening and closing statements regarding the jury hearing evidence that Anthony Rodriguez claimed self-defense or referencing his demeanor at trial did not prejudice him and his not guilty by reason of mental illness or deficiency (NGMI) defense, and thus was harmless. The court noted that Mr. Rodriguez, who had two separate sanity evaluations by forensic psychologists, did not have a viable NGMI defense and was thus unable to show that it was reasonably probable that he would have received a more favorable verdict in the absence of the prosecutor's statements.

### Facts of the Case

On November 17, 2019, Mr. Rodriguez killed his mother-in-law, Mary Fogle, after a reported verbal altercation. He and his wife, Allison Solis, were residing with Ms. Fogle in Wyoming at the time of the incident. Ms. Solis reported she witnessed the assault leading to Ms. Fogle's death. She alleged Mr. Rodriguez struck Ms. Fogle in the face 20 or more times before slitting her throat. Ms. Solis attempted to intervene, though stated that she was pushed away by Mr. Rodriguez and struck in the face. She stated Mr. Rodriguez then positioned Ms. Fogle's unconscious or deceased body and sexually assaulted Ms. Fogle. It was reported that Mr. Rodriguez threatened Ms. Solis' life if she were to seek help. The two then gathered Ms. Fogle's billfold, credit cards, checkbooks, and phone before fleeing to Colorado Springs in Ms. Fogle's vehicle. Once in Colorado, Mr. Rodriguez turned himself in at the insistence of a relative. He presented to a sheriff's department in Colorado Springs to confess to the murder of Ms. Fogle. During interviews, he "admitted killing Ms. Fogle and sexually assaulting her after killing her" (*Rodriguez*, p 853).

On November 19, 2019, Mr. Rodriguez was charged with one count of second-degree murder. This was later amended to one count of felony murder, one count of first-degree murder, and one count of domestic battery.

Mr. Rodriguez received three psychiatric evaluations related to his case. The first evaluation was to determine his fitness to proceed. He was evaluated by a forensic psychologist and found competent to stand trial and fit to proceed. The second evaluation occurred after he pleaded not guilty and NGMI. This evaluation, completed by a different forensic psychologist, concluded that he did not suffer from a mental illness or mental deficiency so severely abnormal as to have grossly and demonstrably impaired his perception or understanding of reality, and that he did not lack capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law at the time of the alleged crime. A third evaluation was requested by Mr. Rodriguez after the second report was submitted. The forensic psychologist performing the third evaluation diagnosed Mr. Rodriguez with an unspecified personality disorder and an unspecified substance use disorder. The third forensic psychologist came to the same conclusion as the second evaluator, offering an